

**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
AMERICAN TELECOM, LLC REGARDING
TELECOMMUNICATIONS SERVICES

TC10-026

**NATIVE AMERICAN TELECOM, LLC'S
COMBINED STATEMENT OF MATERIAL FACTS AND
RESPONSE TO SPRINT COMMUNICATIONS COMPANY, L.P.'S
STATEMENT OF MATERIAL FACTS**

Native American Telecom, LLC ("NAT"), by its undersigned counsel and pursuant to SDCL 15-6-56, submits its Combined Statement of Material Facts and Response to Sprint Communications Company, L.P.'s ("Sprint") Statement of Material Facts. In the first part, NAT presents its Statement of Material Facts and in the second part responds separately to Sprint's Statement of Material Facts.

PART I.

FACTUAL BACKGROUND

A. NAT'S CORPORATE STRUCTURE

1. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Affidavit of Scott R. Swier dated January 10, 2013 ["Swier Aff."] at Exhibit 1). The Crow Creek Sioux Tribe has not established a Uniform

Commercial Code, and as a consequence, NAT could not apply for a business license from the Tribe.

2. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), P.O. Box 50, Fort Thompson, SD 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Swier Aff. at Exhibit 1).

3. NAT Enterprise possesses telecommunications regulatory and managerial experience and experience working in Indian Country. The Principals, Gene DeJordy and Tom Reiman, having worked in telecommunications on tribal lands for Western Wireless and Alltel. (Affidavit of Gene DeJordy at ¶¶ 1-4).

4. Gene DeJordy served Western Wireless as Vice President of Regulatory and Legal Affairs and served Alltel as Senior Vice President for Regulatory Affairs. (Affidavit of Gene DeJordy at ¶¶ 1-4).

5. Tom Reiman served Western Wireless and Alltel as a sales manager in Indian Country. (Affidavit of Gene DeJordy at ¶¶ 1-4).

6. Wide Voice Communication, Inc. is a 24% owner of NAT and possesses telecommunications engineering and management expertise, with the CEO and management team having many years experience

building and managing telephone companies. (Swier Aff. at Exhibit 1 and 2).

7. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation (“Reservation”) in Fort Thompson, South Dakota. (Swier Aff. at Exhibit 2).

8. NAT’s business address is 253 Ree Circle, Fort Thompson, South Dakota 57339. (Swier Aff. at Exhibit 1).

9. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Swier Aff. at Exhibit 1).

B. NAT’S TRIBAL UTILITY AUTHORITY ORDER AND TARIFF

10. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (“Tribal Utility Authority”) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services “to improve the health and welfare of the residents.” (Swier Aff. at Exhibit 1 & 2).

11. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* (“Approval Order”). (Swier Aff. at Exhibit 1 & 2).

12. Under this Approval Order, NAT was “granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.” (Swier Aff. at Exhibit 1 & 2).

13. The Approval Order required that the basic telephone service offered by NAT must be “consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission.” (Swier Aff. at Exhibit 1 & 2).

14. Pursuant to the Approval Order, on September 1, 2009, NAT filed its Access Tariff with the Tribal Utility Authority (“Tribal Tariff”), governing the termination of telephone traffic on the Reservation. (Swier Aff. at Exhibit 1 & 2).

15. NAT’s Tribal Tariff became effective on September 1, 2009. (Swier Aff. at Exhibit 1 & 2).

16. NAT’s Tribal (Intrastate) terminating access tariff rate is the same as its Interstate terminating access rate which is \$.006237 per minute of use, which is considerably less than what NAT could otherwise charge for Intrastate terminating access. (Swier Aff. at Exhibit 1 & 2).

C. NAT’S FEDERAL TARIFFS

17. On September 14, 2009, NAT filed its “Tariff No. 1” with the Federal Communications Commission (“FCC”). The terminating access

rate for Tariff No. 1 was \$.05494, matching the NECA rate. (Swier Aff. at Exhibit 3).

18. The Effective Date of Tariff No. 1 was September 15, 2009. (Swier Aff. at Exhibit 3).

19. On November 15, 2010, NAT filed its “Tariff No. 2” with the FCC. The terminating access rate for Tariff No. 2 was based on a sliding scale where the price of terminating access service declined as traffic volumes increased. This rate was designed to address the concerns of IXC’s who felt that terminating access rates should be lower for higher call volume. The only interstate rate charged to Sprint during this time was \$.05494, matching the NECA rate. (Swier Aff. at Exhibit 4).

20. On November 22, 2010, Sprint (along with other IXC’s), filed a “Joint Petition” asking the FCC to reject, or in the alternative, suspend and investigate, Tariff No. 2. (Swier Aff. at Exhibit 5).

21. On November 24, 2010, NAT filed its response to the IXC’s’ “Joint Petition.” (Swier Aff. at Exhibit 6).

22. On November 30, 2010, the FCC denied the IXC’s’ “Joint Petition” finding that:

[T]he [IXCs] . . . have not presented compelling arguments that [NAT’s] transmittals are so patently unlawful as to require rejection. Similarly, we conclude the [IXCs] have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of

the tariff transmittals. . . . Accordingly, the [IXCs'] petition[] . . . [is] denied, and the transmittals will, or have, become effective on [November 30, 2010].

(Swier Aff. at Exhibit 7).

23. As such, the Effective Date of Tariff No. 2 was November 30, 2010. (Swier Aff. at Exhibit 7).

24. On June 13, 2011, NAT filed its "FCC Tariff No. 2 - Revised" ("Revised Tariff No. 2") with the FCC. (Swier Aff. at Exhibit 8). NAT revised Tariff No. 2 because of an Order by the FCC to Northern Valley Communications ("NVC") directing NVC to change the definition of "End User" in their federal tariff. NAT was using the same definition as NVC at that time. (Swier Aff. at Exhibit 8).

25. No objections were made to Revised Tariff No. 2. (Swier Aff. at Exhibit 8).

26. The Effective Date of Revised Tariff No. 2 was June 26, 2011. (Swier Aff. at Exhibit 8).

27. On August 8, 2011, NAT filed its "FCC Tariff No. 3" with the FCC. (Swier Aff. at Exhibit 9). NAT's Tariff No. 3 was taken directly from CenturyLink/Qwest's (ILEC) tariff. It was drafted by TMIC, the consulting group that works for both IXCs and LECs. NAT lowered its interstate and intrastate terminating access rates to the composite rate

of \$.006327 per minute of use for all terminating access services, both interstate and intrastate. (Swier Aff. at Exhibit 9).

28. No objections were made to Tariff No. 3. (Swier Aff. at Exhibit 9).

29. The Effective Date of Tariff No. 3 was August 23, 2011. (Swier Aff. at Exhibit 9).

30. Tariff No. 3 remains in place as of today's date. NAT was not required to revise its interstate tariff following the Federal Communications Commission's November 18, 2011 Order, because NAT had already adopted rates and terms that complied with the Order. In fact, NAT's rate is lower than that which it could charge according to the Order. (Swier Aff. at Exhibit 9).

D. NAT'S SERVICES

31. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Swier Aff. at Exhibit 1 & 2).

32. NAT is using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ licensed spectrum providing service to residential, small business, hospitality and public safety. (Swier Aff. at Exhibit 1 & 2).

33. Wide Voice Communications, Inc. loaned NAT the money to build the telecommunications facilities on the Crow Creek Reservation. The loan is a non-recourse loan, the physical equipment is the collateral. (Affidavit of Jeff Holoubek at ¶ 23).

34. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Swier Aff. at Exhibit 1 & 2).

35. Through the use of advanced antenna and radio technology with OFDM1 OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Swier Aff. at Exhibit 1 & 2).

36. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Swier Aff. at Exhibit 1 & 2).

37. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Swier Aff. at Exhibit 1 & 2).

38. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, director assistance, and telecommunications relay services. (Swier Aff. at Exhibit 1 & 2).

39. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Swier Aff. at Exhibit 1 & 2).

40. NAT currently provides 142 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Second Affidavit of Jeff Holoubek at ¶ 2).

41. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Swier Aff. at Exhibit 1 & 2).

42. The demand for the Internet Library's services is so great that NAT built an additional facility on the Reservation 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 even these basic services. This state-of-the-art facility will open later this year. (Affidavit of Jeff Holoubek at ¶ 29).

43. The communications center would have already opened but for the very costly litigation brought on by Sprint, consisting of a lawsuit in State Court, a lawsuit in Federal Court, a referral of issues to the Federal Communications Commission, and a challenge to NAT's application for a CLEC license. (Affidavit of Jeff Holoubek at ¶ 30).

44. NAT's largest customer is Free Conferencing Corporation. (Affidavit of Jeff Holoubek at ¶ 7).

45. Free Conferencing has a Marketing Agreement ("Agreement") with NAT. (Affidavit of Jeff Holoubek at ¶ 8).

46. This Agreement between NAT and Free Conferencing Corporation contains a sliding scale between 75% and 95% of gross revenues to be paid to Free Conferencing depending upon the volume of Free Conferencing traffic that is terminated by NAT. (Affidavit of Jeff Holoubek at ¶ 9).

47. Free Conferencing has never received more than 75% of collected revenues, never intended to receive more than 75% of collected revenues, and following the inception of the litigation with Sprint, agreed to never enforce the provision of the contract to receive more than 75% of revenues. (Affidavit of Jeff Holoubek at ¶ 10).

48. This clause was put in the Agreement because there was an understanding between Gene DeJordy, Tom Reiman, and Free Conferencing that Mr. DeJordy and Mr. Reiman would assemble a diverse network of no less than ten (10) tribes into a tribal telephone conglomerate whereby Free Conferencing would become a customer and direct its customers' traffic, because Free Conferencing does not wish to have too much traffic in any one location (diversification is valued). (Affidavit of Jeff Holoubek at ¶ 11).

49. The sliding percentage scale of 75%-95% was included in the Agreement as a deterrent, or negative incentive, for Mr. DeJordy and Mr. Reiman so that they would not simply help only one or two tribes. In other words, Native American Telecom Enterprise ("NATE") owns 25% of NAT, and if Mr. DeJordy and Mr. Reiman stopped with only one tribal telephone company, then they would receive a diminishing percentage of profit from their ownership. (Affidavit of Jeff Holoubek at ¶ 12).

50. If Mr. DeJordy and Mr. Reiman wanted to receive a greater reward, then they would have to continue to expand the network. This seemed like a good plan because it would help the various tribes, would expand telecommunications to some of the most underserved areas in the United States, would help Free Conferencing

diversify (reduce business risk), and would help to carry out President Obama's mandate and that of the FCC to expand telecommunications and broadband to the underserved. (Affidavit of Jeff Holoubek at ¶ 13).

51. This plan for a Tribal Telephone Network was communicated to the Crow Creek Sioux Tribe and to the FCC, including Commissioner Michael Copps, during the many meetings that Free Conferencing held with FCC Commissioners and their Staffs. (Affidavit of Jeff Holoubek at ¶ 14).

52. Free Conferencing typically receives between 50% and 80% of revenues collected on its traffic, depending upon the location and risk involved. (Affidavit of Jeff Holoubek at ¶ 15).

53. Free Conferencing does not receive any other remuneration from NAT. (Affidavit of Jeff Holoubek at ¶ 16).

54. NAT keeps 100% of the revenues it receives from other customers. (Affidavit of Jeff Holoubek at ¶ 17).

55. Free Conferencing is responsible for all costs associated with its customer acquisitions, including but not limited to: advertising costs; corporate facilities costs; salaries and employee costs for sixty (60) or more employees; facilities in California, Washington D.C., and Ukraine, Russia; product development costs; software development costs;

customer service costs, regulatory costs, and all other costs associated with customer acquisition. (Affidavit of Jeff Holoubek at ¶ 18).

56. NAT receives 25% of the gross revenues for traffic from Free Conferencing's customers, and bears no risk whatsoever. (Affidavit of Jeff Holoubek at ¶ 19).

57. Free Conferencing Corporation pays NAT "end-user" customer fees in accordance with NAT's tariffs. (Affidavit of Jeff Holoubek at ¶ 20).

58. NAT pays to USAC the appropriate USF tax on all customer revenues. (Affidavit of Jeff Holoubek at ¶ 21).

PART II.

NAT'S RESPONSE TO SPRINT'S STATEMENT OF MATERIAL FACTS

1. Admit.
2. NAT admits that Tom Reiman and Gene DeJordy were the individuals that formed the original NAT. NAT, in its present form, is entirely different. NAT admits that subsequent to its formation, it has received additional members. NAT denies the ownership percentages. (Knudson Aff. at ¶ 3 and Ex. B. pp. 3-5). NAT admits that it has a board of directors and that each owner selects three board members. NAT admits that Jeff Holoubek is the acting President of NAT.

3. These statements are unrelated to NAT, and NAT is unable to admit or deny. This statement is also denied because it contains Sprint's legal conclusion that Sprint has never consented to being regulated by the Crow Creek Sioux Tribal Utility Authority.

4. Sentence 1 is denied because it contains Sprint's legal conclusion as to how it operates in this case. Sentence 2 is admitted. Sentence 3 is denied because the term "typical situation" is vague and ambiguous, the term "end user customer" is vague, ambiguous, and constitutes a legal conclusion. Sentence 4 is statement that is unrelated to NAT, and NAT is unable to admit or deny.

5. Sentence 1 is denied because it contains Sprint's legal conclusion as to whether Sprint has a "physical presence on the Crow Creek Sioux Tribe Reservation." Sentence 2 *** is unrelated to NAT and encompasses Sprint's internal operation, as such NAT is unable to admit or deny. Sentence 3 and Sentence 4 are denied. Sentence 5 is admitted.

6. Sentence 1 is admitted. Sentence 2 is admitted. Sentence 3 is admitted.

7. Sentence 1 is denied as the term "irregularly shaped reservation" is vague, ambiguous, and not consistent with Sprint's cited exhibit (Knudson Aff. at ¶ 4 and Ex. C). Sentence 1 is admitted to the extent that the Reservation is located within the Counties of Hughes,

Hyde and Buffalo. Sentence 2 is denied as the term “alienated” is vague and undefined. Sentence 3 is admitted only to the extent that it properly cites the 2010 Census information. Sentence 4 is denied to the extent that tax records for Hughes County do not show that the majority of the land is fee and not trust land. (Knudson Aff. at ¶ 4 and Ex. C)

8. NAT denies this paragraph. (Knudson Aff. at ¶ 5 and Ex. D – Response Nos. 1 and 3).

9. Sentence 1 is admitted to the extent that on October 28, 2008, the Crow Creek Sioux Tribal Utility Authority entered its “Order Granting Approval to Provide Telecommunications Service” (“Order”). Sentence 2 is denied to the extent that it provides Sprint’s legal conclusion as to the scope of the Order. Sentence 3 is denied to the extent that it provides Sprint’s legal conclusions as to the scope of the Order. (Knudson Aff. at ¶ 6 and Ex. E).

10. NAT admits this paragraph.

11. NAT admits that on December 16, 2008, it received a “Radio Station Authorization” from the Federal Communications Commission. Sentence 2 is admitted.

12. NAT admits this paragraph.

13. NAT admits that it signed a Service Agreement that became

effective on July 1, 2009. NAT denies that the Service Agreement “governed the relationship” as this term is vague, undefined, and constitutes a legal conclusion. (Knudson Aff. at ¶ 8 and Ex. G).

14. NAT admits that on September 1, 2009, NAT issued its Tariff C.C.S.T. No. 1 with an effective date of September 1, 2009. This document is listed as “Transmittal No. 1.” The excerpt referenced by Sprint as 1.1 appears on “Transmittal No. 2” reflecting an Issued Date of October 20, 2009 and Effective Date of October 21, 2009. (Knudson Aff. at ¶ 9 and Ex. H). NAT admits that it has not filed a tariff for intrastate services with the South Dakota Public Utilities Commission.

15. NAT admits Sentence 1 to the extent that NAT began providing service to Free Conferencing Corporation in September 2009. NAT denies that it provided service exclusively pursuant to the Service Agreement. NAT admits Sentence 2. NAT admits Sentence 3.

16. NAT is unable to admit or deny when Sprint recorded the first call directed over Sprint’s long distance network.

17. NAT admits Sentence 1. NAT admits Sentence 2.

18. NAT admits Sentence 1 to the extent that a bill was sent by CABS Agent FBO on behalf of NAT on December 10, 2009. NAT admits Sentence 2 that NAT billed Sprint through a third-party billing service

called CABS Agent. NAT admits Sentence 3. NAT admits Sentence 4. NAT admits Sentence 5. (Knudson Aff. at ¶ 12 and Ex. K).

19. NAT cannot admit or deny this paragraph because the CABS Agent did not provide the transaction invoices to NAT. NAT also cannot admit or deny this paragraph because Sprint did not provide the transaction invoices to NAT in support of Sprint's motion for summary judgment.

20. NAT cannot admit or deny Sentence 1 because the CABS Agent did not provide the transaction invoices to NAT. NAT also cannot admit or deny Sentence 1 because Sprint did not provide the transaction invoices to NAT in support of Sprint's motion for summary judgment. NAT cannot admit or deny Sentence 2 because NAT is unaware of why Sprint began investigating certain calls. NAT cannot admit or deny Sentence 3 because NAT is unaware of Sprint's investigational determinations.

21. NAT cannot admit or deny Sentence 1 because NAT is unaware of Sprint's investigational determinations. NAT denies Sentence 2 as to how "conferencing calling services" earn revenues as these revenues can also be generated in ways other than revenue sharing agreements with Local Exchange Carriers. NAT denies Sentence 3 as

this sentence is entirely incoherent. NAT cannot admit or deny Sentence 4 because NAT is unaware of what Sprint “identified.”

22. NAT admits that it has a contract with Free Conferencing Corporation. NAT admits that it is supposed to pay Free Conferencing Corporation 75% of the revenues collected from Interexchange Carriers. NAT denies that it is obligated to pay Free Conferencing, nor has NAT ever paid Free Conferencing, more than 75%. NAT admits Sentence 2. (Knudson Aff. at ¶ 13 and Ex. L).

23. NAT admits that it ceased invoicing Sprint for intrastate services and withdrew its invoices for intrastate services. NAT also admits that Sprint has refused to cash NAT’s refund check issued in this case.

24. NAT admits this paragraph.

25. NAT denies this paragraph because it simply contains Sprint’s legal conclusions/legal analyses of the Federal Communications Commission’s *Intercarrier Compensation Order*.

26. NAT denies this paragraph because it simply contains Sprint’s legal conclusions/legal analyses of the Federal Communications Commission’s *Intercarrier Compensation Order*.

27. NAT denies this paragraph because it simply contains Sprint's legal conclusions/legal analyses of the Federal Communications Commission's *Intercarrier Compensation Order*.

28. NAT admits that its new interstate tariff complies with the Federal Communications Commission's *Intercarrier Compensation Order*.

29. NAT denies this paragraph because it simply contains Sprint's legal conclusions/legal analyses of the Federal Communications Commission's *Intercarrier Compensation Order*.

30. NAT denies this paragraph because it simply contains Sprint's legal conclusions/legal analyses of the Federal Communications Commission's *Intercarrier Compensation Order*.

31. NAT denies Sentence 1 because it simply contains Sprint's legal conclusions/legal analyses of the Federal Communications Commission's *Intercarrier Compensation Order*. NAT also denies Sentence 2 because the Crow Creek Sioux Tribe has received substantial benefits from NAT. (Affidavit of Jeff Holoubek, ¶¶ 17, 18, 19, 23, 28, 29).

Dated this 11th day of January, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of January, 2013, the foregoing *NATIVE AMERICAN TELECOM, LLC'S COMBINED STATEMENT OF MATERIAL FACTS AND RESPONSE TO SPRINT COMMUNICATIONS COMPANY, L.P.'S STATEMENT OF MATERIAL FACTS* was served was delivered *via electronic mail* on the following parties:

Service List (SDPUC TC 10-026)

/s/ Scott R. Swier
Scott R. Swier