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

SUPPLEMENTAL REPLY BRIEF OF SPRINT COMMUNICATIONS COMPANY L.P.

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") submits this supplemental reply brief to address the arguments NAT made in response to Sprint's Reply Brief dated December 6, 2010. As discussed in Sprint's briefs in support of its successful motion for a preliminary injunction,[1] the United States Supreme Court has addressed the exhaustion issue in holdings that expanded the exceptions to exhaustion of tribal remedies, a federal judge-made rule based on comity. *See Nevada v. Hicks*, 533 U.S. 353, 369 (2001) ("we added a broader exception in *Strate*"). In the absence of a congressional grant of jurisdiction, a tribal court has no jurisdiction over non-members. *Hicks* held that tribal courts could not enforce § 1983 claims against state game wardens even for conduct on the reservation. Here Congress has gone even further, and *explicitly* enacted a statute that mandates *only* a federal forum for claims based on the Federal Communications Act.

[1] Copies of Sprint's federal briefs are attached to the Affidavit of Scott G. Knudson dated December 10, 2020 as Exhibits AA and BB.

NAT now argues that notwithstanding Judge Schreier's order enjoining NAT's tribal court action the tribal court still has jurisdiction to entertain NAT's allegations about its intrastate traffic. NAT Reply Brief at 2. This argument is simply wrong for several reasons.

Sprint moved to enjoin NAT from pursuing with its tribal court complaint and the tribal court and judge from further proceedings with NAT's complaint. Knudson 12/10/10 Aff. Ex. Z. The district court granted Sprint's motion in total. *See* District Court Order at 18. NAT's effort now to carve out a state law claim for the tribal court to address rings hollow. In sum and substance, NAT's tribal court complaint was premised on the Federal Communications Act, and the federal district court properly enjoined the tribal action in full. Hence, even if the Commission were inclined to defer to that tribal court, the tribal court would violate the federal court order if it acted on NAT's complaint.

NAT also ignores that Sprint initiated its PUC action weeks before NAT filed in tribal court. In these circumstances, the comity considerations that underlie the federal exhaustion rule should give way to the comity considerations that underlie the first-to-file rule. *See United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1999). Nor does NAT cite a *single* case where a state court or regulatory agency applied the exhaustion rule in any circumstance, let alone where the state action was started first.

NAT cites several cases in its response to Sprint to assert that off reservation conduct does not deprive a tribal court of jurisdiction if "the genesis of a dispute lays on-

reservation." NAT Brief at 4. This assertion is belied by the fact that the two invoices that Sprint paid were generated in Texas and sent to Sprint in Kansas, which sent its checks to the Texas billing agent. NAT itself is in Sioux Falls, and the decision not to pay NAT was made in Kansas. Moreover, the traffic pumping business NAT wants to be paid for does not involve tribal members on the Crow Creek Reservation.

The authorities NAT cites do not give the Crow Creek Tribal Court any jurisdiction over Sprint. The *Nigret* decision involved a contract dispute between a construction company and the tribe's housing authority, which the court held made it a tribal affair for exhaustion purposes, allowing the tribal court to determine the validity of the contract's arbitration provision. *Nigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32-33 (1st Cir. 2000). *Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 466 (10th Cir. 1992), presented a dispute over a gaming contract with the tribe for a bingo hall on tribal land, which the federal courts determined should first be decided in tribal court. *Id.* at 1171. *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992), presented a legal malpractice action against an Indian tribe's in-house counsel. Because the attorney did all his work for his allegedly mistaken opinion in his on-reservation office, there was a basis requiring the plaintiff to sue the attorney in tribal court. *Id.* at 918. None of these cases is persuasive authority for concluding that the Crow Creek Tribal Court has jurisdiction over Sprint, which is uncontestibly handing off its Fort Thompson exchange traffic to South Dakota Network

at its switch in Sioux Falls.[2] There is no federal grant permitting the tribal court to assert jurisdiction; there likewise is no state law grant of jurisdiction.

NAT does not even mention, much less address, the South Dakota's Supreme Court decision in *Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission of South Dakota*, 1999 SD 60, 595 N.W.2d 605. In that case, involving the sale of a telephone exchange on the Pine Ridge Reservation, the Supreme Court held that the Commission had "authority and jurisdiction over intrastate facilities" even within that reservation, and that the Commission's authority was "extensive and crucial to the overall regulatory scheme." *Id.* at ¶ 21, 595 N.W.2d at 610. The Supreme Court has thus determined the Commission has jurisdiction in these circumstances. Because the Commission has the legislative mandate to act *now* on Sprint's complaint, it should not take the unprecedented step of refusing to use the authority in deference to Crow Creek Tribal Court.[3]

NAT also disputes Sprint's position on whether *Montana v. United States*, 450 U.S. 544 (1981), provides the tribal court with jurisdiction over Sprint. NAT Reply Brief at 6. As shown in Sprint's federal court reply brief, NAT's litany of alleged injuries to

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[2] Nor does *Wells v. Wells*, 451 N.W.2d 402 (S.D. 1990), which NAT cites at page 4, confer tribal court jurisdiction. That case held that a state trial court could determine whether a tribal court divorce decree was entitled to recognition under SDCL 1-1-25. Because the tribal court lacked personal jurisdiction over the wife, who had moved off the reservation, the state circuit court could hear her divorce action. *Id.* at 405.

[3] The tribal court action was at a standstill even before Judge Schreier's order. At an October 13 scheduling conference, the recent specially appointed tribal court judge, B.J. Jones, raised questions about the validity of his appointment. He also orally set out a briefing schedule and a deadline for the tribe to intervene. The parties agreed to stay the briefing schedule, while the date for intervention came and went without the tribe intervening. Affidavit of Stanley E. Whiting dated December 10, 2010, at ¶¶ 2-3.

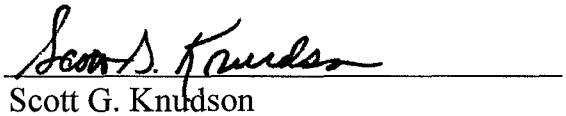
the Crow Creek Tribe's sovereignty is a fiction. Knudson 12/10/10 Aff. Ex. BB at 23-31. The arbitration provisions of NAT's agreement with its non-tribal partners, which rely on South Dakota law, eviscerate NAT's tribal sovereignty concerns. *See* Swier Declaration, dated October 25, 2010 at Ex. 7 (Joint Venture Agreement §§ 16.07, 16.12).

CONCLUSION

Very simply, there is no reason to delay further action on Sprint's complaint. The Commission should take up the mandate the legislature has given it and act.

Dated: December 13, 2010

BRIGGS AND MORGAN, P.A.



Scott G. Knudson
Philip R. Schenkenberg
2200 IDS Center
Minneapolis, Minnesota 55402
(612) 977-8400

WHITING LAW OFFICE
Stanley E. Whiting
142 E. 3rd Street
Winner, South Dakota
(605) 842-3373

TOBIN LAW OFFICES
Tom D. Tobin
PO Box 730
422 Main Street
Winner, S.D. 57580
(605) 842-2500

Counsel for Sprint Communications Company, LP