

EXHIBIT

RGF-7

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH DAKOTA
3 SOUTHERN DIVISION
4 * * * * *
5 Case Civ. 10-4110
6 SPRINT COMMUNICATIONS COMPANY, L.P.,
7 Plaintiff,
8 -vs-
9 NATIVE AMERICAN TELECOM, LLC;
10 B.J. JONES, in his official capacity
11 as Special Judge of Tribal Court; and
12 CROW CREEK SIOUX TRIBAL COURT,
13 Defendants.
14 U.S. District Courthouse
15 Sioux Falls, SD
16 March 3, 2011, 9:00 a.m.
17 * * * * *
18 MOTION HEARING
19 * * * * *
20 BEFORE: The Honorable Karen E. Schreler
21 U.S. District Court Judge
22 APPEARANCES:
23 Mr. Scott G. Knudson
24 Briggs & Morgan
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28 -and-
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1 rule on our opposition.

2 THE COURT: All right. Then the Motion to Amend

3 the Answer and to add Counterclaims is granted.

4 One other Issue I wanted to raise, in Sprint's

5 Objections to the Motion for Preliminary Injunction, one of

6 the arguments that you had raised was that Native American

7 Telecom didn't have any claim for relief that was pending.

8 So, therefore, the Court couldn't grant preliminary

9 injunction.

10 I was wondering if the fact they have now amended

11 their Answer and added the Counterclaims, does that moot

12 out that issue, or do you still have that particular issue?

13 MR. KNUDSON: I believe that resolves that issue.

14 THE COURT: Okay. Now that we've dealt with

15 those procedural things. Since Native American Telecom is

16 the moving party, you have the burden of proof. So you can

17 go ahead and proceed, Mr. Swier.

18 MR. SWIER: Thank you, Your Honor. If it's

19 appropriate with the Court, I think that there's no need

20 for an opening statement, because the Court is familiar.

21 with the case. So if we could start with our witnesses, I

22 would ask the Court to do that.

23 THE COURT: All right. Mr. Knudson, did you have

24 something?

25 MR. KNUDSON: Well, there were a Motion for

6

1 THE COURT: This is the time scheduled for a

2 hearing in the matter entitled United States of America vs.

3 Sprint -- I'm sorry, Sprint Communications Company vs.

4 Native American Telecom. I'm used to the United States

5 being a party. It just came out.

6 Would counsel please note their appearances for

7 the record?

8 MR. SWIER: Good morning, Your Honor. Scott

9 Swier, appearing on behalf of the Defendant in this case,

10 Native American Telecom, an LLC.

11 MR. KNUDSON: Scott Knudson and Tom Tobin for the

12 Plaintiff, Sprint Communications, and with us, before the

13 rail, is Bret Lawson, in-house counsel for Sprint

14 Communications.

15 THE COURT: Thank you. Before I take up the

16 Motion for a Preliminary Injunction, I wanted to raise an

17 issue.

18 The Native American Telecom filed a Motion to Amend

19 its Answer and to add Counterclaims. I know this was just

20 filed within the last week. I was wondering if Sprint was

21 going to be objecting to that, or if you would need the

22 rest of your time to determine whether you would be

23 objecting.

24 MR. KNUDSON: Your Honor, we would stipulate to

25 its filing. That would obviate the need for the Court to

8

1 Protective Order and a corresponding Motion to Compel that

2 had been filed before. I don't know if the Court intends

3 to bring those up or address those today, as well.

4 THE COURT: I didn't plan on addressing those

5 today. I was just going to allow the parties to respond in

6 normal course, and then I would enter a written ruling on

7 those.

8 MR. KNUDSON: Then I will address those issues in

9 my argument later today then.

10 THE COURT: Okay. Mr. Swier?

11 MR. SWIER: Thank you. Your Honor, at this time

12 I would ask if the parties have any witnesses for their

13 case in chief, that those witnesses be sequestered, please.

14 THE COURT: The Motion to Sequester all witnesses

15 is granted, except for the corporate representative would

16 be allowed to stay in. I assume he is the corporate

17 representative.

18 MR. KNUDSON: He is.

19 THE COURT: Okay.

20 MR. SWIER: Your Honor, if I may, Mr. Lengkeek is

21 serving as the corporate representative today, and he will

22 also be one of my witnesses. May he be allowed to sit with

23 me?

24 THE COURT: He may.

25 MR. KNUDSON: Excuse me. What is Mr. Lengkeek's

9

1 status then?

2 THE COURT: He is the corporate representative.

3 Is he also your first witness?

4 MR. SWIER: He'll be my second witness,

5 Your Honor. At this time I'll ask Carlos Cestero to please

6 take the stand.

7 Your Honor, what I've done is I've provided

8 Mr. Cestero with the original exhibits. I've also provided

9 copies of the exhibits both to the Court and to opposing

10 counsel, so everyone is working off the same page.

11 THE COURT: All right.

12 CARLOS CESTERO,

13 called as a witness, being first duly sworn, testified as

14 follows:

15 DIRECT EXAMINATION

16 BY MR. SWIER:

17 Q. Good morning, Mr. Cestero. Would you please introduce

18 yourself to the Court?

19 A. Sure. My name is Carlos Cestero.

20 Q. And would you, please, spell your name for the Court

21 and the court reporter?

22 A. Sure. C-A-R-L-O-S. Last name is C-E-S-T-E-R-O.

23 Q. I'll refer to you as Carlos. Is that all right?

24 A. That's fine.

25 Q. Carlos, what's your business address?

10

1 A. 110 West Ocean Boulevard, Suite A, Long Beach,

2 California 90802.

3 THE COURT: Counsel, if I could just remind you,

4 anytime you have somebody give their complete business

5 address, you'll have to do a redaction of the transcript.

6 So unless there's a real need to have their entire business

7 address, and unless you really want to do redactions to the

8 transcript, you don't need to ask for a formal address.

9 MR. SWIER: I will not ask again, Your Honor.

10 Thank you.

11 BY MR. SWIER:

12 Q. Carlos, would you share with the Court your

13 educational background, please?

14 A. Sure. After high school, I went to college at

15 California State University Long Beach, where I graduated

16 with an accounting degree.

17 Q. What year did you graduate with your accounting

18 degree?

19 A. 1994.

20 Q. Since you graduated Cal State Long Beach in '94, have

21 you been working in your related accounting field?

22 A. Yes, I have.

23 Q. Carlos, would you share with us your employment

24 history since you graduated from college?

25 A. Sure. My first job out of college was at a company

11

1 called Balboa Capital. I worked there for about nine and a

2 half years.

3 Q. What did you do at Balboa Capital?

4 A. I had a variety of different things. I was an

5 accountant. I handled the securitization accounting, cash

6 management. I handled the funding operations, as well as I

7 was the COO during the last few moments of my tenure there.

8 Q. Just remember, for the court reporter, please slow

9 down.

10 A. All right.

11 Q. Carlos, what did Balboa do?

12 A. They are an equipment leasing company.

13 Q. You shared with us your duties there. How long were

14 you with Balboa?

15 A. About nine and a half years.

16 Q. When did you leave Balboa?

17 A. About 2005.

18 Q. Why did you leave Balboa?

19 A. I found another position at another company.

20 Q. When you left Balboa, what was your next employment

21 opportunity?

22 A. It was a company called Nationwide Funding.

23 Q. What does Nationwide Funding do?

24 A. Equipment leasing.

25 Q. What were your duties at Nationwide?

12

1 A. I was the CFO.

2 Q. What duties entailed the CFO position?

3 A. That would involve managing all the accounting

4 records, the bookkeeping, journal entries, reconciliations,

5 anything related to a normal controller/CFO type of

6 position.

7 Q. How long were you in that position?

8 A. About two years.

9 Q. After you left, was it Nationwide?

10 A. Yes.

11 Q. After you left Nationwide, what was your next

12 employment opportunity?

13 A. I went to work for a company called Strada Capital

14 Corporation.

15 Q. Can you spell that, please?

16 A. S-T-R-A-D-A C-A-P-I-T-A-L Corporation.

17 Q. What did you do at Strada?

18 A. Strada, I was their chief operating officer, as well

19 as their controller.

20 Q. How long were you at Strada?

21 A. For about three years almost.

22 Q. Describe for us your day-to-day duties at Strada.

23 A. I managed the books, handled the operational side of

24 the business, did the reconciliations, did all the record

25 keeping. Normal controller/CFO-type responsibilities.

1 Q. And you left Strada when?

2 A. **2009.**

3 Q. Why did you leave Strada in 2009?

4 A. **For another opportunity.**

5 Q. What was that opportunity?

6 A. **Free Conferencing Corporation.**

7 Q. And is Free Conferencing Corporation your current

8 employer?

9 A. **Yes, they are.**

10 Q. Is Free Conferencing Corporation located in

11 Long Beach, California?

12 A. **That's correct.**

13 Q. Carlos, since graduating with your accounting degree

14 in 1994, how many years of experience do you have in the

15 accounting and controller type business?

16 A. **About 16 years.**

17 Q. Carlos, when did you begin your controller duties at

18 FreeConferenceCall?

19 A. **September of 2009.**

20 Q. Real briefly for the Court, what does the controller

21 of FreeConferenceCall do? What do you do?

22 A. **I maintain the books, I do all the reconciliations,**

23 **prepare the financial statements, record cash receipts,**

24 **payables, typical controller duties.**

25 Q. You are the bean counter.

1 A. **So to speak, yes.**

2 Q. Carlos, who do you get paid by each month?

3 A. **Free Conferencing Corporation.**

4 Q. So Free Conferencing Corporation is the entity that

5 actually pays your salary?

6 A. **That's correct.**

7 Q. In addition to your duties with FreeConferenceCall, do

8 you also serve as the controller for any other entities?

9 A. **I do.**

10 Q. We're going to go through those in a second. Are you

11 paid any type of money to do the work for those entities?

12 A. **No, I'm not.**

13 Q. Let's talk about those other entities you serve in

14 this role. What would be the first one?

15 A. **Free Conferencing Corporation.**

16 Q. You told us what you do for that.

17 A. **Yes.**

18 Q. What other entities do you serve as the controller or

19 the bookkeeper?

20 A. **Native American Telecom.**

21 Q. Native American Telecom, LLC, the party that's a

22 Defendant in this case?

23 A. **Yes.**

24 Q. Carlos, just for sake of shortening things up, if I

25 refer to Native American Telecom, LLC, as NAT, is that

1 sufficient?

2 A. **Yes.**

3 Q. You'll know what I'm talking about?

4 A. **Yes.**

5 Q. What other entities do you serve as the controller?

6 A. **WideVoice Communications.**

7 Q. What other groups?

8 A. **FreeConferenceCall Global.**

9 Q. Anyone else?

10 A. **Wyde Voice, spelled slightly different, W-Y-D-E. They**

11 **are a conferencing bridge company.**

12 Q. Just to make clear, there are two companies called

13 WideVoice.

14 A. **That sound the same, yes.**

15 Q. One is spelled W-Y-D-E?

16 A. **Correct.**

17 Q. Any other entities you serve as controller for?

18 A. **Yes. HDPSTN.**

19 Q. Can you say that one more time?

20 A. **HDPSTN.**

21 Q. I want to talk about what you do for WideVoice

22 Communications, the W-I-D-E Voice Communications. What's

23 the purpose of WideVoice Communications?

24 A. **They are a telephone carrier.**

25 Q. What is the purpose of FreeConferenceCall Global?

1 A. **It's a conferencing company.**

2 Q. What is the purpose of Wyde Voice with a Y?

3 A. **It's a conferencing bridge company.**

4 Q. What's the purpose of HDPSTN?

5 A. **They are a telephone company.**

6 Q. Do you know what HDPSTN is the acronym for?

7 A. **Yes.**

8 Q. What is that?

9 A. **It's High Definition Public Switch Telephone Network.**

10 Q. So, Carlos, at this time, just to make sure we

11 clarify, your actual job that you get paid for is to act as

12 the controller of FreeConferenceCall. Correct?

13 A. **Correct.**

14 Q. But you also serve as the controller for these other

15 entities that we've discussed?

16 A. **That's correct.**

17 Q. As an accountant, do you keep separate books for each

18 of those respective entities?

19 A. **Absolutely.**

20 Q. Explain to the Court the mechanics of how that's done.

21 A. **First, we maintain separate databases. We also have**

22 **separate file cabinets, separate file folders. Basically**

23 **everything is separated.**

24 Q. Explain to the Court why that separation between the

25 entities is important.

17

1 **A. Well, to maintain the proper internal controls.**

2 **Q.** What do you mean by "proper internal controls"?

3 **A. You want to make sure nothing is mixed in with**

4 **anything else. You want to keep things separated and**

5 **segregated from one another.**

6 **Q.** When you are dealing with multiple entities like that,

7 is that a fundamental purpose of accounting practice, to

8 make sure you keep that separation very strict?

9 **A. Yes.**

10 **Q.** Carlos, in your 16 years of accounting and controller

11 experience, have you ever deviated from those fundamental

12 separation principles?

13 **A. No.**

14 **Q.** Not once?

15 **A. No.**

16 **Q.** Since you started working for FreeConferenceCall in

17 2009, and for the other entities later on, have you always

18 followed those fundamental separation principles?

19 **A. Yes.**

20 **Q.** Carlos, one of the entities you do the accounting work

21 for is, of course, NAT, Native American Telecom. Is that

22 right?

23 **A. Yes.**

24 **Q.** Explain to Judge Schreier what you do for NAT.

25 **A. I maintain the books, record all the cash receipts,**

18

1 **maintain the payables, reconcile the accounts, prepare the**

2 **financial statements, normal controller/accounting**

3 **responsibilities.**

4 **Q.** When did you take over that role for NAT?

5 **A. It was in late July of 2010.**

6 **Q.** So about eight months ago?

7 **A. About, yes.**

8 **Q.** Why did you take over that controller role for NAT?

9 **A. It was basically to -- it was a cost efficiency move,**

10 **and it allowed for us to maintain the proper controls.**

11 **Q.** Before you took over the book work for NAT -- strike

12 that question. So you did it for a cost effectiveness and

13 efficiency purpose. Is that right?

14 **A. Sure, yes.**

15 **Q.** Carlos, I want to talk about NAT a little bit. Will

16 you describe for us what you understand the ownership

17 structure of NAT to be?

18 **A. Would I describe it?**

19 **Q.** Yes. How is the ownership structure of NAT set up?

20 **A. There's three separate entities. Would you like me**

21 **to --**

22 **Q.** So there's three separate entities. Who is the

23 majority owner of NAT?

24 **A. The Crow Creek Sioux Tribe.**

25 **Q.** Do you know what percentage of NAT the Tribe owns?

19

1 **A. Yes.**

2 **Q.** What is that percentage?

3 **A. 51 percent.**

4 **Q.** So they are the majority owner?

5 **A. Yes.**

6 **Q.** You said there were three total entities?

7 **A. Yes.**

8 **Q.** We have the first one. What is the second entity that

9 owns NAT?

10 **A. WideVoice Communications.**

11 **Q.** What percentage of NAT does WideVoice Communications

12 own?

13 **A. 24 percent.**

14 **Q.** Again, WideVoice Communications, their purpose, or

15 what do they do, Carlos?

16 **A. They are a telephone carrier. They transport traffic.**

17 **Q.** What is the third entity that has an ownership

18 interest in NAT?

19 **A. Native American Telecom Enterprise.**

20 **Q.** What does that entity own, what percentage?

21 **A. They have 25 percent.**

22 **Q.** Just so we're clear, because the names start to get

23 confusing, Native American Telecom Enterprise, is that a

24 separate and distinct entity from NAT?

25 **A. Yes, it is.**

20

1 **Q.** They own what percentage again, Native American

2 Telecom Enterprise?

3 **A. 25 percent.**

4 **Q.** Carlos, I want to talk a little bit about the record

5 keeping and the books you maintain for NAT. Who has access

6 to NAT's financial books?

7 **A. Myself.**

8 **Q.** What if something happens to you? Are there codes set

9 up with another person so they could access the financials?

10 **A. Yes, my assistant.**

11 **Q.** Tell me how that code thing works. Is it kind of a

12 backup?

13 **A. Yes, it's a backup.**

14 **Q.** Is that standard in the accounting industry?

15 **A. Yes. You want to make sure someone can access things**

16 **if you're absent or something happens to you.**

17 **Q.** Carlos, do you receive any payment for the services

18 you provide to NAT?

19 **A. No, I do not.**

20 **Q.** Do you understand why that is?

21 **A. Native American Telecom cannot afford to pay for an**

22 **outside accountant.**

23 **Q.** I want to talk about these internal controls a little

24 bit, and let's go back to the entities you do work for.

25 **FreeConferenceCall. Who has check-writing authority**

21

1 for FreeConferenceCall?
 2 **A. David Erickson and Sue Erickson.**
 3 **Q.** Does David Erickson serve as the CEO for
 4 FreeConferenceCall?
 5 **A. Yes, he does.**
 6 **Q.** Who is Sue Erickson?
 7 **A. His wife.**
 8 **Q.** You also do accounting work for WideVoice, W-I-D-E
 9 Voice. Who has check-writing authority for that entity?
 10 **A. Dave Erickson, Sue Erickson, and Patrick Chicas.**
 11 **That's spelled C-H-I-C-A-S.**
 12 **Q.** For FreeConferenceCall Global, who has the
 13 check-writing authority for that entity?
 14 **A. David Erickson and Sue Erickson.**
 15 **Q.** Who has check-writing authority for Wyde Voice with a
 16 Y?
 17 **A. David Erickson and Sue Erickson.**
 18 **Q.** Who has check-writing authority for HDPSTN?
 19 **A. David Erickson and Sue Erickson.**
 20 **Q.** For Native American Telecom, for NAT, who has the
 21 check-writing authority for that entity?
 22 **A. Myself and Jeff Holoubek. H-O-L-O-U-B-E-K.**
 23 **Q.** Does David Erickson have any check-writing authority
 24 for NAT?
 25 **A. No, he does not.**

22

1 **Q.** Does Sue Erickson have any check-writing authority for
 2 NAT?
 3 **A. No, she does not.**
 4 **Q.** Does Mr. Chicas have any check-writing authority for
 5 NAT?
 6 **A. No, he does not.**
 7 **Q.** Carlos, in front of you are a number of exhibits. I
 8 would like you to take a look at those exhibits, if you
 9 would, please.
 10 **A. Sure.**
 11 **Q.** I would first like you to take a look at Defendant's
 12 Exhibit No. 1. Can you tell the Court what that exhibit
 13 shows?
 14 **A. Sure. It's the bank statements for Native American**
 15 **Telecom for the First Dakota National Bank ending**
 16 **8-31-2009.**
 17 **Q.** Let's clarify this. Since Native American Telecom
 18 became an entity, how many checking accounts has NAT had?
 19 **A. Two.**
 20 **Q.** Was the First Dakota National Bank checking account
 21 the first one?
 22 **A. Yes, it was.**
 23 **Q.** First Dakota National Bank is obviously based here in
 24 South Dakota?
 25 **A. Yes, it is.**

23

1 **Q.** Carlos, I'd like you to take a look at Defendant's
 2 Exhibit 1, because I want to show some of the financial
 3 status of NAT. What is the date of Exhibit 1?
 4 **A. It's 8-31-2009.**
 5 **Q.** For this bank statement, what is the deposit?
 6 **A. We're showing a deposit of \$100.**
 7 **Q.** Carlos, are you aware of what switched access fees
 8 are?
 9 **A. Yes.**
 10 **Q.** What are they?
 11 **A. It's the payments that are made for traffic generated.**
 12 **Q.** Is that the business that NAT is involved in, part of
 13 their business?
 14 **A. Yes.**
 15 **Q.** Carlos, can you tell, by looking at these bank
 16 statements, if the deposits NAT receives come from those
 17 switched access fees?
 18 **A. Should be able to, yes.**
 19 **Q.** The hundred dollars that's in Exhibit 1, is that from
 20 a switched access fee payment?
 21 **A. No.**
 22 **Q.** Do you know where that comes from?
 23 **A. I can't tell from here, but I know it's not a switched**
 24 **access.**
 25 **Q.** So the first month of operation, there's a hundred

24

1 dollar deposit. Is that right?
 2 **A. Yes.**
 3 **Q.** I would like you now to look at Defendant's Exhibit
 4 No. 2. This is another banking statement from First
 5 Dakota?
 6 **A. Yes.**
 7 **Q.** What's the date of Exhibit 2?
 8 **A. 9-30-2009.**
 9 **Q.** What does that bank statement show for a deposit?
 10 **A. It shows a deposit of \$50.**
 11 **Q.** Based on your knowledge, is that a deposit that was
 12 derived from receiving switched access fees?
 13 **A. No, it was not.**
 14 **Q.** If you would now take a look at Defendant's Exhibit
 15 No. 3. What is the date of this banking statement?
 16 **A. October 30, 2009.**
 17 **Q.** What type of deposit did NAT receive in that month?
 18 **A. They received \$140.**
 19 **Q.** Based on your review of Exhibit 3, did that \$140
 20 derive from switched access fees?
 21 **A. No, it did not.**
 22 **Q.** If you'd now please take a look at Defendant's Exhibit
 23 No. 4. What is the date of that banking statement?
 24 **A. November 30, 2009.**
 25 **Q.** What is the deposit under Exhibit 4?

1 **A. \$65.**
 2 **Q.** Again, based on your review, did that \$65 derive from
 3 any type of switched access fees?
 4 **A. No, it did not.**
 5 **Q.** Defendant's Exhibit No. 5. What's the date of that
 6 bank statement?
 7 **A. 12-31-2009.**
 8 **Q.** The deposit in Exhibit 5 shows how much?
 9 **A. It shows total deposits of \$5,040.**
 10 **Q.** Can you tell, by looking at the bank statement, where
 11 the large majority of that money came from?
 12 **A. Yes.**
 13 **Q.** Where?
 14 **A. It came from WideVoice. It was a loan to NAT.**
 15 **Q.** So that \$5,000 of that \$5,040 was a loan from
 16 WideVoice?
 17 **A. Correct.**
 18 **Q.** Do you know if that loan WideVoice made to NAT was
 19 ever paid back?
 20 **A. Yes, it was.**
 21 **Q.** When was it paid back?
 22 **A. I believe it was paid back in February sometime.**
 23 **Q.** Of?
 24 **A. 2010.**
 25 **Q.** The extra \$40 of that \$5,040, did that derive from

1 object to his exhibits as to bank records.
 2 **THE COURT:** All right. Exhibits 1 through 25 are
 3 received.
 4 **MR. SWIER:** Thank you, Your Honor.
 5 **BY MR. SWIER:**
 6 **Q.** Carlos, I would now like you to look at Exhibit 6.
 7 What's the date of that banking statement?
 8 **A. January 29, 2010.**
 9 **Q.** What does that bank statement show as far as deposits
 10 for NAT?
 11 **A. Zero.**
 12 **Q.** Now I'd like you to look at Defendant's Exhibit No. 7.
 13 What is the date of that banking statement?
 14 **A. February 26, 2010.**
 15 **Q.** Does that banking statement reflect any deposits?
 16 **A. Yes, it does.**
 17 **Q.** What amount of a deposit does Exhibit 7 show?
 18 **A. \$114,138.47.**
 19 **Q.** So we've gone from a very minimal amount for the first
 20 four or five months to now we're talking some real money?
 21 **A. Yes.**
 22 **Q.** Carlos, can you tell, from looking at that banking
 23 statement, where that \$114,000 derived from?
 24 **A. Yes.**
 25 **Q.** Where?

1 switched access fees?
 2 **A. No, it did not.**
 3 **MR. KNUDSON:** Your Honor, is he going to offer
 4 these as exhibits?
 5 **MR. SWIER:** I was going to offer them at the end.
 6 I can offer each one individually, if you'd like.
 7 **MR. KNUDSON:** I just wanted clarification, since
 8 he's testifying from the exhibits before they are admitted.
 9 I don't have any objection to their admission.
 10 **THE COURT:** Why don't you offer them all at this
 11 point. Then if he has an objection, I can take up the
 12 objection.
 13 **MR. SWIER:** Thank you. Your Honor, at this time
 14 I would move to admit Defendant's Exhibits 1 through I
 15 believe it's 29.
 16 **THE COURT:** Why don't we just do the bank records
 17 at this point.
 18 **MR. SWIER:** Then, Your Honor, we would offer
 19 Defendant's Exhibits 1 through 25.
 20 **THE COURT:** Any objection to 1 through 25?
 21 **MR. KNUDSON:** Before I respond, Your Honor, I
 22 would like to add that I will also be using an exhibit that
 23 will be the same records, but they are numbered, and I will
 24 be referring to them by that identification number so it
 25 will move my Interrogation along more quickly. I don't

1 **A. It came from our billing agent. They're called CABS**
 2 **Agent.**
 3 **Q.** Briefly how does that work with CABS Agent? What is
 4 it?
 5 **A. They basically bill on behalf of NAT for the traffic**
 6 **that's generated, and they collect on its behalf.**
 7 **Q.** Is using an agent like CABS a standard method of
 8 billing in the telecommunications industry?
 9 **A. It is.**
 10 **Q.** Carlos, again, based on your review of Exhibit 7, that
 11 \$114,000, did that derive from switched access fees that
 12 were paid by carriers?
 13 **A. Yes.**
 14 **Q.** Just to clarify, in February of 2010, that's when NAT
 15 started to be paid for switched access fees?
 16 **A. That is correct.**
 17 **Q.** Carlos, I would like you to look at Defendant's
 18 Exhibit No. 8. What's the date on that bank statement?
 19 **A. March 31, 2010.**
 20 **Q.** What does it show for NAT's deposits?
 21 **A. Shows total deposits of \$149,601.40.**
 22 **Q.** Can you tell from that banking statement how much of
 23 that amount derived from switched access payments from
 24 carriers?
 25 **A. Yes, I can.**

29

- 1 Q. How much?
- 2 A. **\$142,043.72.**
- 3 Q. Carlos, do you know of those payments, did some of
- 4 those payments come from switched access fees that were
- 5 paid by Sprint?
- 6 A. **I do not know.**
- 7 Q. Carlos, now look at Exhibit No. 9. What is the date
- 8 of that banking statement?
- 9 A. **April 30, 2010.**
- 10 Q. What does that exhibit show as far as access fees that
- 11 were received?
- 12 A. **Access fees?**
- 13 Q. Yes.
- 14 A. **\$7,909.88.**
- 15 Q. Can you explain the downward trend between the
- 16 previous month, which was \$142,000, and now we're down to
- 17 \$7,000 or so? Did a payment come in late?
- 18 A. **I believe so.**
- 19 Q. Now I'd like you to look at Exhibit 10. What is the
- 20 date of that banking statement?
- 21 A. **It is May 28, 2010.**
- 22 Q. Does that show that NAT received a deposit?
- 23 A. **Yes, it does.**
- 24 Q. How much was the deposit NAT received?
- 25 A. **\$217,877.45.**

30

- 1 Q. Can you tell, by looking at that document, if that
- 2 amount derived from switched access payments from carriers?
- 3 A. **Yes, it did.**
- 4 Q. If you'd now look at Exhibit No. 11. What is the date
- 5 of that bank statement?
- 6 A. **It is June 30, 2010.**
- 7 Q. Does that exhibit show that NAT received a deposit or
- 8 made a deposit?
- 9 A. **Yes, it does.**
- 10 Q. How much is that deposit, Carlos?
- 11 A. **They made \$243,779.29.**
- 12 Q. Of that amount, how much of that derived from switched
- 13 access fees paid by carriers?
- 14 A. **\$239,879.58.**
- 15 Q. If you'd now look at Exhibit 12, please. What is the
- 16 date of that banking statement?
- 17 A. **It is July 30, 2010.**
- 18 Q. Does that show -- does that banking statement show
- 19 money received by NAT?
- 20 A. **Yes, it does.**
- 21 Q. How much?
- 22 A. **It shows total deposits of \$162,029.60.**
- 23 Q. Can you tell us, of that amount, how much derived from
- 24 switched access fee payments?
- 25 A. **Yes.**

31

- 1 Q. How much?
- 2 A. **\$158,955.70.**
- 3 Q. If you'd now look at Exhibit 13, please. What's the
- 4 date of that banking statement?
- 5 A. **August 31, 2010.**
- 6 Q. Does that banking statement reflect a deposit made by
- 7 NAT?
- 8 A. **Yes, it does.**
- 9 Q. How much?
- 10 A. **\$128,855.42.**
- 11 Q. Is that amount derived totally from switched access
- 12 payments?
- 13 A. **Yes.**
- 14 Q. Just to clarify, Carlos, you can tell that by looking
- 15 at the deposit on the banking statement. Is that right?
- 16 A. **By the description.**
- 17 Q. Carlos, if you would now look at Exhibit 14, please.
- 18 What's the date of that banking statement?
- 19 A. **It is September 30, 2010.**
- 20 Q. What type of deposit is shown there?
- 21 A. **Zero.**
- 22 Q. Is that approximately when you took over the
- 23 controlling function for NAT?
- 24 A. **It's about that time, yes.**
- 25 Q. Let's explain to the Court. When you started to take

32

- 1 over the controlling functions for NAT, did you switch the
- 2 checking account?
- 3 A. **Yes. We opened up a new account.**
- 4 Q. Where did you open up that account?
- 5 A. **With Wells Fargo.**
- 6 Q. So, Carlos, Exhibits 14, 15, 16, 17, and 18, are those
- 7 the final statements you've received for NAT from First
- 8 Dakota Bank?
- 9 A. **Yes, they are.**
- 10 Q. And they would show what in deposits?
- 11 A. **Zero in each.**
- 12 Q. Is that because any revenue NAT received from
- 13 approximately October of 2010 forward went into the
- 14 Wells Fargo checking account?
- 15 A. **From September forward, I believe.**
- 16 Q. Excuse me. When you took over the books, we switched
- 17 to Wells Fargo.
- 18 A. **Yes.**
- 19 Q. Carlos, so the First Dakota Bank account, is that
- 20 really a dormant account? Nothing goes through there?
- 21 A. **It doesn't have any activity anymore.**
- 22 Q. Besides the First Dakota account and the new account
- 23 with Wells Fargo, does NAT have any other checking accounts
- 24 or money accounts out there?
- 25 A. **No.**

1 Q. These are the only two?
 2 A. Yes.
 3 Q. Carlos, if you would now look at Exhibit 19. What
 4 does this document show?
 5 A. **This is the bank statement for Wells Fargo for the**
 6 **period ending July 31, 2010, for Native American Telecom.**
 7 Q. Is this the first banking statement NAT has with
 8 Wells Fargo?
 9 A. **Yes, it is.**
 10 Q. Does Exhibit 19 show any type of deposit?
 11 A. **No, it does not.**
 12 Q. Is that because it's just a brand-new account?
 13 A. **I just opened the account, yes.**
 14 Q. You can now look at Exhibit 20, please. What is the
 15 date on that Wells Fargo Bank statement?
 16 A. **It's August 31, 2010.**
 17 Q. What does that statement show as any deposits that
 18 were received by NAT?
 19 A. **It's transfers that were initiated from the First**
 20 **Dakota Bank to the Wells Fargo.**
 21 Q. I want to go through this real quickly, so we can stay
 22 on the same page.
 23 On Exhibit 20 where it says "posted date." Do you see
 24 that about halfway down?
 25 A. **I do.**

1 A. **Yes, it received three.**
 2 Q. What is the total of those deposits?
 3 A. **\$38,765.67.**
 4 Q. Do you know where that amount of money derived from?
 5 A. **From switched access.**
 6 Q. So we're back to receiving switched access payments
 7 from the carriers?
 8 A. **Yes.**
 9 Q. Carlos, if you would now take a look at Exhibit 22,
 10 please. What's the date on that Wells Fargo statement?
 11 A. **October 31, 2010.**
 12 Q. What does it show for NAT's deposits for that
 13 statement?
 14 A. **Shows \$6.54. I take that back. There's a total of**
 15 **\$6,006.54.**
 16 Q. Do you know where that amount derived from?
 17 A. **Yes.**
 18 Q. Where?
 19 A. **\$6.54 came from switched access; and \$6,000 was a loan**
 20 **from WideVoice.**
 21 Q. To NAT?
 22 A. **To NAT, yes.**
 23 Q. Before we go any further, are you familiar with the
 24 loan agreement between WideVoice and NAT?
 25 A. **The loan agreement between --**

1 Q. We have a posted date of August 4 of 2010. Is that
 2 right?
 3 A. **Yes.**
 4 Q. How much was the amount that was transferred into this
 5 Wells Fargo checking account?
 6 A. **\$75,000.**
 7 Q. Explain where that \$75,000 came from.
 8 A. **It came from the existing balances in the First Dakota**
 9 **National Bank account.**
 10 Q. So you closed the First Dakota account down and took
 11 whatever was in there and gave it to the Wells Fargo
 12 account. Is that right?
 13 A. **Yes.**
 14 Q. There is also, Carlos, an amount of approximately
 15 \$128,855. What does that represent?
 16 A. **That's the switch carrier payments we received in the**
 17 **First Dakota Bank that I transferred from First Dakota Bank**
 18 **to the Wells Fargo Bank.**
 19 Q. So both of those items are just transferred from
 20 First Dakota to Wells Fargo?
 21 A. **Right.**
 22 Q. Carlos, I want you to look at Exhibit No. 21. What is
 23 the date on that Wells Fargo statement?
 24 A. **September 30, 2010.**
 25 Q. Does that statement show that NAT received a deposit?

1 Q. Do you know if there's any terms for that loan
 2 agreement or anything?
 3 A. **I don't know specific terms.**
 4 Q. Fair enough. So under this statement, NAT received
 5 \$6.54 of access fees. Correct?
 6 A. **Yes.**
 7 Q. Carlos, you're obviously aware of the various
 8 lawsuits, including this one we're currently in. Correct?
 9 A. **Yes.**
 10 Q. Can you tell the Court what happened around this time
 11 where your access fees have gone from hundreds of thousands
 12 down to \$6.54?
 13 MR. KNUDSON: Objection. Vague as to time.
 14 THE COURT: Sustained. Rephrase your question.
 15 BY MR. SWIER:
 16 Q. Approximately October of 2010, Carlos, the same time
 17 as this statement, can you tell the Court what was going on
 18 with the legal status of the cases here in South Dakota?
 19 A. **Yes. Sprint brought suit to Native American Telecom.**
 20 Q. When Sprint brought suit against Native American
 21 Telecom, I would presume that all the other carriers, at
 22 least, kept paying you. Didn't they?
 23 A. **No, they didn't.**
 24 Q. Well, who stopped paying you?
 25 A. **Most of them.**

37

1 Q. Other than \$6.54?

2 A. **That's correct.**

3 Q. Carlos, if you would now look at Exhibit 23, please.

4 What's the date on that banking statement?

5 A. **November 30, 2010.**

6 Q. What does it show for deposits that were received from

7 NAT?

8 A. **Total deposits?**

9 Q. Total deposits first.

10 A. **Total deposits, we've got \$58,077.69.**

11 Q. Of that amount, how much of it derives from switched

12 access fees NAT received?

13 A. **\$7,077.69.**

14 Q. In Exhibit 23 there are also a couple references to a

15 couple rather large numbers that says "online transfer

16 loans." Do you see that?

17 A. **I do.**

18 Q. Will you share with the Court what those numbers

19 reflect?

20 A. **Those are loans from WideVoice to Native American**

21 **Telecom.**

22 Q. How much was the loan amount WideVoice made to NAT

23 that month?

24 A. **\$51,000.**

25 Q. As the controller of NAT and being familiar with the

38

1 financials of both WideVoice and NAT, why was that loan

2 made from WideVoice to NAT?

3 A. **To cover operating expenses.**

4 Q. Because the switched access payments relatively

5 stopped?

6 A. **That's correct. Didn't have enough funds to cover its**

7 **own expenses.**

8 Q. If you would now look at Exhibit No. 24. What is the

9 date on that banking statement?

10 A. **December 31, 2010.**

11 Q. What does that statement show regarding deposits from

12 NAT?

13 A. **Shows total deposits of \$47,519.77.**

14 Q. Did NAT receive any switched access fees from the

15 carriers, and if so, how much?

16 A. **They did. They received \$3,519.77.**

17 Q. And the remainder of that amount came from who?

18 A. **Loans from WideVoice to Native American Telecom.**

19 Q. Why did WideVoice make the loan to Native American

20 Telecom?

21 A. **Again, to cover the expenses Native American Telecom**

22 **couldn't pay.**

23 Q. Because the access fee payments stopped?

24 A. **That's correct.**

25 Q. Carlos, if you would now look at Exhibit 25. What's

39

1 the date on that banking statement?

2 A. **January 31, 2011.**

3 Q. What does it show for deposits for NAT?

4 A. **Shows total deposits of \$45,031.02.**

5 Q. Of that amount, what constitutes switched access fees

6 received by NAT?

7 A. **\$31.02.**

8 Q. Where did the other \$45,000 derive?

9 A. **Loans from WideVoice to Native American Telecom.**

10 Q. Why did WideVoice make those loans?

11 A. **For the same reason. Couldn't afford -- didn't have**

12 **any money to pay their operating expenses.**

13 Q. The switched access fee payments stopped?

14 A. **Yes.**

15 Q. Carlos, if you would, would you, please, take a look

16 at Exhibit No. 26?

17 A. **Sure.**

18 Q. I'll give you a minute. Are you familiar with that

19 document?

20 A. **I am.**

21 Q. What is that document?

22 A. **This represents the Balance Sheet for Native American**

23 **Telecom as of December 31, 2010.**

24 Q. I want to run through this very quickly with you.

25 Look under the "Checking and Savings" column. Do you see

40

1 that?

2 A. **Yes.**

3 Q. How much money remains in that First Dakota checking

4 account?

5 A. **\$1,814.19.**

6 Q. How much cash is in the Wells Fargo account that you

7 opened when you first started doing the controller

8 function?

9 A. **\$10,043.06.**

10 Q. So as of December 31, 2010, just a couple months ago,

11 what were NAT's total current assets in those two accounts?

12 A. **\$11,857.25.**

13 Q. If we go down under the "Fixed Assets," we have a line

14 item that talks about "Computer Equipment." Will you

15 explain to us, please, what that is?

16 A. **Sure. That's computer equipment related to the**

17 **Communications Center and Internet Library at the**

18 **Crow Creek Reservation.**

19 Q. Those are fixed assets from NAT that were placed on

20 the Reservation?

21 A. **Correct.**

22 Q. There's also a line there that says "Furniture and

23 Equipment" for \$617.00. What's that?

24 A. **That also goes towards the Communications Center and**

25 **Internet Library located on the Reservation.**

41

1 Q. Then we have a big number. We have a \$216,000 number
 2 for "Wi-Max Equipment." What does that represent?
 3 A. **That's the cost of the communications tower that was**
 4 **put on the Reservation.**
 5 Q. That's all the hardware and software that goes with
 6 that?
 7 A. **Yes.**
 8 Q. So, Carlos, total fixed assets as of December 31,
 9 2010, are what?
 10 A. **\$224,914.85.**
 11 Q. Now if we look under the "Liabilities and Equity"
 12 column, do you see that?
 13 A. **I do.**
 14 Q. It says "Current Liabilities," and then it says "Other
 15 Current Liabilities," and then it gets down to, it says
 16 "Due to WideVoice Communications." Do you see that?
 17 A. **Yes.**
 18 Q. What does that represent?
 19 A. **It's a combination of two things. It's a combination**
 20 **of expenses that WideVoice has paid on behalf of Native**
 21 **American Telecom, as well as loans it made directly to**
 22 **Native American Telecom.**
 23 Q. That total amount due to WideVoice, either through
 24 them paying for equipment or giving loans, is how much?
 25 A. **\$474,949.38.**

42

1 Q. Do you remember when WideVoice started either paying
 2 for things on behalf of NAT or started to provide the
 3 loans? Do you remember when all of that started?
 4 A. **I do.**
 5 Q. When was that?
 6 A. **It was around June of 2009.**
 7 Q. Then, Carlos, there are a couple things under
 8 "Equity." The first item is "Retained Earnings" for
 9 approximately \$75,000. Explain to the Court what that
 10 represents, please.
 11 A. **Retained earnings is the losses from the prior year.**
 12 Q. "Shareholder distributions." What does that
 13 represent?
 14 A. **Those are expenses that -- or transactions that took**
 15 **place throughout the years that we classified as**
 16 **shareholder distributions that were incurred by members of**
 17 **Native American Telecom Enterprise that we classified as**
 18 **shareholder distributions, because we weren't exactly sure**
 19 **if we wanted to classify those as expenses on the books of**
 20 **Native American Telecom until everybody had a chance to**
 21 **figure out if they wanted to allocate those in that manner.**
 22 Q. Does NAT have an Independent tax accountant?
 23 A. **Independent tax accountant?**
 24 Q. Yes.
 25 A. **Yes.**

43

1 Q. Do you know who that person is?
 2 A. **As of which date?**
 3 Q. As of today.
 4 A. **As of today? Yes.**
 5 Q. Who is that?
 6 A. **It would be Kolpfstin & Kapur.**
 7 Q. Could you spell that, the best you can?
 8 A. **K-O-L-P-F-S-T-I-N and K-A-P-U-R.**
 9 Q. That's an accounting firm from where?
 10 A. **They're located in Irvine, California.**
 11 Q. Does that accounting firm have any type of ownership
 12 interest in NAT?
 13 A. **None whatsoever.**
 14 Q. Does that accounting firm have any type of ownership
 15 interest in any of the other various entities that you do
 16 accounting work for?
 17 A. **None whatsoever.**
 18 Q. So they come in and do your taxes?
 19 A. **Yes. They are completely independent.**
 20 Q. Carlos, there's also a line item there for "Net
 21 Income" for approximately minus \$134,000. What does that
 22 represent?
 23 A. **Those are the losses for the period from January**
 24 **through December of 2010.**
 25 Q. You took about a \$135,000 loss?

44

1 A. **Yes.**
 2 Q. "Total Equity" of minus \$238,000, approximately.
 3 Where does that number derive?
 4 A. **That's the cumulative total of the equity, retained**
 5 **earnings, shareholder distributions, and the net income of**
 6 **this year.**
 7 Q. So total liabilities and equities of course always add
 8 up to the total assets. What does that show, Carlos, the
 9 "Total Liabilities and Equity"?
 10 A. **\$236,772.10.**
 11 Q. Just as a matter of accounting, your total liabilities
 12 and equity and your total assets, those numbers come out
 13 that mirror each other. Correct?
 14 A. **Yes. It's called a Balance Sheet. Everything is**
 15 **supposed to balance.**
 16 MR. SWIER: Your Honor, at this time I would move
 17 Defendant's Exhibit 26.
 18 THE COURT: Any objection?
 19 MR. KNUDSON: No objection.
 20 THE COURT: 26 is received.
 21 BY MR. SWIER:
 22 Q. Carlos, if you would now, please, take a look at
 23 Defendant's Exhibit 27. Can you please tell the Court what
 24 this document is?
 25 A. **Sure. This is the support for the amount on the**

1 **Balance Sheet that's due to WideVoice Communications.**
 2 **Q.** Let's go through some of those items real quickly.
 3 Let's take, for instance, if you look at the third column
 4 over where it says "Num."
 5 **A. Yes.**
 6 **Q.** What does that stand for?
 7 **A. That's the journal number.**
 8 **Q.** Under "Name," it says "Wirefree Communications." Is
 9 that right?
 10 **A. Yes.**
 11 **Q.** You have a memo that describes what that is. What is
 12 the amount under that line item, and what was it for?
 13 **A. The amount is \$47,750. It was for the first payment**
 14 **for the installation of the antenna of the communications**
 15 **tower on the Indian Reservation.**
 16 **Q.** That was necessary to put the hardware and software
 17 and everything up probably?
 18 **A. Yes.**
 19 **Q.** Carlos, if you look at the next line -- excuse me, two
 20 down, there is an amount of \$32,775. Do you see that?
 21 **A. Yes, I do.**
 22 **Q.** What does that amount reflect? What payment does that
 23 reflect?
 24 **A. That's another payment for the installation of the**
 25 **communications tower.**

1 that right?
 2 **A. Yes. In November?**
 3 **Q. Yes.**
 4 **A. Yes.**
 5 **Q.** What does that reflect?
 6 **A. That's a loan from WideVoice, so that's a cash**
 7 **transfer.**
 8 **Q.** Do you know why that was needed?
 9 **A. To be able to allow Native American Telecom to pay its**
 10 **expenses.**
 11 **Q.** It says to cover payroll, too. Is that right?
 12 **A. Yes.**
 13 **Q.** You have another circuit charge. Then you have an
 14 amount for \$26,000. Do you see that?
 15 **A. I do.**
 16 **Q.** What is that for?
 17 **A. Again, another transfer to Native American Telecom to**
 18 **allow Native American Telecom to pay its expenses.**
 19 **Q.** Who is that from?
 20 **A. WideVoice Communications.**
 21 **Q.** Then we have another entry for approximately \$30,000.
 22 What does that reflect?
 23 **A. Another loan to Native American Telecom to cover its**
 24 **expenses.**
 25 **Q.** Carlos, at that time, is that the very middle of the

1 **Q.** The next item, we have a payment of \$80,290.28.
 2 Correct?
 3 **A. Correct.**
 4 **Q.** What is that for?
 5 **A. Again, it's another payment for the installation of**
 6 **the communications tower on the Reservation.**
 7 **Q.** Then we go down a couple lines where we have an amount
 8 of \$26,970.93. Correct?
 9 **A. Correct.**
 10 **Q.** What's that for?
 11 **A. Those are the circuit charges for the transporting of**
 12 **the traffic.**
 13 **Q.** Do you understand that circuit thing at all?
 14 **A. No, I don't.**
 15 **Q.** You know you need circuits to do this work.
 16 **A. Correct.**
 17 **Q.** Carlos, we have an amount of \$14,341. Is that also
 18 for circuit payments?
 19 **A. Yes.**
 20 **Q.** Then we have some charges for approximately \$10,000
 21 also for circuit charges. Correct? Quite a few of those
 22 actually.
 23 **A. Yes.**
 24 **Q.** Carlos, if you then go down to where we have an amount
 25 of \$20,000, which is a loan to Native American Telecom. Is

1 period where the carriers, after Sprint brought suit here,
 2 all the other carriers stopped paying NAT?
 3 **A. That's about the same time.**
 4 **Q.** Then we have the last entry there is for \$12,000.
 5 Correct?
 6 **A. Yes.**
 7 **Q.** What does that reflect?
 8 **A. A loan from WideVoice to Native American Telecom to**
 9 **cover its expenses.**
 10 **Q.** Why did WideVoice have to make that loan to Native
 11 American Telecom?
 12 **A. It didn't have enough money. It wasn't getting paid.**
 13 **Q.** So, Carlos, when you look at the final column, the
 14 balance column that has a balance of \$474,949.38, what does
 15 that number reflect?
 16 **A. That's the amount due from NAT to WideVoice**
 17 **Communications for the amounts that were loaned by**
 18 **WideVoice Communications.**
 19 **Q.** That's debt NAT owes to WideVoice?
 20 **A. It is, yes.**
 21 **Q.** Carlos, as of December 31 of 2010, is that a true and
 22 accurate transaction account for NAT?
 23 **A. Yes, it is.**
 24 **MR. SWIER:** Your Honor, I would move to admit
 25 Exhibit 27, please.

49

1 MR. KNUDSON: No objection.

2 THE COURT: 27 is received.

3 MR. SWIER: Thank you, Your Honor.

4 BY MR. SWIER:

5 Q. Carlos, if you'd now take a look at Exhibit 28,

6 please. What is the date on that Balance Sheet?

7 A. **It is January 31, 2011.**

8 Q. I skipped ahead. I'm sorry. What is this document,

9 Exhibit 28?

10 A. **It represents the Balance Sheet for Native American**

11 **Telecom as of January 31, 2011.**

12 Q. So about a month ago. Correct?

13 A. **Correct.**

14 Q. Is this the most up-to-date Balance Sheet Native

15 American Telecom has?

16 A. **Yes.**

17 Q. Did I ask you to prepare this so you could give the

18 Court the most updated information?

19 A. **Yes.**

20 Q. Carlos, let's look at Exhibit 28 real quickly. Again,

21 under the "Checking and Savings" account, we have the First

22 Dakota National account for approximately \$1,800. Correct?

23 A. **Correct.**

24 Q. And that one is just sitting dormant. There's no

25 activity there.

50

1 A. **There's no activity on there.**

2 Q. Then we show approximately \$23,702 in the Wells Fargo

3 account. Is that right?

4 A. **Yes.**

5 Q. So our total checking and savings between those two

6 accounts is what?

7 A. **A total of \$25,516.34.**

8 Q. Then we go down under "Fixed Assets," "Computer

9 Equipment, Furniture and Equipment, and Wi-Max Equipment."

10 Is that the same as you testified to in the yearly Balance

11 Sheet a few minutes ago?

12 A. **Yes.**

13 Q. Now let's go down -- so "Total Assets," it looks like,

14 is how much, Carlos?

15 A. **\$250,431.19.**

16 Q. Now let's look at the "Liability" section. As of

17 approximately a month ago, how much does NAT owe to

18 WideVoice Communications?

19 A. **It shows \$530,689.43.**

20 Q. The "Total Liabilities" for NAT are that amount, too?

21 A. **Yes, they are.**

22 Q. Then we go under "Equity," the "Retained Earnings."

23 We have a negative \$210,592.66. Correct?

24 A. **Correct.**

25 Q. What does that reflect?

51

1 A. **That's the cumulative losses that NAT has incurred for**

2 **the periods from 2009 through 2010.**

3 Q. "Shareholder Distributions," you commented on that

4 earlier. Is that the same?

5 A. **That's the same.**

6 Q. The "Net Income" of a negative \$42,000, approximately,

7 What does that show?

8 A. **That's the current month's losses.**

9 Q. So "Total Equity," Carlos, shows what?

10 A. **Negative \$280,258.24.**

11 Q. Just to make sure we have these numbers straight,

12 under this Balance Sheet, NAT shows they had about \$25,516

13 in the bank. Is that right?

14 A. **That's correct.**

15 Q. And its liabilities that were owed to WideVoice were

16 approximately \$530,000. Is that right?

17 A. **That's correct.**

18 Q. Carlos, did I ask you to check on what's in the

19 checking account as of last night?

20 A. **You did, yes.**

21 Q. Share with the Court what NAT's account balance is as

22 of last evening?

23 A. **It's just a little over \$6,000.**

24 Q. Why did we go from having \$25,000 in the checking

25 account last month to now we're down to a little over

52

1 \$6,000?

2 A. **Because it still hasn't received any payments, and**

3 **it's had certain expenses that it's paid.**

4 MR. SWIER: Your Honor, if I have not done so, I

5 would move Exhibit 28 into evidence.

6 THE COURT: Any objection?

7 MR. KNUDSON: No objection, Your Honor.

8 THE COURT: 28 is received.

9 BY MR. SWIER:

10 Q. Carlos, as the controller of NAT, are you aware of a

11 Marketing Fee Agreement that Native American Telecom has

12 with FreeConferenceCall?

13 A. **Yes, I am.**

14 Q. Based only on your knowledge, but what do you

15 understand that agreement between NAT and

16 FreeConferenceCall to be?

17 A. **My understanding is that Native American Telecom gets**

18 **to keep 25 percent of the access charges received.**

19 Q. Native American Telecom gets to keep 25 percent of the

20 gross or the net access fees?

21 A. **The gross.**

22 Q. In your role as a controller for these companies, and

23 based on the knowledge and experience you've gained, have

24 you had an opportunity to review multiple marketing

25 agreements between FreeConferenceCall and other companies

53

1 around the country?

2 **A. I'm familiar with other arrangements.**

3 **Q.** Does FreeConferenceCall enter into these type of

4 Marketing Fee Agreements with other local exchange

5 carriers?

6 **A. Yes.**

7 **Q.** And is the Marketing Fee Agreement between

8 FreeConferenceCall and Native American Telecom, does that

9 pretty much replicate the other agreements that you are

10 familiar with?

11 **MR. KNUDSON:** Objection. Foundation.

12 **A. Yes.**

13 **THE COURT:** Overruled. You may answer. Or the

14 answer will stand.

15 **BY MR. SWIER:**

16 **Q.** "Yes," you said?

17 **A. Yes.**

18 **Q.** Carlos, you indicated earlier you also served as the

19 controller for WideVoice, W-I-D-E Voice. Correct?

20 **A. Yes.**

21 **Q.** I want to go back to October of 2010. That is when

22 the switched access revenues for NAT went from hundreds of

23 thousands down to almost nothing. Is that right?

24 **A. That's correct.**

25 **Q.** You indicated that was approximately the time that

54

1 Sprint started bringing suits, lawsuits against NAT?

2 **A. Yes.**

3 **Q.** At that same time did WideVoice Communications start

4 to have problems with carriers like Sprint not paying their

5 switched access fees?

6 **A. Sure.**

7 **MR. KNUDSON:** Objection. Relevancy.

8 **THE COURT:** Overruled.

9 **A. Shortly after, yes, they did start receiving problems**

10 **with payments.**

11 **BY MR. SWIER:**

12 **Q.** Describe that, please.

13 **A. Many of the carriers just simply stopped paying.**

14 **Q.** What, they cut their payments in half, or what did

15 they do?

16 **A. Some just stopped paying altogether.**

17 **Q.** Was Sprint one of those that stopped paying

18 altogether?

19 **A. Yes.**

20 **Q.** So, Carlos, what we had then at the same time, tell me

21 if this is right, we had the switched access fees, payments

22 stopped to both WideVoice and to NAT. Is that right?

23 **A. That's correct.**

24 **Q.** There was a recent development over the last couple

25 weeks regarding NAT. Did NAT receive a switched access fee

55

1 payment from AT&T?

2 **A. Recently?**

3 **Q.** Yes.

4 **A. Yes.**

5 **Q.** When did NAT receive that AT&T payment?

6 **A. It was in late January of 2011.**

7 **Q.** So about a month ago?

8 **A. About a month ago, yes.**

9 **Q.** How much did AT&T pay NAT for its switched access

10 fees?

11 **A. About \$150,000.**

12 **Q.** When NAT received that money from AT&T, what did NAT

13 do with it?

14 **A. NAT had to pay WideVoice back for the debt it had on**

15 **its books.**

16 **Q.** So of that \$150,000, how much was paid to repay

17 WideVoice for the loans?

18 **A. \$140,000.**

19 **Q.** So NAT retained about \$10,000 of that?

20 **A. Correct.**

21 **Q.** That amount is now down to about \$6,000 in the

22 checking account?

23 **A. Correct.**

24 **Q.** Hold on here, because I have a question. Under the

25 Marketing Fee Agreement that you talked about a few minutes

56

1 ago, isn't 75 percent of those switched access fees

2 supposed to go to FreeConferenceCall for the work they do

3 for NAT?

4 **A. It is.**

5 **Q.** Then I presume you honored the contract and paid

6 FreeConferenceCall their 75 percent of that \$150,000.

7 Didn't you?

8 **A. We did not.**

9 **Q.** How come?

10 **A. Because WideVoice demanded their payment from NAT.**

11 **Q.** So now we have a situation where NAT owes both

12 WideVoice for loans, and it also, under its contract with

13 FreeConference, owes them?

14 **A. Correct.**

15 **Q.** Why doesn't NAT just write out a check to

16 FreeConferenceCall and abide by your contractual agreement?

17 **MR. KNUDSON:** Objection. Speculation.

18 **THE COURT:** Overruled. You may answer.

19 **A. NAT demanded their payment.**

20 **BY MR. SWIER:**

21 **Q.** WideVoice?

22 **A. I'm sorry. WideVoice demanded their payment from NAT.**

23 **Q.** Well, can't NAT just write a check out of its checking

24 account to pay FreeConferenceCall?

25 **A. It doesn't have any more money.**

1 Q. So you received that payment from AT&T the end of
 2 January; about a month ago. Correct?
 3 A. Correct.
 4 Q. When that payment came -- have you received any other
 5 payments from any other carriers?
 6 A. No, we haven't.
 7 Q. Have you received five cents from Sprint?
 8 A. No.
 9 Q. Does NAT continue to provide service to Sprint's
 10 customers?
 11 A. Yes, it does.
 12 Q. Does Sprint accept that service from NAT?
 13 A. Yes, it does.
 14 Q. But it just doesn't pay you.
 15 A. Right.
 16 Q. If AT&T made a payment to NAT back the end of January,
 17 if AT&T is going to start making consistent payments, would
 18 that make a huge difference for NAT?
 19 A. Yes.
 20 Q. Carlos, if AT&T would have made its payment a few days
 21 ago, the end of the month, like it was supposed to, would
 22 that help NAT?
 23 A. Yes.
 24 Q. Carlos, did AT&T make their regular monthly payment
 25 this month or in February?

1 THE COURT: Sustained.
 2 BY MR. SWIER:
 3 Q. Are you familiar with WideVoice's financial status?
 4 A. Yes.
 5 MR. KNUDSON: Objection. Relevance.
 6 THE COURT: Overruled.
 7 A. Yes.
 8 BY MR. SWIER:
 9 Q. WideVoice Communications isn't in a position to keep
 10 paying NAT these loans. Is it?
 11 MR. KNUDSON: Objection. Leading.
 12 THE COURT: Sustained as leading.
 13 BY MR. SWIER:
 14 Q. Are they in a position to continue to pay these loans?
 15 A. No.
 16 MR. KNUDSON: Objection. Foundation.
 17 THE COURT: Overruled. The answer will stand.
 18 BY MR. SWIER:
 19 Q. Does NAT have any other source of income to keep
 20 afloat if WideVoice discontinues its financial assistance?
 21 A. It does not.
 22 Q. Carlos, are you familiar with the fact that Native
 23 American Telecom has filed two access fee tariffs with the
 24 Federal Communications Commission?
 25 A. Yes.

1 A. No, they did not.
 2 Q. You've been in South Dakota for a few days. Correct?
 3 A. Yes.
 4 Q. When was the last time you checked to see if, indeed,
 5 AT&T is continuing to make its payments?
 6 A. I checked last night.
 7 Q. And I'm sure they paid?
 8 A. They did not.
 9 Q. Has Sprint paid?
 10 A. No.
 11 Q. You indicated of the \$150,000 AT&T payment, \$140,000
 12 went to WideVoice to start to pay the loans back?
 13 A. Yes.
 14 Q. Why was that? Why did you pay WideVoice? Why did you
 15 start paying their loan back?
 16 MR. KNUDSON: Objection. Cumulative.
 17 THE COURT: Sustained.
 18 BY MR. SWIER:
 19 Q. Carlos, you are familiar with the financial status of
 20 WideVoice Communications?
 21 A. Yes.
 22 Q. Based on your knowledge as WideVoice's controller,
 23 based on their financial status, is WideVoice
 24 Communications going to continue to loan NAT money?
 25 MR. KNUDSON: Objection. Foundation. Hearsay.

1 Q. You don't know the details. You just know they filed.
 2 Is that right?
 3 A. I'm aware of the filings.
 4 Q. Do you know when NAT filed its first access revenue
 5 tariff with the Federal Communications Commission?
 6 A. The first tariff?
 7 Q. Yes.
 8 A. I'm not one hundred percent certain.
 9 Q. Let me narrow it down. Approximately the winter of
 10 2010. Would that jog your memory?
 11 A. That would be about right.
 12 Q. To the best of your knowledge, has --
 13 THE COURT: Are you talking about January through
 14 March of 2010, or November, December of 2010, since those
 15 are both winter months?
 16 MR. SWIER: We're talking from February 2010,
 17 Your Honor, up until today. Of course they are, as you
 18 know, two separate tariffs.
 19 BY MR. SWIER:
 20 Q. So, Carlos, let's do this. Under those two tariffs
 21 NAT has, so from February of 2010 to January of 2011, have
 22 you calculated how much Sprint owes to NAT under NAT's
 23 switched access tariffs?
 24 A. Yes, I have.
 25 Q. Would you please share with the Court what that

61

1 outstanding amount is?
 2 **A. Sure. It's about \$557,000.**
 3 **Q.** That doesn't include anything for February yet?
 4 **A. No, it does not. It's through the November 10th**
 5 **billing -- I mean, January 10th billing. Excuse me.**
 6 **Q.** So it will be more as of today?
 7 **A. Yes.**
 8 **Q.** Carlos, are you familiar with the second tariff that
 9 NAT filed back in November?
 10 **A. Yes.**
 11 **Q.** I'm going to, for clarity, I'll refer to that as the
 12 high-volume access tariff. Is that okay?
 13 **A. That's fine.**
 14 **Q.** The high-volume access tariff, are you aware the
 15 high-volume access tariff is written a little bit
 16 differently than the initial tariff?
 17 **A. Yes.**
 18 **Q.** Again, I know you don't know the details, so I won't
 19 ask you. Since that high-volume access tariff went into
 20 place, which would be November 30 of 2010, have you
 21 calculated what Sprint owes to NAT, not under all the past
 22 debt they owe, but since November 30 of 2010 up until
 23 today's date? How much does Sprint owe NAT under that
 24 high-volume access tariff?
 25 **MR. KNUDSON: Objection. Vague at this point.**

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1 I'm not sure if he's asking for the total, or if this is a
 2 subset of the \$530,000 he testified to earlier.
 3 **THE COURT:** If you could clarify. Is it in
 4 addition to or is it already a part of the \$557,000?
 5 **BY MR. SWIER:**
 6 **Q.** Carlos, would you clarify? First of all, under the
 7 high-volume access tariff from November 30 to the present
 8 date, what is the amount that Sprint owes under that
 9 tariff?
 10 **A. \$127,000.**
 11 **Q.** Now, is that \$127,000 number included in the \$557,000
 12 number?
 13 **A. Part of it is.**
 14 **Q.** Okay. Since that high-volume access tariff went into
 15 play a few months ago, how much has Sprint paid of that
 16 \$127,000?
 17 **A. None of it.**
 18 **Q.** Zero?
 19 **A. Zero.**
 20 **Q.** Has payment been demanded by NAT or your agent?
 21 **A. Yes.**
 22 **Q.** Do you hear anything from them?
 23 **A. No.**
 24 **Q.** Your check didn't come?
 25 **A. It has not come.**

63

1 **Q.** When is the last time Sprint paid NAT for the switched
 2 access fees? Do you know?
 3 **A. It was around February of 2010.**
 4 **Q.** So almost exactly a year ago?
 5 **A. Yes.**
 6 **Q.** Carlos, through your 16 years of experience in doing
 7 accounting and controller-like actions, you are familiar
 8 with business plans and how businesses come and go. Aren't
 9 you?
 10 **A. Yes.**
 11 **Q.** Based on your experience, what are NAT's options at
 12 this point to move forward?
 13 **MR. KNUDSON: Objection. Foundation.**
 14 **THE COURT: Overruled. You may answer.**
 15 **A. What options?**
 16 **BY MR. SWIER:**
 17 **Q.** What options do they have?
 18 **A. One option is to close their doors.**
 19 **Q.** Would they have another option?
 20 **A. Yes. Another option would be to file for bankruptcy**
 21 **protection.**
 22 **Q.** Has NAT reached out to a bankruptcy attorney? If you
 23 know, has NAT reached out to a bankruptcy attorney here in
 24 South Dakota?
 25 **A. They have.**

64

1 **Q.** So NAT can file bankruptcy. They can just close its
 2 doors. Do they have any other options?
 3 **A. If Sprint would pay, they could continue to operate.**
 4 **Q.** And if Sprint would pay their debt owed, would that
 5 keep NAT afloat for the time being?
 6 **A. It would.**
 7 **MR. SWIER: Your Honor, if I may have a minute.**
 8 **THE COURT: You may.**
 9 **MR. SWIER: Thank you. Your Honor, I believe**
 10 **that's all the questions I have. Thank you.**
 11 **THE COURT: Mr. Knudson?**
 12 **MR. KNUDSON: Yes, Your Honor. Did you want to**
 13 **start right away?**
 14 **THE COURT: Why don't we take a 10-minute break.**
 15 **We'll be in recess until 25 to 11:00.**
 16 **(Recess at 10:26 until 10:40)**
 17 **THE COURT: Mr. Knudson?**
 18 **MR. KNUDSON: Thank you, Your Honor.**
 19 **CROSS-EXAMINATION**
 20 **BY MR. KNUDSON:**
 21 **Q.** Good morning, Mr. Cestero. You recall we met two days
 22 ago.
 23 **A. Yes.**
 24 **Q.** We had the pleasure of doing a deposition on Tuesday.
 25 Do you recall that?

65

1 **A. I do.**

2 **Q.** Do you recall when your deposition was taken, you were

3 sworn to tell the truth. Do you remember?

4 **A. Yes.**

5 **Q.** Just like you were sworn by the Court today to tell

6 the truth. Correct?

7 **A. Yes.**

8 **Q.** I would like to ask you a few questions about your

9 testimony today and what you said on Tuesday. One thing I

10 think we should clarify is, isn't it a fact in 2010 NAT

11 reported a gross income of \$1,148,925.84?

12 **A. It did.**

13 **Q.** It is also true, is it not, that NAT paid as marketing

14 expenses on its P&L \$794,307.49 in 2010?

15 **A. I don't have the P&L in front of me, but it sounds**

16 **about right.**

17 **Q.** Before we get into those numbers, I'd like to clarify

18 something you testified to about WideVoice with an I. You

19 say that's a carrier.

20 **A. Yes.**

21 **Q.** Then Wyde Voice with a Y. That's a conference bridge

22 equipment manufacturer?

23 **A. Yes.**

24 **Q.** Free Conferencing Corporation, that provides free

25 conferencing service. Correct?

66

1 **A. Correct.**

2 **Q.** Free Conferencing Global. That also provides free

3 conferencing services. Correct?

4 **A. Yes.**

5 **Q.** HDPSTN is a telephone company, you say?

6 **A. Yes.**

7 **Q.** Where does it do business?

8 **A. Where does HDPSTN?**

9 **Q.** Yes.

10 **A. It's a start-up company. It's not actually conducting**

11 **business.**

12 **Q.** I think the common theme in your testimony on direct

13 was that David Erickson had check-signing authority in all

14 these companies. Is that right?

15 **MR. SWIER:** Objection, Your Honor. Mistakes the

16 facts.

17 **THE COURT:** Overruled. You may answer.

18 **A. Not for Native American Telecom, it does not.**

19 **BY MR. KNUDSON:**

20 **Q.** I didn't list that. WideVoice with an I, Wyde Voice

21 with a Y, Free Conferencing Corporation, Free Conferencing

22 Global, and HDPSTN, the common theme between all those

23 companies is that David Erickson has check-signing

24 authority. Correct?

25 **A. He has signing authority.**

67

1 **Q.** In fact, he's the majority owner of WideVoice with

2 an I. Is that true?

3 **A. Yes.**

4 **Q.** That's a Nevada Sub S corporation?

5 **A. It is.**

6 **Q.** Then Wyde Voice with a Y, David Erickson is the

7 majority owner of that, too. Isn't he?

8 **A. Yes.**

9 **Q.** And Free Conferencing Corporation, David Erickson is

10 the founder and chief owner of that, as well?

11 **A. Yes.**

12 **Q.** Likewise, Free Conferencing Global, David Erickson is

13 the majority owner of that, as well. Correct?

14 **A. Yes.**

15 **Q.** HDPSTN, is he also the majority owner of that company?

16 **A. Yes.**

17 **Q.** Now, you said today, if I understood this correctly,

18 just confirm it for me, that you serve as the controller

19 for these entities?

20 **A. I serve the function of a controller.**

21 **Q.** You don't have the title. Just the function?

22 **A. I don't have a title. It's just a title I use, to**

23 **keep things simple.**

24 **Q.** So you're not the controller of Native American

25 Telecom?

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1 **A. I'm not employed by anybody, other than Free**

2 **Conferencing Corporation as the controller.**

3 **Q.** So you're the controller of Free Conferencing

4 Corporation then?

5 **A. Yes.**

6 **Q.** Now, who do you report to at Free Conferencing

7 Corporation?

8 **A. Jeff Holoubek.**

9 **Q.** What is Jeff Holoubek's title at Free Conferencing

10 Corporation?

11 **A. He's the Director of Legal and Finance.**

12 **Q.** Mr. Holoubek reports to David Erickson?

13 **A. I don't know.**

14 **Q.** But David Erickson is the President and CEO of

15 Free Conferencing Corporation. Is that true?

16 **A. Yes, it is.**

17 **Q.** Your understanding is Jeff Holoubek is now the

18 President of Native American Telecom?

19 **A. He is.**

20 **Q.** Do you know when that took place?

21 **A. I don't know the exact date. No.**

22 **Q.** Was it in 2010?

23 **A. I believe so.**

24 **Q.** Would it have taken place when you assumed the duties

25 of controller for NAT?

69

1 **A. Excuse me?**

2 **Q.** Would Mr. Holoubek have become the President of NAT

3 when you assumed the duties of the controller for NAT?

4 **A. I don't know when he became President of NAT.**

5 MR. KNUDSON: If I may approach, Your Honor.

6 THE COURT: You may.

7 BY MR. KNUDSON:

8 **Q.** Mr. Cestero, I'm handing you what's been marked

9 Plaintiff's Exhibit No. 1. Mr. Cestero, take a moment to

10 look at this. I think you've seen it before, but tell me

11 if you recognize it.

12 **A. Yes, I have.**

13 **Q.** Can you identify it for us, please?

14 **A. It's NAT's Responses to Sprint's Document Request**

15 **No. 1 through 18.**

16 **Q.** It's numbered NAT 00001 through NAT 00083. Is that

17 correct?

18 **A. Yes.**

19 **Q.** Do you recognize most of this Exhibit 1 contains the

20 bank statements from First Dakota and Wells Fargo?

21 **A. Yes, it does.**

22 **Q.** You recognize those as the banking statements of NAT.

23 Correct?

24 **A. Yes.**

25 **Q.** And previously on your direct, they were used by

70

1 Mr. Swier in your examination. Correct?

2 **A. Yes.**

3 **Q.** What is the first page of this Exhibit NAT 00001?

4 **A. This represents the minutes generated at NAT.**

5 **Q.** So, in other words, this is the minutes of usage by

6 month for NAT?

7 **A. Yes.**

8 **Q.** Do you recognize that as something generated from

9 NAT's business records?

10 **A. Yes.**

11 **Q.** Go back to the very end of this exhibit, and look at

12 Page 82. That's the Balance Sheet. Isn't it?

13 **A. It is.**

14 **Q.** This is what was previously admitted. Look at the

15 screen, if you need to.

16 **A. Oh, yes.**

17 **Q.** Look at Page 83. That's the Profit and Loss

18 Statement. Is it not?

19 **A. Yes, it is.**

20 **Q.** If it's easier for you to look at the paper

21 document --

22 **A. That's a little blurry.**

23 **Q.** The Profit and Loss Statement, that's something you

24 generated. Is it not?

25 **A. Yes, it is.**

71

1 **Q.** This is from NAT's business records?

2 **A. Correct.**

3 MR. KNUDSON: I would offer Exhibit 1.

4 THE COURT: Any objection?

5 MR. SWIER: No objection.

6 THE COURT: Exhibit 1 is received.

7 BY MR. KNUDSON:

8 **Q.** Before we dig into that, I would like to -- let's go

9 back to Page 83, if you would.

10 THE COURT: Can I make a suggestion? Since the

11 other exhibits are 1 through whatever, can we have this

12 Exhibit A?

13 MR. KNUDSON: That's fine. Let's relabel it

14 Plaintiff's A.

15 BY MR. KNUDSON:

16 **Q.** Do you have Page 83 in front of you now?

17 **A. I do.**

18 **Q.** Now, you heard reference to Free Conferencing

19 Corporation getting 75 percent of the gross revenues from

20 NAT's receipts from carriers paying for terminating

21 services. Correct?

22 **A. Yes.**

23 **Q.** Is that then shown here on the P&L as the marketing

24 expenses?

25 **A. That's correct.**

72

1 **Q.** These marketing expenses were paid to Free

2 Conferencing Corporation. Isn't that true?

3 **A. Yes.**

4 **Q.** Now, I believe it's also the case you have not seen

5 any written agreement between NAT and Free Conferencing

6 Corporation setting forth the terms by which NAT is

7 obligated to pay Free Conferencing Corporation 75 percent

8 of their gross revenues?

9 **A. I have not seen the document, no.**

10 **Q.** Do you know if one exists?

11 **A. I do not know.**

12 **Q.** You were in charge of making these transfers to Free

13 Conferencing Corporation, were you not?

14 **A. Yes.**

15 **Q.** You did so at the direction of Jeff Holoubek. Did you

16 not?

17 **A. Yes. He explained the relationship NAT has with Free**

18 **Conferencing Corporation.**

19 **Q.** Free Conferencing Corporation, that's located in

20 Long Beach at the address you gave earlier. Isn't it?

21 **A. Yes.**

22 **Q.** If we look at the banking statements, beginning with

23 the Wells Fargo statements, they all start going to the

24 same address. Do they not?

25 **A. Yes.**

73

1 Q. Turn to Page 1 of Exhibit 1. What were the minutes of
 2 usage for NAT for all carriers for December 2010?
 3 A. **About 8.4 million.**
 4 Q. Then what happened in January of 2011?
 5 A. **They went up to 12 million.**
 6 Q. Your understanding that Free Conferencing
 7 Corporation's share of NAT's revenues came from what
 8 Mr. Holoubek told you. Is that correct?
 9 A. **He explained the relationship, the agreement that NAT**
 10 **has with Free Conferencing Corporation.**
 11 Q. So he told you it was 75 percent?
 12 A. **Yes.**
 13 Q. He is the President of NAT. Correct?
 14 A. **Correct.**
 15 Q. He is also Director of Legal and Finance at
 16 Free Conferencing Corporation. Correct?
 17 A. **Yes.**
 18 Q. You followed his directives to pay this share of
 19 Free Conferencing Corporation's share of NAT's revenues to
 20 Free Conferencing Corporation in 2010. Didn't you?
 21 A. **Yes.**
 22 Q. Did you ever endeavor to find if there was a written
 23 agreement between NAT and Free Conferencing Corporation
 24 regarding the 75 percent revenue split?
 25 A. **I didn't find it necessary.**

74

1 Q. You just followed Mr. Holoubek's directive on that
 2 point?
 3 A. **He's my direct supervisor.**
 4 Q. So that's yes?
 5 A. **Yes.**
 6 Q. I believe then it's the case that NAT's business
 7 records are in Long Beach at the same location as
 8 Free Conferencing Corporation?
 9 A. **Yes.**
 10 Q. Is your understanding that WideVoice is a member of
 11 NAT?
 12 A. **Correct.**
 13 Q. They have 24 percent interest. Correct?
 14 A. **Correct.**
 15 Q. Have you ever looked at the Joint Venture Agreement
 16 between WideVoice and Native American Telecom Enterprise
 17 and the Crow Creek Tribe to see how NAT is formulated?
 18 Have you looked at the Joint Venture Agreement?
 19 A. **I've seen the Operating Agreement.**
 20 Q. So if you understand from the Operating Agreement,
 21 then WideVoice was responsible for the buildout of the
 22 Wi-Max infrastructure on the Reservation. Is that right?
 23 A. **I'm not entirely familiar with the Operating Agreement**
 24 **as to that specific item.**
 25 Q. But the cost of that buildout, how much does it show

75

1 up on the budget or Balance Statement for NAT? Page 82 of
 2 Exhibit 1.
 3 A. **About \$216,000.**
 4 Q. Turn to Defendant's 27. Do you have that handy?
 5 A. **What am I looking at?**
 6 Q. What was previously admitted as Defendant's 27.
 7 A. **I have it, yes.**
 8 Q. The \$216,000 is reflected in this exhibit. Is that
 9 right, sir?
 10 A. **Part of it would be, yes.**
 11 Q. Part of the additional loan, if you will, you say is
 12 payments to South Dakota Network. Correct?
 13 A. **Among other.**
 14 Q. Then there's a direct loan to NAT itself. Correct?
 15 A. **Yes. There are several loans to NAT.**
 16 Q. So, at the end of 2010, NAT reported owing WideVoice
 17 almost \$480,000?
 18 A. **At the end of 2010?**
 19 Q. Yes. Page 82.
 20 A. **\$474,000. Yes.**
 21 Q. Did you ever determine whether there was a written
 22 loan agreement between WideVoice and NAT?
 23 A. **No. I'm not familiar.**
 24 Q. Now, some of what WideVoice purchased was part
 25 equipment to locate on the Reservation. Correct?

76

1 A. **Yes.**
 2 Q. Do you know if WideVoice took out a security interest
 3 in that equipment?
 4 A. **I do not know.**
 5 Q. Did you ever see a Promissory Note between NAT and
 6 WideVoice reflecting the terms and conditions by which
 7 WideVoice loaned money to NAT?
 8 A. **I have not.**
 9 Q. Take a look at the Income Statement, if you would,
 10 Page 83 of Exhibit 1.
 11 MR. SWIER: Exhibit A, Scott?
 12 MR. KNUDSON: I'm sorry, Exhibit A.
 13 BY MR. KNUDSON:
 14 Q. Looking at that, do you see anywhere that there's a
 15 payment of interest to WideVoice in 2010?
 16 A. **No.**
 17 Q. Let's go back to the Balance Sheet now, Page 83 of
 18 Exhibit A. I would like to look at this \$27,584 in
 19 shareholder distributions. I think you testified on direct
 20 that those were distributions to people in NAT, such as
 21 Tom Reiman and Gene DeJordy?
 22 A. **They are members of Native American Telecom**
 23 **Enterprise.**
 24 Q. So these were distributions to those two gentlemen
 25 that show up on the Balance Sheet for NAT. Is that

77

1 correct?

2 **A. Yes. They were expenses that were incurred by those**

3 **two that we classified as shareholder distributions.**

4 **Q.** In other words, by classifying them as "shareholder

5 distributions," that's money Mr. Reiman and Mr. DeJordy

6 took out of NAT. Correct?

7 **A. Yes. They used as certain expenses, and we decided to**

8 **classify those as shareholder distributions until we could**

9 **figure out how to appropriately account for those.**

10 **Q.** Now, Reiman and DeJordy had debit cards for which they

11 could draw funds out of the First Dakota accounts.

12 Correct?

13 **A. They did.**

14 **Q.** They had no check-signing authority at the Wells Fargo

15 account. Did they?

16 **A. They did not.**

17 **Q.** Well, let's look at a few of the expenses that were

18 classified as "shareholder distributions." Would you take

19 a look at Page 42 of Exhibit A?

20 **A. Okay.**

21 **Q.** Do you see those that are boxed with a notation,

22 "S/H Distribution Note"?

23 **A. Yes.**

24 **Q.** Is that your handwriting?

25 **A. That is my handwriting, yes.**

78

1 **Q.** Looking at these, I think we talked about this on

2 Tuesday. There is an ATM withdrawal, something

3 "NCL-PEARL," which could be the Norwegian Cruiseline ship,

4 Pearl in Miami. Right?

5 **A. It could be many things.**

6 **Q.** But it's expenses incurred, it says here on this

7 listing, in Miami, Florida. Correct?

8 **A. I've seen charges that show Miami, and charges in**

9 **California. I can't verify that.**

10 **Q.** In your handwriting, you are determining that those

11 are shareholder distributions to either Reiman or DeJordy.

12 Did you not?

13 **A. Yes. As I stated before, we classified all these**

14 **expenses as shareholder distributions.**

15 **Q.** What business purpose would NAT have incurring

16 expenses in Miami, Florida?

17 **A. You don't know those are in Miami. I don't know.**

18 **Q.** Let's take a look at some other expenses then. Turn

19 to Page 67. Is there not an entry for a limousine charge,

20 Fairfield, Connecticut? That's not allocated as a

21 shareholder distribution. Is it?

22 **A. I would classify as a shareholder distribution. Just**

23 **because I didn't write it down, doesn't mean I didn't**

24 **classify it.**

25 **Q.** So you think it is a shareholder distribution?

79

1 **A. I would classify that as a shareholder distribution.**

2 **Q.** Do you know that Gene DeJordy lives in Fairfield,

3 Connecticut?

4 **A. I don't know exactly where he lives.**

5 **Q.** What business purpose would he have in taking a

6 limousine for \$153.00?

7 **A. I wouldn't begin to speculate.**

8 **Q.** Now, let's go back to 67. What was the date of this

9 bank statement?

10 **A. What was the date?**

11 **Q.** Yes.

12 **A. July 30, 2010.**

13 **Q.** That's shortly before this account was drained and the

14 money shifted over to Wells Fargo. Correct?

15 **A. It was about the time we transferred over to**

16 **Wells Fargo.**

17 **Q.** In fact, you opened the Wells Fargo account on

18 July 23. Didn't you?

19 **A. Correct.**

20 **Q.** Once the money was in Wells Fargo, Mr. Reiman and

21 Mr. DeJordy had no access to it. Correct?

22 **A. Correct.**

23 **Q.** Now, these two accounts are the only two accounts that

24 NAT has. Correct? First Dakota, which has about \$1,800

25 still, and the Wells Fargo account having, you said just

80

1 now, \$6,000. The only two signers for the Wells Fargo

2 account are Mr. Holoubek and yourself. Correct?

3 **A. Yes.**

4 **Q.** And for First Dakota, it's DeJordy and Reiman.

5 Correct?

6 **A. Yes.**

7 **Q.** There are no members of the Crow Creek Tribe that have

8 signing authority on either account. Correct?

9 **A. Correct.**

10 **Q.** Another one for you. Take a look at Page 66, if you

11 would. Do you see the expenses in Bismarck there on

12 July 19, \$129 for a hotel?

13 **A. Yes.**

14 **Q.** Does NAT provide any services in Bismarck, North

15 Dakota?

16 **A. I don't know.**

17 **Q.** Do you know what business purpose there would be in

18 going to Bismarck, North Dakota?

19 **A. I would not know.**

20 **Q.** How about New Town, Cache Restaurant, on July 20,

21 \$31.90? Do you know where New Town is?

22 **A. I don't know where New Town is.**

23 **Q.** That's in North Dakota, though. That's what it says.

24 Do you know what the business purpose was there for

25 someone to be drawing funds out of the First Dakota Bank

81

1 account?

2 **A. I don't know.**

3 **Q.** Did you ever ask Mr. DeJordy or Mr. Reiman why they

4 incurred these expenses?

5 **A. I do not.**

6 THE COURT: Are you implying you would go to

7 Bismarck or New Town for fun?

8 MR. KNUDSON: I spent a lot of time in Bismarck.

9 I would agree, probably not.

10 BY MR. KNUDSON:

11 **Q.** I would like to know how it ties up to doing business

12 in Crow Creek, as well.

13 **A. I do not know.**

14 **Q.** Isn't it true that once the money was only flowing

15 through the Wells Fargo account, that that gave Free

16 Conference Corporation control over the money?

17 **A. It allowed us to manage NAT.**

18 **Q.** And control the flow of funds through NAT, as well.

19 Correct?

20 **A. For proper accounting.**

21 **Q.** But the only people who controlled those funds were

22 employed by Free Conferencing Corporation. Correct?

23 **A. Yes.**

24 **Q.** You recall you gave an Affidavit in this case. Did

25 you not?

82

1 **A. I did.**

2 **Q.** Handing you what has been marked for identification as

3 Plaintiff's Exhibit B. Take a look at Exhibit B, sir, and

4 tell me if you recognize it.

5 **A. I recognize it.**

6 **Q.** What is it?

7 **A. It is the Affidavit of Carlos Cestero. Do you want me**

8 **to read the entire thing?**

9 **Q.** No, I don't. It has been previously submitted to the

10 Court as part of the moving papers of NAT.

11 MR. KNUDSON: I would offer for purposes of this

12 hearing Exhibit B.

13 THE COURT: Any objection?

14 MR. SWIER: No objection.

15 THE COURT: B is received.

16 BY MR. KNUDSON:

17 **Q.** Let me ask you about the accounting practices of NAT.

18 It's a cash basis taxpayer. Correct?

19 **A. Yes.**

20 **Q.** Its method of accounting is also the cash method of

21 accounting. Correct?

22 **A. Yes.**

23 **Q.** Isn't it true, with the cash method of accounting,

24 that you record income when received. Correct?

25 **A. Correct.**

83

1 **Q.** So if you received income in the month of January, you

2 should post it as received revenue in January. Correct?

3 **A. We record it when we deposit the check.**

4 **Q.** Deposit versus receipt?

5 **A. Yes.**

6 **Q.** So do you recall when you received payment from AT&T?

7 **A. It was in late January.**

8 **Q.** Late January was what day in January?

9 **A. I don't know. I don't remember the exact date.**

10 **Q.** When were the funds deposited into NAT's bank account?

11 **A. February of 2011.**

12 **Q.** What date?

13 **A. The very beginning, around the 2nd.**

14 **Q.** The 2nd of February?

15 **A. Yes.**

16 **Q.** Let's take a look at your Affidavit, Paragraph 12.

17 Would you read that for us, please?

18 **A. Yes. "Because of Sprint's conduct, NAT's current**

19 **financial condition is perilous and NAT has been forced to**

20 **exhaust its credit limits to keep operations running."**

21 **Q.** I would like, first of all, to establish the credit

22 limits. Is there a Loan Agreement with any lender for NAT?

23 **A. I'm not aware of an agreement.**

24 **Q.** Does WideVoice have a written Loan Agreement with NAT?

25 **A. I don't know.**

84

1 **Q.** Does NAT have any line of credit with any lender?

2 **A. I don't know.**

3 **Q.** So what credit limits were you referring to in

4 Paragraph 12?

5 **A. It would be WideVoice's desire to loan money to NAT.**

6 **Q.** But they didn't have an expressed limit on what it

7 would loan. Did it?

8 **A. I'm not aware of any limits.**

9 **Q.** I'm looking at the phrase at the beginning of

10 Paragraph 12 of your Affidavit. "Because of Sprint's

11 conduct." Do you see that, sir?

12 **A. I do.**

13 **Q.** I think it's your testimony that because Sprint

14 refused to pay, other carriers refused to pay. Is that

15 right?

16 **A. That's correct.**

17 **Q.** But the timing of that doesn't tie out to the revenues

18 received by NAT. Does it?

19 **A. It does.**

20 **Q.** When was the last time Sprint paid NAT?

21 **A. Sprint paid NAT in February of 2010.**

22 **Q.** I think Mr. Swier ran you through the revenues being

23 received by NAT after February of 2010. Didn't he? Do you

24 recall that testimony?

25 **A. Yes.**

85

- 1 Q. You recall that money continued to come in from
 2 carriers throughout the summer of 2010. Correct?
 3 A. **From various carriers, but some had stopped paying.**
 4 Q. And some continued to pay, as well. Is that true?
 5 A. **Some had stopped.**
 6 Q. And some continued to pay. Isn't that true?
 7 A. **We received little bits here and there.**
 8 Q. How much did Sprint pay you in 2010?
 9 A. **About \$29,000.**
 10 Q. How much did the other carriers in total pay you?
 11 A. **I don't recall exactly.**
 12 Q. Should I refresh your recollection? Let's look at
 13 NAT 83. How much did the other carriers pay NAT in 2010?
 14 A. **About \$1,120,000.**
 15 Q. I would like to look at this number. It says, "CABS
 16 Collection Income." "CABS," that refers to CABS Agent,
 17 does it?
 18 A. **Yes.**
 19 Q. That was the original billing agent for NAT. Correct?
 20 A. **No. It stands for the Carrier Access Billing. It**
 21 **contains some of the CABS Agent collections, in addition to**
 22 **our latest --**
 23 Q. You've switched billing agents, haven't you?
 24 A. **Yes.**
 25 Q. Who do you use now?

86

- 1 A. **CDG Communications Data Group.**
 2 Q. When did you switch?
 3 A. **Sometime mid 2010.**
 4 Q. Looking at your Affidavit again. Isn't it true that
 5 because of Sprint's conduct, Sprint stopped paying in
 6 February, but other carriers continued to pay throughout
 7 2010 up and over \$1.1 million. Isn't that true?
 8 A. **Yes.**
 9 Q. Let's take a look at Paragraph 13. Could you read
 10 that for us, please?
 11 A. **Sure. "NAT is currently unable to meet its financial**
 12 **obligations because of Sprint's refusal to pay NAT's**
 13 **interstate switched access service charges."**
 14 Q. Now, there are other carriers that aren't paying NAT,
 15 as well. Isn't that true?
 16 A. **There are.**
 17 Q. Is Verizon paying NAT?
 18 A. **I don't know.**
 19 Q. Is Qwest paying NAT?
 20 A. **I don't know.**
 21 Q. How would you know? Are there financial records at
 22 NAT that would let us know?
 23 A. **I would have to look at the ledgers.**
 24 Q. Well, do you have Defendant's Exhibit 27 handy?
 25 A. **Yes.**

87

- 1 Q. Is this part of the ledger detail that would be used
 2 to determine who was paying and who was not?
 3 A. **No. These are loans.**
 4 Q. This is the "Transactions by Account" for WideVoice.
 5 Isn't that true?
 6 A. **These are the loans made to NAT from WideVoice.**
 7 Q. So this Exhibit 27, that ties to your Balance Sheet,
 8 does it not?
 9 A. **Yes.**
 10 Q. And the \$474,949 listed as owing WideVoice shows up on
 11 the Balance Sheet. Correct?
 12 A. **Correct.**
 13 Q. Well, I was asking you the other day about the support
 14 for the income on the P&L. Is there detail that supports
 15 how you determine that there was \$1.148 million in revenue
 16 in NAT?
 17 A. **I have the detail.**
 18 Q. You have the detail. It's available to you?
 19 A. **Yes.**
 20 Q. That would show which carriers you're paying. Would
 21 it not?
 22 A. **It would.**
 23 Q. And by date?
 24 A. **It would.**
 25 Q. And by amount?

88

- 1 A. **Yes.**
 2 Q. And you also have records of NAT that shows what was
 3 invoiced of those carriers. Do you not?
 4 A. **Yes.**
 5 Q. Those are business records of NAT. Correct?
 6 A. **They are.**
 7 Q. They are part of the determination of how much revenue
 8 NAT made in 2010. Correct?
 9 A. **How much revenue it received, yes.**
 10 Q. And whether or not they are paying also bears on
 11 whether or not NAT has revenue sufficient to stay in
 12 business. Correct?
 13 A. **Rephrase that. I'm sorry.**
 14 Q. Whether or not the carriers are paying has an impact
 15 on whether NAT continues to stay in business. Correct?
 16 A. **Yes.**
 17 Q. So when you prepared your Affidavit, you signed it on
 18 January 11. Is that correct?
 19 A. **Yes.**
 20 Q. Within a couple of weeks, NAT had \$150,000 from AT&T?
 21 A. **Yes, at the tail end of January.**
 22 Q. Did NAT and AT&T reach an agreement for AT&T to start
 23 paying the invoices from NAT?
 24 A. **I don't know.**
 25 Q. Did NAT sue AT&T?

89

1 **A. I don't know.**

2 **Q.** Has NAT sued any other carrier for unpaid invoices?

3 **MR. SWIER:** Your Honor, if I may object, please.

4 The objection is who has NAT sued? In this lawsuit Sprint

5 is the Plaintiff. They sued NAT in this case. I want the

6 record to reflect who is the Plaintiff and the Defendant

7 here. Thank you.

8 **THE COURT:** The record will so reflect. You need

9 to answer the question.

10 **A. I don't know.**

11 **BY MR. KNUDSON:**

12 **Q.** Have you asked Mr. Holoubek, Director of Legal and

13 Regulatory at Free Conference Corporation, whether NAT has

14 sued any other carriers for nonpayment?

15 **A. No.**

16 **Q.** Did you reference in your Affidavit the fact that

17 other carriers were not paying?

18 **A. I don't believe so.**

19 **Q.** Now, I think you were testifying, based on the earlier

20 exhibits, about what you could determine when things were

21 coming into Wells Fargo. Do you recall that testimony,

22 sir?

23 **A. I do.**

24 **Q.** Let's take a look here at Exhibit A, Page 5. That's

25 the statement for September of 2010. Do you see the

90

1 deposits there totaling \$38,000 and change?

2 **A. Yes.**

3 **Q.** Was it your testimony that these were deposits from

4 carriers paying for terminating access service?

5 **A. Yes.**

6 **Q.** I believe you testified on Tuesday that you couldn't

7 tell from this whether or not those were payments from

8 carriers. Correct?

9 **A. Not from the statement, I couldn't tell.**

10 **Q.** What did you do to investigate then?

11 **A. I looked to see if those were payments.**

12 **Q.** What records did you examine?

13 **A. Our internal records.**

14 **Q.** Such as the detail which would back up the total gross

15 revenues posted on the P&L for 2010. Correct?

16 **A. Sure, support for the cash receipts.**

17 **Q.** And you did that between Tuesday and today. Is that

18 correct?

19 **A. I did.**

20 **MR. KNUDSON:** If I may approach, Your Honor?

21 **THE COURT:** You may.

22 **BY MR. KNUDSON:**

23 **Q.** Handing you what's been marked as Plaintiff's

24 Exhibit C.

25 **MR. KNUDSON:** I'd give you a copy, Your Honor,

91

1 but I would be without one.

2 **THE COURT:** Okay.

3 **BY MR. KNUDSON:**

4 **Q.** Tell me if you recognize Exhibit C, sir.

5 **A. I do.**

6 **Q.** What is it?

7 **A. It is the Defendant Native American Telecom Answers to**

8 **Plaintiff Sprint Communications First Set of**

9 **Interrogatories.**

10 **Q.** Is your signature on Page 10 of this exhibit?

11 **A. Yes, it is.**

12 **Q.** You reviewed and signed on behalf of Native American

13 Telecom?

14 **A. Yes.**

15 **MR. KNUDSON:** I'd offer Exhibit C.

16 **THE COURT:** Any objection?

17 **MR. SWIER:** No objection, Your Honor.

18 **THE COURT:** C is received.

19 **BY MR. KNUDSON:**

20 **Q.** We've been talking about the support for the P&L

21 Statement, the detail. You recall that Defendant's 27 was

22 the detail that supports the Balance Sheet Information on

23 the amount owing WideVoice.

24 Let's take a look at Interrogatory No. 7. The

25 question, it's on the screen, Your Honor, "Identify all

92

1 interexchange carriers whom NAT has invoiced under any of

2 its tariffs, including the name of the interexchange

3 carrier, the amounts invoiced, and the payments received,

4 if any."

5 **MR. SWIER:** Your Honor, I'm sorry. I don't have

6 that page on the exhibit I was given. I go from 4 to 6.

7 **(Discussion off the record)**

8 **BY MR. KNUDSON:**

9 **Q.** Now, that information that's being sought from

10 Interrogatory No. 7, that's contained in the business

11 records of NAT. Is that correct?

12 **A. Yes.**

13 **Q.** Did you provide an answer to that interrogatory

14 answering who was invoiced, which carriers paid, and how

15 much?

16 **A. I did not.**

17 **Q.** Is that information in that answer?

18 **A. It is not.**

19 **MR. KNUDSON:** In fact, the answer, Your Honor, is

20 objected to on the grounds it's protected by the

21 attorney-client privilege and the work-product doctrine.

22 It's further objected to as being overly broad and unduly

23 burdensome. It's further objected to as seeking

24 information that is beyond the permissible scope of

25 discovery and that it is not reasonably calculated to lead

93

1 to the discovery of admissible evidence.

2 I would submit that objection is unfounded. We were

3 entitled to this information before this hearing, and we

4 didn't get it.

5 MR. SWIER: Your Honor, may I comment on that?

6 THE COURT: Why don't we take argument later.

7 This should really be limited to questions and answers, and

8 not argument by either counsel.

9 BY MR. KNUDSON:

10 Q. We didn't get that information, did we, Mr. Cestero?

11 A. **You didn't.**

12 Q. After Sprint stopped paying in February and the

13 revenues NAT received continued to climb, did it peak at

14 about \$240,000 in July of 2010?

15 A. **Did it peak?**

16 Q. Come to its highest point?

17 A. **Yes.**

18 Q. Then after August 6, 2010, when NAT received over

19 \$128,000 from carriers, the revenue declined dramatically.

20 Correct?

21 A. **Correct.**

22 Q. This was months and months after Sprint stopped

23 paying. Isn't that true?

24 A. **It is.**

25 Q. I'm wondering whether NAT instituted any cost-cutting

94

1 measures to reduce its operating expenses in the face of

2 its declining revenues?

3 A. **Is that a question?**

4 Q. Yes. Did it?

5 A. **It certainly has. It's tried to limit its amount of**

6 **expenses by contracting me to do the books.**

7 Q. Is there a written contract between you and NAT for

8 that purpose?

9 A. **No.**

10 Q. If you would, take a look at the Profit and Loss again

11 for 2010. That's NAT 83. You mentioned there's a circuit

12 expense. On Defendant's 27 that's an expense paid to SDN

13 Communications.

14 A. **Where are you looking?**

15 Q. Look first at Defendant's 27, if you would.

16 A. **Got it.**

17 Q. If you would, just look at Entry No. 11, 12, 13. Do

18 you see those, sir?

19 A. **I do.**

20 Q. That's for SDN Communications?

21 A. **Yes.**

22 Q. What was that for?

23 A. **Those are circuit charges that WideVoice paid on**

24 **behalf of Native American Telecom.**

25 Q. That was circuit charges paid to SDN Communications?

95

1 A. **Yes.**

2 Q. As far as you understand, that's necessary to complete

3 the signal or call all the way to NAT's equipment in

4 Ft. Thompson?

5 A. **I'm not a circuit expert. I don't know exactly their**

6 **true function.**

7 Q. Circuit expenses connected to the usage of that

8 circuit. Correct?

9 A. **It's required is my understanding. Circuits are**

10 **required to communicate.**

11 Q. The more you use a circuit, the more you pay for it.

12 Isn't that true?

13 A. **Yes.**

14 Q. The 12 million minutes of use you reported for January

15 of 2011, there would be circuit expenses associated with

16 those minutes of use. Isn't that true?

17 A. **There would be.**

18 Q. You have a number of carriers that aren't paying that.

19 Isn't that true?

20 A. **Yes.**

21 Q. Has NAT ever attempted to stop service to these

22 carriers that are not paying?

23 A. **I don't know.**

24 Q. Is that you don't know, or is the answer no?

25 A. **I don't know.**

96

1 Q. Who would know?

2 A. **I don't know.**

3 Q. Look at another line item here besides circuit

4 expenses. That would be Exhibit A. Let's look at the

5 collection and billing expense. Is that a percentage of

6 the billings?

7 A. **I do not know.**

8 Q. You've never investigated how that number is

9 determined?

10 A. **I don't recall. I've seen the invoices. I just don't**

11 **recall how it's calculated.**

12 Q. Would there be that detail in NAT's business records,

13 how it would be calculated?

14 A. **Yes.**

15 Q. You spent over \$96,000 in 2010 for billing expenses.

16 Did you ever investigate whether you were overcharged for

17 any of those expenses?

18 MR. SWIER: Objection, Your Honor. Irrelevant.

19 THE COURT: Overruled. You may answer.

20 A. **I did not.**

21 BY MR. KNUDSON:

22 Q. So do you have a calculator, sir?

23 A. **Not with me.**

24 Q. Could you determine what percentage of the gross

25 revenues went out as an expense to the billing agent?

97

1 **A. I don't know.**

2 **Q.** It's at least, almost \$97,000. Is it not?

3 **A. I see the amount, \$97,000.**

4 **Q.** Is that eight percent?

5 **A. Whatever the math comes out to be.**

6 **Q.** It's a simple calculation you could do if you had a

7 calculator.

8 **A. Sure.**

9 **Q.** Circuit expenses, you would agree that's more than 10

10 percent of the gross revenues. Would you not?

11 **A. More than 10 percent?**

12 **Q.** Yes.

13 **A. It would be less than.**

14 **Q.** If you multiply \$126,000 by 10, what do you get?

15 **A. Where do you get the -- I'm sorry, yes. Yes.**

16 **Q.** Now, if I understand correctly, who are the members of

17 the Board of NAT? Do you know?

18 **A. I do not know all the members, no.**

19 **Q.** How about people from WideVoice or Free Conference

20 Corporation? Who are members of the Board of NAT?

21 **A. From which entity?**

22 **Q.** Free Conference Corporation.

23 **A. David Erickson.**

24 **Q.** How about Jeff Holoubek?

25 **A. And Jeff Holoubek.**

98

1 **Q.** Anyone else?

2 **A. That's all I know.**

3 **Q.** Now, you testified earlier today that in late January

4 AT&T paid NAT \$150,000. Is that right?

5 **A. Correct.**

6 **Q.** And then \$140,000 went to pay down WideVoice.

7 Correct?

8 **A. Correct.**

9 **Q.** You've testified there's no written agreement between

10 WideVoice and NAT?

11 **A. I'm not aware of any agreement.**

12 **Q.** There are no other creditors of NAT, to your

13 knowledge?

14 **A. Not to my knowledge.**

15 **Q.** Was there any provision in the Joint Venture Agreement

16 that permitted NAT to pay the \$140,000 to WideVoice?

17 **A. I'm not that familiar with the Operating Agreement.**

18 **Q.** Was there a vote of the NAT Board to authorize that

19 payment?

20 **A. Excuse me?**

21 **Q.** Was there a vote of the Board of NAT to authorize that

22 payment to WideVoice?

23 **A. I don't know.**

24 **Q.** You just did it because you were told to do so. Is

25 that correct?

99

1 **A. Correct.**

2 **Q.** And you were directed to by Mr. Holoubek?

3 **A. Yes.**

4 **MR. KNUDSON:** May I approach, Your Honor?

5 **THE COURT:** You may.

6 **BY MR. KNUDSON:**

7 **Q.** I'm handing you what's been marked Plaintiff's

8 Exhibit D. Do you recognize that?

9 **A. I do.**

10 **Q.** What is it?

11 **A. It's the Profit and Loss Statement for Native American**

12 **Telecom for January of 2011.**

13 **Q.** That's from the same business records of NAT that lets

14 you produce the Balance Sheet for January of 2011.

15 Correct?

16 **A. Correct.**

17 **MR. KNUDSON:** I offer Plaintiff's Exhibit D.

18 **MR. SWIER:** No objection.

19 **THE COURT:** D is received.

20 **MR. KNUDSON:** If I may again, Your Honor?

21 **THE COURT:** You may.

22 **BY MR. KNUDSON:**

23 **Q.** Look at Plaintiff's Exhibit E.

24 **MR. KNUDSON:** I apologize, Your Honor. It seems

25 my extra copy has gone astray. Here it is.

100

1 **BY MR. KNUDSON:**

2 **Q.** Tell me if you recognize Plaintiff's Exhibit E, sir.

3 **A. I do.**

4 **Q.** What is it?

5 **A. It's the bank statement for First Dakota for Native**

6 **American Telecom for the period ending 1-29-2010.**

7 **Q.** That's the first page. The second page is a May 28,

8 2010 --

9 **A. I'm sorry. Then there's another page for the period**

10 **ending 5-28-2010, which is Page 2. Then a statement ending**

11 **July 30, 2010, Page 9.**

12 **Q.** I would explain that these are -- do you recall that

13 we had a discussion about redactions on the bank

14 statements?

15 **A. Yes.**

16 **Q.** In fact, you removed your handwriting and other

17 handwriting from the statements. Correct?

18 **A. These were internal notes that I didn't think you**

19 **needed.**

20 **Q.** But you subsequently produced an unredacted copy of

21 your bank statements?

22 **A. Yes, I did.**

23 **Q.** Exhibit E is a selection of a few pages from that. Is

24 that right?

25 **A. Correct.**

101

1 MR. KNUDSON: I would offer Exhibit E.
 2 MR. SWIER: No objection.
 3 THE COURT: E is received.
 4 BY MR. KNUDSON:
 5 Q. Let's take a look at the first page of Exhibit E.
 6 There seems to be two different persons' handwriting on
 7 that page. Is that true?
 8 A. Yes.
 9 Q. You can recognize your handwriting, can you not?
 10 A. Yes.
 11 Q. Which is your handwriting?
 12 A. The darker.
 13 Q. It says, "Utilities - central electric, shareholder
 14 distribution - Nate," for three for Tom. Is that right?
 15 A. Yes.
 16 Q. Another "Shareholder Distribution - Nate," as well?
 17 A. Yes.
 18 Q. The shareholder distributions, according to the
 19 entries here for the bank statement, they show a transfer
 20 to Tom's account. Is that correct?
 21 A. Yes.
 22 Q. So how much money had he transferred to his own
 23 account?
 24 A. I don't recall.
 25 Q. Does it add up to \$2,400?

102

1 A. I don't know.
 2 Q. It's \$1,000 and \$500 --
 3 A. Oh, on this page?
 4 Q. Yes, this page.
 5 A. Oh, \$2,400.
 6 Q. The next page, you recall our question about whether
 7 these expenses were on the cruiseship in Miami. That's
 8 your handwriting, though, is it not?
 9 MR. SWIER: Your Honor, I'll object to that. The
 10 foundation was never laid for what the purpose of the Miami
 11 charges were.
 12 THE COURT: The objection is overruled. You may
 13 continue on with your question.
 14 BY MR. KNUDSON:
 15 Q. Mr. Cestero, there's handwriting. Do you recognize
 16 the other handwriting?
 17 A. I do.
 18 Q. Whose is it?
 19 A. Tom Reiman's.
 20 Q. Tom wrote down those were his expenses?
 21 A. He provided the statements to me.
 22 Q. With his handwriting on them?
 23 A. Yes.
 24 Q. Did he explain to you why these were associated with
 25 his withdrawals?

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1 A. No. I did not ask him.
 2 Q. But you concluded this was a shareholder distribution
 3 for Nate. Correct?
 4 A. As I mentioned before, there were several transactions
 5 reported to shareholder distributions, this being a few of
 6 them.
 7 Q. Let's look at the next page. There are a series of
 8 debit card transactions. Do you know what business purpose
 9 there was to incur \$433.51 in lodging expenses in
 10 Washington, D.C., for NAT?
 11 A. I do not know.
 12 Q. So you never questioned why that was a business
 13 expense?
 14 A. I do not know.
 15 Q. My question is did you question anybody whether it was
 16 appropriate?
 17 A. No.
 18 MR. KNUDSON: I have nothing further at this
 19 time, Mr. Cestero. Thank you.
 20 THE COURT: I have a couple questions before I
 21 have Mr. Swier ask his.
 22 On that document, Exhibit A, there was an expense for
 23 telephone and circuit expenses. Can you tell me what
 24 that's for?
 25 THE WITNESS: On which page?

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1 THE COURT: Page 83 of Exhibit A.
 2 THE WITNESS: The telephone and circuit expenses?
 3 THE COURT: Right.
 4 THE WITNESS: Those are the circuit costs.
 5 THE COURT: Are those one-time expenses or
 6 ongoing?
 7 THE WITNESS: No, they're ongoing.
 8 THE COURT: Is it based on the amount of traffic
 9 that's happening?
 10 THE WITNESS: I'm not exactly sure what they are
 11 based on. They are monthly invoices that are sent to
 12 Native American Telecom.
 13 THE COURT: You don't know if it's the same flat
 14 fee, no matter how much traffic there is, and it's an
 15 ongoing expense, or if it's directly related to the amount
 16 of traffic?
 17 THE WITNESS: I don't know.
 18 THE COURT: And before you began doing NAT's
 19 accounting, who did the accounting work for NAT?
 20 THE WITNESS: There was a company Tom hired,
 21 Stern Accounting, I believe is their name.
 22 THE COURT: You indicated that NAT has reduced
 23 their costs by eliminating that accounting expense and
 24 having you do their accounting for free?
 25 THE WITNESS: Yes.

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1 THE COURT: Have there been any other
 2 ~~cost-cutting measures that have been taken by NAT that you~~
 3 are aware of?
 4 THE WITNESS: When we switched out the CABS
 5 Agent.
 6 THE COURT: What difference did that make?
 7 THE WITNESS: Substantial. I don't know the
 8 exact amount that we saved, but we're saving money by using
 9 a different CABS Agent or collection service.
 10 THE COURT: So when I did the math, it looked
 11 like CABS' collection and billing expense ended up being
 12 about eight percent of the gross revenue. Are you saying
 13 CABS was at a higher rate than that? Since this was for
 14 the full year, part of it would be the new billing agent?
 15 THE WITNESS: There were two billing agents in
 16 2010. I don't know when one stopped and the other one
 17 began. But the current one they are using is less
 18 expensive than the previous one.
 19 THE COURT: But you don't know the rate either
 20 entity charged?
 21 THE WITNESS: Not with me, no.
 22 THE COURT: You said that Sprint last paid in
 23 February of 2010?
 24 THE WITNESS: Yes.
 25 THE COURT: The tariff was filed in February of

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1 2010?
 2 THE WITNESS: I don't know exactly when the
 3 tariff was filed.
 4 MR. KNUDSON: Could we clarify which tariff we're
 5 referring to; 1 or 2?
 6 THE COURT: I thought when Mr. Swler questioned
 7 you on direct examination, you said the first tariff was
 8 filed in the winter of 2010. I then asked: "Is that
 9 January or February of 2010, or is it the end of 2010 when
 10 we also have winter?" I thought the representation was it
 11 was filed in February of 2010. So you're now saying you
 12 don't know when it was filed?
 13 THE WITNESS: I didn't specify the actual month.
 14 You asked about the time, and I said around that time. I
 15 don't know the exact month.
 16 THE COURT: So you really don't know when it was
 17 filed?
 18 THE WITNESS: No, I don't.
 19 THE COURT: Well, when Sprint made that payment
 20 in February of 2010, was it pursuant to the tariff, to the
 21 first tariff?
 22 THE WITNESS: I believe so. I don't know. I
 23 believe so.
 24 THE COURT: Did they make more than one payment
 25 or just one payment?

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1 THE WITNESS: They made two payments, totaling
 2 \$29,000.
 3 THE COURT: When was the other payment?
 4 THE WITNESS: In January of 2010.
 5 THE COURT: On Exhibit 25, which shows -- it's
 6 the bank account record, the Wells Fargo Bank account
 7 record.
 8 THE WITNESS: Yes.
 9 THE COURT: It's for January, January 1 through
 10 January 31. You testified that AT&T paid NAT \$150,000 in
 11 late January of 2011.
 12 THE WITNESS: We deposited the funds in February.
 13 We received the check in late January, but it didn't go
 14 into the bank until February. That's why it doesn't show
 15 up on the January statement.
 16 THE COURT: On the First Dakota National Bank
 17 statements, for example, Exhibit 13, it indicates the
 18 payments that were made from the phone companies were a
 19 direct pay, so it would be a direct deposit into the
 20 account.
 21 THE WITNESS: Yes, that's from the CABS Agent.
 22 The CABS Agent would collect the payments on behalf of
 23 Native American Telecom and submit one payment for all the
 24 carriers.
 25 THE COURT: The new group you have doing that

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1 sends you checks from the carrier?
 2 THE WITNESS: That's correct. They actually just
 3 collect the checks and forward the checks to us. They do
 4 not deposit the checks.
 5 THE COURT: When did you switch?
 6 THE WITNESS: Sometime in the middle of the year.
 7 I don't recall exactly.
 8 THE COURT: Before or after July?
 9 THE WITNESS: It would be around that time. It
 10 would be around the time where the direct pays were posted
 11 into the account, and then we started receiving the
 12 individual checks.
 13 THE COURT: You're saying you did receive
 14 individual checks from the new agent?
 15 THE WITNESS: Yes. CDG sends us checks.
 16 THE COURT: I see a deposit into your account
 17 that is a direct pay --
 18 THE WITNESS: Into which account?
 19 THE COURT: August 31, so during the month of
 20 August. It's Defendant's Exhibit 13. For \$128,000. I'm
 21 assuming that would be under the old billing agent.
 22 THE WITNESS: Yes. I guess there's overlap
 23 between the time that we switched over to the new carrier
 24 -- or to the billing agent. The old billing agent would
 25 have billed, and they would have for, say, the two months

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<p>1 prior, would have collected those payments. In the</p> <p>2 meantime we would have switched over to the new service.</p> <p>3 The new service would bill, and then we'd receive payments</p> <p>4 thereafter.</p> <p>5 THE COURT: So that August statement shows a</p> <p>6 direct deposit of \$128,000 from the old billing agent. I</p> <p>7 don't see any other payments after that. So you switched</p> <p>8 to a new billing agent, and you didn't receive any new</p> <p>9 payments?</p> <p>10 THE WITNESS: Right.</p> <p>11 THE COURT: I thought you just told me that you</p> <p>12 did.</p> <p>13 THE WITNESS: We did, but the new billing agent</p> <p>14 took over where the old agent left off. So they billed for</p> <p>15 those payments that she had not yet received.</p> <p>16 THE COURT: But you said those were not direct</p> <p>17 deposits into the account. Those were checks sent to that</p> <p>18 billing agent, and those were then forwarded on to you.</p> <p>19 THE WITNESS: Correct.</p> <p>20 THE COURT: My question is I'm looking at the</p> <p>21 bank statements, and I don't see any more deposits.</p> <p>22 THE WITNESS: Not for First Dakota Bank, because</p> <p>23 everything goes to the Wells Fargo Bank.</p> <p>24 THE COURT: I'm looking at both of them.</p> <p>25 THE WITNESS: They won't show up as direct pays.</p>	<p>1 Q. So NAT has a legal contractual relationship to make</p> <p>2 those marketing fee payments. Correct?</p> <p>3 MR. KNUDSON: Objection. Foundation. Calls for</p> <p>4 a legal conclusion.</p> <p>5 THE COURT: Sustained.</p> <p>6 A. Yes.</p> <p>7 BY MR. SWIER:</p> <p>8 Q. Based on your knowledge --</p> <p>9 MR. KNUDSON: Motion to strike the answer.</p> <p>10 THE COURT: The motion to strike is granted. If</p> <p>11 I sustain an objection, then you don't get to answer it.</p> <p>12 THE WITNESS: Oh, I'm so sorry.</p> <p>13 BY MR. SWIER:</p> <p>14 Q. To the best of your knowledge, there's a contract</p> <p>15 between FreeConferenceCall and Native American Telecom that</p> <p>16 FreeConferenceCall's marketing fees are paid. Correct?</p> <p>17 MR. KNUDSON: Objection. Foundation. Misstates</p> <p>18 his prior testimony.</p> <p>19 THE COURT: Sustained.</p> <p>20 BY MR. SWIER:</p> <p>21 Q. Carlos, you were asked about the percentage of that</p> <p>22 contract between FreeConferenceCall and Native American</p> <p>23 Telecom. You indicated earlier that you are familiar with</p> <p>24 the contracts that FreeConferenceCall has with other</p> <p>25 companies like NAT. Correct?</p>
110	112
<p>1 They would show up just as deposits.</p> <p>2 THE COURT: I've looked through those, too. I</p> <p>3 don't see any significant deposits.</p> <p>4 THE WITNESS: You're right, because most of the</p> <p>5 people stopped paying. The deposits that you can see, if</p> <p>6 you look at January 31st on Exhibit 25, you'll see two</p> <p>7 deposits on 1-18, one for \$27.61 and another one for \$3.41.</p> <p>8 Those are the payments that we received that were forwarded</p> <p>9 from the new billing agent for the CABS. You would see</p> <p>10 similar entries on the other Wells Fargo statements.</p> <p>11 THE COURT: For instance, Exhibit 24 shows a</p> <p>12 deposit of \$3,519.77. You are saying that is what the new</p> <p>13 billing agent was able to collect for you?</p> <p>14 THE WITNESS: That's correct. That's what was</p> <p>15 paid by the carriers.</p> <p>16 THE COURT: All right. Thank you. Mr. Swier?</p> <p>17 REDIRECT EXAMINATION</p> <p>18 BY MR. SWIER:</p> <p>19 Q. Carlos, Mr. Knudson asked you on cross-examination</p> <p>20 about the marketing fee payments that NAT has made to</p> <p>21 FreeConferenceCall. Is that right?</p> <p>22 A. Yes.</p> <p>23 Q. Those payments are pursuant to a contract between NAT</p> <p>24 and FreeConferenceCall. Is that correct?</p> <p>25 A. That's correct.</p>	<p>1 MR. KNUDSON: Objection. Assumes a fact not in</p> <p>2 evidence.</p> <p>3 THE COURT: Overruled.</p> <p>4 A. Correct.</p> <p>5 BY MR. SWIER:</p> <p>6 Q. And are those agreements that FreeConferenceCall has</p> <p>7 with the other telephone companies the same or similar as</p> <p>8 what FreeConferenceCall has with Native American Telecom?</p> <p>9 A. Yes, they are.</p> <p>10 Q. So that's a standard contract that FreeConferenceCall</p> <p>11 has with its other telephone companies?</p> <p>12 A. Yes, very similar.</p> <p>13 MR. KNUDSON: Objection. Misstates his prior</p> <p>14 testimony. Lack of foundation.</p> <p>15 THE COURT: Overruled. Now you can answer.</p> <p>16 A. Yes.</p> <p>17 BY MR. SWIER:</p> <p>18 Q. Carlos, you were asked by Mr. Knudson about some</p> <p>19 charges that Native American Telecom has paid out, is that</p> <p>20 correct, that were payments made for the deal in Miami.</p> <p>21 Can you remember that?</p> <p>22 A. Yes.</p> <p>23 Q. And North Dakota. Correct?</p> <p>24 A. Yes.</p> <p>25 Q. Does FreeConferenceCall do business all over the</p>

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1 world?

2 **A. Yes.**

3 **Q.** Do you know what the purpose of Mr. Reiman being in

4 Miami was on that particular day?

5 **A. I do not.**

6 **Q.** As far as you know, it could be related to the

7 business?

8 **MR. KNUDSON:** Objection. Speculation.

9 Foundation.

10 **THE COURT:** Sustained.

11 **MR. SWIER:** May I approach, Your Honor?

12 **THE COURT:** You may.

13 **BY MR. SWIER:**

14 **Q.** Carlos, I'll show you what has been marked as Sprint's

15 Exhibit A. I'm looking at what's designated as NAT 00042

16 on the bottom right-hand corner. Do you see that?

17 **A. I do.**

18 **Q.** Mr. Knudson asked you about the charges Mr. Reiman had

19 in Miami. There are some other charges on here, also, for

20 Washington, D.C. Are there not?

21 **A. Yes.**

22 **Q.** Do you know why NAT had to travel to Washington, D.C.,

23 for a business-related purpose?

24 **A. I'm familiar with certain trips they've taken.**

25 **Q.** Why is it NAT had to take certain trips to Washington,

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1 D.C.?

2 **MR. KNUDSON:** Objection. Foundation as to this

3 particular trip.

4 **THE COURT:** Overruled. You may answer.

5 **A. My understanding is they've gone to Washington, D.C.,**

6 **to meet with the Senators and Representatives regarding the**

7 **Native American Tribe.**

8 **Q.** So it's your understanding they've gone to talk to

9 South Dakota's Congressional delegation?

10 **A. In addition to others.**

11 **Q.** Regarding the nonpayment issue? Do you know?

12 **A. I believe so.**

13 **Q.** According to your knowledge, has NAT also traveled to

14 Washington, D.C., to visit with the Federal Communications

15 Commission?

16 **A. Yes.**

17 **Q.** Do you know what the purpose of those trips were?

18 **A. I do not know the exact purpose.**

19 **Q.** Would you consider, as an accountant, would you

20 consider traveling to Washington, D.C., to lobby

21 administrative agencies in South Dakota's Congressional

22 delegation, based on these nonpayment issues, would be a

23 reasonable business expense?

24 **MR. KNUDSON:** Objection. Foundation.

25 Speculation.

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1 **THE COURT:** Overruled. You may answer.

2 **A. Yes, I would.**

3 **BY MR. SWIER:**

4 **Q.** Carlos, the Court asked you a good question earlier

5 about NAT's expenses. Approximately how much each month

6 are Native American Telecom's expenses, just as a total,

7 first of all?

8 **A. About \$40,000 a month.**

9 **Q.** Can you share with us a breakdown of the \$40,000

10 number and what that monthly amount goes to?

11 **A. Sure. If you look at the January --**

12 **Q.** Which exhibit are you referring to?

13 **A. Plaintiff's Exhibit D.**

14 **MR. SWIER:** May I approach, Your Honor?

15 **THE COURT:** You may.

16 **BY MR. SWIER:**

17 **Q.** Carlos, I'm looking at Plaintiff's Exhibit D. This is

18 the most recent Profit and Loss Statement of NAT from a

19 month ago, January of 2011. Is that right?

20 **A. Correct.**

21 **Q.** Does this Profit and Loss Statement show a typical

22 month of expenses for NAT?

23 **A. It would.**

24 **Q.** Let's go through those a moment. How much did NAT

25 receive from the carriers?

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1 **A. \$31.00.**

2 **Q.** So what was your gross profit?

3 **A. We lost \$42,000.**

4 **Q.** No, I'm talking your gross profit from the carrier

5 payments.

6 **A. Oh, \$31.00.**

7 **Q.** Now let's look at the expenses. Bank service charges.

8 How much is that every month?

9 **A. \$28.00.**

10 **Q.** In your professional opinion is that reasonable?

11 **A. Yes.**

12 **Q.** CABS collection and billing expense. How much was

13 that?

14 **A. \$771.00.**

15 **Q.** Based on what you know, has NAT attempted to minimize

16 that collection as much as they possibly can in the

17 industry?

18 **A. Absolutely.**

19 **Q.** Consulting expenses of \$3,000. Share with the Court

20 what those consulting expenses are for.

21 **A. Those are payments to Tom Reiman to assist with the**

22 **operations of the Reservation.**

23 **Q.** What's your understanding of what Mr. Reiman's role is

24 on a daily basis for NAT?

25 **A. They vary. I mean they go and make sure everything is**

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1 **operating smoothly. If people have problems, he goes by.**

2 **Q.** Is Mr. Reiman NAT's conduit or the person who deals

3 with the Tribe?

4 **A. Yes.**

5 **Q.** You are paying him a fee each month of \$3,000 to do

6 that?

7 **A. That's correct.**

8 **Q.** Payroll expenses of \$1,906. What do those represent?

9 **A. Those are people that work in the Internet Library,**

10 **Communications Center.**

11 **Q.** Are those Tribal members that you pay on a monthly

12 basis for their services?

13 **A. They are.**

14 **Q.** Do you know what you pay those folks an hour?

15 **A. I don't recall exactly.**

16 **Q.** Do you have a ballpark? Do they get paid by the hour?

17 **A. Yes.**

18 **Q.** What's a number?

19 **A. I believe it's \$10.00 an hour.**

20 **Q.** \$10.00 an hour?

21 **A. Yes.**

22 **Q.** Do you think earning a couple dollars above minimum

23 wage is reasonable?

24 **A. Yes.**

25 **MR. KNUDSON: Objection. Argumentative.**

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1 **THE COURT: Overruled. The answer will stand.**

2 **BY MR. SWIER:**

3 **Q.** Payroll tax of \$358.00. What's that?

4 **A. That's the taxes related to the payroll.**

5 **Q.** Is NAT required to pay those?

6 **A. Yes.**

7 **Q.** Or you will go to jail?

8 **A. Yes.**

9 **Q.** Postage and postal charges. How much?

10 **A. \$125.00.**

11 **Q.** Why do we need postage expenses for NAT?

12 **A. It's the P.O. box.**

13 **Q.** So you can get mail?

14 **A. So we can get mail, yes.**

15 **Q.** Is it standard in the industry for a company to have a

16 mailbox?

17 **A. Yes.**

18 **Q.** Is that a reasonable amount in your opinion?

19 **A. For a P.O. box? Yes.**

20 **Q.** Then you have professional fees of \$23,543. This is

21 the most interesting item in the whole bunch. Explain to

22 the Court what those professional fees reflect.

23 **A. Those are legal fees.**

24 **Q.** Legal fees for what?

25 **A. To help us fight everything that's going on.**

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1 **Q.** So last month, in order to maintain this litigation,

2 NAT paid your attorneys \$23,000.

3 **A. Yes.**

4 **Q.** If you don't fight this in Court, what happens to NAT?

5 **A. It goes out of business.**

6 **Q.** Do you think, based on the work you received from your

7 legal professionals, that in order to go through this case,

8 that that's a reasonable amount?

9 **A. Yes.**

10 **MR. KNUDSON: Objection. Foundation.**

11 **THE COURT: Overruled. The answer will stand.**

12 **BY MR. SWIER:**

13 **Q.** The next item is taxes, Federal taxes. I think it's

14 self-explanatory, but what is that?

15 **A. Those are the Federal taxes we have to pay.**

16 **Q.** You are required to pay those every month?

17 **A. Not every month, but every quarter.**

18 **Q.** Are those consistent?

19 **A. Yes.**

20 **Q.** Then we have \$10,765 for telephone and circuit

21 expenses. You've kind of talked about this a little bit,

22 but are those monthly expenses that are needed for NAT to

23 run?

24 **A. That's my understanding without them, you couldn't**

25 **have it.**

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1 **Q.** Based on your knowledge of the circuits, which is

2 limited, but you know what they cost, is that a reasonable

3 amount for telephone and circuit expenses?

4 **A. Yes.**

5 **Q.** We have \$720 for travel expenses. Do you know what

6 those travel expenses would be for?

7 **A. I don't know exactly, but they more likely would be**

8 **for trips to Washington, D.C.**

9 **Q.** To do what?

10 **A. Meet with the FCC and other lobbying efforts.**

11 **Q.** So, Carlos, in January of 2011, if you add all those

12 up, what are NAT's total expenses?

13 **A. \$42,000.**

14 **Q.** Where is the fat in there in your opinion?

15 **MR. KNUDSON: Objection. Argumentative.**

16 **THE COURT: Overruled. You may answer.**

17 **A. There isn't any. It's as lean as it gets.**

18 **BY MR. SWIER:**

19 **Q.** Can you not pay your attorneys?

20 **A. We want to be represented.**

21 **Q.** You want to have good counsel?

22 **A. We want the best.**

23 **Q.** Do you have to pay those telephone and circuit

24 expenses?

25 **A. Absolutely.**

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1 Q. Do you think you need to pay the Federal taxes?

2 A. Yes.

3 Q. Do you need to pay the company that collects your

4 bills for you?

5 A. Yes.

6 Q. Why?

7 A. **If they didn't bill, we wouldn't have any chance of**

8 **collecting.**

9 Q. You're not getting paid, anyway.

10 A. **We're not getting paid, but they still need to get**

11 **billed.**

12 Q. Carlos, Mr. Knudson asked you questions about the

13 loans that have been made from WideVoice Communications to

14 NAT. Is that correct?

15 A. Yes.

16 Q. What have been the total amount of those loans as of

17 today's date?

18 A. **Total amount that they've lent?**

19 Q. Yes.

20 MR. KNUDSON: Objection. I think this is

21 ambiguous. Are we talking about total lent or current

22 balance outstanding?

23 MR. SWIER: I'll clarify.

24 THE COURT: Rephrase.

25 BY MR. SWIER:

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1 Q. What is the outstanding debt that NAT owes to

2 WideVoice?

3 A. **About \$395,000.**

4 Q. That's as of today?

5 A. **As of today.**

6 Q. And you've indicated that based on the conversations

7 you've had with your bosses, that WideVoice, because of

8 their financial status, is now going to discontinue

9 payments or loans to NAT?

10 MR. KNUDSON: Objection. Hearsay.

11 THE COURT: Sustained.

12 BY MR. SWIER:

13 Q. Carlos, what's your understanding of WideVoice's

14 future intentions regarding loans to NAT?

15 MR. KNUDSON: Same objection.

16 THE COURT: Overruled. You may answer.

17 A. **They've indicated they are no longer going to fund NAT**

18 **if they lose this.**

19 MR. KNUDSON: Your Honor, I still object. This

20 is clearly based on hearsay. Move to strike.

21 THE COURT: Overruled. The answer will stand.

22 BY MR. SWIER:

23 Q. Based on your familiarity with WideVoice's financial

24 statements, based on your experience, is that a reasonable

25 financial decision for WideVoice?

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1 MR. KNUDSON: Also speculation.

2 A. Yes.

3 THE COURT: Overruled. The answer will stand.

4 BY MR. SWIER:

5 Q. What was the answer, Carlos?

6 A. Yes.

7 MR. SWIER: Your Honor, I don't have any further

8 questions. Thank you.

9 THE COURT: Mr. Knudson?

10 RE CROSS-EXAMINATION

11 BY MR. KNUDSON:

12 Q. Mr. Cestero, your understanding on what WideVoice

13 would or would not do is based on what other people told

14 you. Is that not correct?

15 A. **Amongst other conversations I was made a part of.**

16 Q. You are not a decision-maker of WideVoice. Correct?

17 A. **I am not.**

18 Q. So whatever WideVoice intends to do is something

19 somebody else told you. Correct?

20 A. **It's what I've heard, and that's my understanding of**

21 **it.**

22 Q. There's no fixed plan to do anything at this point in

23 time. Is there?

24 A. **I can't predict the future.**

25 Q. So you are speculating on what WideVoice might do.

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1 Right?

2 A. **It's my understanding what would happen.**

3 Q. You can't predict the future, so you are just guessing

4 about what would happen. Correct?

5 A. **It's an educated guess.**

6 Q. But still a guess, though. Right?

7 A. Yes.

8 Q. Okay. Let's go back to Plaintiff's Exhibit D. I'll

9 direct your attention to payroll expenses. You can look at

10 it on the screen.

11 I will take your answer that the people, the four

12 employees NAT has on the Reservation are paid about \$10.00

13 an hour. Are you with me on that?

14 A. Yes.

15 Q. I think this is pretty easy arithmetic here. If you

16 divide 10 into \$1,906, how many hours of work would you get

17 out of that if you are paying \$10.00 an hour?

18 A. **How many hours?**

19 Q. Yes.

20 A. **Nineteen?**

21 Q. You are an accountant.

22 A. **That was basic. I'm sorry. What was the question?**

23 **If I divided by 10?**

24 Q. Let me rephrase the question.

25 THE COURT: 190.

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1 **A. 190.**

2 **BY MR. KNUDSON:**

3 **Q.** If you pay \$10.00 an hour and your total payroll

4 expense is \$1,906, how many hours of work did you purchase

5 for \$1,906?

6 **A. I'm sorry. I'm not doing the math in my head. I**

7 **apologize.**

8 **Q.** Would you agree it's 190 hours?

9 **A. Yes.**

10 **Q.** So for the month of January the amount of payroll

11 expenses, that's for the four people at the Internet Cafe

12 on the Reservation, came to \$1,900. That's 190 hours of

13 work. Are you with me on that?

14 **A. Yes.**

15 **Q.** You would agree with that statement?

16 **A. Yes. It's not necessarily just hourly. It's also**

17 **other expenses that go in.**

18 **Q.** In other words, there may be some incidental expenses

19 that are not wages?

20 **A. Well, let me retract that. That would be -- that**

21 **specific line item would be for payroll, for hours. Yes.**

22 **Q.** You bought 190 hours worth of work in January.

23 Correct?

24 **A. Yes.**

25 **Q.** Are you aware that South Dakota Network has a tariff?

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1 MR. SWIER: Objection. Beyond the scope of

2 cross-examination.

3 MR. KNUDSON: No, not at all.

4 MR. SWIER: Let me make my objection, please.

5 Your Honor, I would object as that being beyond the scope

6 of my redirect. We never talked about South Dakota Network

7 on redirect.

8 THE COURT: Mr. Knudson?

9 MR. KNUDSON: South Dakota Network came up both

10 in direct and cross. Also, it was raised and opened the

11 door when he started talking about circuit expenses on his

12 redirect.

13 THE COURT: I think that it is included in

14 circuit expenses, so it was discussed in redirect. So the

15 objection is overruled.

16 **BY MR. KNUDSON:**

17 **Q.** Are you aware that South Dakota Network has a tariff

18 by which it charges circuit expenses per minute of use to

19 NAT?

20 MR. SWIER: Objection. Irrelevant.

21 THE COURT: Overruled.

22 **A. I'm not exactly sure how they are tied in.**

23 **BY MR. KNUDSON:**

24 **Q.** If South Dakota Network charges NAT per minute of use,

25 then the charges South Dakota Network submits to NAT would

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1 vary by the amount of minutes of use. Correct?

2 **A. I don't know.**

3 **Q.** Well, try my question.

4 MR. SWIER: Objection, Your Honor. Asking for

5 speculation. He's testified he doesn't know.

6 **A. Yeah, don't know.**

7 THE COURT: Sustained.

8 **A. I'm not a circuits expert.**

9 THE COURT: Just a minute. I sustained the

10 objection. Ask a new question.

11 **BY MR. KNUDSON:**

12 **Q.** If South Dakota Network charges per minute of usage.

13 Are you with me there?

14 **A. Yes.**

15 **Q.** And the amount, that means the amount South Dakota

16 Network charges NAT, varies by the minutes of usage.

17 Correct?

18 MR. SWIER: Objection. It's been asked, and he

19 indicated he doesn't know the answer.

20 THE COURT: Sustained.

21 **BY MR. KNUDSON:**

22 **Q.** So you're unaware whether or not South Dakota Network

23 has a tariff in place for minutes of use charged to NAT.

24 Correct?

25 MR. SWIER: Objection. Asked and answered.

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1 THE COURT: Overruled. You may answer.

2 **A. I don't know.**

3 **BY MR. KNUDSON:**

4 **Q.** Do you know if anybody at NAT has gone to South Dakota

5 Network to try to get a lower price on the circuit service

6 South Dakota Network charges?

7 **A. I don't know.**

8 **Q.** Now, this P&L for January 2011, that's a cash basis

9 again. You indicated even though, in fact, AT&T had paid

10 you \$150,000 in January, you received a check from your

11 billing agent in January. Right?

12 MR. SWIER: Objection, Your Honor. Beyond the

13 scope of redirect.

14 THE COURT: Overruled. It was an area that I

15 went into. So both parties can go into anything that I

16 brought up in my questioning. So it's proper. You can go

17 ahead.

18 **A. Ask the question. I'm sorry.**

19 **BY MR. KNUDSON:**

20 **Q.** AT&T paid NAT \$150,000 in January. Correct?

21 **A. We received the payment in January.**

22 **Q.** You received the payment. So you had the funds

23 available as soon as you deposited it into the bank.

24 Right?

25 **A. It's not available until you deposit it into the bank.**

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1 Q. So your cash basis method of accounting is when it
 2 goes into the bank. Right?

3 A. Right.

4 Q. But then the operating profit, if I understand, for
 5 February, there would have been \$150,000 minus this
 6 approximately \$40,000 in monthly expenses. Correct?

7 A. It would have been, but we would have had to pay
 8 \$140,000 back to WideVoice.

9 Q. That's a different question in issue. The operating
 10 profit, before paying off a loan, correct, would have been
 11 \$110,000?

12 A. Sure.

13 Q. And NAT could have kept that \$110,000 in its bank
 14 account. Correct?

15 A. They could have, but it needed it. WideVoice needed
 16 the money.

17 Q. Is there any term or condition of a Loan Agreement
 18 between WideVoice and NAT that required payment in
 19 February?

20 MR. SWIER: Objection, Your Honor. Again, beyond
 21 the scope, I believe, of everyone's redirect, and it's been
 22 asked and answered previously on cross.

23 THE COURT: Overruled. You may answer.

24 A. Can you re-ask the question?

25 MR. KNUDSON: Let's have it read back.

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1 (The requested portion of the record was read by the
 2 reporter.)

3 A. Is there any term or condition that required payment?
 4 BY MR. KNUDSON:

5 Q. Yes.

6 A. I don't know.

7 Q. So if AT&T pays in March, you don't know whether or
 8 not NAT would keep that money, do you?

9 MR. SWIER: Objection. Speculation.

10 THE COURT: Overruled. You may answer.

11 A. If AT&T pays?
 12 BY MR. KNUDSON:

13 Q. In March.

14 A. Would what now?

15 Q. If AT&T pays NAT in March, you don't know whether NAT
 16 would keep that money. Do you?

17 A. I don't.

18 MR. KNUDSON: No further questions.

19 THE COURT: Mr. Swier? Anything?

20 FURTHER REDIRECT EXAMINATION

21 BY MR. SWIER:

22 Q. Carlos, if Sprint or AT&T, or whatever carrier, would
 23 be willing to pay you and guarantee you payment of \$150,000
 24 until the end of these lawsuits, would that be okay with
 25 NAT?

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1 A. That would be perfectly fine with NAT.

2 Q. And you've received one of those payments in the last
 3 month?

4 A. Yes.

5 Q. You have not received any other payment, when it
 6 should have already been received, if they were going to
 7 continue payments. Right?

8 MR. KNUDSON: Objection.

9 A. Right.

10 THE COURT: Based on?

11 MR. KNUDSON: "Should have." That means
 12 foundation. They haven't established when the payments are
 13 due.

14 THE COURT: Sustained.

15 BY MR. SWIER:

16 Q. Carlos, are you familiar with when you receive
 17 switched access payments from AT&T?

18 A. Yes.

19 Q. Have you received a switched access payment from AT&T
 20 within the last few days?

21 A. No.

22 Q. Based on their standard of conduct, if they were going
 23 to continue to pay that amount, would NAT have received the
 24 check by now?

25 A. Yes.

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1 MR. KNUDSON: Objection. Foundation.

2 THE COURT: Overruled. The answer will stand.

3 MR. SWIER: Thank you. I don't have anything
 4 further, Your Honor.

5 THE COURT: Mr. Knudson? Anything?

6 MR. KNUDSON: Nothing, Your Honor.

7 THE COURT: You can be excused. Thanks.
 8 (Witness excused)

9 THE COURT: We'll take a lunch break. But I'm
 10 wondering how we're doing on timing for today. Mr. Swier,
 11 how many more witnesses do you have?

12 MR. SWIER: Your Honor, it really will depend a
 13 little bit on what the Court would like to do.

14 Mr. Lengkeek, during our October 14 preliminary injunction
 15 hearing, did testify substantially under oath, and I
 16 believe under the Rules, the Court is well within its right
 17 to take judicial notice of his prior testimony and apply it
 18 to the facts in this case.

19 If the Court would be willing to do that, then
 20 Mr. Lengkeek's remaining testimony would be very brief,
 21 like 10 or 15 minutes. If the Court would not take notice
 22 of that, then we would probably have a couple hours. For
 23 expediency sake, we're fine if the Court wants to just
 24 review his prior testimony. It will be similar, if we put
 25 him on the stand.

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1 THE COURT: Mr. Knudson, any objection to me?

2 doing that?

3 MR. KNUDSON: None, Your Honor. Do I understand

4 you would still intend to call Mr. Lengkeek?

5 MR. SWIER: If the Court takes judicial notice,

6 I'm going to decide over the noon hour if I need to call

7 him.

8 MR. KNUDSON: I would still want to cross him. I

9 don't have much, maybe 10 minutes.

10 MR. SWIER: Well, if I don't call him as a

11 witness, there's no cross.

12 THE COURT: He can call him himself in his case

13 in chief.

14 MR. KNUDSON: In terms of our testimony, we have

15 Amy Clouser here to testify. We could reach an

16 understanding as to what she would say. There's an exhibit

17 that she would lay the foundation for, which basically

18 establishes the minutes of usage attributable to Sprint's

19 Call Detail Record database. In other words, it's the same

20 thing she said in her Affidavits three times, that based on

21 the Call Detail Records that Sprint maintains, in the case

22 of December 2010, 99.94 percent of the usage that Sprint

23 records went to conference calling numbers. That's what

24 her testimony would establish. We could take the exhibit,

25 if they would stipulate to it, and that would support her

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1 testimony, which is in already by way of Affidavit.

2 THE COURT: My only question was if we were going

3 to get finished today.

4 MR. KNUDSON: I understand. That's in an effort

5 to move it along.

6 THE COURT: I would just as soon hear from her in

7 person than trying to understand the Affidavits on what is

8 a pretty technical area.

9 MR. KNUDSON: Absolutely. I understand.

10 THE COURT: With regard to Mr. Lengkeek, I will

11 take judicial notice, since there hasn't been an objection

12 from the other side. I'll leave it up to either of you if

13 you want to call him for anything in addition to what he

14 previously testified to.

15 MR. SWIER: Your Honor, I will call him briefly.

16 THE COURT: Okay. Then let's take a recess until

17 1:15. We'll see you back here then.

18 (Noon recess at 12:10 until 1:15)

19 THE COURT: Mr. Swier, you may call your next

20 witness.

21 MR. SWIER: Thank you, Your Honor. NAT would

22 call Peter Lengkeek.

23 Your Honor, thank you for taking judicial of that

24 testimony. It will save us time.

25

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1 PETER LENGKEEK,

2 called as a witness, being first duly sworn, testified as

3 follows:

4 DIRECT EXAMINATION

5 BY MR. SWIER:

6 Q. Peter, would you please introduce yourself to the

7 Court?

8 A. My name is Peter James Lengkeek.

9 Q. Would you spell your last name for us, please?

10 A. L-E-N-G-K-E-E-K.

11 Q. Peter, do you live in Ft. Thompson on the Crow Creek

12 Sioux Tribe Reservation?

13 A. Yes.

14 Q. Peter, share with us your educational background,

15 please.

16 A. I graduated from high school in 1991 in Chamberlain,

17 South Dakota, and picked up a few other credits while I was

18 in the Marine Corps.

19 Q. After graduating from Chamberlain High School in 1991,

20 what did you do?

21 A. I went into the Marine Corps shortly afterwards.

22 Q. How long were you in the Marine Corps?

23 A. Six years.

24 Q. What was your highest rank in the Marine Corps?

25 A. E-5 Sergeant.

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1 Q. What type of things, Peter, did you do as an E-5

2 Sergeant in the Marine Corps?

3 A. I was a Platoon Sergeant. I was responsible for

4 between 60 and 80 Marines.

5 Q. How long did you serve as an E-5, Peter?

6 A. The final year, one year.

7 Q. You served six years in the Marines?

8 A. Yes, sir.

9 Q. Were you honorably discharged?

10 A. Yes.

11 Q. You did your duty.

12 A. Yes.

13 Q. Peter, after you were discharged from the Marine

14 Corps, what did you do?

15 A. I worked road construction with a couple different

16 outfits that come into the area, and we built roads. Did

17 some guiding for hunters and fishermen. Then got a job

18 with the United Methodist Church as a volunteer group

19 construction manager.

20 Q. Peter, who is your current employer?

21 A. The Crow Creek Sioux Tribe.

22 Q. What position do you have with the Tribe?

23 A. I am the Treasurer of the Tribe.

24 Q. Is that an elected position?

25 A. Yes, by the people.

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1 Q. When did the people of the Crow Creek Tribe elect you
 2 to the Treasurer position?
 3 A. **Oh, about nine months ago, I suppose.**
 4 Q. Coming up on that one-year anniversary?
 5 A. **Yes.**
 6 Q. Do you like it?
 7 A. **Yes.**
 8 Q. Peter, what are your duties as the Treasurer of the
 9 Tribe?
 10 A. **Safeguarding the funds of the Tribe, along with many,**
 11 **many, many other hats that I wear as a Tribal leader.**
 12 Q. Describe for us what the makeup of the Tribal Council
 13 is.
 14 A. **It is made up of seven elected officials that make up**
 15 **the governing body of the Crow Creek Sioux Tribe, one**
 16 **Chairman and six Councilmen. Myself and three other**
 17 **Councilmen represent the Ft. Thompson District of the**
 18 **Reservation, one other Councilman represents the Big Bend**
 19 **District, and one Councilman represents the Crow Creek**
 20 **District.**
 21 Q. Are all seven of those members of the Council elected
 22 amongst the people?
 23 A. **Yes.**
 24 Q. How long is your term, Peter, as an elected Treasurer?
 25 A. **Two years.**

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1 Q. So you are about halfway through?
 2 A. **Yes.**
 3 Q. Peter, are you familiar with the Crow Creek Sioux
 4 Tribe's Tribal Utility Authority?
 5 A. **Yes.**
 6 Q. Do you know when the Tribal Utility Authority started?
 7 A. **I think it began in 1997.**
 8 Q. Well before you were a Council member.
 9 A. **Yes.**
 10 Q. Do you know what the purpose was or purpose is with
 11 the Tribal Utility Authority?
 12 A. **Basically to oversee all utility functions on the**
 13 **Reservation.**
 14 Q. Kind of self-explanatory.
 15 A. **Exactly.**
 16 Q. Now, Peter, are you a member of the Tribal Utility
 17 Authority?
 18 A. **No.**
 19 Q. You are just a member -- you are one of the seven
 20 elected members of the Council?
 21 A. **Yes.**
 22 Q. The Council, are they the governmental entity that
 23 oversees the affairs of the Tribe?
 24 A. **Yes.**
 25 Q. Peter, are you familiar with Native American Telecom,

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1 LLC?
 2 A. **Yes, sir.**
 3 Q. Will you share with the Court what your understanding
 4 is of NAT?
 5 A. **It's basically a phone company.**
 6 Q. Where is it based?
 7 A. **They are on the Reservation in Ft. Thompson.**
 8 Q. What is your understanding as to the ownership
 9 structure of NAT?
 10 A. **The Crow Creek Sioux Tribe owns 51 percent of NAT, and**
 11 **WideVoice owns 24 percent, and Native American Telecom**
 12 **Enterprise owns 25 percent.**
 13 Q. But the Tribal entity is the majority shareholder. Is
 14 that right?
 15 A. **Yes.**
 16 Q. Who serves as the Tribal representative on NAT's Board
 17 of Directors?
 18 A. **Myself, Eric Big Eagle, and Shannon Shields.**
 19 Q. How long has Miss Shields been a board member of NAT,
 20 if you know?
 21 A. **About the same time I -- we all got on there about the**
 22 **same time, maybe late October, early November.**
 23 Q. Of what year?
 24 A. **2010.**
 25 Q. So you've served on the NAT Board for five or six

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1 months?
 2 A. **Something like that, yes.**
 3 Q. Enjoy your service so far?
 4 A. **Yes. Learning a lot.**
 5 Q. It's your understanding that the other members of the
 6 Board are made up of WideVoice and Native American Telecom
 7 Enterprise representatives?
 8 A. **Yes.**
 9 MR. KNUDSON: Objection. Leading.
 10 THE COURT: Overruled.
 11 BY MR. SWIER:
 12 Q. Peter, how did you become a Board member of NAT?
 13 A. **We were pretty much appointed by the Council members,**
 14 **by the rest of the Council.**
 15 Q. Didn't have a choice?
 16 A. **Something like that, but I also volunteered to sit**
 17 **there, also.**
 18 Q. Describe for the Court what your role as a NAT Board
 19 member is.
 20 A. **I am there to look out for the best interests of the**
 21 **Tribe.**
 22 Q. And as a Tribal-elected Treasurer, do you take that
 23 role seriously?
 24 A. **Very.**
 25 Q. Do you think you, based on your experience and

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1 position, are qualified to play that role?

2 **A. Yes.**

3 **Q.** Peter, before you became a Board member of NAT, what

4 did you know about telecom?

5 **A. Nothing.**

6 **Q.** Before you became an NAT Board member, what did you

7 know about switched access fees?

8 **A. Nothing.**

9 **Q.** Do you know a little bit about it now?

10 **A. A little more than I did then.**

11 **Q.** You heard earlier that Jeff Holoubek currently serves

12 as the President of NAT. Is that right?

13 **A. Yes.**

14 **Q.** And you know Mr. Holoubek?

15 **A. Yes.**

16 **Q.** Even though the Tribe is majority owner of NAT, are

17 you okay with Mr. Holoubek currently serving as President

18 of NAT?

19 **A. Yes.**

20 **Q.** Why?

21 **A. He has a high knowledge in that field. He's very**

22 **experienced.**

23 **Q.** So as somewhat the guardian for the Tribe, you are

24 okay with Mr. Holoubek?

25 **A. Yes.**

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1 **Q.** Peter, you said you served on the Board for five or

2 six months.

3 **A. Yes.**

4 **Q.** Do you have a general idea of NAT's finances?

5 **A. A general idea, yes.**

6 **Q.** Based on your knowledge, do your other Board members

7 have an idea what NAT's finances are?

8 **A. Yes.**

9 MR. KNUDSON: Objection. Foundation.

10 THE COURT: Overruled.

11 **A. Yes.**

12 **BY MR. SWIER:**

13 **Q.** At this point, as the Treasurer for the Tribe, are you

14 comfortable with the level of knowledge you have about the

15 financials and how things work?

16 **A. Yes.**

17 **Q.** Earlier today Mr. Knudson brought up the fact that NAT

18 so far has generated and received a little bit over a

19 million dollars in revenue. Is that right?

20 **A. Yes.**

21 **Q.** And you were aware, at least generally, of that

22 number?

23 **A. Yes.**

24 **Q.** Peter, are you familiar with how businesses work?

25 **A. Yes.**

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1 **Q.** Do new businesses always have start-up expenses?

2 **A. Yes.**

3 **Q.** Has NAT had start-up expenses?

4 **A. Yes.**

5 **Q.** The start-up expenses that NAT so far has spent, is it

6 true that a majority, if not all, has been either the

7 switched access fees you were temporarily receiving, or

8 through loans from one of your partners, WideVoice?

9 **A. Yes.**

10 **Q.** If NAT hadn't received those loans from WideVoice,

11 would NAT have been able to survive this long?

12 MR. KNUDSON: Objection. Foundation.

13 THE COURT: Overruled. You may answer.

14 **A. No.**

15 **BY MR. SWIER:**

16 **Q.** They kept you afloat?

17 **A. Yes.**

18 **Q.** Peter, you've seen the financials and all the various

19 charges. Based on your experience, and, again, as the

20 Treasurer for the Tribe, do you believe those start-up

21 expenses are reasonable?

22 MR. KNUDSON: Objection. Foundation.

23 THE COURT: Overruled. You may answer.

24 **A. Yes.**

25 **BY MR. SWIER:**

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1 **Q.** Did it cause you any heartburn?

2 **A. No.**

3 **Q.** You have to spend money to make money?

4 **A. Yes, sir.**

5 **Q.** Peter, are you familiar with the Marketing Fee

6 Agreement between Native American Telecom and

7 FreeConferenceCall?

8 **A. I haven't seen the agreement personally, but I know**

9 **there is one.**

10 **Q.** Do you know who would have signed that agreement?

11 **A. I believe our current -- our previous Chairman at the**

12 **time and Mr. Erickson.**

13 **Q.** Who is that? I'm sorry, who was your previous

14 Chairman that signed the contract?

15 **A. Brandon Sazue.**

16 **Q.** And Mr. Sazue is no longer your Chair?

17 **A. No.**

18 **Q.** Who is your current Chairman?

19 **A. Mr. Duane Big Eagle.**

20 **Q.** And it's your understanding the contract was signed

21 between then Chairman Sazue and who else?

22 **A. Mr. Erickson.**

23 MR. KNUDSON: Objection. I'm confused. Are they

24 saying this is an agreement between the Tribe and

25 FreeConference, or is it an agreement between NAT and

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1 FreeConference? I don't think it's been established which
 2 it is.
 3 THE COURT: Mr. Swier, if you could clarify that.
 4 BY MR. SWIER:
 5 Q. Peter, is this an agreement between Native American
 6 Telecom and FreeConferenceCall?
 7 A. **Native American Telecom and FreeConferenceCall.**
 8 Q. And you said Mr. Sazue signed the agreement on behalf
 9 of Native American Telecom?
 10 A. **As our Chairman.**
 11 Q. And Mr. Erickson signed the agreement on behalf of
 12 FreeConferenceCall?
 13 A. **Yes.**
 14 Q. Peter, what's your understanding of that Marketing Fee
 15 Agreement between Native American Telecom and
 16 FreeConferenceCall? How does it work?
 17 A. **My understanding of it is that NAT gets 25 percent of**
 18 **the gross, and 75 percent goes to FCC.**
 19 Q. Do you know why FCC gets that 75 percent, and the
 20 Tribe receives 25 percent of the gross?
 21 MR. KNUDSON: Objection. Misstates what the
 22 agreement says.
 23 THE COURT: Overruled.
 24 MR. KNUDSON: No, Your Honor. It's not the Tribe
 25 that gets the 25 percent.

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1 THE COURT: That's an area for cross-examination.
 2 Overruled. The answer will stand.
 3 MR. SWIER: I'll clarify.
 4 BY MR. SWIER:
 5 Q. Native American Telecom receives 25 percent of the
 6 gross revenue. Correct?
 7 A. **Yes.**
 8 Q. And the Crow Creek Sioux Tribe owns how much of Native
 9 American Telecom?
 10 A. **51 percent.**
 11 Q. Thank you. Peter, now that you know about the
 12 financial situation and these agreements, again, as the
 13 Treasurer for the Tribe, are you comfortable with the terms
 14 of that agreement?
 15 A. **Yes.**
 16 Q. Do you want to keep that relationship you have between
 17 your partners, WideVoice and Native American Telecom
 18 Enterprises?
 19 A. **Yes.**
 20 Q. Is it a good deal for the Tribe?
 21 A. **I believe so.**
 22 MR. KNUDSON: Objection. Speculation.
 23 THE COURT: Overruled.
 24 BY MR. SWIER:
 25 Q. Is it a good deal for the Tribe?

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1 A. **Yes.**
 2 Q. Do you want to keep your relationship that you have
 3 do you want to keep NAT's relationship with
 4 FreeConferenceCall?
 5 A. **Yes.**
 6 Q. Why?
 7 A. **Well, if it wasn't for FreeConferenceCall, there**
 8 **really wouldn't be a NAT.**
 9 Q. Because --
 10 A. **Because of the world marketing they do, and they do**
 11 **all the work.**
 12 Q. So without FCC, zero percent of zero would be zero.
 13 Is that right?
 14 A. **Exactly.**
 15 Q. Peter, you touched on this previously back in October,
 16 but I want to have you update the Court on NAT's efforts on
 17 the Reservation.
 18 A. **Okay.**
 19 Q. Share with the Court the benefits that NAT provides to
 20 your Tribal members.
 21 A. **There's a number of different benefits. Because of**
 22 **the poverty there and the close to 90 percent unemployment,**
 23 **a lot of our people cannot provide a phone or pay for a**
 24 **phone. Because of NAT, you know, them services are**
 25 **available, also with the Internet.**

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1 Q. Let's talk about that. Describe for the Judge the
 2 facility, the Internet facility that NAT has built on the
 3 Reservation.
 4 A. **Are you talking the Internet Library?**
 5 Q. Yes, the Internet Library, the Internet Cafe. They're
 6 interchangeable.
 7 A. **Yes.**
 8 Q. Talk about that. Describe that for us.
 9 A. **It's an office in a Tribal administration building**
 10 **that NAT refurbished. Provided probably -- I can't**
 11 **remember the exact number -- maybe seven or eight computers**
 12 **with a couple printers and monitors, seven or eight**
 13 **monitors. It's free to the public. Anybody can come in**
 14 **there and get access to the computer and do whatever they**
 15 **need to do in there. There's always somebody there.**
 16 **Sometimes there's people waiting in line to get on there.**
 17 Q. Before NAT built that Internet Library, did anything
 18 like that exist on the Reservation?
 19 A. **No.**
 20 Q. Did Sprint ever make efforts to put that type of
 21 infrastructure at the Reservation?
 22 MR. KNUDSON: Objection. Irrelevant.
 23 THE COURT: Sustained.
 24 BY MR. SWIER:
 25 Q. Are there any more physical structures that NAT has

1 built for the Tribe and its members?
 2 **A. Yes. There is a Learning Center there that was almost**
 3 **completely refurbished.**
 4 **Q.** What did it used to be, Peter? What did the shell of
 5 the building used to be?
 6 **A. It used to be the old ambulance building, and the**
 7 **ambulance moved out of there, and it became a regular**
 8 **storage facility.**
 9 **Q.** What has NAT taken with that old building and done
 10 with it?
 11 **A. They completely refurbished it, the outside and**
 12 **inside. They are turning it into a Learning Center where**
 13 **people can have access to online classes and get their GED**
 14 **through there. They can learn computer technical skills**
 15 **and a number of other things.**
 16 **Q.** Before NAT, were those opportunities ever available on
 17 the Reservation?
 18 **A. No.**
 19 **Q.** Peter, I want to talk about the Learning Center. Did
 20 the Learning Center -- was the Learning Center going to
 21 open a few months ago?
 22 **MR. KNUDSON:** Objection, Your Honor. This is all
 23 prior testimony now.
 24 **MR. SWIER:** Your Honor, if I may.
 25 **THE COURT:** Overruled. You may answer.

1 **Q.** Describe how the facilities provided by NAT have
 2 assisted your Tribal artisans.
 3 **A. Some of the people have been able to sell their**
 4 **artwork online there in various parts of the country and**
 5 **maybe around the world.**
 6 **Q.** Before NAT came, were those opportunities available to
 7 your tribal members?
 8 **A. Very few. Very few.**
 9 **Q.** This has made it much better for them?
 10 **A. Yes, a lot easier.**
 11 **Q.** Peter, talk about from an emergency communications
 12 perspective. How have NAT's efforts assisted the Tribe and
 13 its members with emergency services?
 14 **A. There's probably 115 installations of the free phone**
 15 **service and free Internet service. I'll give you one**
 16 **instance of how that helped here recently.**
 17 **Right now my Reservation is in the middle of a suicide**
 18 **epidemic. I got a call -- because of the recent suicide**
 19 **epidemic, myself and concerned community members of the**
 20 **Reservation there formed a Suicide Prevention Committee.**
 21 **About two weeks ago I got a call about 2:30 in the**
 22 **morning from a young gentleman who was contemplating**
 23 **suicide. He called me on one of those phones.**
 24 **Q.** On one of NAT's phones?
 25 **A. Yes. Before that I don't believe they were able to**

1 **A. From what I understand or what I remember, it was**
 2 **supposed to open in October, but since Sprint hasn't paid**
 3 **their bills, it's kind of in limbo right now.**
 4 **BY MR. SWIER:**
 5 **Q.** There's no money to pay to open?
 6 **A. No.**
 7 **Q.** Peter, I want to talk about NAT's efforts and how
 8 they've assisted with economic development on the
 9 Reservation. Can you explain that to the Court, please?
 10 **A. They are actually one of the employers of the**
 11 **Reservation. There aren't very many employers there as it**
 12 **is. But over the summer when they were doing installations**
 13 **of the free phone service, free Internet service, I think**
 14 **they employed a total of maybe 10 people for a couple**
 15 **months there in the summer. They were local enrolled**
 16 **members, with the instruction of Tom Reiman and his son,**
 17 **who was training our people on how to install these. I**
 18 **think currently there is a total of four employees that**
 19 **help oversee the Internet Library.**
 20 **Q.** Before NAT made these efforts on the Reservation, had
 21 that ever happened before?
 22 **A. No.**
 23 **Q.** Peter, I know you are proud of your people being very
 24 good artisans. Correct?
 25 **A. Yes.**

1 **afford a phone. I got up and got out of bed and rushed**
 2 **over there and prayed with him and talked with him. Pretty**
 3 **much talked him out of doing what he was trying to do.**
 4 **Q.** You were successful?
 5 **A. Yes. But then there's some of our people, you know,**
 6 **they are able to call the ambulance service, the police**
 7 **station, and any other emergency facility there on the**
 8 **Reservation.**
 9 **Q.** Before NAT, were those type of services available to
 10 your members?
 11 **A. Very few.**
 12 **Q.** When you say "very few," why is that?
 13 **A. Because of the poverty there. It's hard to pay the**
 14 **phone bills or pay any bills, as a matter of fact.**
 15 **Q.** Because of the poverty on the Reservation, it would be
 16 extremely difficult for most of your members to pay a
 17 standard Verizon cell phone fee?
 18 **A. Yes.**
 19 **Q.** Would it be difficult, if not impossible, for your
 20 members to afford a Sprint cell phone package?
 21 **A. Yes.**
 22 **MR. KNUDSON:** Objection. Foundation.
 23 **THE COURT:** Overruled.
 24 **A. Yes.**
 25 **BY MR. SWIER:**

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1 Q. Would it be difficult for your members to afford
 2 really any type of commercial cell phone package?
 3 A. Yes.
 4 Q. So what role does NAT then, to fill that gap, what
 5 role do they play?
 6 A. In a lot of instances they play a big role, because
 7 it's a free phone service.
 8 Q. And that's subsidized by NAT?
 9 A. Yes.
 10 Q. As Treasurer of the Council and a Board member of NAT,
 11 do you think that's a reasonable expenditure of funds?
 12 A. Yes.
 13 Q. Peter, you indicated the makeup of NAT's Board is the
 14 Tribe as majority owner and two privately held companies,
 15 WideVoice and Native American Telecom Enterprise. Is that
 16 right?
 17 A. Yes.
 18 Q. Before NAT, describe for the Court the level of Tribal
 19 and private entity partnerships that occurred on the
 20 Reservation.
 21 MR. KNUDSON: Objection. This is definitely from
 22 prior testimony. Cumulative.
 23 THE COURT: Overruled. You may answer.
 24 A. I only know of one. That has to be the only grocery
 25 store there on the Reservation, between the Tribe and the

154

1 private entity.
 2 BY MR. SWIER:
 3 Q. Since NAT came on the Reservation, have there been any
 4 other opportunities like that that have arisen?
 5 A. No.
 6 Q. Peter, I think you said this before, but how many
 7 high-speed broadband and telephone installations has NAT
 8 installed on the Reservation?
 9 A. I believe right around 115.
 10 Q. Before NAT, were any of those broadband installations
 11 and telephone installations available?
 12 A. No.
 13 Q. Did Tribal members receive any type of free
 14 telecommunication services before NAT?
 15 A. No.
 16 Q. Who covers the cost of those services, Peter?
 17 A. What do you mean?
 18 Q. Who subsidizes these services for your Tribal members?
 19 A. The NAT services?
 20 Q. Yes.
 21 A. Native American Telecom.
 22 Q. Were any of those services you've described ever
 23 provided by anyone previously?
 24 A. No.
 25 Q. Peter, other than NAT, is there cell phone coverage

155

1 available on the Reservation?
 2 A. Yes.
 3 Q. But, again, why can't that be used by the majority of
 4 members?
 5 A. Because of the high unemployment rate.
 6 Q. Can people afford to pay for that commercial service?
 7 A. Most of them, no. I'm not aware of any, anyway.
 8 Q. Do you know which commercial companies provide cell
 9 coverage on the Reservation?
 10 A. I believe Alltel is the biggest one, Verizon, and
 11 maybe a little bit of AT&T.
 12 Q. Peter, are you aware of what are called Universal
 13 Service Funds or USF?
 14 A. Yes.
 15 Q. Generally are you aware of those?
 16 A. That's pretty much a government handout.
 17 Q. It's a subsidy from the government?
 18 A. Yes.
 19 Q. Let me ask you this: If the Tribe can receive
 20 subsidies for some of these services, why don't you?
 21 A. Because we want to make our own way. We're tired of
 22 handouts. Like I said in the last hearing, we're tired of
 23 standing there in front of the government with our hand
 24 out, begging for everything we need. We want to stand on
 25 our own two feet. We want financial freedom. We basically

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1 want to make our own way.
 2 Traditionally our people were highly adaptable,
 3 extremely resourceful, and extremely hard working. There's
 4 a movement across Indian Country to get back to that.
 5 Q. So if you had a choice between receiving a government
 6 handout and running a private business, what would the
 7 Tribe choose?
 8 A. We'd run a private business.
 9 Q. Peter, what's the general consensus of your members
 10 regarding NAT and its efforts?
 11 A. They are all very happy they're present there, and
 12 very fortunate to get the services that NAT provides.
 13 MR. SWIER: May I approach, Your Honor?
 14 THE COURT: You may.
 15 BY MR. SWIER:
 16 Q. Peter, I'm going to show you what has been marked
 17 Defendant's Exhibit 29. Do you see that?
 18 A. Yes.
 19 Q. I'll put that up on the screen for you. Peter, you
 20 talked earlier, just touched on it, about employment
 21 opportunities for your members through NAT. Is that
 22 correct?
 23 A. Yes.
 24 Q. And what is Exhibit 29? Can you read what it says at
 25 the top of Exhibit 29?

157	159
<p>1 A. "Jobs created by NAT."</p> <p>2 Q. Let's look at that Exhibit 29 a moment. Tell me if</p> <p>3 I'm reading this wrong. In February of 2010 it looks like</p> <p>4 NAT employed approximately two full-time employees. Is</p> <p>5 that right?</p> <p>6 A. Yes.</p> <p>7 Q. In March of 2010 it looks like about three.</p> <p>8 A. Yes.</p> <p>9 Q. Same In April, same In May. Correct?</p> <p>10 A. Yes.</p> <p>11 Q. In June it looks like we have four full-time</p> <p>12 employees. Is that right?</p> <p>13 A. Yes.</p> <p>14 Q. In July we have 10. Correct?</p> <p>15 A. Yes.</p> <p>16 Q. August, we have nine. September, it looks like we</p> <p>17 have eight. October, seven. Then as it gets colder in the</p> <p>18 winter, probably the construction jobs decrease. Is that</p> <p>19 right?</p> <p>20 A. Yes.</p> <p>21 Q. And it's your understanding that as of February 11 of</p> <p>22 2011, just a week or two ago, how many full-time employees</p> <p>23 does NAT provide on the Reservation?</p> <p>24 A. Four.</p> <p>25 Q. In terms of a private employer on the Reservation, is</p>	<p>1 the economic development impact on the Reservation. Has</p> <p>2 the Tribe or NAT hired a third-party consultant to do any</p> <p>3 type of formal economic analysis of NAT?</p> <p>4 A. No.</p> <p>5 Q. Why?</p> <p>6 A. Can't afford it.</p> <p>7 Q. As the Treasurer of the Tribe, can you see the</p> <p>8 economic advantages that NAT has provided?</p> <p>9 A. Yes.</p> <p>10 Q. Any doubt?</p> <p>11 A. No.</p> <p>12 Q. It's not coming from anywhere else?</p> <p>13 A. No.</p> <p>14 Q. Peter, you talked earlier about that the Learning</p> <p>15 Center was hopefully going to open in October of 2010.</p> <p>16 Correct?</p> <p>17 A. Yes.</p> <p>18 Q. You said it didn't open. Is that right?</p> <p>19 A. Right.</p> <p>20 Q. Do you know how many full-time jobs the Learning</p> <p>21 Center would have provided for your members?</p> <p>22 MR. KNUDSON: Objection. Foundation.</p> <p>23 THE COURT: Overruled. You may answer.</p> <p>24 A. If I remember right, six to eight.</p> <p>25 BY MR. SWIER:</p>
158	160
<p>1 anybody bigger than NAT?</p> <p>2 A. Other than the grocery store there and a gas station</p> <p>3 there that is owned by a Tribal member, no.</p> <p>4 Q. Any privately-held company, other than that one, do</p> <p>5 you have any other employment on the Reservation?</p> <p>6 A. No.</p> <p>7 Q. So anywhere from two to ten private jobs. Is that a</p> <p>8 big deal on the Crow Creek Reservation?</p> <p>9 A. It's huge.</p> <p>10 Q. There was a comment made earlier during Mr. Cestero's</p> <p>11 testimony that it looked like your members were paid</p> <p>12 approximately \$1,900 in payroll last month. Do you</p> <p>13 remember that?</p> <p>14 A. Yes.</p> <p>15 Q. I think we figured those jobs come out to about \$10 an</p> <p>16 hour. Do you remember that?</p> <p>17 A. I think so, yes.</p> <p>18 Q. Is a private job that pays your members \$10 an hour a</p> <p>19 big deal on the Reservation?</p> <p>20 A. Yes, it is.</p> <p>21 Q. Are those jobs available through anyone other than</p> <p>22 NAT?</p> <p>23 A. No, not at \$10 an hour.</p> <p>24 Q. Peter, I know you are going to get asked this</p> <p>25 question, so I'm just going to ask it. You talked about</p>	<p>1 Q. Is that full-time?</p> <p>2 A. Yes.</p> <p>3 Q. Peter, what would be the impact on your Reservation</p> <p>4 for an additional six to eight full-time privately-paid</p> <p>5 jobs?</p> <p>6 A. That would be a huge impact.</p> <p>7 Q. Has NAT done everything they told you they were going</p> <p>8 to do so far with infrastructure and buildouts and</p> <p>9 investment?</p> <p>10 A. Yes.</p> <p>11 Q. Is NAT a big deal on the Reservation?</p> <p>12 A. Yes, it is.</p> <p>13 Q. Based on the current economic conditions, is NAT</p> <p>14 irreplaceable on the Reservation?</p> <p>15 A. Yes.</p> <p>16 MR. SWIER: I don't have any further questions.</p> <p>17 Thank you.</p> <p>18 THE COURT: Mr. Knudson?</p> <p>19 MR. KNUDSON: Thank you, Your Honor.</p> <p>20 CROSS-EXAMINATION</p> <p>21 BY MR. KNUDSON:</p> <p>22 Q. Mr. Lengkeek, pleasure to see you again. We met</p> <p>23 yesterday. Do you recall?</p> <p>24 A. Yes, sir.</p> <p>25 Q. During that meeting, I took your deposition. Do you</p>

161

1 remember that?

2 **A. Yes.**

3 **Q.** In that deposition you were sworn to tell the truth.

4 Isn't that right?

5 **A. Yes.**

6 **Q.** You were sworn today to tell the truth.

7 **A. Yes, sir.**

8 **Q.** I believe you testified in response to Mr. Swier's

9 questions that NAT is based on the Reservation. Is that

10 your testimony?

11 **A. Excuse me?**

12 **Q.** I believe you testified that you understood that NAT

13 is based on the Reservation. Correct?

14 **A. Yes.**

15 **Q.** Do you understand, from listening to the prior

16 testimony of Carlos Cestero, the financial records are kept

17 in Long Beach, California?

18 **A. Yes.**

19 **Q.** And Tom Reiman, who is one of the founders of NAT,

20 lives in Sioux Falls. Correct?

21 **A. Yes.**

22 **Q.** And Mr. Gene DeJordy, another one of the founders,

23 lives out of state, as well. Correct?

24 **A. Yes, sir.**

25 **Q.** Now, do you know who the Native American Telecom

162

1 Enterprise members are on the Board of NAT?

2 **A. I believe Tom Reiman and Gene DeJordy.**

3 **Q.** They are entitled to three, aren't they? Native

4 American Telecom Enterprise is entitled to three members?

5 **A. Yes.**

6 **Q.** Who is the third member for Native American Telecom

7 Enterprise?

8 **A. I believe Native American Telecom Enterprise is**

9 **Tom Reiman and Gene DeJordy. Native American Telecom, LLC,**

10 **is myself, Eric Big Eagle, and Shannon Shields.**

11 **Q.** Doesn't the Joint Venture Agreement bringing the

12 Tribe, Enterprise, and WideVoice together call for a Board

13 of nine members?

14 **A. Yes.**

15 **Q.** So DeJordy and Reiman are entitled to another member

16 on the Board. Are they not?

17 **A. To tell you the truth, I believe I've only seen their**

18 **names on there for Enterprise.**

19 **Q.** Now, you were asked a little bit how comfortable you

20 are with Jeff Holoubek running NAT today. Right?

21 **A. Yes.**

22 **Q.** Now, isn't it true, when I took your deposition, that

23 you didn't recognize Mr. Holoubek when you saw him?

24 **A. No. That's the first time I met him face to face**

25 **yesterday.**

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1 **Q.** You only talked to him on the phone?

2 **A. Yes, sir.**

3 **Q.** So I believe you also testified yesterday, with

4 respect to the Learning Center that Mr. Swier just

5 inquired, that you, in fact, have never seen the building.

6 Have you?

7 **A. I've seen the outside of it. I haven't walked up and**

8 **looked on the inside.**

9 **Q.** Didn't you testify you hadn't been inside the Learning

10 Center?

11 **A. Yes, that's what I just said. I haven't been inside**

12 **of it.**

13 **Q.** So since you've become a Board member of NAT, you've

14 never gone inside the Learning Center?

15 **A. No. It hasn't been opened yet.**

16 **Q.** You haven't gone inside to see the status of the

17 construction. Have you?

18 **A. No.**

19 **Q.** Before you became a Board member, I think you

20 testified the other two Board members of NAT from the Tribe

21 also joined on in November of 2010?

22 **A. Yes.**

23 **Q.** Before that, who were the Tribal members on the Board

24 of NAT?

25 **A. I don't know who was on before that.**

164

1 **Q.** You don't know who you replaced?

2 **A. No.**

3 **Q.** I think you testified that Midstate Communications

4 provides services to the Crow Creek Reservation. Correct?

5 **A. Yes, sir.**

6 **Q.** That's a traditional land line?

7 **A. Yes, sir.**

8 **Q.** In fact, I believe you testified they provide kind of

9 a lifeline service to the Reservation?

10 **A. Yes.**

11 **Q.** They can get services as low as five dollars a month?

12 **A. For the elders with disabilities or sicknesses.**

13 **Q.** And also people who are in poverty, as well?

14 **A. That's not my understanding of it.**

15 **Q.** When I asked you about Universal Service Funding

16 yesterday, you testified you never heard of the term

17 before. Isn't that true?

18 **A. True.**

19 **Q.** So, likewise, since you hadn't heard of it before, no

20 one at NAT had ever recommended that Tribal members apply

21 for Universal Service Funding. Correct?

22 **A. Say that again.**

23 **Q.** Well, since you hadn't heard of Universal Service

24 Funding before, is it also fair to say you never heard

25 anyone from NAT recommend that Tribal members apply for

165

1 Universal Service Funding support?

2 **A. Yes.**

3 **Q.** And are you aware you can get subsidized telephone

4 service through Universal Service Funding from Verizon

5 Wireless?

6 **A. I wasn't aware of that.**

7 **Q.** Do you know how much it costs to purchase services

8 from Sprint?

9 **A. No.**

10 **Q.** Do you know how much it would cost to purchase

11 services from AT&T for cell phone service on the

12 Reservation?

13 **A. No.**

14 **Q.** Now, I believe you testified there are four people

15 working full-time at the Internet Cafe?

16 **A. Yes.**

17 **Q.** The hours of operation are from 8:00 to 5:00?

18 **A. Yes.**

19 **Q.** Monday through Friday?

20 **A. Yes.**

21 **Q.** So it's open approximately 40 hours a week. Is that

22 correct?

23 **A. Yes.**

24 **Q.** All four people that work for NAT are there at the

25 same time?

166

1 **A. No.**

2 **Q.** At least four members. How many hours per month do

3 they work for NAT?

4 **A. I have no idea. I don't involve myself with the**

5 **day-to-day workings of the Internet Library.**

6 **Q.** You're a member of the Board of NAT, and you never

7 inquired as to how many hours each one of these Tribal

8 members works for NAT?

9 **A. No. Like I said earlier, I wear many, many hats**

10 **there. I just can't concentrate on NAT's day-to-day**

11 **workings on a daily and all-day basis.**

12 **Q.** What are your other duties on the Reservation that

13 keep you so busy?

14 **A. Tribal leader. That entails everything from**

15 **safeguarding the funds, looking for economic stimulus,**

16 **economic progress. Just generally trying to make the**

17 **Reservation a better place.**

18 **Q.** Would it be fair to say you devote the majority of

19 your time towards Tribal affairs versus those of NAT?

20 **A. Yes.**

21 **Q.** Would you say the same is true for the other Tribal

22 members or Board members of NAT?

23 **MR. SWIER:** Objection. Speculation.

24 **THE COURT:** Overruled. You may answer, if you

25 know.

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1 **A. Yes.**

2 **BY MR. KNUDSON:**

3 **Q.** So you are quite dependent on what the Free Conference

4 Corporation people tell you about the state of affairs of

5 NAT. Isn't that true?

6 **A. Yes.**

7 **Q.** Now, you testified that about 10 people are seeking to

8 sell their art or craftwork on the Internet today?

9 **A. About that, yes. I don't know the exact number.**

10 **That's from what I was told.**

11 **Q.** So you only heard that secondhand then?

12 **A. Yes.**

13 **Q.** You haven't independently tried to verify that number?

14 **A. No.**

15 **Q.** Of these people you heard were selling their arts and

16 crafts on the Internet today, didn't some of them sell

17 their arts and crafts before NAT arrived?

18 **A. Just there locally. You don't receive the good prices**

19 **on the artwork selling locally versus selling state-wide,**

20 **country-wide, or even internationally.**

21 **Q.** Have you ever looked into, you personally, have you

22 ever tried to measure how much these artists' sales have

23 increased since NAT arrived?

24 **A. No.**

25 **Q.** Before NAT arrived, was there Internet on the

168

1 Reservation?

2 **A. Yes.**

3 **Q.** Who provided that service?

4 **A. Midstate.**

5 **Q.** Anyone else?

6 **A. No. Just Midstate, I believe.**

7 **Q.** Do you know if Midstate provided broadband services?

8 **A. I guess I don't -- I don't think it was broadband. I**

9 **think it was the old type, you know, the -- I can't even**

10 **think of the name of what they used to call it. I think**

11 **now it's the DSL.**

12 **Q.** So they had DSL service on the Reservation before NAT?

13 **A. On the northern part of the Reservation.**

14 **Q.** And that was provided by Midstate?

15 **A. No, that was provided by --**

16 **Q.** Another carrier?

17 **A. No, I don't. Not right offhand.**

18 **Q.** It was another carrier, though, obviously.

19 **A. Not all across the Reservation. Just on a certain**

20 **part of the Reservation that's closer to the capital in**

21 **Pierre.**

22 **Q.** Now, tell me what you understand Free Conferencing

23 Corporation to do.

24 **A. They are basically out there marketing for us.**

25 **Q.** What do they market?

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1 **A. Native American Telecom.**

2 **Q.** What kind of service does Free Conference Corporation

3 provide?

4 **A. What kind of service?**

5 **Q.** Yes.

6 MR. SWIER: Asked and answered, Your Honor. He

7 answered they provide marketing service.

8 THE COURT: Overruled. You can answer.

9 **A. They provide marketing service for Native American**

10 **Telecom.**

11 **BY MR. KNUDSON:**

12 **Q.** Have you ever heard they might be offering a

13 conference bridge service to people outside the

14 Reservation?

15 **A. Yes. I've heard something like that.**

16 **Q.** Well, could you pick up what's been marked as

17 Plaintiff's Exhibit A?

18 MR. KNUDSON: May I approach?

19 THE COURT: You may.

20 **BY MR. KNUDSON:**

21 **Q.** Mr. Lengkeek, I can help you to move this along. Here

22 is the exhibit. I'll ask you to turn your attention to the

23 very last page of it, Page 83.

24 **A. Yes, sir.**

25 **Q.** Can you see Page 83, sir?

170

1 **A. Yes.**

2 **Q.** Do you see the income that NAT has recorded on its

3 Profit and Loss Statement for 2010?

4 **A. Yes.**

5 **Q.** It's \$1,148,000 and change. Correct?

6 **A. Yes.**

7 **Q.** Isn't it true you didn't know until yesterday that NAT

8 reported that much income for 2010?

9 **A. Yes.**

10 **Q.** So until yesterday, you hadn't heard that information,

11 and today is the first time you've seen this Profit and

12 Loss Statement. Isn't that true?

13 **A. Yes.**

14 **Q.** In fact, you only recently learned that Free

15 Conference Corporation received 75 percent of the gross

16 revenues of NAT. Isn't that true?

17 **A. Yes.**

18 **Q.** You were told that when, sir?

19 **A. I received a lot of the financial documents probably**

20 **two weeks ago, and the rest of the Board members have all**

21 **received them, but because I'm so busy, I haven't been able**

22 **to take in on most of the conference calls and conference**

23 **meetings that goes on with the Board. I would probably**

24 **have to say a couple weeks ago.**

25 **Q.** Only two weeks ago you learned Free Conference

171

1 Corporation was taking in 75 percent of the revenues of

2 NAT?

3 **A. Yes.**

4 **Q.** Isn't it also true that the Tribe has not received any

5 money from NAT?

6 MR. SWIER: Objection, Your Honor. That's a

7 misstatement of the facts. We've already talked about the

8 infrastructure investment that's been made on the

9 Reservation through NAT.

10 THE COURT: Overruled. You may answer.

11 **A. What was the question?**

12 **BY MR. KNUDSON:**

13 **Q.** Isn't it true the Tribe has received no money from

14 NAT?

15 **A. No actual dollar bills. But we have received the**

16 **refurbishing of a building for the Learning Center. We**

17 **have received the Internet Library.**

18 **Q.** My question to you was, isn't it true the Tribe has

19 received no money from NAT. Isn't that correct?

20 **A. Yes.**

21 **Q.** Isn't it also the case that the Tribal Utility

22 Authority didn't have any members on the Board until

23 September of 2010?

24 **A. If I remember right, the Tribal Utility Authority was**

25 **put in place years ago, 1997, and from my understanding,**

172

1 **when this was first brought to the prior Council, probably**

2 **18 to 20 months ago, there were members placed on there.**

3 **Then when the new Council took over, which I am a part of,**

4 **we appointed four members to that Utilities Council.**

5 **Q.** Isn't it true September 9, 2010, a Tribal Council

6 adopted a Resolution appointing four members to the Tribal

7 Utility Authority Board?

8 **A. Yes.**

9 **Q.** And there were no Board members before that action.

10 Isn't that true?

11 **A. I don't even know their names.**

12 **Q.** My question to you is, were there really any Board

13 members on the Board of the Tribal Utility Authority before

14 this Resolution was adopted September 9, 2010?

15 **A. To my understanding, there was, but I don't know who**

16 **they were. It don't seem right to have a Board with no**

17 **members.**

18 MR. KNUDSON: No further questions, Your Honor.

19 THE COURT: Thank you. Mr. Swier?

20 **REDIRECT EXAMINATION**

21 **BY MR. SWIER:**

22 **Q.** Peter, Mr. Knudson asked you a series of questions.

23 I'm going to take them in the order he gave them to you.

24 He indicated, of course, the books, the financial books of

25 NAT, those are kept for you in Long Beach, California.

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1 Aren't they?

2 **A. Yes.**

3 **Q.** Who keeps those books for you?

4 **A. WideVoice.**

5 **Q.** Who, in particular?

6 **A. Mr. Cestero.**

7 **Q.** Peter, are you okay, as a Board member, with the bean

8 counting of NAT being done with experienced accountants in

9 Long Beach?

10 **A. Yes.**

11 **Q.** Do you think that's unreasonable?

12 **A. No.**

13 **Q.** Peter, how were you chosen to be on the Board again of

14 NAT?

15 **A. I volunteered for it, and at the same time I was**

16 **appointed by the rest of the Council members.**

17 **Q.** You indicated that you had some predecessors who

18 served on the Board of NAT before you. Is that right?

19 **A. Yes.**

20 **Q.** Peter, Mr. Knudson also asked you about Universal

21 Service Funds or USF handouts. Explain to the Court again

22 why you don't want to accept those government handouts.

23 **MR. KNUDSON:** Objection. Cumulative.

24 **THE COURT:** Sustained.

25 **BY MR. SWIER:**

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1 **Q.** Mr. Knudson also asked you about Sprint and their

2 services or some of the other big carriers' services on the

3 Reservation. Is that right?

4 **A. Yes.**

5 **Q.** What do those big carriers do to market their services

6 to the members of your Tribe?

7 **A. I haven't seen any of them there doing anything.**

8 **Q.** Why do you think that is?

9 **MR. KNUDSON:** Objection. Speculation.

10 **THE COURT:** Overruled. You may answer, if you

11 know.

12 **A. I would say because there's no opportunity there, or**

13 **very little opportunity for customers and for people to pay**

14 **their bills.**

15 **BY MR. SWIER:**

16 **Q.** In other words, it doesn't help the carriers, bottom

17 line. Is that right?

18 **MR. KNUDSON:** Objection. Foundation.

19 **THE COURT:** Sustained as leading.

20 **BY MR. SWIER:**

21 **Q.** Based on the poverty rate of your people, do you think

22 Sprint can make any money out on the Reservation?

23 **MR. KNUDSON:** Objection. Leading. Foundation.

24 **THE COURT:** Sustained as leading.

25 **BY MR. SWIER:**

175

1 **Q.** Describe for the Court what Sprint has ever done on

2 the Crow Creek Reservation.

3 **MR. KNUDSON:** Objection. Irrelevant.

4 **THE COURT:** Overruled. You may answer.

5 **A. Nothing.**

6 **BY MR. SWIER:**

7 **Q.** What has AT&T ever done on your Reservation?

8 **A. Nothing.**

9 **Q.** What has Verizon ever done on your Reservation?

10 **A. Nothing.**

11 **Q.** What has Alltel ever done on your Reservation?

12 **A. Nothing.**

13 **Q.** What has NAT done on your Reservation?

14 **A. They've provided jobs. They provided phone access,**

15 **Internet access, access to emergency services, and**

16 **hopefully if Sprint and the other carriers pay their bills,**

17 **they will provide revenue.**

18 **Q.** Peter, are you comfortable with your business partners

19 with NAT?

20 **A. Yes.**

21 **Q.** Peter, are you a smart guy?

22 **A. I like to think so.**

23 **Q.** Are you stupid?

24 **A. Well, not all the time.**

25 **Q.** Depends if I ask your wife? Okay. Peter, can

176

1 somebody from outside the Reservation come and take you by

2 the hand and simply lead you to wherever in the galaxy you

3 want to go?

4 **MR. KNUDSON:** Objection. Argumentative.

5 Speculation.

6 **THE COURT:** Sustained.

7 **BY MR. SWIER:**

8 **Q.** Peter, can out-of-Reservation companies come in and

9 pull the wool over your eyes regarding a business venture?

10 **MR. KNUDSON:** Same objection.

11 **THE COURT:** Sustained.

12 **BY MR. SWIER:**

13 **Q.** What are your thoughts of how you, as a Board member,

14 and your fellow Tribal Board members, handle your duties

15 for NAT?

16 **MR. KNUDSON:** Objection as to foundation as to

17 the other members.

18 **THE COURT:** Sustained as to the other members.

19 But he can go ahead and answer regarding himself.

20 **A. Can you repeat that?**

21 **MR. SWIER:** Jill, can you read that back, please?

22 (The requested portion of the record was read by the

23 reporter.)

24 **A. What are my thoughts on how we handle the duties of**

25 **NAT?**

1 **BY MR. SWIER:**
 2 **Q.** Are you engaged?
 3 **A. Yes.**
 4 **Q.** Are you engaged, to the best of your ability, based on
 5 the other numerous duties you told Mr. Knudson you do?
 6 **A. As much as I can, yes.**
 7 **Q.** Do you believe your fellow Board members are of that
 8 same thing?
 9 **MR. KNUDSON:** Objection. Same. Foundation.
 10 **THE COURT:** Sustained.
 11 **BY MR. SWIER:**
 12 **Q.** Peter, do you have monthly Board of Director meetings
 13 for NAT?
 14 **A. In the past it was monthly. But here recently, they**
 15 **are starting to meet weekly.**
 16 **Q.** Is it your understanding that your predecessors on the
 17 Board during the meetings received financials?
 18 **A. Yes.**
 19 **Q.** So the financials have been provided to your Board
 20 members since pretty much when NAT became a telephone
 21 provider. Is that fair?
 22 **MR. KNUDSON:** Objection. Leading.
 23 **THE COURT:** Sustained as leading.
 24 **BY MR. SWIER:**
 25 **Q.** To the best of your knowledge, have your previous

1 **A. Yes, sir, very hard.**
 2 **Q.** When you work, when you provide a service to someone,
 3 do you expect to be paid?
 4 **A. Yes.**
 5 **Q.** Is NAT providing a service to Sprint?
 6 **A. Yes.**
 7 **Q.** Is NAT being paid for the service it provides Sprint?
 8 **A. No.**
 9 **Q.** Do you feel Sprint should pay for the service that NAT
 10 provides?
 11 **A. Why not? Everybody in this room, they provide a**
 12 **service. They expect to get paid. You are supposed to pay**
 13 **your bills.**
 14 **Q.** Has Sprint paid its bills?
 15 **A. No.**
 16 **MR. SWIER:** No further questions.
 17 **THE COURT:** Mr. Knudson?
 18 **REXCROSS-EXAMINATION**
 19 **BY MR. KNUDSON:**
 20 **Q.** Didn't you just testify that Alltel has done nothing
 21 on your Reservation?
 22 **A. Yes.**
 23 **Q.** You have an Alltel cell phone, don't you?
 24 **A. Yes.**
 25 **Q.** It works on the Reservation, doesn't it?

1 Board members been kept apprised of the financials of NAT?
 2 **A. To the best of my knowledge, yes.**
 3 **Q.** So we have monthly Board calls, conference calls, that
 4 have now turned into weekly calls. Right?
 5 **A. Yes.**
 6 **Q.** Are you comfortable with those weekly calls?
 7 **A. Yes.**
 8 **Q.** Do you think that's a good thing?
 9 **A. Yes.**
 10 **Q.** Do you and your Board members make every effort to
 11 attend those Board meetings?
 12 **A. Yes.**
 13 **Q.** Peter, Mr. Knudson asked you, "Why hasn't the Tribe
 14 received any money?" Explain to the Court why the Tribe
 15 hasn't received any money.
 16 **A. Well, it's a new business starting out, and all new**
 17 **businesses incur a lot of costs. In the beginning -- I**
 18 **just learned there was money coming in, a little over a**
 19 **million dollars. Most of that was paid back to the people**
 20 **and the organizations that put up the money.**
 21 **I would have to say when we were close to getting**
 22 **payments from that or receiving revenues from that is about**
 23 **the time when Sprint and the other providers quit paying**
 24 **their bills.**
 25 **Q.** Peter, you work. Right?

1 **A. Yes.**
 2 **Q.** You understand Verizon offers cell phone service on
 3 the Reservation?
 4 **A. Yes.**
 5 **Q.** In fact, it's an eligible telecommunications carrier,
 6 and it provides subsidized cell phone service on the
 7 Reservation?
 8 **A. Who does?**
 9 **Q.** Verizon. Do you know that?
 10 **A. No. Alltel is the one there with the best coverage,**
 11 **but we have to travel over an hour away to the Alltel**
 12 **office.**
 13 **Q.** Now, you said the money that went into NAT went to the
 14 people who put the money in. Is that right?
 15 **A. As far as I understand.**
 16 **Q.** How much money has Free Conferencing Corporation put
 17 into NAT?
 18 **A. I don't know right off the top of my head.**
 19 **Q.** Are you aware that Sprint paid its last invoice of
 20 NAT's in February of 2010?
 21 **A. Yes. I was just made aware of that.**
 22 **Q.** That happened before you became a member of the Board
 23 of NAT. Isn't that true?
 24 **A. That was February of 2010, yes.**
 25 **Q.** Have you gone back to look at the financial records of

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1 NAT since you joined the Board of NAT?

2 A. No.

3 Q. Are there any financial records on the Reservation

4 pertaining to NAT that you could go look at?

5 A. Yes.

6 Q. Where are they?

7 A. In my office.

8 Q. You never looked at them, though?

9 A. Yes, I've skimmed through them.

10 Q. Have you skimmed through the records before you became

11 a Board member?

12 A. No.

13 Q. So you don't know the financial history of NAT prior

14 to becoming a Board member. Do you?

15 A. No.

16 Q. Since becoming a Board member, all you've done is skim

17 those records. Is that correct?

18 A. Yes.

19 MR. KNUDSON: No further questions.

20 THE COURT: Mr. Swier?

21 MR. SWIER: No further questions. Thank you.

22 THE COURT: You may be excused then. Thank you.

23 (Witness excused)

24 THE COURT: Mr. Swier, you may call your next

25 witness.

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1 MR. SWIER: Thank you, Your Honor. We would have

2 no further witnesses at this time.

3 THE COURT: Mr. Knudson?

4 MR. KNUDSON: We have one. We'll call Amy

5 Clouser.

6 AMY CLOUSER,

7 called as a witness, being first duly sworn, testified as

8 follows:

9 DIRECT EXAMINATION

10 BY MR. KNUDSON:

11 Q. Good afternoon, Miss Clouser. If you would be so kind

12 to tell the Court and courtroom your name and how you spell

13 it.

14 A. My name is Amy Clouser. A-M-Y C-L-O-U-S-E-R.

15 Q. Miss Clouser, tell me about your employment experience

16 at Sprint.

17 A. I started at Sprint in March of 1998 with Sprint

18 Publishing and Advertising.

19 Q. Is that the Yellow Pages?

20 A. Yes.

21 Q. Then what did you do?

22 A. I worked in the Billing and Collections Department.

23 Q. Then where did you go?

24 A. In March 2001 I applied for and was offered a position

25 with Access Verification as an Access Auditor II.

183

1 Q. What are your duties as an Access Verification

2 Analyst?

3 A. I audit and process invoices for Sprint Long Distance.

4 Q. Those invoices come from whom?

5 A. It comes from various telephone companies.

6 Q. Would that include the invoices that were sent by CABS

7 Agent on behalf of NAT?

8 A. Yes.

9 Q. You are familiar that there is a dispute here between

10 Sprint and NAT over the payment of certain invoices. Is

11 that right?

12 A. Yes.

13 Q. When did the dispute with NAT arise?

14 A. In February 2010.

15 Q. What happened?

16 A. At that time we received an invoice with significant

17 charges that we reviewed and found that it was for toll

18 fraud minutes of use.

19 MR. SWIER: I'll object, Your Honor, and ask that

20 be stricken, the fraud comment. That's obviously a

21 mischaracterization.

22 THE COURT: Overruled. The answer will stand.

23 MR. KNUDSON: Thank you, Your Honor.

24 BY MR. KNUDSON:

25 Q. Prior to that invoice, had Sprint paid invoices sent

184

1 on behalf of NAT?

2 A. Yes. We paid two invoices.

3 Q. When was that?

4 A. For the December 2009 and January 2010 invoices.

5 Q. Do you recall how much the December 2009 invoice was?

6 A. It was for \$18,544.26.

7 Q. Then the January Invoice, ma'am?

8 A. It was \$10,911.96.

9 Q. How did Sprint pay those invoices?

10 A. They were paid by check to CABS Agent.

11 Q. After you did your audit for the third invoice, what

12 was the decision made regarding that invoice?

13 A. The decision was made to dispute the charges.

14 Q. What does that mean?

15 A. That we determined access pumping, and that the

16 charges were invalid.

17 Q. When you dispute them, what do you do?

18 A. We submitted a Dispute Detail Report to the billing

19 party.

20 Q. Who is that?

21 A. CABS Agent.

22 Q. Did you do anything about the first two invoices that

23 you paid?

24 A. Yes. We disputed those invoices in arrears, and

25 submitted Dispute Detail Reports for those charges, as

185

187

1 well.

2 Q. Did you request a refund?

3 A. Yes.

4 Q. Has that refund request been granted?

5 A. No.

6 Q. You've looked at -- have you performed what would be a

7 minutes of usage analysis of NAT's traffic to Sprint?

8 A. Yes.

9 MR. KNUDSON: If I may approach, Your Honor.

10 THE COURT: You may.

11 BY MR. KNUDSON:

12 Q. Miss Clouser, I'm handing you what's been marked as

13 Plaintiff's Exhibit F. Take a moment to look at that,

14 please. Can you identify that exhibit?

15 A. Yes.

16 Q. What is it?

17 A. This is from an Excel spreadsheet that I created from

18 Call Detail Records.

19 Q. Is there a database you examined to prepare this

20 report?

21 A. Yes. We have a database called Sonar, in which we can

22 run ad hoc reports for Call Detail Records.

23 Q. What's inside the Sonar database?

24 A. The Sonar database contains call detail information,

25 as recorded by Sprint switches.

1 Q. Let's go to the top line. "Terminating OCN 424F."

2 What is that?

3 A. OCN is Operating Carrier Number. 424F is NAT's as

4 assigned by NECA.

5 Q. By whom?

6 A. National Exchange Carrier Association.

7 Q. What does the next line, "Type FGD," mean?

8 A. FGD signifies long distance.

9 Q. Then we have a "Start Date." What is that?

10 A. That's the date range for the calls.

11 Q. So these are calls from December 1 through December

12 31, 2010?

13 A. Correct.

14 Q. Then there's a listing, "Conference MOU." Can you say

15 what "MOU" stands for?

16 A. Minutes of use.

17 Q. What does the number represent?

18 A. The number represents the minutes of use I attributed

19 to conference lines.

20 Q. Does this report show the total number minutes of use

21 to the 477 exchange for December of 2010?

22 A. Yes. At the very bottom there's a sum of the total

23 minutes of use.

24 Q. What were the total minutes of use reported?

25 A. 922,691.

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1 Q. Is that the database for all calls going through

2 Sprint's equipment?

3 A. Yes.

4 Q. So it has the Call Detail Records for all calls made

5 on Sprint's switches?

6 A. Yes.

7 Q. Is this database checked for accuracy?

8 A. Yes, it is.

9 Q. What steps are taken to secure the database from --

10 the data stored in that database from loss or alteration?

11 A. We have quality controls in place with Sprint

12 technicians and outside vendors to ensure the accuracy of

13 the data, and also to make sure it's secure from loss of

14 data per Sprint retention policies.

15 Q. So this database became the basis for preparing

16 Exhibit F?

17 A. Yes.

18 MR. KNUDSON: I would offer Exhibit F.

19 MR. SWIER: No objection.

20 THE COURT: F is received.

21 BY MR. KNUDSON:

22 Q. Tell us what Exhibit F represents, Miss Clouser.

23 A. It represents the dialed telephone numbers.

24 Q. Should I just walk through this?

25 A. Sure.

1 Q. Of that, minutes of use attributed to conference were

2 how much?

3 A. 922,146.

4 Q. What percentage of the total did that represent?

5 A. 99.94 percent.

6 Q. How did you determine it was 99.94 percent to

7 conference calls?

8 A. I called the top telephone numbers to determine the

9 conference numbers. I also did Internet searches to see if

10 there was any marketing or advertising for the conference

11 phone numbers.

12 Q. Based on that investigation, you concluded what?

13 A. That the top six phone numbers were for conference

14 phone numbers. Those are what make up the 99.94 percent.

15 Q. Did you determine that any were associated with

16 FreeConference.com?

17 A. Yes.

18 Q. You performed other traffic analyses of NAT's exchange

19 previously. Haven't you?

20 A. Yes.

21 Q. Is the results of Exhibit F consistent with what

22 you've seen before?

23 A. Yes.

24 Q. Is Exhibit A up there? If you would, Amy, take a look

25 at Plaintiff's Exhibit A, and look at the first page. Do

1 you see what that report represents?

2 **A. Yes.**

3 **Q. What is it?**

4 **A. It appears to be their volumes of minutes by month,**

5 **and also their number of ports.**

6 **Q. Do you know what "ports" represent?**

7 **A. It's part of the facilities necessary to carry the**

8 **traffic.**

9 **Q. So if your traffic increases, you need more ports?**

10 **A. Yes.**

11 **Q. Now, in your work as an Access Verification Analyst,**

12 **have you had an opportunity to take a look at circuit**

13 **expense charges?**

14 **A. Yes.**

15 **Q. What do those represent to you, circuit expense**

16 **charges?**

17 **A. The facilities necessary for the traffic to flow.**

18 **Q. You see circuit charges being invoiced to Sprint as**

19 **part of your work?**

20 **A. Yes.**

21 **Q. Are circuit expenses directly related to the amount of**

22 **minutes being invoiced?**

23 **A. Yes.**

24 **Q. So if there are more minutes of use, there will be**

25 **more facilities used?**

1 **A. Correct.**

2 **Q. Describe for me what your roles are as a Financial**

3 **Auditor and a Financial Analyst for Sprint. What did you**

4 **do?**

5 **A. As an Access Auditor II, I was just an hourly**

6 **employee, I was working with facility accounts.**

7 **Q. What are "facility accounts"?**

8 **A. It would be the monthly recurring charges.**

9 **Q. Can you give me an example of that?**

10 **A. Such as a customer's direct lines, the special access**

11 **charges.**

12 **Q. Anything else under those positions that you did?**

13 **A. I did similar work auditing and processing, but I**

14 **didn't work directly with customers for resolutions of**

15 **disputes.**

16 **MR. SWIER: May I approach, Your Honor?**

17 **THE COURT: You may.**

18 **BY MR. SWIER:**

19 **Q. Miss Clouser, I'm going to put Plaintiff's Exhibit F**

20 **on the screen. Is that okay?**

21 **A. Yes.**

22 **Q. Just so I can understand, first of all, as an Auditor,**

23 **as a Financial Auditor and Financial Analyst, you are good**

24 **with numbers. We've already seen that. Right?**

25 **A. Yes.**

1 **A. Correct.**

2 **Q. The provider of the facilities will charge more. Is**

3 **that what happens?**

4 **A. Yes.**

5 **Q. And looking at Page 1 of Exhibit A, what is happening**

6 **as we go down this report, from October 2009 to January**

7 **2011, for minutes of use?**

8 **A. As the minutes of use increase, so do the ports.**

9 **MR. KNUDSON: I have nothing further,**

10 **Miss Clouser. Thank you.**

11 **THE COURT: Mr. Swier?**

12 **MR. SWIER: Thank you.**

13 **CROSS-EXAMINATION**

14 **BY MR. SWIER:**

15 **Q. Ms. Clouser, how are you this afternoon?**

16 **A. Well. Thank you.**

17 **Q. I apologize, the roles you've had at Sprint, since you**

18 **started your employment there, were what again?**

19 **A. I started out as an Access Auditor II.**

20 **Q. An auditor?**

21 **A. Yes.**

22 **Q. Then you went to your present job?**

23 **A. In 2005 I was a Financial Analyst II.**

24 **Q. So the time you've been with Sprint, you've been a**

25 **Financial Auditor and a Financial Analyst. Correct?**

1 **Q. That's your job. Right?**

2 **A. Uh-huh.**

3 **Q. In your position at Sprint, you are used to dealing**

4 **with pretty big numbers. Aren't you? I'm looking at**

5 **Exhibit F, and we're talking numbers in the total MOU at**

6 **the top of 531,000. Is that right?**

7 **A. Yes.**

8 **Q. What do those MOUs represent? I'm sorry.**

9 **A. Minutes of use.**

10 **Q. Okay. And when you look at those minutes of use,**

11 **those obviously turn into very sizable monetary amounts for**

12 **switched access fees. Don't they?**

13 **A. Yes, depending on the rate.**

14 **Q. Now, you haven't paid Native American Telecom any**

15 **access fees for how long? Has it been almost a year?**

16 **A. We haven't paid them for --**

17 **Q. I'm sorry. What I'm asking you is when is the last**

18 **payment you provided to NAT for switched access charges?**

19 **A. The last payment was for the January 2010 invoice, for**

20 **what they invoiced as switched access.**

21 **Q. So you haven't paid a nickel to Native American**

22 **Telecom for over a year. Have you?**

23 **A. We can't be forced to pay for invalid charges.**

24 **Q. You can answer my question, or we'll be here a while.**

25 **You haven't paid NAT a nickel for their switched**

1 access charges for over a year. Have you?
 2 **A. We have not remitted payment for any additional**
 3 **invoices after that date.**
 4 **Q.** You have not paid NAT for over a year. Have you?
 5 **A. Correct.**
 6 **Q.** You bill your customers every month, is that right,
 7 Sprint's customers?
 8 **MR. KNUDSON:** Outside the scope of direct.
 9 Objection.
 10 **THE COURT:** Overruled. You can answer.
 11 **BY MR. SWIER:**
 12 **Q.** Does Sprint bill its customers on a monthly basis, for
 13 the most part?
 14 **A. I don't work in the Sprint billing department. I'm**
 15 **unsure how all the policies work.**
 16 **Q.** You do know, based on your experience, I would
 17 presume, that Sprint still charges their customers access
 18 fees. Don't they?
 19 **A. Yes.**
 20 **Q.** In fact, the access fees that your customers have paid
 21 to you are the access fees generated by NAT's services.
 22 Aren't they?
 23 **MR. KNUDSON:** Objection. Foundation.
 24 **THE COURT:** Overruled. You may answer, if you
 25 know.

1 **THE COURT:** Overruled. You may go ahead and
 2 answer.
 3 **BY MR. SWIER:**
 4 **Q.** Sprint then does not pay those access fees to local
 5 exchange carriers, if they're disputed. Right?
 6 **A. The charges are in dispute and are not being paid.**
 7 **MR. SWIER:** Your Honor, I have been patient with
 8 three questions, and I haven't gotten an answer.
 9 **THE COURT:** I think she answered that time.
 10 **BY MR. SWIER:**
 11 **Q.** So let me get this straight. Sprint bills their
 12 customers. They collect the access fees. They refuse to
 13 give the access fees to the companies that provide the
 14 services. You keep the access fees and make a profit. Is
 15 that right? Is that right?
 16 **A. No.**
 17 **Q.** Where does the money go?
 18 **A. Those minutes of use are not subject to access.**
 19 **Q.** Do you charge your customers for those access fees?
 20 **A. I don't know the charges involved.**
 21 **Q.** You charge them for those fees and keep them. Don't
 22 you?
 23 **A. I do not know that.**
 24 **MR. KNUDSON:** Objection. Asked and answered.
 25 **THE COURT:** Overruled. The answer will stand.

1 **A. I don't know for certain.**
 2 **BY MR. SWIER:**
 3 **Q.** Miss Clouser, does Sprint bill their customers for
 4 access fees, and then refuse to pay the local exchange
 5 carriers those fees?
 6 **A. I don't know how the billing works.**
 7 **Q.** In fact, what Sprint does is they bill their customers
 8 for those access fees, they refuse to pay the local
 9 exchange carriers, and Sprint puts that money in their
 10 pocket to make a profit. Don't they?
 11 **MR. KNUDSON:** Objection. Foundation. Outside
 12 the scope of direct.
 13 **THE COURT:** Overruled. You may answer.
 14 **A. We're not refusing to pay. We're disputing invalid**
 15 **charges.**
 16 **BY MR. SWIER:**
 17 **Q.** Miss Clouser, Sprint collects the access fees from
 18 their customers. Correct?
 19 **A. Correct.**
 20 **Q.** Sprint refuses to pay the access fees to the companies
 21 that provide those services. Don't they?
 22 **A. Sprint is --**
 23 **Q.** Do they refuse to pay --
 24 **MR. KNUDSON:** Objection. He's arguing with the
 25 witness.

1 **BY MR. SWIER:**
 2 **Q.** Have you ever looked at Sprint's filings with the
 3 National Securities and Exchange Commission?
 4 **A. No.**
 5 **Q.** You are well aware, though, in working for Sprint for
 6 the years you have, Sprint is a multi-billion dollar
 7 company. Isn't it?
 8 **A. Yes.**
 9 **Q.** In fact, Sprint is one of the largest companies,
 10 telecommunications companies in the world, isn't it, in
 11 terms of revenue?
 12 **A. I don't know that for certain.**
 13 **Q.** You guys do really well. Don't you?
 14 **MR. KNUDSON:** Objection. Outside the scope of
 15 direct.
 16 **THE COURT:** Sustained.
 17 **BY MR. SWIER:**
 18 **Q.** Miss Clouser, while you were a Financial Auditor and
 19 an Analyst, you obviously counted money coming in for
 20 customers who paid Sprint for services. Right?
 21 **A. No.**
 22 **Q.** Ever run a business before?
 23 **A. No.**
 24 **Q.** Do you have a business degree?
 25 **A. No.**

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1 Q. What's your background in being familiar with finances

2 of a business? Do you have any background in that?

3 A. No.

4 Q. Let me ask you this: Do you have any children?

5 MR. KNUDSON: Objection. Outside the scope of

6 direct.

7 THE COURT: Sustained.

8 BY MR. SWIER:

9 Q. Did you ever run a lemonade stand when you were a kid?

10 A. Actually, no.

11 MR. KNUDSON: Objection.

12 THE COURT: The objection is overruled. The

13 answer will stand.

14 BY MR. SWIER:

15 Q. Let's say I ran a lemonade stand, and you came to me

16 and I gave you lemonade, and I charged you five cents for

17 that lemonade. Okay?

18 A. Okay.

19 Q. You took my lemonade and drank it. You drank it all

20 empty. No more lemonade left. I said, "Ms. Clouser, I'm

21 glad you enjoyed my lemonade. Now please pay me my five

22 cents for the lemonade."

23 MR. KNUDSON: Objection. Argumentative.

24 Speculation. Outside the scope of direct.

25 THE COURT: Overruled.

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1 BY MR. SWIER:

2 Q. If you take my product and you use it and you drink

3 it, and you don't pay me, do I get to stay in business very

4 long?

5 A. I'm not sure.

6 Q. Does Sprint provide services?

7 A. Yes.

8 Q. Does Sprint get paid for their services?

9 A. Yes.

10 Q. Is Sprint making a profit on their services?

11 A. I don't know.

12 Q. But you do work, and you get paid. Right?

13 A. Yes.

14 Q. So if I give you lemonade, and you drink it, then

15 isn't it fair that I get my five cents for what I provided

16 you?

17 A. If we were in agreement with the lemonade, yes.

18 Q. Wouldn't you pay me for the lemonade? You'd pay me

19 for the lemonade, wouldn't you?

20 MR. KNUDSON: Objection. Asked and answered.

21 THE COURT: Overruled. You may answer.

22 A. If we were in agreement that the lemonade was worth

23 five cents, I would pay you for that lemonade.

24 BY MR. SWIER:

25 Q. Well, who gets to determine that? What if you tell me

199

1 that you drank all my lemonade, and you tell me that

2 lemonade is only worth a penny? Is that fair that you get

3 to tell me how much my lemonade is worth?

4 MR. KNUDSON: Objection. Argumentative.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. If I came and bought lemonade from you and drank your

8 lemonade, would you expect me to pay you?

9 A. It depends.

10 Q. Well, would you give me your lemonade, if you are in a

11 for-profit business --

12 THE COURT: Mr. Swier, you've really made your

13 point.

14 MR. SWIER: I don't think I have any questions

15 left, Your Honor. Thank you.

16 THE COURT: Mr. Knudson, anything further?

17 MR. SWIER: Oh, I'm sorry, can I ask one more

18 question?

19 THE COURT: Sure.

20 BY MR. SWIER:

21 Q. Miss Clouser, are you familiar with what an FCC tariff

22 is?

23 A. Yes.

24 Q. Are you aware that on November 30 of 2010 the FCC

25 approved Native American Telecom's new tariff?

200

1 MR. KNUDSON: Objection. Calls for a legal

2 conclusion.

3 THE COURT: Overruled. You may answer.

4 A. Yes.

5 MR. SWIER: May I approach, Your Honor?

6 THE COURT: You may.

7 BY MR. SWIER:

8 Q. I'm showing you what's been marked as Defendant's

9 Exhibit 30. Have you ever seen that document before?

10 MR. KNUDSON: Objection. I have not seen this

11 document either.

12 (Mr. Swier handed Mr. Knudson a document)

13 MR. KNUDSON: Well, and he's throwing it at me.

14 Your Honor, this conduct is unprofessional. An admonition,

15 please.

16 THE COURT: Let's just all act like adults.

17 Mr. Swier, you may continue.

18 MR. SWIER: Thank you.

19 BY MR. SWIER:

20 Q. Are you familiar with that access tariff?

21 A. No, I have not seen this before.

22 Q. Are those the type of tariffs that Sprint looks at

23 when they decide to pay access fees?

24 A. Yes.

25 Q. So those are standard in the industry?

201	203
<p>1 A. Yes.</p> <p>2 Q. Are you familiar with that, with the term "high-volume</p> <p>3 access tariff"?</p> <p>4 A. Not really familiar, no.</p> <p>5 Q. Are you familiar with the high-volume access tariff in</p> <p>6 that particular exhibit?</p> <p>7 A. No, because I was not aware of this tariff.</p> <p>8 Q. But you still had instructions not to pay NAT for</p> <p>9 their services. Correct?</p> <p>10 A. Correct.</p> <p>11 MR. SWIER: Your Honor, I offer Exhibit 30,</p> <p>12 please.</p> <p>13 THE COURT: Any objection?</p> <p>14 MR. KNUDSON: Seeings it's a public record, no</p> <p>15 objection.</p> <p>16 THE COURT: Exhibit 30 is received.</p> <p>17 MR. SWIER: Thank you. Your Honor, I also have a</p> <p>18 question. I don't think I offered Exhibit 29 with</p> <p>19 Mr. Lengkeek. Could I offer that exhibit at this time?</p> <p>20 That's the one that shows the jobs.</p> <p>21 THE COURT: Any objection to Exhibit 29?</p> <p>22 MR. KNUDSON: No objection.</p> <p>23 THE COURT: 29 is received.</p> <p>24 MR. SWIER: Thank you. I have no further</p> <p>25 questions.</p>	<p>1 attention to, if there are any.</p> <p>2 MR. SWIER: Your Honor, I think just as a whole,</p> <p>3 we would ask the Court to take notice of those. In</p> <p>4 particular, the high-volume access tariff that I believe</p> <p>5 was marked as Exhibit 30. That's also been made a part of</p> <p>6 our docket filings here.</p> <p>7 I also believe the FCC's new Notice of Proposed</p> <p>8 Rulemaking has also been filed with the Court.</p> <p>9 THE COURT: It has. All right. Let's take a</p> <p>10 15-minute break, and come back and do argument.</p> <p>11 MR. SWIER: That's fine.</p> <p>12 MR. KNUDSON: I'm all for taking a break, Your</p> <p>13 Honor. I am also mindful of the time. I believe</p> <p>14 Mr. Lengkeek went much longer than was represented on</p> <p>15 direct. I'd like to be able to leave today. Can we at</p> <p>16 least break by 5:00?</p> <p>17 THE COURT: Yes. We'll take a 15-minute break.</p> <p>18 But then, Mr. Swier, how much time are you going to use for</p> <p>19 your first part of your argument?</p> <p>20 MR. SWIER: Twenty minutes tops.</p> <p>21 THE COURT: Okay. Then 20 minutes for you? That</p> <p>22 should get us out by 4:00 then. We'll give Mr. Swier a 5-</p> <p>23 or 10-minute rebuttal. We'll be in recess.</p> <p>24 (Recess at 2:48 until 3:05)</p> <p>25 THE COURT: Mr. Swier?</p>
<p>202</p> <p>1 THE COURT: Mr. Knudson? Anything further?</p> <p>2 MR. KNUDSON: Nothing further.</p> <p>3 THE COURT: You can be excused then. Thank you.</p> <p>4 (Witness excused)</p> <p>5 THE COURT: You may call your next witness.</p> <p>6 MR. KNUDSON: We have no further witnesses. I</p> <p>7 would only advise the Court of the Affidavit of Randy D.</p> <p>8 Farrar which we filed in October, responding to some</p> <p>9 allegations that Mr. Swier was insinuating when he had</p> <p>10 Mr. Reiman on the stand, as well, and addressed directly</p> <p>11 what he was attempting to elicit in his cross-examination.</p> <p>12 THE COURT: Do you know the docket number on that</p> <p>13 Affidavit?</p> <p>14 MR. KNUDSON: Yes, I do. Your Honor, it's Docket</p> <p>15 61-3.</p> <p>16 THE COURT: Any objection to the Court</p> <p>17 considering that, Mr. Swier?</p> <p>18 MR. SWIER: No, Your Honor. In addition to that,</p> <p>19 I believe the Court could also take judicial notice of all</p> <p>20 the exhibits provided by both parties on both preliminary</p> <p>21 injunction motions. I believe those are already in the</p> <p>22 record, and I would just ask the Court to take notice of</p> <p>23 those.</p> <p>24 THE COURT: I will. It helps if you can point</p> <p>25 out specifically which ones you want me to give closer</p>	<p>204</p> <p>1 MR. SWIER: Thank you, Your Honor. Your Honor,</p> <p>2 may it please the Court and counsel.</p> <p>3 We've heard a lot of facts today about this matter.</p> <p>4 This really comes down to a very technical and very</p> <p>5 important legal issue.</p> <p>6 Native American Telecom has requested two items in</p> <p>7 Their Preliminary Injunction Motion. First, that all back</p> <p>8 payments, via the switched access service fees, be paid to</p> <p>9 Native American Telecom for the services that NAT provided</p> <p>10 under their tariff.</p> <p>11 The second item we're asking under our Preliminary</p> <p>12 Injunction is that Sprint be enjoined from withholding any</p> <p>13 current or future switched access payments under NAT's new</p> <p>14 high-volume access tariff that went into play November 30</p> <p>15 of 2010.</p> <p>16 So, Your Honor, this case, of course we have to</p> <p>17 examine the Dataphase factors. The first prong of the</p> <p>18 Dataphase factor --</p> <p>19 THE COURT: Actually before that, don't we need</p> <p>20 to determine if the Court can even give injunctive relief?</p> <p>21 MR. SWIER: Yes, Your Honor. If you would like</p> <p>22 me to address that first.</p> <p>23 THE COURT: I would.</p> <p>24 MR. SWIER: I know in its Brief, Sprint has cited</p> <p>25 two primary cases saying the Court can't grant injunctive</p>

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<p>1 relief, because this is a damages or money request. The</p> <p>2 first case that's relied on by Sprint is the United States</p> <p>3 Supreme Court case, in Grupo Mexicano, I think is how it's</p> <p>4 pronounced. Here is why this case is easily</p> <p>5 distinguishable from Grupo Mexicano.</p> <p>6 Number one. The Grupo case was a creditor preference</p> <p>7 case. We're not dealing with a creditor preference here.</p> <p>8 Number two, the movant in that case, the movant for</p> <p>9 the injunctive relief, was looking for a Restraining Order</p> <p>10 that precluded an asset transfer because of the creditor</p> <p>11 preference they thought was going on. So that case sought</p> <p>12 a freezing of assets. There were no arguments in that case</p> <p>13 regarding anything similar to the Dataphase factors.</p> <p>14 THE COURT: A freezing of assets in that case</p> <p>15 would have left the parties at the status quo, so that by</p> <p>16 the time a judgment was entered, money would be available,</p> <p>17 if, in fact, the Plaintiff won.</p> <p>18 The relief you are requesting here is even more than</p> <p>19 freezing the status quo. You are asking for an affirmative</p> <p>20 change in the position of the parties to affirmatively</p> <p>21 order Sprint to pay before a judgment is entered on the</p> <p>22 merits of the case.</p> <p>23 So isn't the relief you are requesting even greater</p> <p>24 than what was requested in Grupo?</p> <p>25 MR. SWIER: I think in this case, as in Grupo,</p>	<p>1 when they don't even discuss Grupo?</p> <p>2 MR. SWIER: I think possibly, with the facts in</p> <p>3 that case, in order to maintain the status quo, which in</p> <p>4 that case it's the same here. NewLife was just going to go</p> <p>5 out of business if they did not receive their payment.</p> <p>6 THE COURT: I understand the facts of that case.</p> <p>7 Let's go back to Grupo for a minute.</p> <p>8 One of the things that Grupo made clear was that the</p> <p>9 Court has to look at whether the relief you're requesting</p> <p>10 is something that traditionally the Court could grant.</p> <p>11 I look at your Counterclaim. First, you have a claim</p> <p>12 for breach of contract, which is basically a damages claim.</p> <p>13 Wouldn't you agree on a breach of contract claim, the</p> <p>14 Court historically has not used equitable powers?</p> <p>15 MR. SWIER: I think to a certain point that's</p> <p>16 right, Your Honor. However, when you look at the</p> <p>17 circumstances in this case, plus in our Answer we did</p> <p>18 allege various equitable defenses. We alleged unclean</p> <p>19 hands. We alleged other equitable affirmative defenses.</p> <p>20 THE COURT: But do you think that if you have a</p> <p>21 claim at law, like breach of contract, that an equitable</p> <p>22 defense then is a defense to a legal claim?</p> <p>23 MR. SWIER: I think in this case, Your Honor,</p> <p>24 equity is meant to maintain the status quo. I understand</p> <p>25 where the Court is going. So this means that if you are</p>
<p>206</p> <p>1 the issue was the status quo, and in this case the status</p> <p>2 quo cannot be maintained without payment being made to NAT.</p> <p>3 Because if payment is not made to NAT, then NAT, as the</p> <p>4 testimony indicated, is likely to either file bankruptcy or</p> <p>5 likely to go out of business.</p> <p>6 THE COURT: But in Grupo, the issue of whether</p> <p>7 the money was owed or not was not even really contested,</p> <p>8 unlike here there is a question that Sprint has raised as</p> <p>9 to whether they even owe the money. They're not admitting</p> <p>10 they owe the money. In Grupo that wasn't even a question.</p> <p>11 The Supreme Court found that entering a preliminary</p> <p>12 injunction was beyond the Court's power.</p> <p>13 MR. SWIER: Your Honor, of course we have cited,</p> <p>14 in our favor, the NewLife vs. Express Scripts case. That's</p> <p>15 a 2007 --</p> <p>16 THE COURT: From a District Court.</p> <p>17 MR. SWIER: -- from a District Court in</p> <p>18 Pennsylvania.</p> <p>19 THE COURT: That's not binding on this Court.</p> <p>20 MR. SWIER: Correct. It's simply used as a</p> <p>21 factually analogous case. In the NewLife case --</p> <p>22 THE COURT: They didn't even discuss Grupo.</p> <p>23 MR. SWIER: They didn't discuss Grupo. That</p> <p>24 wasn't brought up. But the fact is that Grupo --</p> <p>25 THE COURT: So you think that's binding on me</p>	<p>208</p> <p>1 going to read Grupo in that way, that any company can</p> <p>2 simply cut off the oxygen of any other company, and that's</p> <p>3 entirely permissible. I don't think Grupo is intended to</p> <p>4 be read that broadly. I think it was very fact specific.</p> <p>5 So I think with the claims that are brought, when you</p> <p>6 look at maintaining the status quo, the only way we can</p> <p>7 maintain the status quo here is for NAT to receive payment.</p> <p>8 There's no other way.</p> <p>9 As the other cases have indicated, if we receive</p> <p>10 payment four, five, six months down the line, that doesn't</p> <p>11 do NAT any good. They are either going to close their</p> <p>12 doors, or they're going to file bankruptcy. We have</p> <p>13 provided the concrete evidence for the Court to make that</p> <p>14 determination. So I think that --</p> <p>15 THE COURT: How is the remedy you are seeking</p> <p>16 anything different than like prejudgment attachment?</p> <p>17 MR. SWIER: Your Honor, in most circumstances, of</p> <p>18 course, prejudgment attachment is not proper. But, again,</p> <p>19 when you look at the facts here, equity is intended to not</p> <p>20 let this type of thing happen. It's within the Court's</p> <p>21 discretion, I believe, even with Grupo, because I think</p> <p>22 that's a limited decision. I think even with Grupo, this</p> <p>23 Court still has the ability under the affirmative defenses</p> <p>24 and under the damages claim to maintain the status quo.</p> <p>25 If these payments are not made for one or two or three</p>

1 months until this case comes to a final resolution, the
 2 status quo is gone, because you have a company that's
 3 surviving and still has their doors open, which no longer
 4 will. I think that's very clear.

5 So I think that Grupo can be distinguished, because
 6 we're dealing with an entirely different factual situation.
 7 The Court's equitable powers would allow this to be done.
 8 The Court, of course, can also impose under Rule 65 a bond.
 9 The fact is if these payments are not made --

10 THE COURT: If I impose a bond under Rule 65,
 11 generally it has to be in an amount so that the party can
 12 be made whole that I've ruled against. So if I rule
 13 against Sprint here and order them to pay, and let's say
 14 the amount I order them to pay is the \$500,000 mentioned
 15 earlier today, you would have to post a bond in that
 16 amount, plus the interest that would accrue during the time
 17 period this case was pending on appeal.

18 How does your client have the wherewithal to pay that
 19 bond?

20 MR. SWIER: What we would do, Your Honor, what's
 21 done in most of these cases. We would have to find a
 22 bonding company who would be willing to have us put up
 23 whatever percentage of the bond they would require to do
 24 that. I think the financial wherewithal is probably such
 25 that we could post potentially a 10 percent bond with a

1 bonding company.

2 THE COURT: One of the representations made is
 3 that your client is on the verge of bankruptcy. I know
 4 from getting bonds for clients of mine in the past, that
 5 you have to have the wherewithal to pay back the amount in
 6 the event the bonding company pays the bond. So I don't
 7 know how your client would be able to, since you
 8 represented they are on the verge of bankruptcy, would be
 9 able to come up with the collateral that would be necessary
 10 for the bonding company.

11 MR. SWIER: Your Honor, I think that's a decision
 12 they would have to make. The fact of the matter is that
 13 with the bond, I still think that would be a commercial
 14 decision. If we could get a bonding company who could
 15 require whatever amount they could require, and NAT could
 16 at least come up with a 10 percent bond, that would at
 17 least allow them for the next couple months to keep their
 18 doors open and to keep providing the services that need to
 19 be provided.

20 The Court also has the discretion to say, simply based
 21 on the party's financial status, after a factual finding,
 22 you can find that they can't afford a bond. Therefore,
 23 based on your factual findings, you don't think a bond is
 24 appropriate in this case. You could do that. That's
 25 within your power to do that.

1 Again, this company is in such dire circumstances.

2 We're dealing with a company that has \$6,000 in the bank
 3 against a company that is a multi-billion dollar company.

4 THE COURT: Mr. Swier, going back to the merits
 5 of whether the Court even has the power to do this. I
 6 looked at the claims you have.

7 First, you have the breach of contract. Then you have
 8 breach of an implied contract. Both of those are just
 9 seeking standard damages or a standard collection action.

10 The third claim you have seeks relief based on a
 11 theory of quantum meruit, which would be an equitable
 12 claim.

13 The question I have is in a similar case to yours,
 14 back in June of 2009, Sancom vs. Qwest, this Court
 15 dismissed the quantum meruit claim, finding that it was
 16 barred by the filed rate doctrine.

17 So is there any reason why I would do anything
 18 different here with regard to that equitable claim you do
 19 have?

20 MR. SWIER: I think there would be, Your Honor.
 21 There was a new case that came down just a few weeks ago.
 22 It was the All American case from the FCC. In that case
 23 the FCC found in that case that you could not bring claims
 24 under the Federal Communications Act, I believe it was
 25 Section 201 and 203, if found that, indeed, these type of

1 switched access service litigations, you could not bring
 2 those type of claims under the Federal Communications Act.

3 What the case said is you have to bring a normal
 4 common law action, which could be breach of contract, which
 5 could be implied contract. Which in this case, after that
 6 new decision, means I can now bring an unjust enrichment or
 7 quantum meruit equitable claim. I think that All American
 8 case changed the entire landscape of the cause of action
 9 that need to be brought validly in these switched access
 10 cases.

11 THE COURT: So let's say you have a valid quantum
 12 meruit claim. How would I determine the dollar amount that
 13 would be paid? Quantum meruit assumes there's no contract
 14 between the parties. There's no contract. There's no
 15 implied contract. The Court just has to determine what the
 16 value of the services was.

17 So how could I fashion a remedy ordering Sprint to pay
 18 a reasonable amount at this point in the litigation?

19 MR. SWIER: I think you can do it in one of two
 20 ways. Number one, it's in the record that Sprint owes from
 21 the very first tariff up to today almost \$600,000.

22 THE COURT: But that's based on the tariff rate.

23 MR. SWIER: It is, but --

24 THE COURT: The quantum meruit assumes the tariff
 25 rate is not valid.

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1 MR. SWIER: But I think, Your Honor, what you can
 2 do is you can use that tariff rate as a benchmark, and say
 3 for a short period of time for this preliminary Injunction,
 4 that is the amount that I will use as a benchmark, because
 5 the FCC hasn't struck down -- In fact, the FCC said the
 6 tariffs are fine.

7 THE COURT: But wouldn't it be fair for the Court
 8 to assume that even you don't think that tariff rate is
 9 correct since you have now filed a new tariff?

10 MR. SWIER: No, I don't think at all. I think in
 11 that case what NAT has done is exactly what the FCC has
 12 said in their new NPRM. That NPRM, as you know, was an
 13 incredibly historic document, and it just happened to come
 14 out about less than a month ago.

15 What that document says specifically is that access
 16 stimulation, which is what they called it, access
 17 stimulation is both legal and compensable, which we've
 18 argued from the beginning. So I think that will be clear
 19 that this type of traffic is legal and compensable. That
 20 issue I think is off the table now.

21 Then what they said is, okay, if you were involved in
 22 access stimulation or conferencing service, like my clients
 23 are. We don't hide that. That's what we're involved in.
 24 We're with a free conferencing company. What you do is you
 25 don't just say they don't get paid.

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1 What the FCC has said is that that is compensable
 2 traffic. How we're going to compensate for that traffic is
 3 to have a high-volume access tariff, which is exactly, just
 4 a couple months before the FCC's NPRM came out, is what we
 5 did. So we were actually a couple months ahead of the
 6 FCC's NPRM, which says as of right now, we think the
 7 high-volume access tariff is the way to go, which is
 8 exactly what we did. We were two steps ahead of the FCC.

9 So I think what the Court could do, if you look at the
 10 past tariffs before the high-volume was filed in November,
 11 you could say, "You know what? I think that amount is in
 12 dispute, and we need a little bit more clarification from
 13 the FCC."

14 But now, with the high-volume access tariff, we have
 15 done exactly what the FCC has said you need to do.

16 THE COURT: How does that affect -- if I applied
 17 that rate, what impact does it have on your damages?

18 MR. SWIER: It has an impact on the damages that
 19 I think, if the number Mr. Cestero said, was that if you
 20 take the money that Sprint owes from the time the
 21 high-volume access tariff was filed until as of right now,
 22 they owe NAT approximately \$120,000 under that high-volume
 23 access tariff. Let's just leave the other money to the
 24 side a minute. We can fight about that later.

25 But that high-volume access tariff, number one, Sprint

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1 and all the large carriers fought like heck, as the record
 2 reflects, to try to get that high-volume access tariff
 3 deemed illegal. The issues were briefed voluminously by
 4 the parties.

5 The FCC said that is a lawful tariff, and we reject
 6 Sprint and Verizon and the other big companies' arguments
 7 that it's not. That tariff has been deemed lawful.

8 Then a month and a half later --

9 THE COURT: It wasn't really deemed lawful,
 10 though, was it? They decided that at that point it should
 11 not automatically be rejected.

12 MR. SWIER: But when you go through the 15-day
 13 notice process, like that tariff did, Your Honor, once that
 14 15-day notice period goes by, and the FCC does not reject
 15 the tariff, that is deemed lawful. That's in our Brief.
 16 Because in the NPRM, the FCC clarified what "deemed lawful"
 17 is. If you look at that "deemed lawful" language in the
 18 Brief, that is a deemed lawful tariff.

19 Now, the large companies can still sue us through the
 20 FCC process, and we'd go through the entire litigation
 21 there. But as of right now, that high-volume access tariff
 22 is deemed lawful.

23 The FCC now has says, "Yeah, that's how you should do
 24 it. If you're going to crank up the minutes, then the rate
 25 should come down." That's exactly what NAT did here.

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1 So we think if you would take what is owed under the
 2 high-volume access tariff for the next couple months, and
 3 you would say, "Okay, Sprint, you owe \$120,000 to NAT." I
 4 mean it's clear under that tariff that that's a valid
 5 tariff. Then what you can do is you can say, "Okay, from
 6 this time until we have the ultimate trial on the merits,
 7 Sprint, you have to pay that money under the high-volume
 8 access tariff until we have a final resolution."

9 That allows the Court to provide the equitable relief
 10 to keep NAT open. It's easy to determine, because you are
 11 under a tariff that the FCC has deemed lawful. It sets out
 12 specifically what the rate of compensation would be based
 13 on the minutes. The higher the minutes go, the more the
 14 compensation comes down. It's to Sprint's advantage. If
 15 there's a bunch of access stimulation, the more minutes
 16 their customers use, the lower their rate they have to pay
 17 NAT goes.

18 So from a financial standpoint, it's an advantage for
 19 them, because they don't have to pay that higher rural
 20 tariff fee. Once you hit a certain number of minutes, it
 21 takes a big drop.

22 That's exactly what the FCC has said is the way to do
 23 this. That's why the timing of that document is so ironic.
 24 Not only did we file the tariff November 30, but then on
 25 February 9 the FCC says, "That's exactly what we think

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1 we're going to do here to figure out this access
 2 stimulation problem."
 3 So I think, Your Honor, it's very easy. You take that
 4 high-volume access tariff rate. That's what you apply
 5 until the FCC comes out with their final rules here
 6 probably in the next three or four months, and it keeps
 7 NAT's doors open. It's the only way those doors will be
 8 kept open.
 9 THE COURT: So the remedy you are seeking is one
 10 that's equitable in nature.
 11 MR. SWIER: Yes.
 12 THE COURT: One of the issues a Court would
 13 generally have to look at, before granting an equitable
 14 issue, is whether the party seeking relief has unclean
 15 hands.
 16 MR. SWIER: Yes.
 17 THE COURT: One of the things I look at here is
 18 the fact that, as I indicated before, in June of 2009 I
 19 issued an opinion in Sancom vs. Qwest, and in that case the
 20 small telephone exchanges were suing the large telephone
 21 companies, because the large telephone companies were
 22 denying payment on the access charges. Same issue we have
 23 here. So there was already notice in June of 2009 that the
 24 big telephone companies were disputing and not paying those
 25 access charges.

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1 NAT was set up after June of 2009, basically using the
 2 same model for billing. Now they are arguing they are in
 3 financial trouble, because the big telephone companies are
 4 refusing to pay those access charges.
 5 I guess my question is, doesn't that put them on
 6 alert, the fact I already issued an opinion in June of 2009
 7 that was a published opinion, and I know there were 15 to
 8 20 of these cases going on in South Dakota at that same
 9 time period. So NAT was already on notice, before they
 10 even set up this business model, that the large telephone
 11 companies would dispute and may not pay these access
 12 charges.
 13 So is it fair that NAT proceeds forward, knowing it
 14 may be disputed and they'll need deep financial pockets to
 15 survive this and fight this battle with the phone
 16 companies, and their argument for injunctive relief now is
 17 we may go bankrupt if we don't get injunctive relief. Do
 18 they really have clean hands?
 19 MR. SWIER: I think they do, and here is why I
 20 think it's different. If you look, and I put a chart up
 21 that showed the switched access revenues' history.
 22 If when NAT was formed in August of 2009, those
 23 switched access payments would have been zero across the
 24 board, then it's a different story. Then I think NAT is on
 25 notice that, "We don't agree with what you guys are doing,

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1 and we won't pay you a dime."
 2 But the fact is, when you look at these revenues, as
 3 soon as the access stimulation and conference calling
 4 started, NAT was getting paid by the carriers hundreds of
 5 thousands of dollars.
 6 THE COURT: But that's the exact same evidence
 7 that was in those other cases. It was only when the
 8 revenues got above a certain point, that the large
 9 telephone companies identified that it was from this type
 10 of revenue generator. That was already in the opinion I
 11 issued earlier.
 12 MR. SWIER: But in that case, Your Honor, the
 13 parties were not asking for immediate preliminary
 14 injunction. Sancom and those parties were not going to
 15 file bankruptcy. They weren't going to close their doors,
 16 because they had the financial wherewithal to withstand
 17 this.
 18 THE COURT: But my point is, that information was
 19 already out in the public before NAT was even formed. So
 20 can NAT use that as a basis to get injunctive relief, the
 21 fact they didn't put together a business model that gave
 22 them the wherewithal as a start-up company to weather the
 23 large telephone companies disputing these charges?
 24 MR. SWIER: I think in that case, though, when
 25 you look at the facts and the fact they were paid -- if we

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1 looked at business models and said, "You cannot go into any
 2 type of business if there's any type of regulatory or
 3 litigation questions." Then we wouldn't have any
 4 businesses.
 5 They have a business model that the FCC has now said,
 6 "That is compensable. It should have been compensable from
 7 the beginning."
 8 If the FCC comes out and says, "You know what? This
 9 stuff, access stimulation, is not compensable." Then I
 10 have an extremely difficult, if not impossible, argument to
 11 make. But the fact is, as Sprint unilaterally just said,
 12 "We're not going to pay."
 13 Now the FCC has come out and said, "No, it is
 14 compensable. We're going to have a high-volume access
 15 tariff. That's how it looks like we're going to do this."
 16 That has been part of NAT's business model. The FCC I
 17 just think has shown, "Yeah, that is a valid model. If you
 18 are going to have a high-volume access tariff, if you're
 19 going to have access stimulation, this is how it should be
 20 compensated."
 21 So I think when you look at unclean hands, the FCC has
 22 said, "You haven't done anything wrong. You've actually
 23 done exactly what we're saying. If you are going to have
 24 access stimulation, then the rate has to come down."
 25 How can it be unclean hands if we've done what the FCC

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<p>1 is now saying is how you should do it? At least from the</p> <p>2 time --</p> <p>3 THE COURT: The part I'm concerned about is that</p> <p>4 NAT should have been on notice that they needed to have a</p> <p>5 substantial amount of money to invest into this business to</p> <p>6 weather this time period where there was issues and doubt.</p> <p>7 MR. SWIER: Your Honor, of course as the Court</p> <p>8 knows, there are some companies who simply, for whatever</p> <p>9 reason, can't raise that type of capital. They tried.</p> <p>10 They got loans. They did what they could. The fact of the</p> <p>11 matter is, it's been months and months and months. Even</p> <p>12 after the FCC says, "Yeah, NAT, you're doing things right,"</p> <p>13 we still don't get paid.</p> <p>14 If we would get paid under the high-volume access</p> <p>15 tariff until this case is concluded, we could survive and</p> <p>16 we'd be fine, and the chips would fall where they may in</p> <p>17 front of a jury. That's why all the traffic previously,</p> <p>18 like I said, put that in a separate pot.</p> <p>19 But all we're asking for is to recognize that what we</p> <p>20 did with the high-volume access tariff was correct, and we</p> <p>21 should be paid for that, because our hands are totally</p> <p>22 clean, because we did everything right. NAT did what the</p> <p>23 FCC said we were supposed to do. If we get those payments</p> <p>24 from here until the end of the case, we're fine. We</p> <p>25 definitely have clean hands at that point. We've done</p>	<p>1 Amendment case.</p> <p>2 So the interest there, protecting the party who wants</p> <p>3 the expressive conduct to keep on going, is perhaps</p> <p>4 analyzed differently than if you've got a private dispute,</p> <p>5 such as we have here. In any case, I think that language</p> <p>6 in that opinion is not dispositive to the Court's decision</p> <p>7 in Doran. It was looking to whether or not the First</p> <p>8 Amendment would protect the bar owner who wanted to provide</p> <p>9 this topless dancing or nude dancing. I don't think it's</p> <p>10 controlling in any way in this case.</p> <p>11 Certainly Grupo Mexicano, another Supreme Court case,</p> <p>12 decided substantially later, and I think that sets the rule</p> <p>13 that governs this particular dispute. I think the Court</p> <p>14 was right on the mark with what the relief is being</p> <p>15 requested by NAT with its Motion for a Preliminary</p> <p>16 Injunction. It is seeking to obtain, through a preliminary</p> <p>17 injunction, that which it might secure, if it prevails, at</p> <p>18 the end of the day.</p> <p>19 The Tekstar decision, which we cite in our Brief,</p> <p>20 that's from Judge Erickson in the District of Minnesota,</p> <p>21 was analogous in this respect. Again, it involved a</p> <p>22 dispute between a traffic pumper and a long-distance</p> <p>23 carrier. The case is being referred to the FCC.</p> <p>24 Tekstar is moving for a bond to require the</p> <p>25 long-distance carrier, I believe it was Qwest, to pay in to</p>
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<p>1 exactly what we're supposed to do.</p> <p>2 THE COURT: All right. I think we've used up</p> <p>3 your time.</p> <p>4 MR. SWIER: I didn't get to what I was going to,</p> <p>5 but that's fine. Thank you.</p> <p>6 THE COURT: Mr. Knudson?</p> <p>7 MR. KNUDSON: Yes, Your Honor.</p> <p>8 THE COURT: Mr. Knudson, why don't I start out</p> <p>9 with my concern on your case. In the Supreme Court Opinion</p> <p>10 of Doran vs. Salem Inn, Inc., the Supreme Court recognized</p> <p>11 that if a party would suffer a substantial loss of</p> <p>12 business, and perhaps even bankruptcy, that that may be</p> <p>13 sufficient to show the harm they would experience, and that</p> <p>14 preliminary injunction would be proper.</p> <p>15 MR. KNUDSON: I don't think that was the issue in</p> <p>16 front of the Court. What you are referring to, I would</p> <p>17 regard as sort of a preparatory background on injunctive</p> <p>18 relief, but not necessarily to the decision of the Court.</p> <p>19 I submit what you saw in Doran, which was a case about nude</p> <p>20 dancing and whether a city could ban it or under conditions</p> <p>21 could restrict it, did not involve the precise issue as to</p> <p>22 whether or not injunctive relief could issue to</p> <p>23 circumstances like this, help parties resolve a private</p> <p>24 dispute where no constitutional issues are at stake, which</p> <p>25 is really what is going on in Doran. It's a First</p>	<p>1 the Court \$17 million, which is what Tekstar said would be</p> <p>2 its damages during the pendency of the FCC referral.</p> <p>3 Judge Erickson looked at Grupo Mexicano, and said</p> <p>4 that's the same rule that pertains in Tekstar. It's</p> <p>5 injunctive relief, prior to judgment, that's not supported</p> <p>6 by Grupo Mexicano. In fact, it's precluded by the Court's</p> <p>7 decision in that case.</p> <p>8 THE COURT: But in Grupo the Court recognized the</p> <p>9 difference between equitable relief and relief at law.</p> <p>10 In this case NAT does have the request for relief</p> <p>11 under quantum meruit, which would be an equitable claim.</p> <p>12 Why, if they have an equitable claim, wouldn't the Court be</p> <p>13 able to grant the preliminary injunction?</p> <p>14 MR. KNUDSON: Well, I think it's because the</p> <p>15 nature of the relief requested under quantum meruit is a</p> <p>16 proxy for remedy at law. It's a situation where the Court</p> <p>17 stepped in to try to help out the party who failed to</p> <p>18 perfect the creation of a legal contract, and it provided</p> <p>19 something of value. The measure of damages again is in</p> <p>20 money. Therefore, the quantum meruit claim, even if it</p> <p>21 sounds in equity, is not the basis for granting preliminary</p> <p>22 injunctive relief, awarding money damages before judgment.</p> <p>23 Quantum meruit also presupposes that there was value</p> <p>24 provided, and of course Sprint is contesting there was any</p> <p>25 value provided here. That it's being billed for</p>

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1 terminating access charges that are not permitted under the
 2 Federal Communications Act, and, therefore, there is no
 3 value by which you measure.
 4 I hear that you use the benchmark of a tariff. The
 5 tariff they are purporting to charge is, per se,
 6 unreasonable. The rates, if enforced, would allow them to
 7 recover enormous rates of return, far beyond anything
 8 that's allowed under a tariff regime. So even under their
 9 high-volume access tariff, they are seeking rates that are
 10 far and above what the FCC would permit following the end
 11 of its Notice of Proposed Rulemaking.
 12 THE COURT: But the FCC did refuse to strike down
 13 their tariff at this point. Correct?
 14 MR. KNUDSON: Are we talking about NAT's tariff?
 15 THE COURT: NAT's Tariff No. 2.
 16 MR. KNUDSON: Well, the Commission has recognized
 17 that the deemed lawful regime, which is the accelerated
 18 review, so that a tariff that's going to raise rates has to
 19 be reviewed. It goes into force or can be enforced after
 20 15 days, if the Commission has not suspended the tariff.
 21 The Commission did not have the benefit of the
 22 discovery we have presented to this Court, which is that
 23 Free Conferencing Corporation is siphoning 75 percent of
 24 the revenue off the top. I think that may have changed the
 25 Commission's analysis of whether this tariff should have

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1 been suspended pending a ruling on its lawfulness.
 2 I think the Commission itself recognizes the flaw in
 3 the deemed lawful regime and addresses that in its own
 4 proposed rulemaking, which is why it's trying to address
 5 this problem created by traffic stimulation, which the
 6 Commission says contravenes public policy because it
 7 distorts investment in telecommunications resources,
 8 imposes the cost of traffic stimulation on other customers
 9 of this public telephone network.
 10 THE COURT: It's pretty clear to me in the cases
 11 I've read that the FCC has handed down that they're going
 12 to find that Sprint owes NAT something.
 13 MR. KNUDSON: I don't think so, Your Honor. Take
 14 a look at Farmers. Farmers is a situation where they
 15 looked at a traffic stimulation scheme like we see here --
 16 THE COURT: I think the footnote in Farmers makes
 17 it clear that NAT is going to end up with something.
 18 MR. KNUDSON: If it ends up with something, it
 19 will be so de minimis, compared to what they are seeking,
 20 that the end result would be the same. This business plan
 21 doesn't work unless they can make unreasonable rates of
 22 return.
 23 Farmers says that you cannot posture a situation or
 24 create a situation where the subscriber, that's FCC, Free
 25 Conferencing Corporation, under their definition, is paid

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1 by the local carrier. The whole idea of allowing higher
 2 ~~tariffed switched access charges in rural areas assumes~~
 3 that you have the regular customer relationship, and that
 4 you can get higher costs out of the long-distance carriers
 5 to cover the higher cost of operating that rural system.
 6 Now you have some scheme that comes in here, plants a
 7 piece of equipment that connects callers from all over the
 8 country or all over the world with an idea that they can
 9 take advantage of what they call switched access charges
 10 for terminating traffic, and take advantage of the higher
 11 rate allowed by the Commission because of the high cost of
 12 operation, when, in fact, it's not a high cost of operation
 13 to generate 12 million minutes of use, and seek to recoup
 14 hundred of thousands of dollars of revenue for an
 15 investment on NAT's books of just over \$200,000. That's an
 16 obscene rate of return, and certainly would never pass
 17 regulatory mustard if the FCC had an opportunity to examine
 18 it.
 19 So the deemed lawful regime the FCC has recognized
 20 allows companies like Free Conferencing Corporation to
 21 arbitrage rates to try to take advantage of a system where
 22 they can file a tariff and hopefully slip through the radar
 23 screen and be able to charge and get paid these tariffs.
 24 But the Commission has now ruled in All American, that
 25 simply because the long-distance carriers have woken up and

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1 are not paying, is not a violation of the Act. So it's not
 2 a violation of the Federal Communications Act. The
 3 Commission is very explicit about the remedies that NAT
 4 has.
 5 NAT can cut off Sprint. The testimony of Ms. Clouser
 6 shows in doing so, it would reduce the minutes of use
 7 attributable to Sprint, and could reduce the charges from
 8 South Dakota Network, because that's based out of portal
 9 use, and that's commensurate with the amount of minutes of
 10 use.
 11 The other option the Commission said in All American
 12 was that NAT could sue for breach of contract. A breach of
 13 contract is at law. I don't think All American, I don't
 14 think the Notice of Proposed Rulemaking changes your ruling
 15 on quantum meruit from a few years ago.
 16 The Commission is saying sue under breach of contract,
 17 and if you've got a breach of contract case, Grupo Mexicano
 18 says you don't get pre-judgment injunctive relief. That's
 19 what Judge Erickson found in the Tekstar case. Therefore,
 20 their Motion at the threshold fails, because they don't
 21 have a legal right, or I should say a right in equity to
 22 injunctive relief. They failed to establish irreparable
 23 harm.
 24 I think you are on the mark with your analysis of they
 25 went into this business, knowing full well that the

<p>229</p> <p>1 long-distance carriers would wake up and oppose and refuse 2 to pay these charges. Nonetheless, they go ahead and begin 3 investing resources, as Defendant's Exhibit 27. This is 4 invest money from WideVoice that's pouring in to build out. 5 But who is WideVoice? WideVoice is David Erickson. 6 David Erickson is an experienced telecom entrepreneur. He 7 is exploiting his regulatory arbitrage all over the 8 country. He knows full well the risk of going in and 9 creating another one of these schemes. 10 Who is Gene DeJordy? Gene DeJordy was active with 11 Alltel. He knew very well where the long-distance carriers 12 stood on this kind of business. 13 So they walked in there with their eyes wide open. 14 They hoped so they could take advantage of the Native 15 American aspect of this case, that they could work through 16 the Tribal Utility Authority, the Tribal Court, and seek to 17 maintain their business operation, without an examination 18 and protection from a Federal Court, which fortunately we 19 got. 20 THE COURT: So Tariff No. 2 that was filed, don't 21 you think that tariff meets the FCC's interests, as they've 22 set out in the Notice of Proposed Rulemaking? 23 MR. SWIER: No, I don't. Here is why. First of 24 all, it will allow for unreasonable charges, 25 notwithstanding the rates they purport to set in their</p>	<p>231</p> <p>1 must do equity. Frankly, I think you've seen the situation 2 here where the people who are in charge of NAT today have 3 not been fair to their business partners. They are seeking 4 injunctive relief. They're seeking the equitable powers of 5 this Court to protect them for their business practice. 6 But you heard Mr. Lengkeek testify. Until I told him 7 how much money NAT had earned in 2010, he didn't know that 8 fact. They have not produced any evidence that they are 9 keeping the Tribal Board members informed of the financial 10 status of NAT. 11 Where is Mr. Reiman? I wanted his deposition, and 12 they benched him and put him out of town. 13 MR. SWIER: Objection, Your Honor. That is not 14 in the record, and that is not what happened, as the Court 15 can see from the Protective Order filed. 16 MR. KNUDSON: Where is Mr. Reiman? He was here 17 in October. He didn't disclose to the Court then he was no 18 longer the President of NAT. You may recall we went into a 19 sealed session to hear how much money he invested in the 20 business. I refer the Court to the sealed portion of the 21 transcript at Page 3, Lines 5 through 14. You can see what 22 his answer was, how much money he said he put into the 23 business. 24 If you look at the Balance Sheet that's part of 25 Exhibit A and also put into evidence by the Defendant, NAT</p>
<p>230</p> <p>1 tariff. Even if you look at their tariff, and we can't 2 quite figure out how they are doing it, because if you look 3 at their tariff and their so-called high-volume access 4 tariff, if you get over five million minutes of use, your 5 rate drops down to 0.14 cents per minute. Your other rates 6 are higher than that. 7 But we're being billed or invoiced at about five cents 8 per minute right now, even after this tariff has been 9 filed. We're finding that, even on the evidence that's 10 coming to us, that this tariff isn't being followed. 11 So the question again -- 12 THE COURT: Sorry. How many minutes are they at 13 now? 14 MR. KNUDSON: Which? My argument or the minutes 15 of use? 16 THE COURT: The minutes of use. I don't have 17 that exhibit right now. 18 MR. SWIER: Plaintiff's Exhibit A, Page 1, 19 they're up to 12 million. Again, that's all the carriers 20 that they are invoicing. 21 THE COURT: Not just Sprint. 22 MR. KNUDSON: Sprint's, as you heard, was 922,000 23 and change. Sprint is less than 10 percent of the business 24 here. 25 We talk about irreparable harm. He who seeks equity</p>	<p>232</p> <p>1 has claimed that Mr. Reiman, far from putting money into 2 the business, is taking money out. I would submit that's 3 why Mr. Reiman is no longer the President of NAT. 4 Again, what has happened to NAT? All the money is now 5 under the control of the people in Long Beach, Free 6 Conference Corporation, David Erickson. It's his money, 7 and yet we don't hear a thing about how much money 8 WideVoice has, how much money Free Conference Corporation 9 has. They are the stakeholders here. They are the ones 10 who knew what they were getting into. 11 Now they say we want to pull the plug, but we'll give 12 it one last shot and see if we can get the Court to order 13 Sprint to pay and see what happens. They're more 14 interested in getting their money out of this business than 15 putting any money back into the Reservation. You heard 16 Mr. Lengkeek testify that the Tribe had not received a 17 dollar, any money at all from NAT. 18 But when there was money in February of 2011, where 19 did the money go? AT&T paid \$150,000. Did they keep the 20 money in NAT so it could keep operating? No. The money 21 went to WideVoice, in preference to any of the other owners 22 of NAT. To repay what, a loan? We don't see any evidence 23 of a loan. We don't have a loan agreement. We don't have 24 a promissory note. There's no interest on its books of 25 NAT, interest being charged by WideVoice.</p>

1 So, again, WideVoice, Free Conference Corporation,
 2 David Erickson, is asking this Court to use its equitable
 3 powers to further its scheme that they concealed from the
 4 Tribe that transgresses the open, transparent policy that
 5 the FCC wants in its Notice of Proposed Rulemaking. That's
 6 the policy side of this case, Your Honor. It's not often a
 7 dispute between private parties implicates important issues
 8 of public policies, but this is one of those cases.

9 In the Notice of Proposed Rulemaking, they talk about
 10 converting the Universal Service Fund, of which
 11 Mr. Lengkeek was ignorant until I brought it up to him, so
 12 that it's Connect America Broadband. It's a much more
 13 comprehensive program to bring higher quality
 14 telecommunication services to remote areas, including
 15 Tribal lands like the Crow Creek Reservation.

16 But the FCC in its Notice of Proposed Rulemaking wants
 17 it done in an open and transparent way. We've submitted
 18 with our Memorandum addressing the Notice of Proposed
 19 Rulemaking comments of the Chairman of the Commission
 20 directly responding to the question, "Why don't we let this
 21 traffic pumping go on in rural or remote areas?" Well, he
 22 says he wants it to be open and transparent. I think he
 23 knows why.

24 We have a situation here where it's not open and
 25 transparent. It's a system designed to enrich people who

1 have no stake in what goes on at the Reservation.
 2 You heard Mr. Reiman say in October how he was
 3 concerned about how poor things were at the Crow Creek
 4 Reservation. I don't deny they are. Statistics show it is
 5 a very poor place. But he is not here anymore. The money
 6 is all controlled by Free Conference Corporation. They're
 7 in Long Beach or Nevada, that's WideVoice, Nevada, a Sub S
 8 corporation.

9 So they can't cloak themselves in any public policy
 10 benefit. They are promoting a scheme that is inconsistent
 11 with what the Commission would permit under its Notice of
 12 Proposed Rulemaking. They are attempting to keep going a
 13 scheme that contravenes the policy initiatives the
 14 Commission has undertaken in its Notice of Proposed
 15 Rulemaking. If this Court were to grant that Motion, it
 16 would be directly contravening the policy initiatives the
 17 Commission has undertaken.

18 So this is an unusual case for a private dispute,
 19 where the issues are of national significance, and that the
 20 Court should be mindful in considering NAT's Motion. They
 21 have the burden on that issue, as well. I don't think they
 22 can meet their burden on that. Far from it.

23 NAT claims some legal authority that this Court can
 24 intervene at this point in time and order Sprint to pay
 25 unpaid invoices and Invoices going forward. The authority

1 it cites in its Brief, we have the Semmes vs. Ford Motor
 2 Company case, which is one of those hard cases to make bad
 3 law types of cases. When the Eighth Circuit considered
 4 Semmes in the Watkins Distributor case, it held Semmes
 5 strictly limited to the facts of that case, i.e., those of
 6 no real precedential value in this Circuit.

7 Much is placed on the NewLife case. I think the Court
 8 correctly noted it's an unpublished decision, without
 9 addressing Grupo Mexicano.

10 As you recall in our briefing last fall, when there
 11 were cases that were advanced in support of Tribal
 12 exhaustion, I think failed to address Nevada v. Hicks, or
 13 other more recent Supreme Court jurisprudence on
 14 exhaustion. They were hardly persuasive. I would think
 15 NewLife falls in that category.

16 Further, one issue that seems to be motivating the
 17 District Court in NewLife. It's a factual situation where
 18 Express Scripts is asserting a right of setoff against
 19 NewLife based on a contract NewLife had with Blue Cross, to
 20 which Express Scripts was not a party or apparently a
 21 third-party beneficiary, so hardly could have standing to
 22 assert a right of setoff.

23 And that NewLife alleged it was providing life-saving
 24 medicines. I would submit that life-saving medicines are
 25 not the same as high-speed Internet access, and that you've

1 heard there are alternative sources for Internet service on
 2 the Reservation, as well.

3 Again, the Court also noted in NewLife the concrete
 4 evidence of imminent collapse of the business. We don't
 5 have that kind of concrete evidence. We have very
 6 nebulous, very vague testimony from a person who purports
 7 to be NAT's controller, although he doesn't claim that
 8 title. We don't have a cash flow forecast.

9 We have no real explanation for why they pulled
 10 \$140,000 out of NAT, except to pay WideVoice. They weren't
 11 looking ahead to see what their future costs would be and
 12 how much they had to keep in the bank to keep going.

13 I would like to point out another thing that is sort
 14 of how this thing falls apart. We talk about the founders
 15 and now the current operators of Free Conferencing
 16 Corporation. Set up something that I think is inherently
 17 doomed to fail, no matter what's going on here, if you have
 18 but one or two carriers who might say we're not going along
 19 with this scheme.

20 We've heard about the revenue generated. Then take a
 21 look at how much goes out the door for marketing expenses.
 22 Those really aren't marketing expenses. That's Free
 23 Conferencing Corporation's take off the top. That's
 24 precisely what bothered the Commission in Farmers, that the
 25 subscriber, Free Conferencing Corporation, is getting paid.

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<p>1 That distorts and makes a mockery of what the NECA tariff</p> <p>2 is supposed to allow.</p> <p>3 Then the billing agent. I think the Court did the</p> <p>4 math that the controller was unwilling to do. It's about</p> <p>5 eight percent of revenues. We don't hear how much that</p> <p>6 cost went down after they fired the CABS Agent and picked</p> <p>7 up another player.</p> <p>8 Circuit expenses. Circuit expenses, you heard from</p> <p>9 Amy Clouser, relate to usage. Those are being charged, if</p> <p>10 you recall, by we've got invoices from South Dakota Network</p> <p>11 and on and on. Those are the circuit expenses. That's</p> <p>12 done by tariff. They knew what those charges would be. If</p> <p>13 they wanted to negotiate a better rate, they could have</p> <p>14 done so. They haven't offered any evidence that they've</p> <p>15 ever tried to really lower those costs.</p> <p>16 But let's go back to these. If we add this up, we</p> <p>17 have 75 percent. We did hear the controller say 12</p> <p>18 percent, and then 8 percent. So right off the top, 95</p> <p>19 percent of the revenues are going to places other than</p> <p>20 covering other operating expenses.</p> <p>21 We have some consulting fees. I'm not sure what they</p> <p>22 are. Paid Mr. Reiman \$3,000 a month, but we don't know</p> <p>23 what that's for, other than to make sure the Internet Cafe</p> <p>24 is open.</p> <p>25 THE COURT: As I understood the agreement, out of</p>	<p>1 THE COURT: The 75 percent that goes to Free</p> <p>2 Conferencing is 75 percent of the gross. They don't pay</p> <p>3 any expenses out of the 75 percent?</p> <p>4 MR. KNUDSON: That's correct. Now, I would like</p> <p>5 to point out that Free Conferencing Corporation and</p> <p>6 WideVoice are interrelated. They have a common CEO, David</p> <p>7 Erickson. So David Erickson has put in various amounts of</p> <p>8 money. At one point it's around \$500,000. But he's taken</p> <p>9 out almost \$800,000. So even though WideVoice is the</p> <p>10 nominal creditor, there is only one creditor of NAT. Free</p> <p>11 Conferencing Corporation, a/k/a David Erickson, has done</p> <p>12 well by this 2010.</p> <p>13 THE COURT: You have about two more minutes.</p> <p>14 MR. KNUDSON: I've addressed the policy</p> <p>15 arguments. I think the irreparable harm, both in the front</p> <p>16 end, the threshold inability, and the fact that this is a</p> <p>17 flawed business model they knew wouldn't work from the</p> <p>18 get-go.</p> <p>19 The other Dataphase factor of significance, and I</p> <p>20 really don't have time to go into it at length, is they are</p> <p>21 -- the likelihood of success on the merits. In particular,</p> <p>22 I pointed out the Farmers decision, which is referenced in</p> <p>23 our Brief in this section. I would like basically to quote</p> <p>24 from that. I'll finish with just a reference to the tariff</p> <p>25 and its complexity and its violation of the Act by virtue</p>
<p>238.</p> <p>1 all the gross revenues, 75 percent of the gross goes to</p> <p>2 Free Conferencing, and 25 percent goes to NAT. Then NAT</p> <p>3 has to pay all of the expenses. Then the gross is then</p> <p>4 divided according to the shares? I mean the net?</p> <p>5 MR. KNUDSON: Net profit, according to the Joint</p> <p>6 Venture Agreement, would be divided up according to</p> <p>7 respective interests.</p> <p>8 Think about this for a minute, Your Honor. If you</p> <p>9 take 75 percent off the top, and then the 25 percent has to</p> <p>10 cover these two line items, it doesn't leave enough behind</p> <p>11 to pay those expenses. So we don't know what the agreement</p> <p>12 is really between Free Conference Corporation and NAT,</p> <p>13 other than it apparently calls for 75 percent off the top.</p> <p>14 We heard testimony there was a written agreement signed --</p> <p>15 THE COURT: But my question is out of the 25</p> <p>16 percent that's going to NAT, all the expenses are paid</p> <p>17 first, which would include the billing agent, circuit</p> <p>18 expenses, consulting fees, the wages, any of those other</p> <p>19 expenses. Then if there's anything left over, 51 percent</p> <p>20 would go to the Tribe, and 25 and 24 percent to the other</p> <p>21 two entities?</p> <p>22 MR. KNUDSON: It could under the Joint Venture</p> <p>23 Agreement if there's some profit left over. If there's</p> <p>24 profit, we would also reinvest it. But that would be</p> <p>25 available for distribution.</p>	<p>240</p> <p>1 of the way it's written and designed.</p> <p>2 I'll refer the Court to Page 27 of our Brief. In</p> <p>3 there basically they're saying this scheme that was at</p> <p>4 issue in Farmers involved a situation where the subscriber</p> <p>5 was getting paid for the services, not the other way</p> <p>6 around, which is what the tariff regime is supposed to</p> <p>7 protect.</p> <p>8 We, of course, believe they are trying to tariff for</p> <p>9 void services, which is not allowed. The tariff itself,</p> <p>10 No. 2, is void. They have an issue for vagueness, for</p> <p>11 excessive rates, and this is really impossible to follow.</p> <p>12 It would be found unreasonable under the Federal</p> <p>13 Communications Act by the Commission if it were to have a</p> <p>14 chance to take a look at this tariff. I would suggest this</p> <p>15 case be referred there, Your Honor. That's all I have.</p> <p>16 THE COURT: Thank you, Mr. Swier? I'll give you</p> <p>17 ten more minutes.</p> <p>18 MR. SWIER: Your Honor, there's a lot of areas I</p> <p>19 want to discuss with the Court.</p> <p>20 The first is the 75 percent that FreeConferenceCall</p> <p>21 gets of the contract. FreeConferenceCall is the largest,</p> <p>22 privately held conference calling company in the world. If</p> <p>23 FreeConferenceCall doesn't do all the marketing, doesn't</p> <p>24 drive all the traffic to NAT, NAT gets nothing. Zero</p> <p>25 percent of zero is nothing. The only way NAT and the Tribe</p>

1 make money is because of FCC's worldwide marketing efforts.
 2 So without FCC and their presence, the Tribe is back
 3 to where they've been forever. Nothing. Because those
 4 calls then to NAT don't get generated without FCC. You've
 5 heard that is a standard percentage in this industry.

6 Also, I want to clarify. NAT gets 25 percent of the
 7 gross revenues. That is the way the contract is set up.
 8 They get 25 percent of the gross.

9 THE COURT: Who pays the expenses? Out of whose
 10 portion do the expenses come?

11 MR. SWIER: The expenses come out of the shares
 12 according to what the shareholders have. The Tribe had no
 13 liquid assets to pay for any of the start-up costs.

14 THE COURT: My question is like the employee
 15 salaries, are they paid out of the 75 percent that goes to
 16 FreeConferenceCall, or are they paid out of the 25 percent
 17 that goes to NAT?

18 MR. SWIER: I don't know for sure. I'll guess,
 19 Your Honor, because they are an employee of NAT, they are
 20 paid by NAT.

21 THE COURT: And the carrier expenses would come
 22 out of NAT, because that's an expense that NAT has
 23 contracted for?

24 MR. SWIER: Correct. If NAT doesn't provide
 25 those services and that infrastructure, there is no NAT.

1 WideVoice has the expertise, one of the partners, WideVoice
 2 has the expertise to provide that high technological
 3 equipment that's needed to do worldwide conference calling.

4 THE COURT: So does FreeConferenceCall provide or
 5 pay for any of the expenses associated with this?

6 MR. SWIER: FreeConferenceCall -- that's a good
 7 question, Your Honor. FreeConferenceCall gets their 75
 8 percent gross, and because -- FreeConferenceCall is not a
 9 member of NAT. They are a contractual partner of NAT, but
 10 they are not a part of NAT.

11 THE COURT: I understand that. So of all the
 12 revenue generated, FreeConferenceCall gets 75 percent.

13 MR. SWIER: Yes.

14 THE COURT: And NAT gets 25 percent and pays all
 15 the expenses.

16 MR. SWIER: I believe that's correct. Again,
 17 that's a standard agreement.

18 THE COURT: It may be a standard agreement, but
 19 when you look at all the expenses involved, it pretty much
 20 eats up that 25 percent.

21 MR. SWIER: Your Honor, it doesn't. What
 22 FreeConferenceCall -- what FreeConferencing has to pay to
 23 market worldwide to get up to 12 million minutes to
 24 Crow Creek is immense. It's not like they are taking that
 25 \$700,000 and putting it in their pocket free and clear.

1 They market worldwide. If they don't pay those upfront
 2 costs, there is no NAT.

3 THE COURT: That's what I asked. What expenses
 4 does FreeConferenceCall have?

5 MR. SWIER: Sure. Marketing throughout the
 6 world. They have employees, 40 or 50 employees whose job
 7 it is to further the interests of FreeConferenceCall. If
 8 that isn't there, if that leadership, if that know-how, if
 9 that corporation, which has become the largest privately
 10 held conference calling company in the world, doesn't
 11 exist, NAT gets nothing.

12 THE COURT: But all the expenses listed on the
 13 exhibits that came in today are all paid by NAT.

14 MR. SWIER: They are paid by NAT, because
 15 FreeConferenceCall covers all the expenses worldwide to
 16 drive the traffic. So it's a partnership. Each entity has
 17 its role. But if you don't have FreeConferenceCall
 18 generating the traffic, there's no traffic to get payment
 19 on.

20 THE COURT: Mr. Knudson?

21 MR. KNUDSON: I would like to object to the
 22 assertion that FreeConferenceCall pays all these other
 23 expenses. There's no competent evidence of that in the
 24 record for the Court today.

25 THE COURT: I can assume that there are some

1 marketing expense, though. I mean I can use my common
 2 knowledge to assume that. People don't just pick up the
 3 phone and dial a number that gets to NAT unless there's
 4 some marketing. I think that I can draw that conclusion.

5 MR. KNUDSON: Maintain a web browser, I suppose
 6 there might be some expense. But, again --

7 THE COURT: I don't know what the expense is. I
 8 just think I can use my common sense to assume there is
 9 some expense.

10 MR. KNUDSON: More than de minimis? I can't say
 11 that's the case.

12 THE COURT: In any event, continue on.

13 MR. SWIER: Your Honor, could I have my time,
 14 please?

15 THE COURT: Yes.

16 MR. SWIER: You asked before how you can fashion
 17 a fair remedy for the Interim period. Here is how you can
 18 do it.

19 Number one, Sprint has pounded on the table that this
 20 new high-volume access tariff is somehow improper. That is
 21 flat wrong. They've fought tooth and nail, and the FCC has
 22 told them, "No, you're wrong." This tariff, this
 23 high-volume access tariff is not only deemed lawful, but
 24 it's exactly what the FCC's NPRM has said how this should
 25 be handled.

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1 What could we possibly do more? We did everything
 2 right. They still refuse to pay us a nickel. You know
 3 why? Because they are a huge, multi-billion dollar
 4 organization that can beat on anybody who believes they
 5 could be a competitor or who they just don't agree with how
 6 they do business.
 7 It's insulting that Mr. Lengkeek has to sit up here
 8 and get bombarded with questions about, "Why don't you just
 9 take government subsidies? Why don't you put your hand
 10 out, like all the Reservations do, and take money?" That's
 11 arrogant and that's insulting. I actually felt sorry for
 12 Mr. Lengkeek that this has happened twice now. "Just stick
 13 your hand out. Take the government money. Don't try to
 14 compete."
 15 And the scheme and the traffic pumping, look at the
 16 NPRM. They use access stimulation. They say it's
 17 compensable. The Court is exactly right. That traffic is
 18 going to be compensable. But the more and more Sprint
 19 fights, the more and more companies, like NAT, can go out
 20 of business.
 21 So here is the remedy that I ask the Court to fashion.
 22 You've asked for one.
 23 The NPRM says this: The lowest tariff the FCC has
 24 suggested for high-volume services is that it should be
 25 compensated at the RBOC rate. That's the Regional Bell

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1 Operating Company rate. That rate is .0055 cents a minute.
 2 In other words, it's five and a half tenths of a cent per
 3 minute. That's the RBOC rate, which the NPRM says that's
 4 probably what we'll use for the default.
 5 Okay. If you want to go off NAT's high-volume access
 6 tariff and say, "You know what? I'm not sure of those
 7 numbers. I don't know if that's the per minute charge that
 8 will eventually come out." Then fall back to the RBOC,
 9 which is what the FCC says that's kind of what we're
 10 looking at proposing now.
 11 If you award NAT that RBOC rate, from the traffic from
 12 when the high-volume access tariff was filed until this
 13 case is completed, that is an equitable remedy that would
 14 allow the status quo to be maintained, and NAT could keep
 15 its doors open until the end of this case. So if you want
 16 to default to the RBOC rate, we can survive for a few
 17 months. That would be a perfect equitable remedy to
 18 maintain the status quo.
 19 To say this is not compensable, they keep saying that,
 20 the Court is exactly right. The NPRM says this is
 21 compensable, and it's going to be based on a high-volume
 22 access tariff to what we've done.
 23 Now, if you want to question the rate, personally we
 24 don't because the FCC has said, "Your tariff is fine.
 25 We're going to deem it lawful." But if you are looking for

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1 a default and an equitable remedy, that is the perfect
 2 equitable remedy. It's based on what the FCC said that
 3 lowest rate should be. If the Court would do that, we
 4 could survive until this case comes to trial.
 5 Also, the Farmers case, and I know we talked about
 6 this ad nauseam in the Briefs. The Farmers case was
 7 specific to Farmers' particular tariff. That is a clear
 8 reading of that case. Our tariff takes into consideration
 9 conferencing traffic, the new high-volume tariff. That
 10 tariff, as the Court knows, has been given the okay by the
 11 FCC.
 12 Your Honor, may I have a couple more minutes?
 13 THE COURT: You may.
 14 MR. SWIER: I want to talk about probably the
 15 most important factor here, because I think the first
 16 factor, which is the probability of success, that NAT is
 17 going to get compensated for this traffic, I think that's
 18 an easy one. We're going to get compensated for this
 19 traffic. The question is are we going to be around to get
 20 our money when it does happen? So I think probability of
 21 success, that's clearly in our favor.
 22 Irreparable harm. NAT has to show the threat of
 23 irreparable harm, and we need to present concrete evidence.
 24 We have given the Court the banking statements, the
 25 financials, the monthly costs to keep NAT up and running.

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1 If that's not concrete evidence of the current financial
 2 status, I don't know what is.
 3 The NewLife case. Sprint attempted to pooh-poo the
 4 NewLife case. The NewLife case is on all fours. You can
 5 say, well, it's another District Court opinion. Well, it's
 6 not binding on this Court, but it provides this Court,
 7 along with Doran, with the most factually analogous case
 8 that's out there. It's almost on all fours factually.
 9 Here is what the Court said. It said in NewLife, "A
 10 substantial loss of business and the threat of bankruptcy
 11 can be sufficient for finding of irreparable harm."
 12 The Doran case, where the economic loss would be so
 13 great as to threaten destruction of the moving party's
 14 business, a preliminary injunction should be issued to
 15 maintain the status quo.
 16 We've shown irreparable harm. We've shown what the
 17 current financial situation is. Here is what Wright &
 18 Miller said in their classic treatise on Civil Procedure.
 19 Where the potential economic loss is so great as to
 20 threaten the existence of a moving party's business, then a
 21 preliminary injunction may be granted, even though the
 22 amount of direct financial harm is readily ascertainable.
 23 So the argument we're asking for a specific amount of
 24 money, Wright & Miller have said that under certain
 25 circumstances is acceptable.

1 Finally, Your Honor, Dataphase Factor No. 3, the
 2 ~~balance of the harms. Here is the balance of the harms.~~
 3 NAT's harm, their business shuts down or they file
 4 bankruptcy. Sprint's harm, they are a multi-billion dollar
 5 company that has to pay maybe a couple hundred thousand in
 6 lawful fees for a few months. Balance of the harm weighs
 7 heavily in our favor.
 8 Finally, Your Honor, the Dataphase 4 factor, the
 9 public interest. Here is the public benefit interest for
 10 NAT. Again, these were pooh-pooed as being insignificant.
 11 Maybe if Sprint would have spent some time at the
 12 Reservation, they would have found these aren't
 13 insignificant. The education and the learning
 14 opportunities. The employment and the business
 15 opportunities. The public safety service. The access to
 16 governmental services. High-speed Internet and basic
 17 telephone service for Tribal members. Over a hundred
 18 high-speed broadband and telephone installations. The
 19 Internet Library. I can go on and on.
 20 Sprint, Verizon, no other company has ever attempted
 21 to do this. NAT is providing an incredible public service
 22 to the Crow Creek Reservation. No doubt about that.
 23 Sprint said, "Well, public policy dictates that we win."
 24 That was written before the NPRM came out. The NPRM
 25 said, "No, Sprint, public policy is not going to be just

1 that you win. Public policy is going to be this traffic is
 2 compensable, and you are eventually going to have to pay."
 3 But hopefully Sprint can have things drawn out enough
 4 that all these companies go out of business, including NAT.
 5 I mean, that's their business plan. If they have a problem
 6 with our business plan, take a look at theirs. It's to cut
 7 the oxygen tank off for these small companies. That's
 8 their business plan, and they are doing a good job.
 9 Luckily, NAT has had the wherewithal, with WideVoice's
 10 help, to come this far in the litigation, to pay their
 11 attorneys, to try to lobby the Congressional delegation and
 12 the FCC. NAT is one of the few companies that has had the
 13 wherewithal to stick this out. But at a certain point,
 14 it's like the lemonade stand, when you provide a service
 15 for months and months, and you don't get a penny, how are
 16 you supposed to survive? Especially on that new
 17 high-volume access tariff traffic, which is clearly
 18 compensable.
 19 So let's do this, if the Court wants to fashion a
 20 remedy. Let's allow NAT to be paid the RBOC rate from the
 21 time the high-volume access tariff was filed until this
 22 case is completed. Sprint should be ordered to pay the
 23 back money of approximately \$127,000 under the HVAT, and it
 24 should be ordered to pay each month the fees under that
 25 high-volume access tariff. That's a perfect equitable

1 remedy which limits the amount that Sprint has to pay, but
 2 lets us survive.
 3 Your Honor, because of that, we would ask you to grant
 4 NAT's Preliminary Injunction Motion. Thank you.
 5 THE COURT: Thank you, Mr. Swier. I'm going to
 6 take it under advisement, and I'll issue a written opinion.
 7 Anything further from either counsel before we adjourn for
 8 the day?
 9 MR. SWIER: No. Thank you, Your Honor.
 10 MR. KNUDSON: Do you want anything further on the
 11 discovery motion, or should we just wait?
 12 THE COURT: Did you want to do oral argument on
 13 it? I guess my concern was there was a Motion made, and no
 14 Response, no written Response that had been filed.
 15 MR. SWIER: We'd like to file a written Response,
 16 but our time to do that is not up yet. We will definitely
 17 be filing a written Response.
 18 MR. KNUDSON: Let's clarify. We wrote a Response
 19 to their Motion for a Protective Order to keep Tom Reiman
 20 from being deposed. One of the questions I wanted to ask
 21 Reiman in his deposition was the answer to Interrogatory
 22 No. 7.
 23 I sought that information from Carlos Cestero.
 24 Although he could produce Defendant's Exhibit 27 promptly,
 25 he was instructed by Mr. Swier not to produce the backup

1 that would show which carriers paid which invoices and for
 2 how much, which is the underlying detail to the revenue
 3 posted for 2010. That information we wanted in preparation
 4 for this hearing, but we still think that information is
 5 germane and should be produced.
 6 THE COURT: Are you saying if you got the answer
 7 to Interrogatory No. 27, you would not need to depose Tom
 8 Reiman?
 9 MR. KNUDSON: No. But we should get that
 10 information, by all means.
 11 THE COURT: Are you saying I should wait to rule
 12 today until you get this information, or until you find out
 13 if I'm going to order that you get the information?
 14 MR. KNUDSON: Well, depending on how you rule.
 15 Ultimately at some point in time if this case continues in
 16 this Court, we want that information.
 17 THE COURT: You have to tell me if I need to wait
 18 on my ruling on the preliminary Injunction, because you
 19 need this information to present to the Court for me to
 20 consider regarding the preliminary injunction.
 21 MR. KNUDSON: I would like Reiman's deposition
 22 and that information and Interrogatory No. 7, Your Honor.
 23 MR. SWIER: If I may, Your Honor?
 24 THE COURT: Mr. Swier?
 25 MR. SWIER: Your Honor, first of all, we have

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1 provided Sprint with all our financial documents except

2 Interrogatory No. 7. Interrogatory No. 7, we can't give up

3 the specific carrier minutes and receivables. This gives

4 the other carriers -- this is, again, Sprint with their

5 heavy hand. That carries a distinct -- that information

6 carries a distinct competitive advantage, and is incredibly

7 helpful to Sprint and the other carriers with their

8 competing services. Now, we have provided all the totals.

9 THE COURT: Let me ask a question. Your

10 objection to it was attorney-client privilege. It sounds

11 to me like what you are arguing is more along the lines of

12 a trade secret.

13 MR. SWIER: Your Honor, I think it is proprietary

14 and a trade secret. I think, also, as we put in there, it

15 was beyond reasonableness for discovery. Now, we can

16 certainly amend our objection. But that information, first

17 of all, it's not relevant. Everyone knows what the

18 financial numbers are. It doesn't make a difference what

19 Verizon owes or Sprint owes or Alltel owes.

20 Sprint sued us. They were the ones who started this.

21 That's why they found themselves in Court. What the game

22 plan was, they were hoping NAT would sue all the big

23 companies, because then they can put NAT in discovery for

24 years. That would guarantee NAT would go out of business.

25 I mean, that's a pretty clear litigation strategy. That's

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1 why the suit was brought with Sprint. They sued us.

2 That information is incredibly proprietary. It will

3 put us in a terrible position with the other carriers that

4 we work with, and it will provide Sprint with a huge

5 competitive advantage. Again, what difference does it make

6 how the breakdown is? The fact is, we know what Sprint

7 owes. We know what the total is. Why do we have to keep

8 delaying this for information that's already out there what

9 Sprint owes? Why do we need to know what Verizon owes or

10 any of the other carriers?

11 So I think the Court can go ahead and rule based on

12 the voluminous financial material that we've provided.

13 Again, delay serves only one purpose.

14 THE COURT: Mr. Knudson?

15 MR. KNUDSON: It's simple information to produce.

16 It could have been produced in short order.

17 In terms of any proprietary concerns, I had sent

18 Mr. Swier a proposed confidentiality stipulation that would

19 protect the sensitivity of the information.

20 It was germane to their case, because, first of all,

21 if you read Mr. Cestero's Affidavit and listen to the

22 testimony of Mr. Cestero and Mr. Lengkeek, NAT is going out

23 of business because of Sprint. Sprint is a minor player in

24 the overall business, and we'd like to be able to show

25 that.

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1 They are seeking an injunction against Sprint. They

2 haven't sued any of these other people, and they can't

3 explain why. That goes directly to why they're not

4 entitled to injunctive relief.

5 THE COURT: Mr. Swier, you need to get in your

6 response in to the protective order and the interrogatory

7 issue. I'll review both of those motions and decide

8 whether I think it's germane to the issue of whether or not

9 I need to wait on the preliminary injunction motion. If I

10 believe I don't need to wait, I'll go ahead and issue my

11 order. If I think I do need to wait, then I'll rule on the

12 discovery issue first, and do the preliminary injunction

13 after that.

14 MR. SWIER: Your Honor, we'll get a response to

15 the court early next week.

16 THE COURT: Thank you. With that, we'll be

17 adjourned for the day.

18 (End of proceedings at 4:30 p.m.)

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1 UNITED STATES DISTRICT COURT
 2 DISTRICT OF SOUTH DAKOTA :SS CERTIFICATE OF REPORTER
 3 SOUTHERN DIVISION

4 I, Jill M. Connelly, Official United States
 5 District Court Reporter, Registered Merit Reporter,
 6 Certified Realtime Reporter, and Notary Public, hereby
 7 certify that the above and foregoing transcript is the
 8 true, full, and complete transcript of the above-entitled
 9 case, consisting of Pages 1 - 255.

10 I further certify that I am not a relative or
 11 employee or attorney or counsel of any of the parties
 12 hereto, nor a relative or employee of such attorney or
 13 counsel, nor do I have any interest in the outcome or
 14 events of the action.

15 IN TESTIMONY WHEREOF, I have hereto set my hand
 16 this 13th day of March, 2011.

17 /s/ Jill M. Connelly

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