

**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
MEMORANDUM IN RESPONSE TO
SPRINT COMMUNICATIONS COMPANY, L.P.'S
SUPPLEMENTAL AUTHORITY**

Native American Telecom, LLC ("NAT"), by its undersigned counsel, submits its Memorandum in Response to Sprint Communications Company, L.P.'s ("Sprint") Supplemental Authority.

FACTUAL BACKGROUND

On April 3, 2013, Sprint filed its "Notice of Supplemental Authority" in this matter. Sprint's "Notice of Supplemental Authority" alleges that the Federal Communications Commission's ("FCC") decisions in *In the Matter of AT&T Corp. v. All American Telephone Co., et al.* and *In the Matter of Qwest Communications Company, LLC v. Sancom, Inc.* provide further support for Sprint's motion for summary judgment. However, these two decisions are factually inapposite to the facts in this docket before the Commission.

A. The *All-American* Decision

In *All-American*, (FCC File No.: EB-09-MD-010) AT&T filed a formal complaint against Defendants under Section 208 of the Communications Act of 1934. *Id.* at ¶ 1. In its decision, the FCC made the following findings:

1. The *All-American* Defendants did not serve a broad range of customers in its local area.

The FCC found that Defendants did not serve a broad range of customers in its local area. *Id.* at ¶ 3. Instead, All American provided services in Nevada and Utah only to a single chat line/conferencing service provider (“CSP”), Joy Enterprises, Inc. *Id.* at ¶ 3. Similarly, ChaseCom and e-Pinnacle provided services in Utah exclusively to a few CSPs. *Id.* at ¶ 3.

In this case, NAT provides the following services to its customers on the Crow Creek Sioux Tribe Reservation (“Reservation”):

- NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (NAT’s Combined Statement of Material Facts and Response to Sprint’s Statement of Material Facts, ¶ 31 – filed with SDPUC on 1-14-2013) (hereinafter “NAT’s SUMF, ¶ --).

■ NAT currently provides 152 high-speed broadband and telephone installations at residential and business locations on the Reservation. (NAT's SUMF, ¶ 40). NAT also has a waiting list of additional subscribers who are enrolled members of the Crow Creek Sioux Tribe.

■ 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. (NAT's SUMF, ¶ 37).

2. The *All-American* Defendants owned and operated both a CLEC and conferencing company.

The FCC found that the *All-American* Defendants owned and operated both a CLEC and a conferencing company in violation of federal law.

In this case, NAT does not own or operate a conferencing company. Instead, Free Conferencing Corporation ("Free Conferencing") is one of NAT's customers. Free Conferencing does not have ownership in NAT. In fact, Free Conferencing sends less than 3% of its world-wide traffic to NAT. (NAT's SUMF ¶¶ 44-58).

3. The *All-American* Defendants’ rates were “unjust and unreasonable” because of “mileage pumping.”

The FCC also found that the *All-American* Defendants’ rates were “unjust and unreasonable” because of “mileage pumping,” (*i.e.*, using a more distant drop-off point for its traffic).

In this case, NAT’s rate is the lowest in South Dakota. Also, NAT is clearly not engaged in “mileage pumping” because NAT uses the closest drop-off point, which is in Sioux Falls.

4. The *All-American* Defendants’ were operating in violation of state law.

The FCC found that the *All-American* Defendants were operating in clear violation of state law.

In this case, it is not at all clear whether or not NAT is operating in violation of South Dakota law, and in fact NAT has always intended to follow the law. In October 2008, the Tribal Utility Authority entered its “Order Granting Approval to Provide Telecommunications Service” (“Approval Order”). (NAT’s SUMF ¶ 11). 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.” (NAT’s SUMF ¶ 12). 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.” (NAT’s SUMF ¶ 13).

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. (NAT’s SUMF ¶ 14). NAT’s Tribal Tariff became effective on September 1, 2009. (NAT’s SUMF ¶ 15). NAT’s Tribal (Intrastate) terminating access tariff rate is the same as its Interstate terminating access rate which is \$.006327 per minute of use, which is considerably less than what NAT could otherwise charge for Intrastate terminating access. (NAT’s SUMF ¶ 16).

NAT also filed a CLEC application with the Commission because NAT wanted to have the option to provide telecommunication services outside the boundaries of the Reservation. However, that application was met with opposition from Sprint and Qwest, among others. NAT, being a newly-formed telecommunications company with limited resources, determined that it would be prudent to withdraw its application with the Commission rather than incur the high legal costs of defending itself against huge public companies with unlimited resources. NAT, with the Commission’s permission, withdrew its application, and decided instead, with the Commission’s full knowledge, to operate within

the Reservation's borders. NAT was never forewarned by the Commission that NAT was (or even could be) operating outside of South Dakota law.

NAT has never provided services to customers outside the borders of the Reservation, and all subscribers are enrolled members of the Crow Creek Sioux Tribe, except for Free Conferencing Corporation, a Nevada corporation that locates conferencing equipment in leased facilities located on the Reservation and was, and still is, required to submit to the authority of the Tribal Utility Commission. Consequently, all services are provided to customers on the Reservation and within the boundaries of the Reservation and those customers are therefore subject to the authority of the Tribal Utility Commission.

During the Commission's recent April 9, 2013 hearing, NAT learned that a customer's provision of services to its customers that involve a "605" South Dakota area code calling another "605" South Dakota area code, outside the Reservation's borders, may qualify as intrastate service, even though all of the calls terminate on the Reservation and all of NAT's services to that customer are offered within the Reservation's boundaries. Upon learning of this possibility, NAT immediately took steps to cease calls made between "605" South Dakota area code customers, because

NAT does not desire to offend the Commission or take the chance that such activity may be considered a violation of South Dakota law.

Furthermore, after the Commission determined (in this docket) that it had jurisdiction over certain of NAT's intrastate interexchange telecommunications activities, and even though it was unclear exactly what would constitute an intrastate service since all telecommunications traffic terminates on the Reservation, NAT immediately filed for a Certificate of Authority in SDPUC TC 11-087. Because of Sprint's (and other IXCs') intervention, this (normally routine) certification proceeding has now been pending for almost nineteen (19) months. In other words, NAT has been attempting (for almost two years) to comply with the Commission's certification requirements. NAT certainly has not "thumbed its nose" at the Commission as Sprint so cavalierly asserts.¹

5. The *All-American* Defendants lacked the necessary technical, financial, and managerial resources

The FCC also noted that the Utah Public Service Commission

¹ Furthermore, after the Commission found that it had jurisdiction over certain of NAT's intrastate interexchange telecommunications services, NAT ceased invoicing for intrastate services and withdrew its outstanding invoices for intrastate services. (NAT's Response to Sprint's Statement of Material Facts, ¶ 23).

revoked All-American's certificate of authority because All-American was a "mere shell company" that lacked the "technical, financial, and managerial resources" to serve customers. *All-American*, at ¶ 19.

In this case, NAT ENTERPRISE, a 24% owner of NAT, possesses telecommunications regulatory and managerial experience and experience working in Indian Country. The Principals, Gene DeJordy and Tom Reiman, have worked in telecommunications on tribal lands for Western Wireless and Alltel. (NAT's SUMF ¶ 3). Gene DeJordy served Western Wireless as Vice President of Regulatory and Legal Affairs and served Alltel as Senior Vice President for Regulatory Affairs. (NAT's SUMF ¶ 4). Tom Reiman served Western Wireless and Alltel as a sales manager in Indian Country. (NAT's SUMF ¶ 5). WideVoice, a 24% owner of NAT, possesses telecommunications engineering and management expertise, with the CEO and management team having over forty (40) years of combined experience building and managing telephone companies. (NAT's SUMF ¶6). Finally, based on its recent confidential financial documents (filed with the Commission in SDPUC TC 10-087), NAT also has sufficient financial resources and reserves to serve its customers. NAT is currently revising its CLEC application to provide the Commission with updated financial information, which includes a plan for continued operation when access fees are no longer a source of

revenue. Clearly, NAT is a legitimate company that has the requisite “technical, financial, and managerial resources” to serve its numerous customers.

B. The *Sancom* Decision

The FCC’s decision in *Sancom*, (FCC File No.: EB-10-MD-004) is also inapposite to this docket.

First, Sprint contends that the FCC found Qwest did not owe access charges to Sancom because Free Conferencing was not Sancom’s “end user.” This assertion is simply untrue. Rather, the FCC found (like its earlier decision in *Farmers*) that Sancom was not treating all customers in accordance with its tariff and therefore, Qwest did not owe “terminating access charges” under Sancom’s tariff. The *FCC never found that Qwest owed nothing* for accepting Sancom’s services.

Second, Sprint alleges that Free Conferencing’s business plan has been to “enter into sham arrangements with South Dakota companies to bilk IXCs and line its own pockets.” Once again, Sprint makes these comments without any proof or justification. In fact, Sprint knowingly pays Northern Valley Communications for access traffic that Sprint readily acknowledges is provided by Free Conferencing. Sprint is also aware that Free Conferencing offers a basic conferencing calling service – not unlike those offered by other IXCs.

CONCLUSION

For the foregoing reasons, NAT respectfully requests that the Commission reject Sprint's reliance on the FCC's *All-American* and *Sancom* decisions in this matter.

Dated this 24th day of April, 2013.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this *24th day of April, 2013*,
the foregoing *NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN
RESPONSE TO SPRINT COMMUNICATIONS COMPANY, L.P.'S
SUPPLEMENTAL AUTHORITY* was served was delivered *via electronic mail*
on the following parties:

Service List (SDPUC TC 10-026)

/s/ Scott R. Swier

Scott R. Swier