BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC10-026
SPRINT COMMUNICATIONS COMPANY L.P., Complainant, v. NATIVE AMERICAN TELECOM, LLC, Respondent.	**MEMORANDUM OF LAW OF SPRINT COMMUNICATIONS COMPANY L.P. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** **[PUBLIC VERSION]**

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") is moving for summary judgment on its Amended Complaint against Native American Telecom LLC ("NAT"). Specifically, Sprint seeks a declaration from the Commission that:

(1) NAT cannot provide telecommunications anywhere within the State of South Dakota without a certificate of authority from the Commission;

(2) NAT cannot invoice for intrastate telecommunications services until it has a lawful tariff on file with the Commission;

(3) NAT's invoices to Sprint for intrastate services that NAT has issued without a certificate of authority and lawful tariff on file with the Commission are void; and

(4) The Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota, and conversely, the Crow Creek Sioux Tribal

Utility Authority cannot regulate Sprint's activities in this State.

NAT admits, indeed proclaims proudly, that it is currently providing telecommunications services within South Dakota. But there is no dispute that NAT has neither a certificate of authority from the Commission nor a lawful tariff on file with the Commission. NAT's intrastate activities constitute a criminal offense under South Dakota law, and all of its invoices to Sprint must therefore be deemed void. Federal law establishes that the Federal Communications Commission ("FCC") has regulatory jurisdiction over interstate telecommunications services and reserves authority over intrastate services to the 50 states, but leaves no room for tribal authorities to regulate interexchange carriers like Sprint. Consequently, the Commission should put an end to the activities of a brigand like NAT.

FACTUAL BACKGROUND

The Commission is familiar with NAT, which has been involved in three proceedings before the Commission since 2008 – Telecom Dockets TC 08-110, TC 10-026 and TC 11-087.[1]

[1] NAT has an agreement with Free Conferencing Corporation, which is an acknowledged access stimulator. The Commission should likewise be familiar with Free Conferencing, as its principals are involved in Wide Voice LLC, which pursued a certificate of authority briefly before the Commission. *See* October 27, 2011, Application of Wide Voice, LLC for Certificate of Authority in TC 11-088 (Attachments I and III). Free

In August 2008, Thomas Reiman and Gene DeJordy organized NAT as a limited liability company formed under the laws of South Dakota. Sprint's Statement of Undisputed Material Facts ("UMF") ¶ 1. Neither Reiman nor DeJordy are members of the Crow Creek Sioux Tribe, or any other Indian tribe for that matter. *Id.* NAT listed a Sioux Falls address as its office in the documents filed with the Secretary of State. *Id.*

Reiman and DeJordy were initially the sole owners of NAT. Since its formation, NAT has added new members. Currently, the Crow Creek Sioux Tribe has 51 percent ownership, Reiman and DeJordy own 26 percent and an entity called Wide Voice Communications, Inc. owns 24 percent. NAT is managed by a board of directors, which each owner selecting three directors. UMF ¶ 2. Hence, while NAT claims to be tribally owned, non-tribal owners can determine NAT management practices. Jeff Holoubek, an employee of Free Conferencing Corporation, is the acting President of NAT. *Id.*

Sprint is a Delaware limited partnership with its principal place of business in Overland Park, Kansas. It is authorized to do business in South Dakota, certificated by the South Dakota Public Utilities

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Conferencing was also one of the traffic pumpers that Northern Valley contracted with. *See* Northern Valley Communications, LLC's Memorandum in Support of Motion for Summary Judgment at 3-4; Declaration of James Groth at ¶¶ 26-28 (filed July 11, 2012, in TC 09-098).

Commission ("Commission") to provide intrastate long distance services in South Dakota and authorized by the Federal Communications Commission to provide interstate long distance services. UMF ¶ 3. Sprint is a telecommunications company that provides telecommunications services nationwide and, in the context of the issues addressed in this case, operates as an interexchange carrier ("IXC"). UMF ¶ 4.

Sprint does not have a physical presence on the Reservation. Any traffic directed to NAT is delivered to a switch operated by South Dakota Network ("SDN") in Sioux Falls. From there, all calls to NAT go to a switch operated by Wide Voice Communications in Long Beach, California, which routes the traffic back to the SDN switch in Sioux Falls. Once there, NAT-bound traffic goes over SDN fiber to a Midstate Communications switch in Ft. Thompson, where it is exchanged with NAT. UMF ¶ 5.

On September 6, 2008, NAT filed an application for a certificate of authority from the Commission pursuant to SDCL 49-31-3 and ARSD 20.10.32.03 and 20.10.32.15 to provide local exchange services to all persons and businesses on the Crow Creek Sioux Reservation ("Reservation"), without discriminating between whether the individuals and businesses it served are members or owned by members of the Crow

Creek Sioux Tribe. UMF ¶¶ 6, 8. The Reservation is an irregularly shaped reservation located in the Counties of Hughes, Hyde and Buffalo. Land within the Reservation has been alienated, and according to 2010 Census data, approximately 10 percent of the population on the Reservation is non-Indian. UMF ¶ 7. Tax records for Hughes and Buffalo County show the majority of Reservation land within those counties to be fee land, as opposed to trust land, indicative of private versus tribal ownership. *Id.* The Commission assigned docket number TC 08-110 to NAT's application.

NAT's application was to provide local exchange services within the existing service area of Midstate Communications and Venture Communications Cooperative, both of whom moved to intervene in TC 08-110. South Dakota Telecommunications Association also intervened. UMF ¶ 6. Although its application in TC 08-110 did not disclose it, NAT was concurrently seeking authorization from the Crow Creek Sioux Tribal Utility Authority ("CCSTUA") to provide telecommunications services on the Reservation.

In an order dated October 28, 2008, the CCSTUA granted NAT's application "to provide telecommunications services on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe." The CCSTUA order did not limit its grant of authority to

provide services only to Tribal members. The order also did not restrict the use of wireless services to the exterior boundaries of the Reservation. UMF ¶ 9. On December 1, 2008, NAT moved to dismiss its application in TC 08-110, which the Commission allowed over the opposition of the interveners in an order dated February 5, 2009. UMF ¶¶ 10, 12.

In December 2008, the FCC issued NAT a license to operate a wireless telecommunications service in the 3650-3700 MHz band. The technology NAT uses under this license is so-called WiMax technology that enables NAT to provide wireless Internet Protocol voice and data telecommunication services. UMF ¶ 11.

On September 1, 2009, NAT issued a tariff denominated Crow Creek Tribal Tariff No. 1, effective as of that same date. The tariff states:

> 1.1 This tariff sets forth the regulations, rates and charges for the provision of Intrastate Access services and facilities (hereinafter "Services") by NATIVE AMERICAN TELECOM, LLC into, out of and within the State of South Dakota.

This tariff purports to be issued under the authority of the CCSTUA. UMF ¶ 14. NAT has never filed a tariff with the Commission. *Id.*

In September 2009 NAT began providing service to Free Conferencing Corporation pursuant to a service agreement they had entered into in May 2009. UMF ¶ 13, ¶ 15. As part of the telecommunications service NAT started providing, it provided Free

Conferencing with [redacted]. [redacted]. UMF ¶ 15.

NAT's local exchange prefix is 477. Sprint recorded the first interexchange call to that prefix on September 12, 2009. UMF ¶ 16. NAT did not have an interstate tariff in effect on that date, however. Its first tariff filed with the FCC was dated September 14, 2009, with an effective date of September 15, 2009. UMF ¶ 17.

Sprint does not have a physical presence on the Reservation. Any traffic directed to NAT's prefix 477 is delivered to a switch operated by South Dakota Network ("SDN") in Sioux Falls. From there, all calls to NAT go to a switch operated by Wide Voice Communications in Long Beach, California, which routes the traffic back to the SDN switch in Sioux Falls. Once there, NAT-bound traffic goes over SDN fiber to a Midstate Communications switch in Ft. Thompson, where it is exchanged with NAT. NAT has been and is continuing to provide two-way voice and internet services to individuals and businesses on the reservation. UMF ¶ 5.

Sprint received its first invoice from NAT in December 2009. NAT used a billing service called CABS Agent to invoice Sprint. CABS Agent operates out of Texas. The December 2009 invoice was for $18,363.24 for interstate services and $186.02 for 3,562 minutes of intrastate

services. Sprint paid that invoice in full by sending payment to CABS Agent. UMF ¶ 18.

NAT's next invoice was dated January 10, 2010, and again came through CABS Agent. The January 2010 invoice was for a total of $10,911.96 and included a charge of $104.93 for [redacted] minutes of intrastate telecommunication services. Sprint paid this invoice in full by sending payment to CABS Agent. UMF ¶ 19.

NAT's third invoice was dated February 10, 2010, and was for a total of $[redacted], including $[redacted] for intrastate services. Because of the large increase over the January 10, 2010, invoice, Sprint investigated the calls coming into NAT's 477 prefix. UMF ¶ 20.

Sprint's investigation determined that over 99.9% of the calls were to a few select phone numbers that were being used by so-called "free" conferencing calling services. These conference calling services do not require its users to pay the conferencing company a fee, but instead earn revenue by entering into agreements with local exchange carriers (LEC) to share with the LECs the terminating access charges the LECs charge the IXCs that deliver the traffic generated by the conferencing company to the LECs. The volume of conference calling business NAT has billed Sprint for has been over 99.9% of the total volume of use. In the case of

NAT, Sprint determined that the conference calling numbers were being used by Free Conferencing Corporation. UMF ¶ 21.

NAT admits it has a contract with a company called Free Conferencing Corporation whereby NAT pays Free Conferencing Corporation a minimum of 75% of the gross revenue NAT receives from IXCs like Sprint. In 2010, for example, NAT reported paying Free Conferencing $794,307.49 as "marketing expense" for 2010. UMF ¶ 22.

Sprint objected to NAT's third invoice and demanded a refund of the payments on the December 2009 and January 2010 invoices. NAT has continued to bill Sprint for both interstate and intrastate services. NAT's invoices to Sprint for interstate services total $[redacted] through August 2012, and $[redacted] for intrastate services through April 2012, when NAT stopped invoicing Sprint for intrastate services. NAT tendered a refund check on what Sprint paid for intrastate services in December 2009 and January 2010, but Sprint has not cashed the check. UMF ¶ 23.

On November 18, 2011, the FCC released its *Report and Order and Further Notice of Proposed Rulemaking*, Connect America Fund, WC Docket No. 10-90 et al., FCC 11-161 ("*Intercarrier Compensation Order*"). UMF ¶ 24.

In the *Intercarrier Compensation Order* the FCC revised its interstate switched access charge rules to address, and ultimately eliminate, business practices that are driven by the manufacturing of large volumes of terminating traffic and corresponding collection of intercarrier compensation revenues. *Id.* ¶¶ 656-701. In its order the FCC determined that revenue sharing was neither per se lawful nor per se unlawful, ¶¶ 672-673. UMF ¶ 30.

In the *Intercarrier Compensation Order*, the FCC found that:

> Access stimulation schemes work because when LECs enter traffic-inflating revenue sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Act.

Id. ¶ 657. UMF ¶ 25. This was NAT's business model – inflate traffic and bill IXC's for switched access at rates that were unjust and unreasonable.

To address the unreasonableness of these access rates, the FCC imposed transition and final rules. For the transition period, the *Intercarrier Compensation Order* established a two-pronged test to determine whether a LEC is participating in access stimulation. *Id.* ¶ 658. The test is met if the LEC:

(a) Is sharing switched access revenues with a third party, and

(b) Has traffic volumes that meet either of the following:

(i) A three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or

(ii) More than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.

Id. Under these guidelines, NAT is engaged in access stimulation, artificially boosting traffic far beyond what bona fide local customers would generate. UMF ¶ 26.

If a LEC satisfies these conditions, it is required to file a revised interstate switched access tariff with switched access rates generally equal to the lowest rate charged by the largest LEC in the state. *Id.* ¶ 679. In South Dakota, a LEC engaged in access stimulation will have to match CenturyLink's interstate access rate. UMF ¶ 27. NAT claims to have filed a new interstate tariff that complies with the restriction the FCC set in its *Intercarrier Compensation Order.* UMF ¶ 28.

The FCC's transition period moves the industry to the FCC's final destination, which is the elimination of all terminating compensation payments between carriers. *Id.* ¶ 741. Access rates will be phased down over time, to bill and keep, that is, no carrier will bill another for

terminating traffic. *Id.* ¶ 35. UMF ¶ 29. This transition will vitiate NAT's business model.

In its decision, the FCC also rejected the justification specifically advanced by NAT that it was entitled to assess access charges because it was building infrastructure in a Tribal area. *Id.* ¶ 666. In the federal litigation between Sprint and NAT the Treasurer of the Crow Creek Sioux Tribe has testified that the Tribe has received nothing from NAT, while Free Conferencing Corporation has received hundreds of thousands of dollars, perhaps millions, through its fee-sharing agreement with NAT. UMF ¶ 31.

ARGUMENT

I. Sprint is entitled to Judgment as a Matter of Law on its requested Declaratory Relief.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(d). "All reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party." *Ward v. Lange*, 1996 SD 113 ¶ 10, 553 N.W.2d 245, 249, while the moving party must show the absence of any genuine issue of material fact. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212 (1968). But "the party opposing a motion for

summary judgment must be diligent in resisting the motion, and generally mere allegations and denials which do not set forth specific facts will not prevent issuance of a judgment." *Breen v. Dakota Gear & Joint Co.*, 433 N.W. 221, 223 (S.D. 1988). Hence NAT must put forward specific material facts that controvert Sprint's right to its requested relief. This NAT cannot do.

NAT has previously argued to the Commission that Sprint's action against NAT in docket TC 10-26 is moot. As grounds for arguing mootness NAT pointed to its offer to forgo billing Sprint for intrastate services until it obtains a certificate of authority from the Commission. NAT has not shown the Commission any legal precedent that establishes that the mootness doctrine applies to administrative agencies in South Dakota.

As Sprint noted earlier to the Commission, the theoretical underpinnings to the mootness doctrine – that courts should decide concrete cases or avoid advisory opinions – apply with less force to an administrative agency, if at all. *See Friends of the Earth, Inc. v. Laidlaw Env. Serv., Inc.*, 528 U.S. 167, 189-92 (2000) (holding that voluntary compliance with permit standard did not moot case); *cf. In re Appeal of Centron Indus., Inc.*, ASBCA No. 52581, 2002 WL 31242207 (A.S.B.C.A.) (government's withdrawal of contested decision did not deprive Board of

Contract Appeals of jurisdiction); *see generally* Richard J. Pierce, Jr. ADMIN. LAW TREATISE (5th ed. 2009) § 16.2 (discussing historical evolution of Case or Controversy Clause jurisprudence).

But assuming the Commission will apply the mootness doctrine, the Commission should reject NAT's claim of mootness. The fact that NAT offered to cease billing Sprint for intrastate services and to offer a refund of money Sprint paid to NAT does not deprive the Commission of jurisdiction to address Sprint's claims for declaratory relief. This offer of NAT does not address the outstanding unpaid invoices. NAT's unilateral act also cannot render a case moot nor deprive the Commission of jurisdiction to grant Sprint relief. *See Friends of the Earth*, 528 U.S. at 189-92. The inescapable conclusion is that the Commission can grant the declaratory relief Sprint seeks in its Amended Complaint.

II. The Action Sprint has against NAT is not Moot.

The first issue raised by Sprint's Complaint is a request to declare the Commission has sole intrastate jurisdiction over Sprint. NAT has argued that when the Commission ruled it had "clear jurisdiction over intrastate telecommunications," (May 4, 2011, Order at 2), the Commission declared it had sole jurisdiction over intrastate telecommunication services. *See* NAT's Memorandum in Opposition to Sprint's Motion to Compel at 7 (filed in TC 10-26 on May 9, 2012).

Sprint's position is that federal communications law divides regulatory authority between the Federal Communications Commission for interstate traffic and state regulatory agencies for intrastate traffic, leaving none for tribal agencies. That means the Commission would have sole authority over Sprint's intrastate activities in South Dakota, but the Commission has not yet expressly adopted Sprint's position.[2] It should clarify that it has sole authority over Sprint's intrastate activities in South Dakota.

The converse of the first issue is Sprint's declaratory request, that the CCSTUA lacks jurisdiction over Sprint's intrastate interexchange services. As discussed below, *infra* at 23-28, federal law gives the CCSTUA no authority over Sprint. The Commission has yet to specifically address that issue.

Finally, NAT argues that by applying for a certificate of authority it has rendered Sprint's third declaratory request moot. But the Commission has yet to state expressly that NAT cannot lawfully offer intrastate services within the exterior boundaries of the State of South

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[2] In the federal litigation Sprint brought against NAT, the federal district court granted Sprint's motion for an injunction preventing NAT from proceding against Sprint in Crow Creek Sioux Tribal Court. The Court did so because Congress very specifically gave only the federal courts or the FCC jurisdiction over interstate telecommunications services. *See* order dated December 1, 2010 at 8-14, Civ. No. 10-4110 (KES) (available on Pacer as Doc. 62).

Dakota without a Commission–issued certificate of authority and a valid tariff on file with the Commission. In 2008 NAT applied for such a certificate, only then later to withdraw the application after the CCSTUA purportedly authorized NAT to offer telecommunications services within the state. If the Commission rejects NAT's application in TC 11-087, then the declaration Sprint seeks will be germane to any Commission enforcement proceeding against NAT.

III. The Commission should Declare that NAT cannot Operate within the State until it Receives a Certificate of Authority and Files a Lawful Tariff.

With its Amended Complaint Sprint is seeking a declaration from the Commission that NAT cannot provide telecommunications services anywhere in the State of South Dakota without a Commission-issued certificate of authority. Concomitantly, Sprint asks the Commission to declare that NAT must have a valid tariff on file with the Commission before it can charge for intrastate telecommunications services.

The South Dakota Legislature has articulated an unequivocal requirement that NAT must have a certificate of authority from the Commission before it offers telecommunications services in this state. Under SDCL § 49-31-3, no one can operate as a local exchange carrier until it has a certificate of authority from the Commission. SDCL § 49-31-3 provides in relevant part:

> 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 commission shall have the exclusive authority to grant a certificate of authority.

NAT initially sought such a certificate in 2008, but withdrew its application after purportedly receiving authority to operate in this state from the CCSTUA. *See* Order Granting Motion to Dismiss dated Feb. 5, 2009, in Telecom Dkt. 08-110.

NAT began providing telecommunications services in this state in September 2009. These services included providing ISDN-PRIs and ports to Free Conferencing. UMF ¶ 15. By September 12, 2009, Sprint recorded the first call directed to NAT's exchange prefix 477. UMF ¶ 16. NAT's first invoices to Sprint showed NAT billed Sprint for intrastate services. UMF ¶ 18.

NAT began invoicing Sprint in December 2009 and presumably other interexchange carriers, for providing what NAT calls terminating access charges. But NAT still has no certificate of authority from the Commission to provide any service in this state and thus is operating illegally in this state. In SDCL § 49-31-3, the Legislature has made NAT's conduct a Class 1 misdemeanor:

> The offering of such telecommunications services by a telecommunications company without a certificate of

authority or inconsistent with this section is a Class 1 misdemeanor.

NAT cannot gainsay that it has no certificate of authority from the Commission. That is the very purpose to NAT's application in TC11-087 – to get such a certificate. Likewise, NAT cannot deny that it has no valid tariff on file with the Commission. Its Crow Creek Tariff No. 1 does not suffice to bill Sprint for intrastate services. NAT's provision of PRI's and ports to Free Conferencing, and its offering of voice and internet services to individuals and businesses in South Dakota very simply violate South Dakota law and are a criminal violation. Sprint is undeniably entitled to the declarations it seeks regarding certification and tariff filing. Sprint leaves it to the Commission whether NAT must go dark until it has complied with SDCL § 49-31-3.

IV. The Commission should declare NAT's Invoices for Intrastate Telecommunications Services to Sprint are Void as a Matter of Law.

It is undisputed that NAT does not have a certificate of authority from the Commission. It is also undisputed that NAT does not have a valid tariff on file with the Commission. SDCL § 39-31-3 requires NAT to have a certificate of authority before it starts providing telecommunications services within South Dakota and makes it a Class 1 misdemeanor – a criminal offense – to provide such service without a Commission certificate.

Settled South Dakota law holds that a party to an illegal contract cannot sue to enforce that contract. In *Nature's 10 Jewelers v. Gunderson*, 2002 SD 80, 648 N.W.2d 804, a franchisee sued his franchisor for breach of contract and fraud arising out of a failed jewelry franchise business. The franchisor persuaded the circuit court to enforce the arbitration clause in the franchise agreement. *Id* at ¶9, 648 N.W.2d at 806. The Supreme Court reversed, holding that because the franchisor's state registration had expired, the franchise agreement was void and therefore unenforceable. *Id.* at ¶13, 648 N.W.2d at 807. The South Dakota Supreme Court has also held other contracts entered into in violation of state law to be unenforceable. *See, e.g., Beverage Co. v. Villa Marie Co.*, 69 S.D. 627, 13 N.W.3d 670 (1944) (assignee of beer wholesaler could not enforce note where wholesaler violated statutory prohibition on financing the sale of fixtures to saloons); *Minnesota, Dakota & P. Ry v. Way*, 34 S.D. 435, 148 N.W. 858 (1914) (railroad could not recover on performance bond securing illegal contract); *Conrad Seip Brewing Co. v. Green*, 23 S.D 619, 122 N.W. 662 (1909) (illegal wholesale beer purchase order held unenforceable).

NAT cannot defend its intrastate invoices on the so-called filed rate doctrine because NAT has no tariff on file with the Commission. NAT's tribal tariff is of no force and effect, in Sprint's view, anywhere in South

Dakota, and indisputably, nowhere outside the Crow Creek Reservation. Thus, by statute and case law, all of NAT's invoices to Sprint for intrastate services void and unenforceable. Sprint is accordingly entitled to a declaration from the Commission to that effect.

V. The Commission should declare that only the Commission can Regulate Sprint's Interexchange Services within the State of South Dakota.

On September 1, 2009, NAT issued what it deems is its Crow Creek Tribal Tariff No. 1 to establish its terms of service within the State of South Dakota. After Sprint refused to pay NAT's third invoice and demanded a refund, on March 26, 2010, NAT contacted the Tribal Utility Authority about Sprint's position that traffic pumping is not a legitimate access service. On March 29, 2010, the Tribal Utility Authority issued an *ex parte* order stating that Sprint was required to pay the access charges, based on the tariff on file with the FCC and the Tribal Utility Authority:

> [T]his Utility Authority finds Sprint's non-payment of Native American Telecom-Crow Creek's access tariff charges to be in violation of the laws of the Crow Creek Sioux tribe. This finding applies to both the *intrastate* access services subject to the tariff in effect at this Utility Authority and the *interstate* access services subject to the tariff in effect at the FCC.

Tribal Utility Authority Order, at 4 (Mar. 29, 2010) (emphasis added). Knudson Aff. ¶ 11 and Ex. J. On its face, that order applied to <u>all</u> of NAT's invoices – both intra and interstate. But the CCSTUA has no

jurisdiction over Sprint for any purpose, and only the Commission can regulate Sprint within this State.

It is plain from this order the CCSTUA attempted to usurp the Commission's authority over Sprint, and indeed, even that of the Federal Communications Commission. In enacting the Communications Act of 1934, Congress created a system of dual regulation of telecommunications providers. Subject to certain exceptions,

> "nothing in this chapter [Chapter 5 of Title 47] shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, ..."

47 U.S. C § 152(b). The United States Supreme Court has held that the "sweeping" language of § 152(b) "fences off from FCC reach intrastate matters – indeed, including matters 'in connection with' intrastate service." *Louisiana Pub. Serv. Comm'n v. Fed. Comm'cns Comm'n*, 476 U. S. 355 (1986) (quoting statute)(upholding state authority to regulate depreciation rates for dual use property when regulating intrastate rates). In creating this dual regulatory system, Congress did not carve out any role for Indian tribes to regulate telecommunications services.

Pursuant to this dual system, the South Dakota Legislature has authorized the Commission to have "general supervision and control of all telecommunications companies offering common carrier 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 also 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 Commission also has jurisdiction over all tariffs affecting the state. *See* SDCL § 49-1-11.

This broad authority is further enumerated under SDCL § 49-31-7.1, entitled "Powers and Duties of Commission." Under this provision, the Commission may:

> inquire into the management of the business of all telecommunications companies subject to the provisions of this chapter, and the commission shall keep informed as to the manner and method in which the same is conducted, and may obtain from such telecommunications companies full and complete information necessary to enable it to perform the duties and carry out the objects for which it was created.

SDCL § 49-31-7.1(3).

The South Dakota Supreme Court has recognized the Commission's primacy over telecommunications in this state:

> The regulatory scheme of telecommunications services specifically grants [the Commission] authority and jurisdiction over intrastate facilities. *See* 47 U.S.C. § 152(b). The authority of [the Commission] is extensive and crucial to the overall regulatory scheme. *See* SDCL ch. 49-31. Among other things it has "general supervision and control of all

> telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation." SDCL § 49-31-3.

Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of South Dakota, 1999 SD 60, ¶ 21, 595 N.W.2d 604, 609 (holding that the Commission had authority over the sale of a telephone exchange located on a reservation). Through its regulation, the Commission protects public welfare. "Public service commissions are generally empowered to, and are created with the intention that they should regulate public utilities insofar as the powers and operations of such utilities affect the public interest and welfare." *In re Establishment of Switched Access for US West Commc'ns, Inc.*, 2000 SD 140 ¶ 21, 618 N.W.2d 847, 852 (S.D. 2000) (quoting *Northwestern Bell Tel. Co. v. Chicago & N.W. Transp. Co.*, 245 N.W.2d 639, 642 (S.D. 1976)).

Federal judicial precedent also does not support any inherent tribal regulatory authority over telecommunications services within reservation boundaries. The federal courts, from the Supreme Court on down, have articulated a general rule that a tribe cannot regulate non-members. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 659 (2001) (tax on non-member on fee land presumptively invalid); *see Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) ("tribal

jurisdiction over non-members is 'presumptively invalid'") (quoting *Atkinson*, 532 U.S. at 659).

In *Montana v. United States,* 450 U.S. 544 (1981), the Supreme Court set out two exceptions to this general rule. Under the first *Montana* exception, tribal jurisdiction may only be exercised where a non-tribal member enters into a consensual relationship with a tribe or a tribal member. 450 U.S. at 565. Sprint is obviously not a tribal member, being a limited partnership with its principal place of business in Overland Park, Kansas. UMF ¶ 3. Nor has Sprint consented to the jurisdiction of the CCSTUA. *Id.*

The CCSTUA's authority over Sprint also cannot rest on the fact Sprint is a telecommunications provider. Providing telecommunications services on a reservation "as a matter of law does *not* create a 'consensual relationship' with the tribe or its members." *Reservation Tel. Coop. v. Henry*, 278 F. Supp. 2d 1015, 1023 (D.N.D. 2003) (tribe had no authority to tax utility's property within reservation). Because "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself, . . . it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts." *In re*

Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (internal quotations omitted).

In addition to requiring a consensual relationship, the Supreme Court has also held that the proposed regulation must bear a nexus to any such relationship. "*Montana* limits tribal jurisdiction under the first exception to the regulation of the activities of nonmembers." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 332 (2008), (quoting *Big Horn Cty. Cooperative, Inc. v. Adams*, 219 F.3d 944, 951 (9th Cir. 2000); *see also Atkinson*, 532 U.S. at 656 (holding that the tribal regulation must bear some nexus to the consensual relationship). "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank,* 554 U.S. at 337. In this case, Sprint's alleged activities, *i.e.*, nonpayment of access charges, lack a sufficient regulatory nexus, because Sprint has no consensual relationship with a South Dakota limited liability company, partially owned (49 percent) and completely controlled by non-members of the Crow Creek Sioux Tribe. Similarly, if Sprint has no physical presence or interconnection with NAT on the Reservation, the CCSTUA cannot have regulatory jurisdiction over Sprint.

The lack of jurisdiction is the same regardless of whether, as claimed, the Tribe owns 51 percent, of NAT. In *Plains Commerce Bank*, the borrower was a South Dakota LLC owned by members of the Cheyenne River Sioux Tribe. The fact the bank in *Plains Commerce* chose to do business with tribal members involving fee land on a reservation did not confer adjudicatory jurisdiction over the bank. *Id.* at 330. The same result holds for the CCSTUA's regulatory jurisdiction over Sprint.

The second *Montana* exception recognizes that tribes also may retain inherent jurisdiction over "the conduct of non-Indians on fee lands within its reservation when the conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This second *Montana* exception is also narrowly applied. As the Supreme Court observed in *Atkinson*:

> *Montana's* second exception "can be misperceived." The exception is only triggered by *non-member conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

532 U.S. at 657 n.12 (emphasis in original).

The second *Montana* exception is designed to allow a tribe to do only "what is necessary to protect tribal self-government or to control internal relations." *Strate v. A-1 Contractors*, 520 U.S. 438, 458-59 (1997). "The conduct must do more than injure the tribe, it 'must imperil the subsistence' of the tribal community.'" *Plains Commerce Bank*, 128 S. Ct. at 2726 (quoting *Montana*, 450 U.S. at 566); *see* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][C], at 231 n.220 (2005) (the "elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences.").

Courts and the FCC have found the second *Montana* exception does not apply in cases like this. In *Reservation Telecom Coop. v. Henry*, the court held:

> The Defendants have wholly failed to establish that *Montana's* second exception applies and justifies the imposition of a possessory interest tax. The Cooperative's actions of providing telecommunication services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe.

278 F. Supp. 2d at 1024; *see also Cheyenne River*, 1999 SD 60, ¶¶ 18-23, 595 N.W.2d at 608-09 (PUC's exercise of authority over tribe's agreement to purchase on-reservation portion of telephone exchange did not infringe on exercise of tribal self-government). The FCC likewise

rejected Western Wireless' assertion that the second *Montana* exception applied to its services on the Pine Ridge Reservation:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-members 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.

Western Wireless, at ¶ 23. Similarly, NAT's provision of telecommunications services to Free Conferencing or other businesses or individual cannot meet this high threshold.

In sum, Supreme Court and FCC precedent unequivocally deny any authority to the CCSTUA to regulate Sprint's business activities in South Dakota.

CONCLUSION

For the foregoing reasons, Sprint asks the Commission to enter judgment in its favor.

Respectfully submitted,

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