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.	**SPRINT'S REPLY TO RESPONSE MEMORANDUM OF NATIVE AMERICAN TELECOM**

Sprint Communications Company ("Sprint") submits this Reply to the Response Memorandum that Native American Telecom ("NAT") filed with the Commission on April 24, 2013. At the April 9 hearing, Chairman Hanson allowed Sprint seven days in which to reply.

On April 3, 2013, Sprint provided the Commission with notice of two recent decisions of the Federal Communications Commission ("FCC") that involved circumstances analogous to what is before the Commission on Sprint's complaint. NAT's response conflates the issues raised by its application for a certificate of authority in TC 11-087 with what Sprint seeks in TC 10-026, a determination that NAT is currently operating illegally in South Dakota and cannot bill Sprint (and by extension, any IXC) for terminating access services for intrastate telecommunications. NAT tries vainly to distinguish factually Sprint's supplemental authority;

its effort to do so relies on immaterial facts or assertions of fact that are not supported by the record before the Commission on Sprint's motion for summary judgment. Very simply, NAT cannot avoid the inescapable conclusion it must have a certificate of authority from the Commission before it begins to offer intrastate telecommunications services to Free Conferencing Corporation (or anyone else) within South Dakota.

The *All American* decision is on point.

In its *All American* decision, the FCC determined that All American had engaged in unjust and unreasonable conduct under the Communications Act of 1934. *In re AT&T Corp. v. All American Tele. Co.,* File No. EB-09-MN-010, FCC 13-38, Mem. Op. and Order, at ¶¶ 1, 33-34 (Mar. 25, 2013). A key part of the FCC's decision was the determination that All American was a sham entity and operated in violation of state law. *Id.* at ¶¶ 24-25. The Utah PSC revoked All American's certificate of public convenience and necessity. *Id.* at ¶ 19. The Utah PSC's finding that All American had violated Utah law and thus had no authority to operate in Utah was a linchpin to the FCC's ruling against All American. The same finding would hold true here – NAT's violation of S.D.C.L. § 49-31-3 is incontestable.

NAT offers yet another argument – not as a response to Sprint's supplement authority, but as an embellishment of what it argued to the

Commission on April 9, that NAT is operating validly under a tariff allegedly filed with the Crow Creek Sioux Tribal Utility Authority. (Response at 4-5) But even assuming that there is a validly constituted tribal utility authority and that NAT actually filed its intrastate tariff with that entity, NAT must still have a certificate of authority from the Commission before it can offer intrastate telecommunication services within South Dakota.

Notably, NAT admits that it is providing Free Conferencing with local exchange services and that Free Conferencing is not a Crow Creek tribal entity. There is no question NAT must have a Commission certificate of authority to lawfully provide Free Conferencing with local exchange service. With regard to other subscribers, NAT still says it will offer local exchange service anywhere and to anyone within the Crow Creek reservation, which has numerous nontribal residents within its boundaries.

NAT also tries to distinguish *All American* on various factual grounds, none of which address the central issue of NAT's ongoing violation of South Dakota Law. For example, NAT asserts that, unlike All American, it serves more than a traffic pumper like Free Conferencing. (Response at 2, 3) While Sprint does not dispute that NAT has a few local exchange customers besides Free Conferencing, NAT cannot dispute

that Sprint measured over 99.9 percent of NAT's minutes of use going to calls terminating at numbers NAT had assigned to Free Conferencing. That Free Conferencing only sent less than three percent of its total traffic worldwide (Response at 3) to NAT does not alter the fact that Free Conferencing is effectively NAT's reason to exist. NAT argues that Free Conferencing does not own NAT (Response at 3); that assertion ignores that Free Conferencing (or its affiliate WideVoice) manages NAT and has total control of all of NAT's revenues. These are all indicia of a sham operation like All American. It is of no moment that NAT may be the lowest priced CLEC in South Dakota, as it asserts (Response at 4) – NAT must still have a certificate of authority from the Commission.

NAT also makes a totally unbelievable argument that "it is not at all clear" NAT is violating state law and that NAT has an order from the tribal utility authority approving NAT's operations. (Response at 4) This assertion ignores S.D.C.L. § 49-31-3, which indisputably requires NAT to have a Commission-issued certificate of authority before it provides intrastate telecommunication services of any sort. The Crow Creek Sioux Tribal Utility Authority cannot override this Commission's authority under state and federal law to regulate NAT's intrastate activities. Moreover, the "sliver" of tribal authority NAT's counsel argued to the Commission on April 9 (Tr. at 55) cannot extend beyond allowing a true

tribal entity (which Sprint does not concede NAT is) from providing services only within the reservation and solely to enrolled tribal members. NAT claims far more.

NAT makes an illogical argument that in 2008 it applied for a CLEC application in order to be able to provide services outside the Crow Creek Reservation, but withdrew that application, allegedly on opposition from Sprint and Qwest (Response at 5), to avoid the expense of a contested proceeding. That assertion is simply false as applied to Sprint or Qwest, neither of whom intervened in NAT's initial application.[1] NAT withdrew its application over intervenor's objections, but contrary to NAT's current assertion, nothing in the record in that proceeding suggests the Commission agreed NAT could operate in the State solely on its purported tribal authorization.

NAT's current plea is that the Commission should have warned NAT that it would still need a certificate of authority to operate when the Commission granted NAT's motion to dismiss its application in TC 08-110. (Response at 6) But when the Commission granted NAT's motion to dismiss its application in TC 08-110, NAT was not even operating. In any case, NAT cannot plead ignorance of the plain language of S.D.C.L.

[1] The only intervenors were Midstate Communications, Venture Cooperative Communications and SDTA. *See* Order Granting Intervention in TC 08-110 (Oct. 21, 2008).

§ 49-31-3, which requires a Commission-issued certificate before beginning operations. Hence, NAT's claim that it always intended to comply with state law should be given no credence. (Response at 5-6)

NAT now claims to have ceased providing service to customers outside the reservation. (Response at 6-7) Absolutely no record evidence is offered to support that assertion. Further, NAT claims to have stopped invoicing for intrastate services (Response at 7 n. 1), but that claim applies only to Sprint.[2] Moreover, such self help should be subject to Commission regulation. NAT also argues that All American is distinguishable because NAT's non-Indian owners have telecommunications experience. (Response at 8) Sprint does not concede the validity of that expertise, but notes simply such expertise is relevant to TC 11-087, not TC 10-026.

The *Sancom* decision remains relevant.

NAT argues the *Sancom* decision is inapplicable because the FCC did not hold Qwest owed nothing for Sancom's services. (Response at 9) But this argument ignores the FCC ruled in Qwest's favor on liability, which meant nothing was owed under Sancom's tariffs, which were held

[2] In paragraph 23 of its response to Sprint's statement of undisputed facts that NAT filed with the Commission on January 14, 2013, NAT stated: "NAT admits that it ceased invoicing Sprint for intrastate services and withdrew its invoices for intrastate services." The necessary inference is that this statement applies only to Sprint and not to any other IXC.

unlawful. *See In re Qwest Commc'ns, Co. v. Sancom, Inc.*, File No. EB-10-MD-004, DA 13-321, Mem. Op. and Order at ¶ 29 (Mar. 5, 2013).

Moreover, NAT does not refute that the *Sancom* circumstances are functionally the same – traffic pumpers like Free Conferencing have been exploiting the regulatory structure to extract an unjustifiable advantage, especially in South Dakota.

The *Cahnmann* decision is wholly inapplicable.

On April 9, at oral argument on Sprint's motion for summary judgment, counsel for NAT argued a case to the Commission NAT had never cited to before, *Cahnmann v. Sprint Corp.,* 133 F.3d. 484 (7th Cir. 1998). Sprint would like to explain why *Cahnmann* is completely irrelevant to TC 10-026.

Cahnmann involved a putative class action against Sprint alleging state law breach of contract and fraud claims based on a Sprint tariff that permitted small businesses who agreed to a minimum of $50 in long distance charges a month to make up to $1,000 per month in long distance calls to anywhere in the world for free on any Friday for up to one year. *Id.* at 486. Sprint subsequently changed its tariff to limit the countries that could be called under the plan. *Id.* Sprint removed the case to federal court, and the precise issue on appeal was whether the district court should have granted the plaintiff's motion to remand the

case back to state court. The court of appeals affirmed the denial of the remand motion, holding that Sprint properly removed the case because federal law completely preempted the state law claims. *Id.* at 488-90.

Contrary to what NAT implies by citing *Cahnmann*, that decision does not hold that the Commission cannot regulate NAT's intrastate telecommunications services. Foremost, 47 U.S.C. § 152(b) specifically preserves state jurisdiction over intrastate services. Moreover, in enacting the 1996 Telecommunications Act, Congress expressly preserved the states' right to regulate intrastate telecommunications services.

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers.

47 U.S.C. § 253(b). Thus, this Commission properly has jurisdiction over Sprint's intrastate claims against NAT. *See Competitive Carriers of the South, Inc. v. Edgar*, 2008 WL 4613077 at *4 (N.D. Fla. Oct. 16, 2008) (construing § 253 (b) to permit Florida PSC to impose a 50¢ per line charge on CLECs to recoup hurricane repair costs). *Cahnmann* simply did not address the Commission's authority under 47 U.S.C. § 152(b) or § 253 (b) to act on Sprint's complaint in this case.

CONCLUSION

Sprint's supplemental authority is relevant to this docket and supports Sprint's motion for summary judgment against NAT. *Cahnmann*, however, is simply a red herring and can and should be ignored.

Respectfully submitted,

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