

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 COMMUNICATIONS
COMPANY L.P.'S STATEMENT
OF UNDISPUTED MATERIAL
FACTS**

[PUBLIC VERSION]

Sprint Communications Company L.P. ("Sprint") submits the following undisputed material facts in support of its motion for summary judgment in accordance with SDCL 15-6-56(c) and ARSO 20:10:01:01.02.

1. On August 29, 2008, the South Dakota Secretary of State issued a Certificate of Organization to Native American Telecom, LLC ("NAT"). NAT was formed under South Dakota law by Thomas Reiman and Gene DeJordy, neither of whom is an enrolled member of the Crow Creek Sioux Tribe or any other tribe. In its organizing documents, NAT listed a Sioux Falls address as its office location. (Affidavit of Scott G. Knudson dated December 11, 2012 ["Knudson Aff."] at ¶ 2 and Ex. A.)

2. Reiman and DeJordy were the original owners of NAT. Subsequent to its formation, NAT has received additional members.

Currently, the Crow Creek Sioux Tribe owns 51% of NAT, Native American Telecom Enterprise LLC, an entity controlled by Reiman and DeJordy, owns 26% of NAT, and Widevoice Communications Inc. owns 24% of NAT. NAT is managed by a Board of Directors, and each owner selects three board members. Jeff Holoubek, an employee of Free Conferencing Corporation, is the acting President of NAT. (Knudson Aff. at ¶ 3 and Ex. B, pp. 3-5.)

3. 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 Commission ("Commission") to provide intrastate long distance services in South Dakota and authorized by the Federal Communications Commission to provide interstate long distance services. Sprint has never consented to being regulated by the Crow Creek Sioux Tribal Utility Authority. (Affidavit of Amy S. Clouser ["Closure Aff."] dated December 11, 2012 at ¶ 1)

4. 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"). As an IXC, Sprint provides long distance telecommunications services. In a typical situation, when an end user customer places a long distance call,

the IXC delivers the call to the network of the local exchange carrier (“LEC”) serving the called party. In some cases there is a third party carrier between Sprint’s long distance network and the network of the LEC serving the called party. (Closure Aff. ¶ 2.)

5. Sprint does not have physical presence on the Crow Creek Sioux Tribe Reservation (“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. NAT has been and is continuing to provide two-way voice and internet services to individuals and businesses on the reservation. (Clouser Aff. ¶ 3.)

6. On September 6, 2008, NAT filed an application for a certificate of authority with the South Dakota Public Utilities Commission (“Commission”) to provide local exchange services to persons and businesses located on the Reservation. (Commission Docket TC 08-110). NAT’s application was to provide 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. (Commission Docket TC 08-110.)

7. The Reservation is an irregularly shaped reservation located within the Counties of Hughes, Hyde and Buffalo. Land within the Reservation has been alienated, and today people live and own property within the boundaries of the Reservation who are not members of the Crow Creek Sioux Tribe. According to the 2010 Census, approximately 10 percent of the residents of the Reservation are non-Indians. (Census data.) Tax records for Hughes and Buffalo County show the majority of the land within those counties to be fee and not trust land. (Knudson Aff. at ¶ 4 and Ex. C.)

8. In its responses to discovery Sprint has served on NAT in Commission Docket TC11-087, NAT stated it intends to serve all customers within the Crow Creek Reservation, without discriminating between whether the individuals and businesses it serves are members or owned by members of the Crow Creek Sioux Tribe or not. (Knudson Aff. at ¶ 5 and Ex. D – Response Nos. 1 and 3.)

9. On October 28, 2008, the Crow Creek Sioux Tribal Utility Authority (CCSTUA) issued an order granting NAT authority to provide telecommunications service “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. (Knudson Aff. at ¶ 6 and Ex. E.)

10. On December 1, 2008, NAT moved to dismiss its application for a certificate of authority from the Commission. (Commission Docket TC 08-110.)

11. On December 16, 2008, NAT received authorization from the Federal Communications Commission to register individual fixed and base stations for wireless operations on the 3650-3700 MHz band. The technology NAT uses under this license is WiMax technology that enables NAT to provide wireless Internet Protocol voice and data telecommunication services. (Knudson Aff. at ¶ 7 and Ex. F.)

12. On February 5, 2009, the Commission granted NAT's motion to dismiss, which was opposed by interveners Midstate Communications, Venture Communications Cooperative and South Dakota Telecommunications Association. (Commission Docket TC 08-110.)

13. On or about May 1, 2009, NAT and Free Conferencing Corporation entered into a Service Agreement ("Service Agreement") that governed the relationship between those two parties. (Knudson Aff. at ¶ 8 and Ex. G.)

14. On September 1, 2009, NAT issued its Tariff C.C.S.T. No. 1 with an effective date of September 1, 2009. 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.

(NAT Tribal Tariff No. 1.) This tariff purports to be issued under the authority of the Crow Creek Sioux Tribal Utility Authority. (NAT Resp. to Sprint Int. 18.) NAT has yet to file a tariff for intrastate services with the Commission. (Knudson Aff. at ¶ 9 and Ex. H.)

15. In September 2009, NAT began providing service to Free Conferencing Corporation pursuant to the Service Agreement. NAT provided [REDACTED]. [REDACTED]
[REDACTED]. (Knudson Aff. at ¶ 10 and Ex. I.)

16. On September 12, 2009, Sprint recorded the first call directed over its long distance network directed to NAT's NXX number 477. (Clouser Aff. ¶ 4.)

17. On September 14, 2009, NAT issued Tariff F.C.C. No. 1 with an effective date of September 15, 2009. This tariff covers the provision of interstate access services. (Knudson Aff. at ¶ 11 and Ex. J (cover page only).)

18. Nat's first invoice to Sprint was dated December 10, 2009. NAT billed Sprint through a third-party billing service called CABS Agent.

The December 10, 2009, invoice was for \$18,363.24 for interstate services and \$181.02 for intrastate services. The intrastate bill covered 3,562 minutes of use. Sprint paid this invoice in full by submitting payment to CABS Agent. (Knudson Aff. at ¶ 12 and Ex. K.)(Clouser Aff. ¶ 5.)

19. NAT's next invoice to Sprint also came from CABS Agent. The invoice was dated January 10, 2010. The January 10, 2010, invoice was for a total of \$10,911.96 and included \$104.93 for [REDACTED] minutes of intrastate telecommunications services. Sprint paid this invoice in full by submitting payment to CABS Agent. (Clouser Aff. ¶ 6.)

20. 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 NXX number. Based on that investigation Sprint determined that the vast majority of the calls coming into NAT's exchange was for "free" conference calling services. (Clouser Aff. ¶ 7.)

21. 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 IXC's that deliver the traffic generated by the conferencing company to the LECs. The volume of conference calling business NAT has billed Sprint for over 99.9% of the total volume of use. In the case of NAT, Sprint identified that the conference calling services were being offered by Free Conferencing Corporation. (Clouser Aff. ¶ 8.)

22. 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 IXC's like Sprint. In 2010, for example, NAT reported paying Free Conferencing \$794,307.49 as "marketing expense" for 2010. (Knudson Aff. at ¶ 13 and Ex. L.)

23. 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. (Clouser Aff. ¶ 9.)

24. On Nov. 18, 2011 the Federal Communications Commission 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”*).

25. 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 generation of large volumes of terminating traffic and corresponding collection of intercarrier compensation revenues. *Id.* ¶¶ 656-701. 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.

26. To address the unreasonableness of these access rates, the FCC imposed transition “rules” and final “rules.” For the transition period, the *Intercarrier Compensation Order* established a two-pronged

test to determine whether a local exchange carrier (“LEC”) is participating in access stimulation. *Id.* ¶ 658. The test is met if the LEC:

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

27. 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.

28. NAT claims to have filed a new interstate tariff that complies with the restriction the FCC set in its *Intercarrier Compensation Order*.

29. This transition period will move 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, neither carrier bills the other to terminate traffic. *Id.* ¶ 35.

30. In the *Intercarrier Compensation Order* the FCC determined that revenue sharing is neither per se lawful nor per se unlawful and instead left the facts of revenue sharing to be examined on a case by case basis. ¶¶ 672-673.

31. In its decision, the FCC also rejected the justification advanced by NAT that it was entitled to assess access charges because it was developing infrastructure in a Tribal area. *Id.* ¶ 666. In the federal litigation between Sprint and NAT, however, the Treasurer of the Crow Creek Sioux Tribe testified that the Tribe has received nothing from NAT, while Free Conferencing Corporation has received hundreds of thousands of dollars through its fee sharing agreement with NAT. (Knudson Aff. at ¶ 14 and Ex. M.)

Dated this 11th day of December, 2012.

BRIGGS AND MORGAN, P.A.

s/ Scott G. Knudson

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

**Counsel for Sprint
Communications Company L.P.**