

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

**IN THE MATTER OF THE COMPLAINT)
FILED BY SPRINT COMMUNICATIONS)
COMPANY, LP AGAINST NATIVE) **Docket No. TC10-026**
AMERICAN TELECOM, LLC)
REGARDING TELECOMMUNICATIONS)
SERVICES)**

**Respondent Native American Telecom LLC's *Reply to Staff Brief* in Response to
Motion to Stay and Motion to Dismiss**

INTRODUCTION

Respondent Native American Telecom, LLC (NAT) hereby files its *Reply to Staff Brief* in this matter.

DISCUSSION OF LAW

**I. THIS COMMISSION SHOULD ADOPT THE RECOMMENDATION OF
THE "STAFF BRIEF" AND GRANT NAT'S MOTION TO STAY**

On November 15, 2010, the South Dakota Public Utilities Commission's (SDPUC or Commission) "Staff Brief" was filed in this matter. This Staff Brief recommends that the Commission grant NAT's Motion to Stay "thereby permitting either the tribal court or the federal district court to resolve questions of its jurisdiction regarding Sprint first." (Staff Brief, page 7).

The parties have extensively briefed the "tribal exhaustion" issue to this Commission. NAT agrees with the SDPUC's Staff Brief that "the Commission should take a pragmatic approach to this matter as it relates to the tribal exhaustion doctrine." As such, NAT respectfully requests that the Commission adopt its Staff's recommendation and grant NAT's "Motion to Stay."

Sprint is correct that on December 1, 2010, the federal district court held that Congress has preempted tribal court jurisdiction for *interstate* tariff claims brought under 47 U.S.C. § 207.

However, Sprint’s assertion that the federal district court’s decision now makes “tribal exhaustion” moot in this case is misplaced. The federal district court *did not rule* on whether the Crow Creek Sioux Tribal Court (Tribal Court) should be allowed to initially determine its jurisdiction regarding *intrastate* tariff claims (at issue in the present case before this Commission). In fact, the federal district court specifically limited its decision by finding that the Communications Act is “a comprehensive scheme for the regulation of *interstate communication.*” District Court Order at 7 (emphasis added).

In every case, this Commission must determine at the outset whether it has jurisdiction. Under well-established Indian law principles, the facts of this case authorize that before further proceedings should occur before this Commission, Sprint should be required to exhaust its remedies (regarding *intrastate* tariff claims) in the parallel action previously filed by NAT in Tribal Court.

The exhaustion doctrine precludes a party from attacking or evading the jurisdiction of a tribal court in a collateral or parallel action until it first exhausts all remedies available in the tribal court. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15-17 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). At its core, the exhaustion doctrine recognizes that “[t]ribal courts play a vital role in tribal self-government . . . over matters relating to reservation affairs [that] can . . . impair the authority of tribal courts[.]” *Iowa Mut.*, 480 U.S. at 14-15 (citations and footnote omitted). Of course, tribal exhaustion is “required as a matter of comity, not as a jurisdictional prerequisite.” *Iowa Mut.*, 480 U.S. at 16 n.8.

Sprint has not (and cannot) reasonably dispute that the actions giving rise to its *intrastate* tariff complaint before this Commission arise from activities occurring within the exterior boundaries of the Reservation, specifically –

- NAT - a tribally-owned limited liability company;
- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;
- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;
- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- a new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to these basic services on the Reservation;
- subsidies that provide telecommunications services, free-of-charge, to Tribal members;
- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;
- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and

- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.

Sprint’s attempt to characterize this *intrastate* tariff dispute as a “non-tribal affair” finds no support in the law and is inconsistent with the factual record. It is also well-settled that the existence of off-reservation contacts does not excuse application of the exhaustion doctrine where the genesis of a dispute lays on-reservation. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 32 (1st Cir. 2000) (dispute arising from tribal housing authority’s development of off-reservation low-income housing project for tribal members); *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1168-70 (10th Cir. 1992) (exhaustion required in interpleader action filed by off-reservation bank holding funds subject to contract dispute between tribe and non-Indian company stemming from on-reservation gaming activity); *Stock West Corp. v. Taylor*, 964 F.2d 912, 919 (9th Cir. 1992) (although disputed document “was delivered . . . off the reservation[,]” exhaustion required because totality of facts show that activities giving rise to the allegations were “commenced on tribal lands”). Here, it is clear that the “genesis” of the parties’ dispute arises from activities taking place within the Reservation’s boundaries.

Sprint also continues to imply that this Commission (as a *state* political body) can simply ignore both the tribal exhaustion doctrine and the Tribal Court’s jurisdiction. Sprint disregards the fact that “[i]f state-court jurisdiction over Indians or activities on Indian land *would interfere* with tribal sovereignty and self-government, the *state courts are generally divested of jurisdiction* as a matter of federal law.” *Iowa Mut.*, 480 U.S. at 15 (citing *Fisher v. District Court of Sixteenth Judicial Dist. of Montana*, 424 U.S. 382, 386 (1976) and *Williams v. Lee*, 358 U.S. 217 (1959)) (emphasis added). *See also Wells v. Wells*, 451 N.W.2d 402, 405 (S.D. 1990)

(“[t]he test for determining whether a state court may assume jurisdiction over claims involving Indians . . . [is] ‘whether the state action [would infringe] on the right of reservation Indians to make their own laws and be ruled by them.’”) (citations omitted); *Matsch v. Prairie Island Indian Community*, 567 N.W.2d 276, 277-79 (Minn. Ct. App. 1997) (holding that a party may not circumvent the jurisdiction or determination of a tribal court by filing a duplicative action in state court).

In this case, there is no doubt that this Commission’s exercising of jurisdiction over *intrastate* tariff claims would undermine the authority of the Tribal Court over Reservation affairs and would improperly infringe on the right of the Tribe to govern itself. It is immaterial that Sprint is not an Indian. Sprint has contacts with the Reservation and with a tribally-owned limited liability company. The United States Supreme Court has consistently guarded the authority of Indian governments over their reservations. The South Dakota Supreme Court has done likewise.

In sum, the fundamental question to be answered by this Commission for the purpose of NAT’s Motion to Stay is not whether the Tribal Court *has* jurisdiction; rather the issue is *which forum* (tribal court or the SDPUC) should be permitted to *first address* the issue of jurisdiction before the matter is heard on the merits. This Commission should adopt the recommendation of its “Staff Brief” and hold that the Tribal Court should be allowed to first address its jurisdiction over Sprint’s *intrastate* tariff claims.

II. IF THIS COMMISSION DOES NOT INVOKE THE TRIBAL EXHAUSTION DOCTRINE, THEN NAT SHOULD BE ALLOWED TO RENEW ITS MOTION TO DISMISS WHEN FURTHER FACTS ARE INTRODUCED

The Staff Brief indicates that because “the facts are highly disputed . . . it is not possible for the Commission to determine if either of the [*Montana v. U.S.*, 450 U.S. 544 (1981)] exceptions apply. On this basis, Staff recommends that the Commission deny the Motion to Dismiss.” (Staff Brief, page 8).

Sprint somehow takes this clear statement and (1) makes an entirely unsupported assertion that the Staff Brief provides this Commission with a recommendation based on a thorough *Montana* analysis; and (2) simply repeats the *Montana* analysis it provided in previous filings with this Commission.

NAT will not repeat the extensive *Montana* analysis provided in previous filings with this Commission. However, NAT believes that the current voluminous record provides this Commission with a sufficient factual basis to dismiss Sprint’s complaint under the *Montana* exceptions.

III. SPRINT’S COMPLAINT BEFORE THIS COMMISSION IS IMPROPER BECAUSE SPRINT HAS ALREADY ELECTED TO SEEK MONEY DAMAGES AGAINST NAT IN FEDERAL DISTRICT COURT

SDCL 49-13-1.1 provides:

Any person claiming to be damaged by any telecommunications company . . . 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*.

(emphasis added).

Sprint’s actions violate the plain language of this statutory authority. First, Sprint claims to have been damaged by NAT, a telecommunications company. As a result, Sprint made a

complaint with this Commission based on NAT’s alleged misconduct. Sprint’s complaint requested that this Commission direct repayment from NAT to Sprint.

Second, Sprint later brought a lawsuit on its own behalf in the federal district court. This lawsuit seeks the *recovery of damages* and is based on the *same alleged misconduct* as contained in Sprint’s complaint with this Commission.

Sprint is improperly pursuing multiple remedies *at the same time*. Sprint attempts to circumvent the plain language of SDCL 49-13-1.1 by alleging that it “requested separate and distinct damages” in the two actions. However, Sprint fails to provide any authority for its proposition and this statutory authority does not differentiate between “separate and distinct damages” or “interstate and intrastate” tariff claims. SDCL 49-13-1.1 prohibits Sprint from simultaneously pursing its claims against NAT before both the federal district court and this Commission.

CONCLUSION

Because this case goes to the core of the exhaustion doctrine, NAT respectfully requests that this Commission adopt the recommendation of its Staff and stay all proceedings in this action until the Crow Creek Tribal Court has a full and fair opportunity to determine its jurisdiction over Sprint and the subject matter of NAT’s action, and if it finds such jurisdiction to exist, to adjudicate the parties’ dispute on the merits. In the alternative, NAT respectfully requests that its motion to dismiss be granted because this Commission does not have jurisdiction over NAT’s activities on the Reservation.

Finally, NAT respectfully requests that Sprint not be allowed to circumvent the clear mandates of SDCL 49-13-1.1 by simultaneously pursing its claims against NAT before both the

federal district court and this Commission.

Dated this 6th day of December, 2010.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
133 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
www.SwierLaw.com
scott@swierlaw.com
*Attorneys for Native American Telecom,
LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *December 6th, 2010*, the foregoing “**Respondent Native American Telecom LLC’s Reply to Staff Brief in Response to Motion to Stay and Motion to Dismiss**,” was served *via electronic mail*, upon the following:

Ms. Patty Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, S.D. 57501
patty.vangerpen@state.sd.us

Mr. David Jacobson
Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol
Pierre, S.D. 57501
david.jacobson@state.sd.us

Mr. Richard D. Coit
Executive Director and General Counsel
SDTA
P.O. Box 57
Pierre, S.D. 57501
richcoit@sdtaweb.com

Mr. William P. Heaston
V.P., Legal & Regulatory
SDN Communications
2900 West 10th Street
Sioux Falls, S.D. 57104
bill.heaston@sdncommunications.com

Stanley E. Whiting
142 E. 3rd Street
Winner, South Dakota 57580
swhiting@gwtc.net

Ms. Karen Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, S.D. 57501
karen.cremer@state.sd.us

Ms. Darla Pollman Rogers
Attorney at Law
Riter Rogers Wattier & Brown LLP
P.O. Box 280
Pierre, S.D. 57501-0280
dprogers@riterlaw.com

R. William M. Van Camp
Attorney at Law
Olinger Lovald McCahren & Reimers PC
P.O. Box 66
Pierre, S.D. 57501-0066
bvancamp@olingerlaw.net

Ms. Diane C. Browning
6450 Sprint Parkway
Overland Park, Kansas 66251
diane.c.browning@sprint.com

Mr. Phillip Schenkenberg
Briggs and Morgan, P.A.
80 South 8th Street
2200 IDS Center
Minneapolis, Minnesota 55402
pschenkenberg@briggs.com

Mr. Scott G. Knudson
Briggs and Morgan, P.A.
80 South 8th Street
2200 IDS Center
Minneapolis, Minnesota 55402
sknudson@briggs.com

Tom D. Tobin
422 Main Street
PO Box 730
Winner, South Dakota 57580
tobinlaw@gwtc.net

Judith Roberts
Attorney at Law
P.O. Box 1820
Rapid City, South Dakota 57709
jhr@demjen.com

/s/ Scott R. Swier

Scott R. Swier