BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:

SPRINT COMMUNICATIONS COMPANY L.P.,

Complainant,

v.

NATIVE AMERICAN TELECOM, LLC,

Respondent.

Docket No.TC10-026

SPRINT COMMUNICATIONS COMPANY L.P.'S REPLY TO STAFF'S BRIEF IN RESPONSE TO NATIVE AMERICAN TELECOM'S MOTION TO STAY AND MOTION TO DISMISS

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this reply memorandum to the Commission Staff's brief. In its brief, Staff recommended that the Commission stay any further proceedings to "permit[ ] either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first." Staff Brief at 7. On December 1, the federal district court determined that it (or the FCC) had *exclusive* jurisdiction over the claims that Native American Telecom, LLC ("NAT") was asserting against Sprint in tribal court. Second Affidavit of Scott Knudson dated December 6, 2010 ("Second Knudson Aff.), Ex. U. This ruling thus moots NAT's motion to stay.

Sprint concurs with Staff's recommendation to deny NAT's motion to dismiss. The federal court's ruling does not resolve important issues of state telecommunications law that Sprint's complaint raised and which the Commission must address. *Montana v. United States*, 450 U.S. 544 (1981), has no direct bearing on the Commission, as that case addressed the two very limited circumstances when a tribal court might have jurisdiction

over a non-member. Moreover, moving forward on Sprint's complaint will not implicate either of the *Montana* two exceptions to the general rule that tribes do not have jurisdiction over non-members.

Pursuant to Staff's directive, Sprint also addresses its request for money damages. As Sprint has requested separate and distinct relief from the Commission and the federal court, this action may proceed under SDCL § 49-31-1.3.

I. THE FEDERAL DISTRICT COURT HAS DETERMINED THAT NAT'S CLAIMS AGAINST SPRINT MUST BE DECIDED IN A FEDERAL FORUM

Nearly two months after Sprint initiated its Commission action, NAT brought a claim against Sprint in Crow Creek Sioux Tribal Court alleging violations of the Federal Communications Act ("FCA"). In response, Sprint sued NAT in federal district court asserting that NAT's traffic pumping scheme violated the FCA. Second Knudson Aff. at Ex. V. As part of its federal action, Sprint moved for a preliminary injunction seeking an order from the federal district court enjoining NAT's tribal court action. NAT in turn moved for a stay, arguing that Sprint should first be required to exhaust its tribal court remedies.

The federal district court rejected NAT's tribal exhaustion argument. The court looked to the Supreme Court's decisions in *Nevada v. Hicks*, 533 U.S. 353 (2001), *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), to conclude that when tribal court jurisdiction was lacking, the exhaustion rule was inapplicable. *See* District Court Order at 16 (Ex. U). For instance, in *Hicks*, the question of tribal court exhaustion came up when a tribal member brought a

§ 1983 claim in tribal court against Nevada state game wardens who had searched his home located on tribal lands for evidence of violations of Nevada hunting laws. The Supreme Court held that because tribal courts did not have jurisdiction to hear § 1983 claims, the tribal exhaustion rule was "unnecessary" as it "would serve no purpose other than delay." 533 U.S. at 369. *Strate* reached a similar conclusion for suits against non-members for torts committed on fee-owned land within a reservation, while *El Paso* concluded tribal courts had no jurisdiction over Price-Anderson Act claims.

The district court concluded that in enacting the FCA, Congress intended to occupy the field when regulating interstate telecommunications. District Court Order at 7 (Ex. U). The district court thus accepted Sprint's argument that 47 U.S.C. § 207 mandated only a federal forum for NAT's claims against Sprint.[1] The district court reasoned:

> The FCA and the ICA[2] where adopted for the purpose of bringing the telecommunications field under one federal regulatory scheme. It logically follows that Congress intended to have that regulatory scheme consistently interpreted in a federal forum.

District Court Order at 10 (Ex. U). Because Congress had acted to preempt tribal court jurisdiction, the court concluded "the doctrine of tribal court exhaustion must give way."

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[1] Section 207 reads: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States . . . but such person shall not have the right to pursue both such remedies."

[2] The court referred to the ICA, or Interstate Commerce Act, because the ICA was the predecessor to the FCA, and Congress relied on the ICA when drafting the FCA. District Court Order at 6 n.2. (citing *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998)).

District Court Order at 16 (Ex. U). The district court then granted Sprint's motion to enjoin NAT's tribal court action against Sprint.[3]

The district court's decision renders NAT's motion to stay the Commission proceeding moot. While Sprint believed the Commission should (and could) have gone forward without waiting for the federal court decision, the Commission can now move forward on Sprint's complaint without any concern over interfering with the jurisdictional determinations of either the federal or tribal court. The federal law issues Sprint has against NAT will be decided in a federal forum; the question of NAT's state law violations can be decided by the Commission.

II. IN KEEPING WITH STAFF'S RECOMMENDATION, NAT'S MOTION TO DISMISS SHOULD BE DENIED

A. The Commission has the authority to regulate NAT both on and off the Reservation.

Sprint supports the Staff's recommendation that the Commission deny NAT's motion to dismiss. South Dakota law is clear – the Commission has the power and authority to regulate telecommunications services in South Dakota and to protect South Dakota residents. The legislature has granted the Commission broad and sweeping authority to regulate telecommunications within the state: "The commission has general supervision and control of all telecommunications companies offering common carrier

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[3] The district court's exhaustion ruling tracks squarely with what the Supreme Court said in *Strate*: "When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montanta's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." 520 U.S. at 459 n.14. Here, Congress did more than simply not conferring jurisdiction, it acted expressly to preclude tribal court jurisdiction.

services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL § 49-31-3. The Commission is empowered to require a certificate of authority from every such telecommunications company. *Id.* ("Each telecommunications company that plans to offer or provide interexchange telecommunications service shall file an application for a certificate of authority with the commission pursuant to this section.").

The South Dakota Supreme Court agrees. In *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, 595 N.W.2d 604, the court addressed the question whether the Commission had jurisdiction over the sale of US West's (now Qwest) on-reservation portion of a local exchange. US West and the tribal utility authority argued the Commission's assertion of jurisdiction was "barred by federal preemption and violated well-established principles of federal Indian law." *Id.* at ¶ 14, 595 N.W.2d at 608. The South Dakota Supreme Court rejected that argument, holding that the Commission had express "authority and jurisdiction over intrastate facilities" and that the Commission's authority was "extensive and crucial to the overall regulatory scheme." *Id.* at ¶ 21, 595 N.W.2d at 595. Thus, the Commission had the authority "to regulate the activities of US West and its sale of telephone exchanges, whether on or off the reservation." *Id.* at ¶ 22, 595 N.W.2d at 609.

The evidence before the Commission is uncontroverted that a significant portion of the Reservation's population is non-tribal. *See* Knudson Aff. Ex. Q. Moreover, a significant portion of the land within the Reservation is non-fee land. *See* Knudson Aff. ¶¶ 20-21 and Exs. S and T. At a hearing before the South Dakota federal district court, a

NAT representative testified that NAT is ready, willing, and able to provide services to non-tribal members. Second Knudson Aff., Ex. W. Indeed, NAT's very business model requires traffic pumping to work – without revenues from interexchange carriers NAT cannot not compete with the existing LEC's for business from on-Reservation customers. NAT operates in South Dakota without a certificate of authority, and does so for the improper purpose of traffic pumping.

NAT's tribal tariff demonstrates that NAT is offering services outside of the Reservation and clearly within the scope of the Commission's authority. Knudson Aff. Ex. F. The Commission undoubtedly has complete authority to rule on the legality of that tariff. *See* SDCL § 49-1-11 (giving the Commission the power to promulgate rules over tariffs for the state). In a previous proceeding before the Commission, when NAT sought a certificate of authority from the PUC, NAT and the Tribal Utility Authority represented that NAT would provide services only *within* the Reservation. *See* Knudson Aff. Exs. J and L.

NAT later withdrew its application for a certificate of authority, but the need for Commission authorization and action remains. On its face, the tribal tariff applies outside the Reservation, within South Dakota and even outside the State of South Dakota. The tribal tariff defines its scope as providing "Intrastate Access Services . . . by Native American Telecom, LLC into, out of and within the State of South Dakota." Tariff at 11 (Knudson Aff. Ex. F). Under the so-called tribal tariff, Customers and End Users do not even need to be located on the Reservation. *See* Knudson Aff. Ex. F at 9, 10. And by using the radio technology of WiMax, NAT's services need not stop at the Reservation

boundary. Even if NAT's services remain within Reservation boundaries, NAT is still serving a significant number of non-tribal members residing on the Reservation. *See* Knudson Aff. Ex. Q.

By their very terms, not only do NAT's tribal and interstate tariffs attempt to usurp the Commission of its authority to regulate telecommunications services in South Dakota, but these tariffs indicate a LEC that is out of control. In particular, NAT's interstate tariff contains completely one-sided and improper terms concerning billing disputes, including provisions allowing for NAT to collect attorneys' fees based on any collection action, even if NAT does not prevail, and prohibiting customers from withholding disputed billing amounts. *See* Second Knudson, Ex. Y at §§ 2.10.4-5; 3.1.5; 3.1.7.[4] NAT's filing of its tribal complaint after Sprint brought this matter to the attention of the Commission, and then within a matter of days seeking to delay these proceedings because of a tribal exhaustion claim, further exemplify NAT's attempts to deprive the Commission of its jurisdiction and authority. In keeping with the mandate of the South Dakota State legislature, the South Dakota Supreme Court and the FCC, the Commission is obligated to act to require NAT to operate with a certificate of authority.

B. The *Montana* exceptions do not apply to the Commission's regulation of NAT's intra-state services to non-members or outside the Reservation.

None of the facts in this case, whether disputed or not (Staff Brief at 8), supports the application of either of the *Montana* exceptions to this case. *Montana* addressed only

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[4] On November 15, 2010, NAT issued its FCC Tariff No. 2, which is found at Second Knudson Aff. Ex. Y. AT&T, Sprint and other interexchange carriers are contesting the validity of that tariff. *See* Second Knudson Aff. Ex. X.

the limited scope tribes might have to regulate the activities of non-members within a reservation, carving out two limited circumstances when that might occur: (1) in consensual relationships with the tribe or tribal members, or (2) to protect the political integrity or economic security of the tribe. 450 U.S. at 565-66. "Outside of these two exceptions, as the Court emphasized in *Montana*, the tribes' inherent sovereignty does not give them jurisdiction to regulate the activities of nonmembers." *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938 (9th Cir. 2009). It is important to note that *Montana* does not extend to off-reservation activities or displace state regulation. Thus, the Commission can regulate NAT irrespective of whether the tribe can also arguably regulate Sprint.

Assuming, *arguendo*, that the *Montana* exceptions might be relevant, neither applies. With respect to the first *Montana* exception, as argued previously to the Commission, Sprint has not entered into a consensual relationship with a tribal entity. Nor does Sprint have any presence on the Reservation. It is undisputed that Sprint's services as an interexchange carrier end at the switch South Dakota Network LLC has in Sioux Falls. From there South Dakota Network routes calls destined to NAT's exchange prefix as TDN (traditional) traffic to WideVoice's switch in Los Angeles, where the traffic is rerouted as VoIP information services traffic back to South Dakota Network, for further routing on South Dakota's Network fiber optic to Fort Thompson.

There can be no dispute that Sprint does not have a presence on the Reservation, and the fact that WideVoice and/or NAT has located conference bridge hardware in Fort Thompson does not change that fact. Furthermore, the FCC has ruled that traffic

pumping does not constitute switched access service because pumped calls are not terminated at or delivered to an end user's premises. *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel Co.*, Second Order on Reconsideration 24 FCC Rcd. 14801, ¶¶ 10-25 (Nov. 25, 2009). Thus, Sprint has no presence on the Reservation, and the FCC has ruled that any Sprint traffic routed by South Dakota Network would not be considered switched access service on the Reservation.

The Eighth Circuit Court of Appeals made clear in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), that the power of Indian tribes with respect to civil jurisdiction over non-Indians is limited to activities "on their reservations." *Id.* at 1091. In *Hornell Brewing*, the Estate of Tasunke Witko (Crazy Horse) sued two breweries in tribal court to halt the brewing and distribution of "The Original Crazy Horse Malt Liquor." *Id.* at 1089. Among the claims asserted against the breweries were defamation, violation of privacy and infliction of emotional distress. *Id.* While the lower tribal court held there was no personal or subject matter jurisdiction, the tribal appellate court ruled there was both personal and subject matter jurisdiction to hear the case. The breweries then sued in federal district court, which ordered that the tribal court should first rule on whether it had jurisdiction. *Id.* at 1091.

The Eighth Circuit reversed the district court's directive that the exhaustion rule required the tribal court to be the first to decide whether it had jurisdiction. *Id* at 1090-91. Judge Lay wrote for the Eighth Circuit:

> Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations* .... 133 F.3d at 1091(emphasis in original).

> ...because the conduct and activities at issue here did not occur on the Rosebud Sioux Reservation, we do not believe *Montana's* discussion of activities of non-Indians on fee land within a reservation is relevant to the facts of this case. More importantly, the parties fail to cite a case in which the adjudicatory power of the tribal court vested over activity occurring outside the confines of a reservation .... *Id.*
>
> ...we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority .... *Id.* at 1093.
>
> ... the Rosebud Sioux Tribal Court lacks adjudicatory authority over the dispute arising from the Breweries' use of the Crazy Horse name in the manufacturing, sale and distribution of Crazy Horse Malt Liquor outside the Rosebud Sioux Reservation. *Id.* at 1093-94.

The Eighth Circuit then vacated the order requiring exhaustion. *Id.* at 1093-94.

A similar analysis and result is seen in *Christian Children's Fund, Inc.* ["CFF"] *v. Crow Creek Sioux Tribal Court,* 103 F. Supp. 2d 1161 (D.S.D. 2000). There a South Dakota non-profit, Hunkpati, had an agreement with CFF, a national charity based in Virginia, to administer CCF's program on the Crow Creek Sioux Reservation. After CCF terminated the relationship, Hunkpati sued CCF in Crow Creek Sioux Tribal Court. *Id.* at 1162. In granting CCF's motion to dismiss, the district court, per Judge Kornmann, found that no critical activities had taken place on the reservation. For example, CCF made its decision to terminate Hunkpati in Virginia and had no employees on the Reservation. And Hunkpati had its bank account outside the Reservation, and all funds were solicited and received off the Reservation. *Id.* at 1166. Citing to and quoting *Hornell,* the district court found the Tribal Court had no adjudicatory power over conduct "outside the confines of a reservation." *Id. Hornell* and *Christian Children's Fund* establish that the Tribal Court lacks jurisdiction over NAT's claims because the Sprint

calls at issue interconnect to South Dakota Network on its switch in Sioux Falls, *not* to NAT.

Similarly, the second *Montana* exception is not implicated in this case. None of Sprint's actions in this case "'imperil the subsistence" of the tribal community, which is the standard for assessing the second exception. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709, 2726 (2008) (quoting *Montana v. United States*, 450 U.S. 544, 566 (1981)). One commentator has described the second *Montana* exception as one where "tribal power must be necessary to avoid *catastrophic* consequences." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW at 232 n.220 (2005 ed.) (emphasis added). In *Cheyenne River Sioux Tribe Telephone Authority,* the South Dakota Supreme Court expressly rejected any argument that the Commission's authority impinged upon tribal self-government. 1999 SD 60 at ¶ 21, 595 N.W.2d at 610.

The FCC also supports this conclusion. The FCC has recognized the primacy of the Commission to protect non-tribal members living on a reservation. *In re Western Wireless Corp. Pet. for Designation as an Eligible Telecommc'ns Carrier for the Pine Ridge Reservation in South Dakota*, [*Western Wireless*], FCC 01-284, 16 F.C.C. Rcd. 18145 (2001), determined that the telecommunications regulatory scheme gives the FCC jurisdiction to determine ETC status over tribal members on the reservation. The FCC also addressed tribal sovereignty concerns in *Western Wireless*:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-tribal customers and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court's exacting standard. Insofar as the State asserts authority to regulate Western Wireless' provision of service to non-tribal members,

> therefore, we believe it may do so. We conclude, therefore, that under principles of federal Indian law, the Tribe has jurisdiction over aspects of Western Wireless' service to tribal members living within the Reservation boundaries, but the State commission has authority over the carrier's provision of service to non-tribal members.

Id. at ¶ 23. While the FCC carved out authority for the tribe to act within the reservation with tribal members, that authority did not extend beyond reservation boundaries. Hence, the Commission also has the authority to regulate NAT's services to tribal members which extend outside the Reservation. In keeping with Staff's recommendation, NAT's motion to dismiss should be denied.

III. SPRINT REQUESTS THAT THE COMMISSION ORDER NAT TO RETURN AMOUNTS NAT CHARGED FOR INTRASTATE TRAFFIC

In its May 5, 2010 Amended Complaint, Sprint requested that the Commission direct that NAT repay those amounts Sprint inadvertently paid NAT for intrastate traffic. *See* Amended Complaint, ¶ 24. In its federal Complaint, Sprint requested an order directing NAT to repay those amounts Sprint inadvertently paid NAT for interstate traffic. *See* Complaint, ¶¶ 43, 45 (Second Knudson Aff., Ex. V). Because Sprint has requested separate and distinct damages relief from the Commission and the federal court, Sprint's requests are allowed under SDCL § 49-13-1.1.

This rule provides as follows:

> 49-13-1.1. **Complaint to commission or suit by private person—Election of remedies.** Any person claiming to be damaged by any telecommunications company or motor carrier may either make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

Sprint's claims seek to recover separate and distinct damages. Before the Commission, Sprint requests relief based upon NAT's tribal tariff and those amounts Sprint mistakenly paid for intrastate pumped traffic. Before the federal court, Sprint requests relief based upon NAT's FCC tariff and those amounts Sprint mistakenly paid for interstate pumped traffic. *Compare* PUC Amended Complaint ¶ 24 (seeking monetary damages for those inadvertently paid intrastate access charges) *with* federal Complaint ¶¶ 43, 45 (Second Knudson Aff., Ex. V) (seeking monetary damages for those inadvertently paid interstate access charges).

The South Dakota Supreme Court has recognized that SDCL § 49-13-1.1 limits a party's ability to present claims before the Commission when those claims have been already asserted in another venue. *See State ex rel. Johnson v. Public Utilities Comm'n of South Dakota*, 381 N.W.2d 226, 230 (S.D. 1986) (upholding the lower court's decision to deny a party's petition to intervene in commission proceedings when the party had elected to pursue its remedy in circuit court, citing to SDCL § 49-3-23 (the predecessor statute to 49-13-1.1)). This statute and result, however, is inapplicable to this case where Sprint has carefully requested separate and distinct damages relief from the Commission and the federal court.

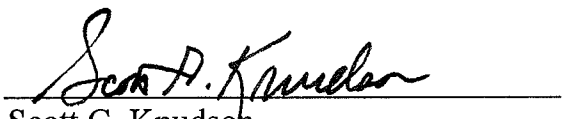
CONCLUSION

The federal district court has determined that the tribal court does not have jurisdiction over NAT's complaint against Sprint. The Commission, under its mandate from the South Dakota State legislature, the South Dakota Supreme Court and the FCC, has the authority, power and duty to bring NAT into compliance with South Dakota law.

Sprint's Complaint also complies with SDCL § 49-13-1.1 because Sprint has requested separate and distinct damages before the federal court and the Commission. NAT's motions for a stay or to dismiss must therefore be denied.

Dated: December 6, 2010

BRIGGS AND MORGAN, P.A.



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