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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * *

Case Civ. 10-4110

SPRINT COMMUNICATIONS COMPANY, L.P.,

Plaintiff,

-vs-

THERESA MAULE, in her official capacity
as Judge of Tribal Court, CROW CREEK
SIOUX TRIBAL COURT, and
NATIVE AMERICAN TELECOM, LLC,

Defendants.

U.S. District Courthouse
Sioux Falls, SD
October 14, 2010
9:00 o'clock a.m.

* * * * *

H E A R I N G

* * * * *

BEFORE: The Honorable Karen E. Schreier

APPEARANCES:

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-and-

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13

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23

24

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1 THE COURT: This is the time scheduled for a
2 hearing in the matter entitled Sprint Communications
3 Company, LP, versus Theresa Maule, Crow Creek Sioux Tribal
4 Court, and Native American Telecom, LLC.

5 Would counsel please note their appearances for
6 the record?

7 MR. WHITING: Your Honor, my name is Stan
8 Whiting. I'm here on behalf of Sprint. With me is Tom
9 Tobin from Winner, South Dakota. Bret Lawson is in-house
10 corporate counsel from Kansas City. The gentleman that
11 will be handling the matters today is Scott Knudson from
12 Minneapolis.

13 THE COURT: Thank you.

14 MR. SWIER: Good morning, Your Honor. Scott
15 Swier. I represent Native American Telecom in this matter.

16 MS. ROBERTS: Good morning, Your Honor. Judith
17 Roberts. I represent Crow Creek Tribal Council, and in
18 extension of them the Utility Authority and the Tribal
19 Court.

20 MS. DAMON: Your Honor, my name is Jamie Damon.
21 I represent Theresa Maule, in her official capacity as
22 Judge of the Tribal Court.

23 THE COURT: Thank you. First I wanted to take up
24 the motion filed by Theresa Maule to dismiss the claim
25 against her, because she no longer serves as a Tribal Court

1 Judge. Mr. Knudson, do you have any objection to that?

2 MR. KNUDSON: No, we have no objection, because
3 we are only suing the Tribal Judge in his or her official
4 capacity. If Ms. Maule is no longer the Judge of Tribal
5 Court, it wouldn't make sense to keep her in the case.

6 On the other hand, in order for us to obtain the
7 relief we are requesting, we need to maintain somebody in
8 the capacity as Tribal Judge in order for the injunction to
9 lie.

10 There was a hearing yesterday before B.J. Jones from
11 North Dakota whom apparently the Tribal Council appointed
12 to serve as the substitute for Ms. Maule, but I am informed
13 that his capacity to serve as Tribal Judge is yet in
14 question. Perhaps you could address us, Miss Damon.

15 THE COURT: Miss Roberts?

16 MS. ROBERTS: Your Honor, what the Tribal Council
17 did is appoint B.J. Jones as a Special Judge just for this
18 case. He has not been hired as the Tribal Judge. But
19 because of the questions of conflicts and just to handle
20 this one matter, the Tribal Council did appoint a Special
21 Judge from off the Reservation.

22 THE COURT: So does the -- do any of the
23 Defendants have any objection to the substitution of
24 B.J. Jones for Theresa Maule?

25 MS. DAMON: The only thing I would have to say

1 about it is there's been a difference in the funding. I
2 think one of the things the Tribe and Northern Plains Court
3 of Appeals needs to determine is who is actually doing the
4 funding.

5 The reason why I'm here, separate on behalf of
6 Theresa, is because there's been -- previously under 638
7 Contract the tribe no longer had control or authority over
8 the Court, so Northern Plains Court of Appeals was asked to
9 step in and run the Court system. They have previously
10 been paying the Clerk and the Court staff, including the
11 Judge.

12 So I think that's the only confusing thing is Northern
13 Plains, I guess I'd like to know if the Sioux Tribal Court,
14 which is represented by Judith Roberts, if they are
15 planning on representing whoever would step in.

16 MS. ROBERTS: I believe, Your Honor, that much of
17 that is irrelevant of today. What happened in the past as
18 far as the contract with the BIA and the funding and who
19 was running the Court, that has been changed. That funding
20 is no longer in place. The BIA is very aware of it. The
21 Tribe is taking full control through resolution and
22 notification through the BIA that they are running the
23 Court. It's a natural progression, a yearly funding
24 mechanism that's been processed through the BIA and
25 Northern Plains. That no longer exists. That's

1 intertribal workings. It's nothing unusual.

2 THE COURT: Miss Roberts, I think the only issue
3 I am concerned about is if B.J. Jones is substituted for
4 Theresa Maule, are you then representing B.J. Jones and the
5 Crow Creek Sioux Tribal Court?

6 MS. ROBERTS: Yes, Your Honor.

7 THE COURT: Then Miss Damon can be excused.

8 MS. ROBERTS: Yes.

9 THE COURT: Miss Damon, with that understanding,
10 do you have any objection to B.J. Jones being substituted
11 for Theresa Maule?

12 MS. DAMON: No, Your Honor.

13 THE COURT: Miss Roberts, do you have any
14 objection to B.J. Jones being substituting for Theresa
15 Maule?

16 MS. ROBERTS: Well, only in the aspect that he is
17 not a Tribal Judge of Crow Creek. He has been specially
18 appointed. This happens on many Reservations. He is only
19 in this one particular case.

20 THE COURT: So if the caption read, "B.J. Jones,
21 in his official capacity as Special Judge of the Tribal
22 Court," if it reflects that, do you have any objection?

23 MS. ROBERTS: No, Your Honor.

24 THE COURT: Mr. Swier, any objection?

25 MR. SWIER: No, Your Honor.

1 THE COURT: Then I'm going to grant the Motion to
2 Dismiss Theresa Maule. The Plaintiffs made a motion to
3 substitute B.J. Jones, because he is the newly appointed
4 Special Judge for this case. So I'm going to grant the
5 Plaintiff's motion to substitute B.J. Jones, in his
6 official capacity as Special Judge of Tribal Court.

7 Miss Damon, you are excused then. Thank you.

8 (Miss Damon left the Courtroom)

9 THE COURT: Then that takes us to the main
10 motions today, which is a Motion for Preliminary Injunction
11 and a Motion for Stay. I'll have the Plaintiffs proceed
12 first on their Motion for Preliminary Injunction. Both of
13 the issues kind of intertwine, but I'll have the Plaintiffs
14 go first.

15 MR. SWIER: Your Honor, if I may?

16 THE COURT: You may.

17 MR. SWIER: In our response to the Preliminary
18 Injunction Motion, we did touch upon the Tribal exhaustion
19 issue. However, if the Court looks, there was a separate
20 brief filed by Sprint which specifically opposed our Motion
21 to Stay. That was Document I believe 34 was their brief.
22 That was filed -- our reply brief in that is actually due
23 next week, our 14 days. Even though my brief in opposition
24 of the Preliminary Injunction Motion encompasses that
25 Tribal exhaustion issue, I do think it's fair I be given an

1 opportunity before the Court would make a ruling on the
2 Tribal exhaustion to complete my reply brief, which again
3 would be due early next week. Some of the issues that have
4 been brought up I thought were not appropriate to put in
5 the preliminary injunction opposition brief, but I would
6 like the opportunity to do a standard reply to their
7 specific Tribal exhaustion brief.

8 THE COURT: I will allow you to do that.

9 MR. KNUDSON: Your Honor, I would think in the
10 context of allowing him to file a reply brief, that Sprint
11 -- let me restate it. We should also be entitled to reply
12 to the papers they filed in response for a Motion for a
13 Preliminary Injunction, which we received only yesterday
14 morning.

15 THE COURT: You can do that, too. Do you have
16 any evidence you are presenting?

17 MR. KNUDSON: I submitted a written record which
18 I thought was comprehensive. I have no idea what he
19 intends to present by way of live testimony. On that
20 basis, I feel I'm being prejudiced by the fact he brings in
21 witnesses at the last minute, without identifying who they
22 are or what the subject matter of their testimony would be.

23 THE COURT: This was scheduled as an evidentiary
24 hearing. If any party wanted to produce evidence, they
25 can. So I'll start out with any evidence. You said you

1 don't have any evidence to present.

2 MR. KNUDSON: Well, the evidence I have submitted
3 as part of my moving papers would be the Affidavit of Amy
4 Clouser, which I think is competent evidence, as regards to
5 why it would be appropriate to proceed in this case in
6 Federal Court and to preclude the Tribal Court from
7 addressing the complaint that NAT has filed there.

8 Also, with my Affidavit, I submitted a number of
9 documents that also support Sprint's Motion for Preliminary
10 Injunction. I think on that basis we have an adequate
11 factual record for this Court to make a ruling with respect
12 to their request for exhaustion and our request for
13 preliminary injunction enjoining the Tribal Court.

14 I think their live testimony is cumulative of the
15 papers they have submitted with their motion papers. So I
16 think the Court should bear that in mind that this live
17 testimony may be duplicative of what has already been
18 submitted in writing. I would object to it on the grounds
19 of it being cumulative.

20 THE COURT: Well, at this point I haven't heard
21 what the substance of their live testimony is, so I can't
22 determine if it's duplicative or not. So your objection is
23 noted, but it's denied. If you think something is
24 cumulative as we go along, you can renew your objection at
25 that time.

1 MR. KNUDSON: Thank you, Your Honor.

2 THE COURT: Thank you. Why don't I hear all the
3 evidence first before I hear argument, so you can put your
4 argument into context with the evidence. So if you don't
5 have any evidence to present, I'll ask the Defendants if
6 they have any evidence. Mr. Swier?

7 MR. SWIER: Native American Telecom will have two
8 witnesses this morning for this evidentiary hearing.

9 MR. KNUDSON: Can I have a proffer of what they
10 would testify to?

11 THE COURT: Who are the witnesses?

12 MR. SWIER: First one is Keith Williams.
13 Mr. Williams is an engineer. His Affidavit was placed in
14 the record. However, this is an evidentiary hearing, and I
15 would like him to offer some live testimony so that the
16 Court can better understand this very complex issue of
17 telecommunications in this area. We think that would be
18 much more helpful than just simply relying upon the written
19 submission.

20 Our second witness, Your Honor, would be Tom Reiman.
21 Tom Reiman is a minority owner of Defendant NAT. He also
22 submitted an Affidavit, but, again, there are some areas
23 that we think provide the Court with a better factual
24 record when it can be presented live, as opposed to the
25 cold written record. Of course I do believe we have that

1 ability. The Court has set this as an evidentiary hearing.
2 That's why we are here today.

3 MS. ROBERTS: Your Honor, depending on the
4 testimony that is given, Crow Creek Tribe may have one
5 witness, and that would be Peter Lengkeek, a Council
6 member.

7 THE COURT: Mr. Knudson?

8 MR. KNUDSON: The last witness, I don't even know
9 what the substance of the testimony would be. This person
10 has never surfaced in name in any record or document that
11 I've seen so far. I renew my objection, but nonetheless,
12 the Court has set aside this morning for this hearing, if I
13 understand correctly?

14 THE COURT: You can have as much time as you
15 need. I have other things scheduled this afternoon, but I
16 can move them, if we need longer than this morning.

17 MR. KNUDSON: I'm trying to determine the
18 allocation of time, in terms of how much time would be left
19 over for argument. I think it comes together when you hear
20 the argument presented.

21 THE COURT: The amount of time you need is what
22 you have. Mr. Swier, you may proceed.

23 MR. SWIER: Your Honor, Defendant Native American
24 Telecom would call Keith Williams. Your Honor, we would
25 like to use the easel, if possible. What would be the most

1 convenient way for us to set it up? Should we direct it
2 toward the Court, or how would you like us to do that?

3 THE COURT: If you want me to see what's on
4 there, it would help if you would turn it so I can see it.

5 MR. SWIER: May I proceed?

6 THE COURT: You may.

7 KEITH WILLIAMS,
8 called as a witness, being first duly sworn, testified as
9 follows:

10 MR. KNUDSON: If we could move the easel back
11 towards the screen, both the Court and counsel could see
12 what is on the screen.

13 THE COURT: Another option is we have an overhead
14 camera. If you wanted to write something on a sheet of
15 paper there, I can see it on my screen here, and the
16 attorneys can see it on their screens. Unless you are
17 really tied to using the easel.

18 MR. SWIER: As long as everybody can see it,
19 that's all I care about, Your Honor.

20 DIRECT EXAMINATION

21 BY MR. SWIER:

22 Q. Keith, would you please introduce yourself to the
23 Court.

24 A. My name is Keith Williams. I'm a network engineer
25 with WideVoice Communications. I've been doing

1 telecommunications and IP networking for over 10 years.

2 Q. You are an employee of WideVoice Communications. Is
3 that right?

4 A. That's correct.

5 Q. Tell us about your experience in dealing with
6 telecommunications networks that are similar to what is
7 found on the Crow Creek Reservation.

8 A. I've worked for a couple CLECs, which are competitive
9 local exchange carriers, phone companies, doing voiceover
10 IP, in scenarios not unlike what is going on at Native
11 American Telecom.

12 Q. Real briefly, tell you what your duties are for
13 WideVoice. What do you do everyday when you get up?

14 A. Network design, implementation, troubleshooting.

15 Q. Keith, are you familiar with the network that is owned
16 on the Crow Creek Reservation by Native American Telecom?

17 A. I am.

18 MR. SWIER: At this time I do have a sheet of
19 paper. Could I approach and give this to Mr. Williams, and
20 we can put it on the screen so everyone can see it?

21 THE COURT: Sure.

22 BY MR. SWIER:

23 Q. Keith, you indicated to the Judge before you are
24 familiar with the system that is used by NAT in this case.
25 Is that right?

1 A. That's correct.

2 MR. SWIER: With the Court's permission, could
3 the witness approach the easel?

4 THE COURT: It did just zoom in now, if you want
5 to try it.

6 BY MR. SWIER:

7 Q. Keith, I'd like you to explain to the Court how this
8 complex system that we are all arguing about works. Would
9 you take us through a call simply from say Fargo, North
10 Dakota, and how that routes and ultimately gets to the
11 Reservation at Ft. Thompson?

12 A. Okay. I'll start by drawing just the United States,
13 or something similar to.

14 Q. Keith, could you turn that so -- there we go. Okay.
15 You've drawn a picture of the United States. Mark for the
16 Court where North Dakota would be, and where would South
17 Dakota be?

18 A. (Witness indicating).

19 Q. Mark where the Crow Creek Reservation would be,
20 approximately, in South Dakota.

21 A. (Witness indicating).

22 Q. Keith, let's say my grandmother lives in Fargo, and
23 she wants to make a call from Fargo to the Crow Creek
24 Reservation to NAT's facility there.

25 A. Okay.

1 Q. Take us through the first step that grandma does.

2 A. The first step is obviously she would pick up her
3 telephone and would be given dial tone by the local
4 exchange carrier, the LEC.

5 Q. That would be the LEC, the local exchange carrier in
6 Fargo?

7 A. Correct. Depending on the digits she dialed, for
8 instance, if she wanted to dial someone on the Crow Creek
9 Reservation, it would be 605-477. 605 is the area code or
10 NPA. That's how you discern what area of the country you
11 are calling.

12 Q. The 605 area code is obviously all of South Dakota.

13 A. All of South Dakota, correct. They only have one area
14 code. 477 designates Ft. Thompson, Crow Creek. So 477
15 anything would go to Ft. Thompson.

16 Q. Grandma picks up the phone and dials 605 for the area
17 code in South Dakota. 477 is the prefix for Ft. Thompson.
18 Correct?

19 A. Correct.

20 Q. Let's say it's 477-1111, for example. That then would
21 be the number grandma would be using to call her friend in
22 Crow Creek.

23 A. Ft. Thompson.

24 Q. Okay. What happens next after she picks up the phone
25 and dials?

1 A. Well, the switch in Fargo would then go to the LERG,
2 which is the local exchange routing guide. It's an
3 industry standard database that lists switch identifiers,
4 the NPAs NXXs they serve and how to get to them.

5 Q. So the LERG, what does that stand for again, just so
6 we're straight?

7 A. Local exchange routing guide.

8 Q. Tell me if I'm wrong. That's a database in the
9 industry that shows how grandma's call would initially get
10 routed from Fargo to Ft. Thompson.

11 A. Sure. I mean ultimately TeleCourier manages that
12 database and keeps track of all the switches in North
13 America and the rate centers and phone numbers that would
14 be served by those switches.

15 Q. So grandma picks up the phone. She dials her
16 Ft. Thompson number. It's then -- that's Step No. 1. Then
17 what happens? You go to the LERG.

18 A. Yes. So the LERG would tell you in this case to get
19 to Ft. Thompson, you would go to SDN.

20 Q. What does SDN stand for?

21 A. South Dakota Network.

22 Q. Where is that located?

23 A. Sioux Falls.

24 Q. Is it safe to say -- let's think about this as a road
25 going somewhere. Is that our first leg on the road?

1 A. It would be your first leg into getting to 605-477.

2 Yes. You have to go to South Dakota Network to get to
3 there.

4 Q. When grandma's phone call travels from Fargo to the
5 South Dakota Network on the way to Ft. Thompson, what is
6 the next step? Where does that call go?

7 A. Once the South Dakota Network gets it, they would see
8 it's destined for Ft. Thompson, in which point they would
9 route the call to WideVoice, who has a switch in
10 Los Angeles.

11 Q. That's what I want to talk about. Why if the call is
12 coming from grandma in Fargo down to SDN in Sioux Falls
13 with the ultimate termination stop being Ft. Thompson, why
14 is it going from SDN to WideVoice's facility in
15 Los Angeles?

16 A. Native American Telecom does not own their own
17 telephone infrastructure, per se, switching equipment in
18 Ft. Thompson.

19 Q. So if anyone is going to make a call to
20 Ft. Thompson, be it from Fargo, Canada, wherever, you never
21 have that interconnection directly from SDN to
22 Ft. Thompson. It just doesn't exist. Right?

23 A. Correct.

24 Q. So we go from Fargo, the call travels to Sioux Falls,
25 because there is no facility in Ft. Thompson, it goes to

1 WideVoice's facility in Los Angeles.

2 A. That's correct.

3 Q. What leg of the route then would SDN to Los Angeles
4 be?

5 A. I would say that's 2.

6 Q. That's the second place. When grandma's call then
7 gets routed to WideVoice's high-tech facility in Los
8 Angeles, then what happens?

9 A. At that point that is the end of what would be the
10 traditional telephone call using the TDM PSTN network?

11 Q. The old network.

12 A. Correct. At that point WideVoice takes that call and
13 routes it to Ft. Thompson via IP.

14 Q. Again, I don't think any of us are technical gurus.
15 Explain to the Judge what IP is.

16 A. IP would be Internet protocol, basically using the
17 Internet, as opposed to the public switch telephone
18 network.

19 Q. Is that done based on the technology that's now
20 available to both WideVoice and what's on the Reservation?

21 A. Yes. I mean ultimately most new telephone,
22 telecommunication deployments would be using IP at this
23 point.

24 Q. So then from the WideVoice facility in Los Angeles to
25 Ft. Thompson, what leg of the journey would that be?

1 A. I would say that's 3.

2 Q. Okay. So grandma's call goes from Fargo to SDN in
3 Sioux Falls to Los Angeles and ultimately ends in
4 Ft. Thompson.

5 A. Correct.

6 Q. Explain then the technology that is present at
7 Ft. Thompson that makes this whole thing work.

8 A. In Ft. Thompson obviously they have a router which
9 terminates that IP leg, at which point, depending on where
10 grandma is at within the Reservation, they also have a
11 wireless network out there, WiMax, that would direct where
12 to send that phone call.

13 Q. Is that any different than any other system in the
14 country?

15 MR. KNUDSON: Objection. Foundation.

16 THE COURT: Overruled. You may answer.

17 A. Not at its core, no. It's pretty traditional in that
18 sense. WiMax is a little different, but this is what would
19 be considered the last mile. It's how you reach the end
20 users from the local rate center.

21 Q. Again, one of the keys here, tell me if I'm wrong, is
22 that there's simply not the infrastructure equipment for
23 any call to go from SDN directly to the Ft. Thompson-Crow
24 Creek Reservation.

25 A. Correct. That switching equipment is expensive. I

1 mean ultimately Midstate, who serves Ft. Thompson as the
2 traditional LEC in that area, their switching equipment is
3 in Kimball. It's not in Ft. Thompson, per se, either.

4 Q. Explain to the Court the kind of high-tech technology
5 that NAT has invested out on the Crow Creek Reservation?
6 What is out there? What makes this thing work?

7 A. Again, they've got a network facility out there that
8 obviously terminates these IP connections, allows the
9 wireless WiMax connection to customers throughout the
10 Reservation, at which point they would deploy within the
11 end user locations, ATAs, which are basically digital --
12 analog-to-digital phone converters, or digital-to-analog
13 phone converters, but allows you to turn that IP signal
14 into a traditional phone signal. They also within that
15 network facility house application services, so they have
16 servers, and they are offering services, as well.

17 Q. Some pretty serious infrastructure out there?

18 A. Yes.

19 Q. Just so I understand this, grandma picks up the phone
20 in Fargo. She calls her granddaughter in Ft. Thompson.
21 Dials 605-477-1111. Grandma's call goes to Sioux Falls to
22 SDN. Because there's no infrastructure from SDN in
23 Sioux Falls to Ft. Thompson, the call then goes from
24 Sioux Falls to WideVoice's technology in Los Angeles.

25 A. Correct, and this leg, too, is over dedicated

1 facilities. I mean WideVoice is paying for dedicated
2 services back to SDN. So the trunk side of this call is on
3 private line, leased line facilities.

4 Q. So the call travels down on that private leased line
5 from Sioux Falls to Los Angeles. WideVoice's technology
6 takes grandma's call and ships it to the facilities on the
7 Reservation in Ft. Thompson.

8 A. That is correct.

9 Q. Keith, let's say when grandma picks up the phone in
10 Fargo, her local exchange is let's just say AT&T. Would
11 the process be any different if AT&T were that provider?

12 A. No. I mean the local exchange carrier, as well as the
13 IXC, who would be the interexchange carrier, or the
14 long-distance carrier, it wouldn't matter. Again, the LERG
15 would tell you if you are dialing Ft. Thompson, regardless
16 of where you are coming from, you would go to SDN, and then
17 to the Ft. Thompson rate center.

18 Q. So AT&T would use the same routing system, same
19 dedicated line system as what is being used here. Is that
20 right?

21 A. That is correct.

22 Q. How about Sprint instead of AT&T? Let's put Sprint in
23 that situation. Would that be the same?

24 A. Two and three for sure are always the same. One, you
25 could be anywhere. The end is always going to look the

1 same.

2 Q. But ultimately grandma's call from Fargo gets to
3 granddaughter in Ft. Thompson on the Reservation because of
4 the facility that's been built on the Reservation?

5 A. That is correct.

6 Q. Keith, we're talking in this case, also, about
7 conference calling. We have seen how a single call from a
8 grandma to a granddaughter works.

9 Do this. Put a point down in Florida, put a point in
10 Texas, and put a point in New York. Let's say those three
11 points are involved in a business dealing, and instead of
12 traveling to wherever, they want to conduct their business
13 meeting via a conference call.

14 A. Okay.

15 Q. Explain to the Court then how this conference calling
16 with these three companies works.

17 A. In that case, I mean depending on the number you dial
18 for that conference call, that still would decide where the
19 call routes. In this case if they are dialing 605-477-1112
20 is their conference bridge --

21 Q. Then all three of them would use the same number?

22 A. They would all dial the same number. That's correct.
23 So when they dial that number, the routing again would stay
24 the same. In the end you would end up going to South
25 Dakota Network, who would tell you to route that call to

1 Ft. Thompson. To get there, it would go via WideVoice's
2 dedicated facilities to Los Angeles, at which point we
3 would redirect the call back to Ft. Thompson where they
4 house and own their own conferencing equipment.

5 Q. If we have three people on this conference call, is
6 the way that that call is routed, ultimately terminating
7 and ending in Ft. Thompson, any different than grandma's
8 call to granddaughter on the Reservation?

9 A. It is not.

10 Q. It's the exact same?

11 A. Yes.

12 Q. Let me ask you this. What if Sprint were the company
13 that -- let's say they were using Sprint's calling
14 conference services. All right? How does that change this
15 route?

16 A. In that case you would need to know where the Sprint
17 local was. But if Sprint were in Florida, say, I mean it
18 would end up the same. All these people would call. It
19 would go to the LERG database, which would say send that
20 call to whatever that NPA NXX was, and that's where that
21 call would terminate.

22 Q. So that route is the same, whether it's Sprint, AT&T,
23 or a conference calling company.

24 A. Correct. I mean in the end, depending on the number
25 you dial, the call will always go to whatever the rate

1 center is for that NPA access.

2 Q. But using the 605-477 prefix, your conference call or
3 grandma's call ends because of the high-tech equipment at
4 Ft. Thompson.

5 A. Any call calling 605-477 will end in Ft. Thompson. It
6 will be go to the facilities on the Native American Telecom
7 Reservation.

8 Q. The facilities in Ft. Thompson, you've been there
9 before?

10 A. I have not.

11 Q. Are you aware if those facilities are actually located
12 on the Reservation?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Sustained. Lack of foundation.

15 MR. SWIER: May I have a moment, Your Honor?

16 THE COURT: You may.

17 MR. SWIER: Your Honor, at this time I've marked
18 Defendant's Exhibit 41. We have previously filed 40
19 exhibits with the Court. I want to keep the numbering
20 consistent, if I could. May I approach?

21 THE COURT: You may. Do you have a copy for
22 counsel and for me?

23 MR. SWIER: Yes.

24 BY MR. SWIER:

25 Q. Keith, I'm showing you what's been marked Exhibit 41.

1 THE COURT: And one for the Plaintiff.

2 Q. Personally I found this confusing. I like that a lot
3 better what you did. Defendant's Exhibit 41, is that
4 simply a little bit more detailed schematic of what you
5 just showed us?

6 A. Certainly. It still shows the rate centers, the
7 switch identifiers --

8 THE COURT: Just a minute. He's making an
9 objection.

10 MR. KNUDSON: Objection. Foundation. Who
11 prepared this document? How was it prepared? Why wasn't
12 it provided earlier?

13 THE COURT: He hasn't offered it yet, so he may
14 lay foundation through the questions. So the objection is
15 overruled.

16 BY MR. SWIER:

17 Q. Can you explain to the Court what this document is,
18 please.

19 A. It's a routing diagram explaining how the call
20 scenario we're talking about would route based on the
21 WideVoice network.

22 Q. Who prepared this document?

23 A. I did.

24 Q. In a nutshell again, explain to the Court briefly what
25 this shows.

1 A. It shows basically the same thing we were just showing
2 within the nationwide, but it gets a little more detailed.
3 So, again, you have Sprint's switch here, or pretty much
4 any switch in the world, who is trying to route to
5 Ft. Thompson. So this would have been the switch
6 identifier for there. To get to there, you would have to
7 go to South Dakota Networks.

8 Once you get there, again, they would say to send that
9 call to WideVoice via their switch identifier, which is the
10 identifier here. At which point we send that back via an
11 IP network to SDN and on to the Reservation, where that
12 call would go to the WiMax we talked about and to the end
13 user, or to their application services there within their
14 facilities.

15 Q. So Exhibit 41 is simply a more detailed explanation of
16 what you did previously?

17 A. Yes.

18 MR. SWIER: Your Honor, at this time I would like
19 to have Mr. Williams' original drawing of the United States
20 marked Exhibit 41A, if I could, please.

21 THE COURT: It may be marked.

22 MR. SWIER: I would also move to have Exhibits
23 41A, which is Mr. Williams' drawing, and Exhibit 41, the
24 more computerized-generated schematic, admitted into
25 evidence.

1 THE COURT: Any objection?

2 MR. KNUDSON: No objection.

3 THE COURT: 41 and 41A are both received.

4 MR. SWIER: At this time I don't have anymore
5 questions for Mr. Williams. Thank you.

6 THE COURT: Thank you. Miss Roberts, any
7 questions?

8 MS. ROBERTS: No, Your Honor.

9 THE COURT: Mr. Knudson?

10 MR. KNUDSON: Yes, Your Honor. I need the
11 Court's indulgence. I only have one copy of Mr. Williams'
12 Affidavit, and it's marked up. I may need to show him his
13 Affidavit. I believe probably Mr. Swier has a copy that is
14 clean.

15 THE COURT: Mr. Swier?

16 MR. SWIER: I do have a copy. Could we make a
17 copy, and let him use that so I can keep my clean copy?

18 THE COURT: Sure. If you would give it to
19 Nicole.

20 MR. KNUDSON: Your Honor, I have an unsigned
21 version. I would prefer to use a signed copy.

22 THE WITNESS: I have a signed copy where I was
23 sitting.

24 MR. SWIER: I have one right here, Your Honor.

25 MR. KNUDSON: How are we marking exhibits for the

1 Plaintiff then?

2 THE COURT: The Clerk will mark it for you.

3 MR. KNUDSON: We'll solve that when we get to it.

4 CROSS-EXAMINATION

5 BY MR. KNUDSON:

6 Q. So, Mr. Williams, Scott Knudson. I represent Sprint
7 Communications, the Plaintiff in this action. I believe
8 you testified that you hadn't been to Ft. Thompson yet. Is
9 that correct?

10 A. That is correct.

11 Q. Is this your first time to South Dakota?

12 A. It is not.

13 Q. Now, I'd like you to turn your attention to this
14 schematic. I believe it's still showing up on the screen.
15 Do you have it in front of you?

16 A. Yes.

17 Q. What you have described then is how I believe you said
18 all calls that could end up at the Ft. Thompson 477
19 exchange are routed. Is that correct?

20 A. That is correct.

21 Q. If I understand your testimony correctly, from the
22 schematic, all the traffic that ends up at the Ft. Thompson
23 477 exchange goes first to this switch owned by South
24 Dakota Network. Is that correct?

25 A. Correct.

1 Q. And that's based on the LERG data you've analyzed.

2 Correct?

3 A. Yes.

4 Q. You believe the LERG data to be something you can rely
5 on?

6 A. I would say so.

7 Q. And if I follow this schematic correctly, then all
8 this traffic that is intended for the Ft. Thompson 477
9 exchange goes out to WideVoice in Los Angeles. Correct?

10 A. Yes.

11 Q. You've reviewed the Amy Clouser Affidavit. Haven't
12 you?

13 A. Yes.

14 Q. You agree with her analysis that is where the traffic
15 goes?

16 A. Yes.

17 Q. There is a switch owned by WideVoice in Los Angeles.
18 Correct?

19 A. Yes.

20 Q. You receive traffic from other areas of the country,
21 as well, traffic destined for 477. Correct?

22 A. Correct.

23 Q. In fact, let me ask you this. Freeconferencecall.com,
24 is that a company owned by WideVoice?

25 A. It is not.

1 Q. Is it reverse? Freeconferencecall.com owns WideVoice?

2 A. I don't know that. There's definitely a business
3 dealing there.

4 Q. Then if I understand correctly then, you switched all
5 of this traffic intended back to Ft. Thompson 477 exchange
6 from Los Angeles back, and if I follow the schematic
7 correctly, it ends up back at a router owned by South
8 Dakota Network?

9 A. Yes. Basically this would be the demarc or the edge
10 of the equipment today owned by WideVoice. So, yes, it
11 would end up back at an SDN router here in South Dakota.

12 Q. From the Sioux Falls switch owned by South Dakota
13 Network, it goes over the fiberoptic South Dakota Network
14 phones to Ft. Thompson. Isn't that true?

15 A. Yes.

16 Q. Now, you have this little cloud between a router in
17 Los Angeles and a router in Sioux Falls. It says ATT IP
18 Network. Can you explain what that is?

19 A. Sure. The internet is obviously -- I mean ultimately
20 incumbents own the networks, so everyone is paying access
21 to get on the network. In this case WideVoice pays AT&T
22 for dedicated facilities to access the Internet in
23 Los Angeles.

24 Q. So the calls that go from your WideVoice switch in
25 Los Angeles back to the South Dakota Network switch in

1 Sioux Falls are an Internet protocol?

2 A. Correct. They are using the public Internet.

3 Q. You use this term "voiceover Internet protocol." Is
4 that right?

5 A. Yes.

6 Q. Is that the kind of signal that's going from the
7 switch in Los Angeles to the South Dakota Network?

8 A. It is.

9 Q. I want to clarify then what you call the traditional
10 service, when grandma was calling her granddaughter. The
11 traditional service ends at the South Dakota Network switch
12 in Sioux Falls. Correct?

13 A. It does not. It actually ends at the WideVoice switch
14 in Los Angeles.

15 Q. I see. The traditional, that would be the first leg.
16 The second leg, that's a traditional.

17 A. Correct. That would be using traditional TDM
18 facilities.

19 Q. Would we call that the legacy network?

20 A. Yes. That would be the PSTN.

21 Q. Now, you indicated that Native American Telecom is
22 using WiMax technology. Are you familiar with that
23 technology?

24 A. I am somewhat, yes.

25 Q. That's a radio-based technology. Correct?

1 A. Yes.

2 Q. Do you understand that Native American Telecom, NAT,
3 for short, has gone to the FCC to get a radio license to
4 operate its WiMax facility?

5 A. I believe you would have to.

6 Q. Do you know the range of that WiMax signal on
7 Ft. Thompson?

8 A. I don't, but traditionally it's 20 miles or something,
9 give or take, I believe.

10 Q. So if it's located in Ft. Thompson, it radiates out in
11 a circle that is 20 miles in radius, so it could be 40
12 miles in diameter?

13 A. Sure, if that's correct. Again, I'm not completely
14 familiar with how far. That's the basis, yes.

15 Q. You understand the topography in South Dakota around
16 Ft. Thompson is fairly flat. Correct?

17 A. I don't know that. I would assume.

18 Q. There are no tall --

19 A. It's not the mountains.

20 Q. Nor are there any tall buildings nearby.

21 A. Not that I'm aware of.

22 Q. Let me go back to your schematic for a second. This
23 call -- let's say it's grandma's call that ultimately gets
24 on the Ft. Thompson 477 exchange. This whole process is
25 moving through interstate commerce. Isn't it?

1 A. I would guess, sure.

2 Q. So it's really an interstate call regulated by the
3 Federal Communications Commission?

4 MR. SWIER: Objection. Calls for a legal
5 conclusion.

6 THE COURT: Sustained.

7 BY MR. KNUDSON:

8 Q. Let me make sure I understand what states this call
9 gets routed through. It starts in Fargo, North Dakota,
10 according to Mr. Swier's example. Then it goes to South
11 Dakota. Right? Then from South Dakota it goes all the way
12 to Los Angeles. Now, you have to go through a number of
13 different states to get there. Correct?

14 A. It could.

15 Q. Likewise, on its way back over this dedicated Internet
16 line, it's going to travel through a number of states to
17 get back to South Dakota. Correct?

18 A. Assumably, yes.

19 Q. Then you understand that Sioux Falls, South Dakota, is
20 not located on the Ft. Thompson or the Crow Creek
21 Reservation. Don't you?

22 A. It is not located. Correct.

23 Q. Let me understand you correctly. I believe you said
24 when this call goes back to Ft. Thompson, it ends up in
25 some equipment, and then ultimately it's actually going to

1 the granddaughter in your first example. It's going
2 through some equipment. Who owns that equipment that
3 actually gets the signal to the final call to party?

4 A. Native American Telecom, as far as I know.

5 Q. Excuse me?

6 A. As far as I know, it's Native American Telecom.

7 Q. Now, this conference bridge equipment, that's
8 something a little different. Isn't it?

9 A. Different how?

10 Q. Let's ask it a different way. I think in your
11 Affidavit you said there are a hundred or so customers on
12 the Reservation on Native American Telecom.

13 A. I believe so, yes.

14 Q. In order for you to get a signal through this process
15 of your schematic to an individual resident on the
16 Reservation, they need an ATA device. Don't they?

17 A. Yes.

18 Q. That ATA device then converts that signal coming from
19 the WiMax radio to some signal that a regular old phone
20 could use. Correct?

21 A. It would do a digital-to-analog conversion, digital
22 being the IP network, analog being the traditional PSTN, so
23 yes.

24 Q. With the conference calling bridge equipment, however,
25 isn't it true you don't need that ATA unit?

1 A. Correct.

2 Q. So when we go to the hand drawing, can you put that up
3 for me? When we have the example of callers in, was it
4 New York, Florida, and Texas, they call one of these 477
5 numbers, and they can talk to each other without having to
6 use one of these ATA units. Correct?

7 A. Correct.

8 Q. In fact, a conference bridge could have more than
9 three callers on it at one time. Isn't that true?

10 A. Depending on the equipment, sure.

11 Q. Now, in order for these conference bridge numbers to
12 work then, they are a preassigned four-digit number that
13 goes 605-477, and I think in your example it was 1112.
14 Correct?

15 A. Correct.

16 Q. So if you identified, let's say, a hundred thousand
17 minutes of use to one of those four-digit numbers, like
18 1112, that would indicate it's a conference bridge call.
19 Correct?

20 A. If it was that number in this example, yes.

21 Q. Do you know how many numbers in NAT's exchange are
22 dedicated to conference calling bridges?

23 A. I do not.

24 Q. You have done no particular traffic analysis yourself
25 to see how much of NAT's traffic, that is, directed to the

1 477 exchange, is a conference calling bridge call, have
2 you?

3 A. I have not.

4 Q. Your Affidavit. Are you familiar with it, sir?

5 A. I am.

6 MR. KNUDSON: Let's mark it. May I approach?

7 THE COURT: You may.

8 MR. KNUDSON: Do you have a copy?

9 THE COURT: I do.

10 BY MR. KNUDSON:

11 Q. Mr. Williams, I'm handing you what's been marked for
12 identification as Plaintiff's Exhibit 101. Can you
13 identify that document?

14 A. Yes.

15 Q. What is it?

16 A. It's my Affidavit.

17 Q. That's your signature at the back?

18 A. It is.

19 Q. You submitted this Affidavit as part of the record in
20 this proceeding?

21 A. I did.

22 Q. Turn your attention to Paragraph 4 of your Affidavit.
23 Again, if I could direct your attention to the second
24 sentence, and if you could read it for me, please.

25 A. "NAT delivers all line side subscriber calls to

1 subscribers or subscriber equipment located on the Crow
2 Creek Reservation in Ft. Thompson, South Dakota."

3 Q. Let's go back to grandma's illustration, if you would
4 take that document out, please. I would like to see, when
5 you describe your grandma calling her granddaughter, was
6 the granddaughter the subscriber on the Reservation?

7 A. If the grandmother is calling the granddaughter, the
8 granddaughter would be the subscriber on the Reservation.

9 Q. Now, you used the term "subscriber equipment." Do you
10 see that, sir?

11 A. Yes.

12 Q. Can you explain to me what "subscriber equipment"
13 refers to in terms of this network that NAT has created?

14 A. It would be the ATA, digital-to-analog converter that
15 is allowing that IP network to go back to the traditional
16 PSTN.

17 Q. If I'm clear then, from looking at the other example
18 of these three people calling each other, 477-605-1112, the
19 conference bridge number, they are not terminating those
20 calls with this ATA equipment. Correct?

21 MR. SWIER: Objection. Asks for a legal
22 conclusion as to what "termination" is.

23 THE COURT: Overruled. You may answer.

24 A. No. In that case it would be terminating to whatever
25 their conferencing equipment is.

1 Q. So it wouldn't be subscriber equipment then. Right?

2 A. It depends on the definition of "subscriber." In this
3 case if the granddaughter was housing the conference
4 revenue, it would be the subscriber because she is the end
5 user. That's who you are calling. Right?

6 Q. Right. The granddaughter isn't housing the --

7 A. No. Instead Native American Telecom is.

8 Q. Native American Telecom is the subscriber here, if I
9 understand?

10 A. In that case, yes.

11 Q. When you refer to the next sentence, and I'll read it
12 here. "In the case of the latter, the subscriber equipment
13 is voice application equipment." Can you explain to me
14 what "voice application equipment" refers to?

15 A. I mean I would assume in this case it's some sort of
16 server that is offering a telecommunication service. I
17 mean in the end that subscriber equipment, that server,
18 would still be doing the termination of that phone call.

19 Q. So it could be in the termination of this one call to
20 any of these three people who aren't on the Reservation?

21 None of them are on the Reservation. Right?

22 A. Not in that example.

23 Q. You agree, I believe, in Paragraph 5 that the Clouser
24 trafficking analysis correctly concluded that traffic ends
25 up at the WideVoice switch in Los Angeles. Right?

1 A. Within the traditional PSTN, yes. The ultimate switch
2 identifier would be WideVoice.

3 Q. You personally have done no traffic analysis of what
4 calls going into the 477 exchange go to which numbers.
5 Have you?

6 A. What do you mean?

7 Q. You have not looked to see how many calls or how many
8 minutes of usage go to any particular number on the 477
9 exchange.

10 A. I do not know the minutes of usage for any number on
11 the 477 exchange.

12 MR. KNUDSON: No further questions, Your Honor.

13 THE COURT: Mr. Swier?

14 MR. SWIER: Thank you, Your Honor.

15 REDIRECT EXAMINATION

16 BY MR. SWIER:

17 Q. I have just a couple questions for you. You talked
18 about VoIP, V-o-I-P?

19 A. That's correct.

20 Q. Explain what VoIP is.

21 A. Voice over Internet Protocol. Again, we talked about
22 the legacy telephone network, which is how phones worked up
23 until probably the mid '90s traditionally everywhere. With
24 the advent of the Internet, VoIP protocol, which typically
25 uses another protocol on the top of that called SIP,

1 Session Initiation Protocol, which allows you to use that
2 Internet, which in this case we'll call it the new network,
3 the IT network, to carry telephone traffic the same as the
4 traditional network, but obviously it opens that network
5 and facility to allow easier access to offer those
6 services. I mean the traditional network, the LEC that
7 owned the copper --

8 Q. The LEC being the local exchange carrier?

9 A. Local exchange carrier, would be the only one who
10 could provide service, because they owned the
11 infrastructure in the ground. By allowing Internet
12 protocol to do the same thing, it allows you to reach a lot
13 more people in a lot easier manner. Typical traditional
14 telephone services also require huge amounts of equipment
15 to take up large facilities. You can service the same
16 amount of people in much less space.

17 Q. So technology is good for the consumer?

18 A. And it's good for those providing service. Real
19 estate is expensive, as are the equipment and contracts to
20 maintain it.

21 Q. Mr. Knudson asked you some questions about the SDN
22 switch in Sioux Falls. If you could look at your map
23 again, Keith, Exhibit 41A. Earlier you testified that
24 there's simply no infrastructure equipment that goes from
25 SDN in Sioux Falls to Ft. Thompson. Is that correct?

1 A. Yes.

2 Q. Explain to us what WideVoice Communications, which is
3 a minority partner of NAT, explain what WideVoice is doing
4 from an investment standpoint to try to alleviate that
5 infrastructure problem between Ft. Thompson and
6 Sioux Falls.

7 MR. KNUDSON: Objection. Outside the scope of
8 cross.

9 THE COURT: Overruled. You may answer.

10 A. Can you ask the question again?

11 Q. Sure. What is WideVoice Communication doing? What
12 kind of infrastructure are they investing in for that
13 Sioux Falls to Ft. Thompson problem we have?

14 A. One, they are offering a solution to be able to
15 deliver those phone calls to the NAT exchange at a more
16 reasonable rate than they are getting from whoever the
17 incumbent would be.

18 Q. In the future will that call from Sioux Falls not be
19 required to go to Los Angeles?

20 A. The call itself, yes, will route through SDN.
21 WideVoice is in the process of redesigning their network.
22 We have worked out agreements with SDN to actually house
23 trunking equipment within their facilities here in South
24 Dakota, at which point Leg 2 would go away, because it
25 would terminate directly within equipment in Sioux Falls,

1 and Leg 3 would go over leased-line facilities directly to
2 Ft. Thompson.

3 Q. So WideVoice is making that investment so we don't
4 have to have the Sioux Falls to Los Angeles leg?

5 A. Correct. Ultimately it saves me money or us money, as
6 WideVoice, in turn, allowing us to offer a more competitive
7 rate.

8 Q. Keith, the high-tech conference calling equipment in
9 Ft. Thompson, that is located within the exterior
10 boundaries of the Reservation, according to your knowledge?

11 A. As far as I know, yes.

12 Q. In fact, to the best of your knowledge, is NAT, Native
13 American Telecom, a majority tribally owned company?

14 MR. KNUDSON: Objection. Calls for a legal
15 conclusion. Foundation.

16 THE COURT: Sustained based on lack of
17 foundation.

18 BY MR. SWIER:

19 Q. Keith, the service in this case, the services that are
20 being provided, the equipment that allows the services to
21 be provided, that's located on the Reservation. Isn't it?

22 MR. KNUDSON: Objection. Foundation.

23 A. As far as I know, yes.

24 THE COURT: Overruled.

25 Q. The equipment is located on the Reservation?

1 A. It is located on the Ft. Thompson facility.

2 MR. SWIER: I don't believe I have any other
3 questions. Thank you, Your Honor.

4 THE COURT: Mr. Knudson?

5 MR. KNUDSON: Thank you, Your Honor.

6 RE CROSS-EXAMINATION

7 BY MR. KNUDSON:

8 Q. So if I understand Mr. Swier's redirect correctly,
9 WideVoice is providing all of this equipment to this
10 network that's going to be operated by NAT. Correct?

11 A. No. WideVoice is providing our own facilities for
12 this transport. Again, Native American Telecom owns
13 whatever equipment they have in the Ft. Thompson facility.

14 Q. Okay. So even if WideVoice goes forward with this
15 plan to put another switch in South Dakota so we don't have
16 this long -- I take it your testimony is that Leg No. 2
17 would go away?

18 A. The TDM leg would go away. Obviously -- not
19 obviously, but within this, the call control for our
20 switching will still be in Los Angeles. From the
21 traditional PSTN standpoint, you will still see WideVoice's
22 switch identifier. But obviously with the IP switching
23 technology we were talking about before allows you to be
24 geo-diverse in the location of that equipment.

25 So the calls themselves will actually route SDN

1 directly to Ft. Thompson. There will be a signaling
2 protocol back to Los Angeles to communicate how to direct
3 that call.

4 Q. So just to be clear, even with this additional
5 technology, the final leg into the Reservation is over
6 South Dakota Network fiber. Correct?

7 A. Ask that one more time.

8 Q. Even with this new equipment being located in
9 Sioux Falls, the final leg going into the Reservation will
10 be on South Dakota Network fiber.

11 A. It will be, yes.

12 MR. KNUDSON: No further questions.

13 THE COURT: Anything further, Mr. Swier?

14 MR. SWIER: No, Your Honor.

15 THE COURT: You can be excused. Thank you.

16 (Witness excused)

17 THE COURT: You may call your next witness.

18 MR. SWIER: We will call Tom Reiman.

19 TOM REIMAN,

20 called as a witness, being first duly sworn, testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. SWIER:

24 Q. Would you please introduce yourself to the Court and
25 spell your last name.

1 A. My name is Thomas J. Reiman, R-E-I-M-A-N. I am the
2 President of Native American Telecom Enterprise, which is a
3 minority owner of NAT.

4 Q. Tom, I'd like to talk with you briefly about the
5 corporate structure of Defendant Native American Telecom,
6 who we will refer to as NAT. Will you share with the Court
7 the ownership structure of NAT?

8 A. Native American Telecom, LLC, is 51 percent owned by
9 the Crow Creek Sioux Tribe.

10 Q. Hold on right there. So Defendant NAT is majority
11 owned by the Crow Creek Sioux Tribe.

12 A. That is correct.

13 Q. How is the remaining 49 percent dealt with?

14 A. Native American Telecom Enterprise, LLC, owns 25
15 percent. WideVoice Communications owns 24 percent,
16 equaling one hundred percent of the corporation.

17 Q. This gets a little bit confusing, but I want the Court
18 to understand. The Defendant in this case, Native American
19 Telecom, LLC, is that a distinct and separate entity from
20 your company, Native American Telecom Enterprises, LLC?

21 A. Yes, it is.

22 Q. Tom, tell us how Native American Telecom, LLC, came
23 about.

24 A. Native American Telecom, LLC, has been a thought of
25 ours for a long time. I come from serving Indian

1 Reservations for the last 11 years, and hadn't been on one
2 prior to that in my entire life. Stepping onto the Pine
3 Ridge in 2000, we saw how Indians and Native Americans live
4 out there.

5 Q. Give me a little bit of your background on that. How
6 did you come into this type of telecommunication system
7 work on Indian Reservations?

8 A. I was in the wireless business with Western Wireless
9 Corporation. There was a tornado back in 1999 in Oglala,
10 South Dakota, which completely destroyed the entire town
11 and also the infrastructure of the telephone lines. The
12 company I worked for, John, the CEO was John Stanton who
13 noticed that. Bill Clinton came out, the President at the
14 time, to view this catastrophe, and decided maybe that
15 company could make a difference. So what they did is
16 brought in cellular-on-wheels, which is called COW, and
17 what they did is started a telecommunications system out
18 there before the land lines could ever rebound from such a
19 problem.

20 Because of what we were able to do out there, we
21 decided or the company decided to try to bring modern
22 telecommunication services to the Pine Ridge Indian
23 Reservation.

24 So what we did and the Tribe did is went in front of
25 the FCC to get eligible telecommunication carrier status.

1 They were granted, the first Tribe to ever be granted
2 eligible telecommunication state carrier status.

3 What they would do is give Western Wireless the
4 opportunity to build out an infrastructure on the Pine
5 Ridge Indian Reservation, and which we did. We provided
6 telephone cellular phones at low cost to people who had no
7 other phones.

8 At that time we figured the telephone penetration was
9 less than 25 percent, meaning 75 percent of the people did
10 not have telephones. We were able to bring that up to over
11 90 percent in a matter of six, seven years. From them, we
12 went on to other reservations because of what we saw.

13 Q. Let me ask you this. So you started working on the
14 Reservations back in the early '90s.

15 A. Late '90s, 1999, 2000 is when we first started.

16 Q. The reason of that is because of the natural disaster
17 that happened out on Pine Ridge with the Oglala Sioux?

18 A. That exposed the situation to us.

19 Q. As a result of that, President Clinton and the United
20 States Government found this was a priority to restabilize
21 communication services.

22 A. Correct.

23 Q. And you did that, and it was successful. Take us then
24 to how you got from that point and what you've done through
25 the past few years, ultimately how we came to NAT.

1 A. What we did, we saw successes were happening on the
2 Pine Ridge Indian Reservation, and then went and started to
3 do the same thing on other Indian Reservations where they
4 were suffering the same situation without basic phone
5 service. We did that on seven Reservations in South
6 Dakota, three Reservations in North Dakota, and during that
7 period Alltel bought out Western Wireless.

8 Q. Western Wireless being the company you used to work
9 for?

10 A. Correct. Alltel bought us out. We continued to do
11 the same thing. Alltel was a lot larger corporation than
12 what Western Wireless was. We were small. And what has
13 happened in the industry is these large companies have
14 taken over the smaller companies.

15 But, anyway, I did not actually enjoy doing what I was
16 doing. My capacity was minimized, and I didn't feel like I
17 was doing what I could for these poverty areas. Then that
18 was the time I decided to start Native American Telecom
19 Enterprise to address this personally better.

20 When I arrived on the Reservation in 1999, it was the
21 first time, and I could not believe people in the United
22 States actually lived this way, and why wasn't anything
23 being done? I've heard of Reservations all my life. I had
24 never seen anything like that. What I'm saying is there
25 were three or four families living in homes. There are

1 very little to live off of. There are no jobs, no economic
2 activity out there.

3 So what we decided to do is do a joint venture with
4 the Crow Creek Reservation where we thought we could maybe
5 start or thought we could do economic development out there
6 by starting a Tribally-owned telephone company.

7 Q. Let me stop you right there. You're going to be asked
8 this by Mr. Knudson, and it's in his pleadings. Sprint is
9 alleging that the Defendant in this case, Native American
10 Telecom, LLC, is simply a shell or a sham organization
11 because you were one of the organizers of the LLC.

12 Explain to the Court again a little more in-depth the
13 ownership structure of Defendant NAT and how this is a
14 Tribally-owned business.

15 A. Native American Telecom, LLC, was formed with my
16 partner and I, Gene DeJordy, prior to us ever talking to
17 any Tribes. We were going to form this corporation, Native
18 American Telecom, LLC, and then approach a Tribe and give
19 them the opportunity to start their Tribally-owned
20 telephone company. That's what we did. Then the agreement
21 was drawn up with the Tribal Council.

22 We had a pretty big to-do over it just because it was
23 an exciting thing for them. There isn't a lot of companies
24 investing much money on Indian lands today.

25 Q. Talk about that a little bit. Talk about the

1 negotiation process between Native American Telecom and the
2 Tribe to try to bring the Tribe and the Reservation into
3 this company.

4 MR. KNUDSON: Objection on relevancy grounds. I
5 think we've agreed that the papers say the Crow Creek Tribe
6 owns 51 percent of the equity of Native American Telecom.
7 We don't need to go into the background and negotiations
8 leading to that result.

9 THE COURT: Overruled. You may answer.

10 A. Restate that question. Would you, Scott?

11 Q. Can you take us through the negotiating process and
12 how it came to be that Native American Telecom, LLC, came
13 to be majority Tribally-owned?

14 A. I had meetings. Initially I was out there offering
15 cell phones and got to know some of the people. This is
16 when our idea came to start our own Tribally-owned
17 telephone company. So I had met with the Tribal Council
18 and the Chairman at the time, Brandon Sazue, to discuss the
19 possibilities of our big dream to start a telephone company
20 that would be Tribally-owned by the Crow Creek Sioux Tribe
21 and what this would offer to people, that being a telephone
22 company they owned that would provide state-of-the-art
23 Internet and phone service to their people at minimal or no
24 cost.

25 Q. What was the Tribe's reaction?

1 A. Well, as Tribal people, I think when people come on to
2 the Reservation, they may see that as too good to be true.

3 But Brandon, you know, I've been around Native
4 Americans for the last 10 years, and I have a very good
5 track record where everything I've said I was going to do,
6 I did. I had references. I said, "Feel free to check them
7 out." I had a long dealing with the Oglala Sioux Tribe,
8 the Rosebud Sioux Tribe, the Yankton Sioux Tribe, where we
9 did go out and make a difference.

10 Now they have an opportunity to make this even bigger
11 and better, where they can be their own telephone company,
12 less dependent on outside carriers. If you go there right
13 now on Crow Creek, I had heard 93 cents out of every dollar
14 leaves the Reservation, because there are no services
15 there. They have to purchase all services from off the
16 Reservation. This gives them one less chance to be less
17 dependent on outside resources where they can have their
18 own telephone company. So it was a dream to them and it
19 was a dream to me, and we were making it a reality.

20 Q. Why did you decide to make this business majority
21 Tribally-owned? You wouldn't need to do that. You and
22 Mr. DeJordy have plenty of experience in the business. Why
23 was that important to you?

24 A. It would give them the opportunity, after we educated
25 the people out there, to own this company, and we could go

1 forward. We have trained several people.

2 We have put on I think about a hundred and some
3 customers. I've been in the majority of those homes. I
4 see the eyes light up when the Internet turns on, and they
5 have access to services they've never had before. I am
6 very proud of what we've accomplished there, and look to
7 accomplish bigger and better things.

8 Right now that tower serves Ft. Thompson and three
9 other communities. There's a school in Stephan that is the
10 home of the Crow Creek Chieftans, which is the high school
11 which boards students up there. My dream is to put a tower
12 there and give those students wireless Internet that they
13 don't have right now, Internet services in the dorms with
14 computers, that they have the fair shake that everybody
15 else does outside of Indian grounds.

16 Q. Let me ask you this. Are you aware of any efforts
17 Sprint Communications Company has ever made to bring
18 technology to the Crow Creek Reservation?

19 A. No.

20 Q. Are you aware of any efforts Sprint has made in
21 assisting economic development on the Crow Creek
22 Reservation?

23 MR. KNUDSON: Objection. Totally irrelevant and
24 it's also argumentative.

25 THE COURT: Sustained.

1 BY MR. SWIER:

2 Q. Tom, share with the Court -- first of all, share with
3 the Court the work that NAT has done, the infrastructure
4 it's built. Let's start with that. Talk about the
5 infrastructure NAT has built.

6 A. Okay. We erected an 80-foot monopole tower out there
7 without any ground penetration. The lands on Indian
8 country are very historical. There are things you do not
9 want to disturb.

10 Q. Sacred.

11 A. Sacred, exactly. We wanted to erect our tower without
12 touching the ground at all. We went in there and put up a
13 tower without any ground penetration, weighted down with
14 thousands of pounds of brick, and then we put in a tower we
15 brought in, a concrete tower, with the plans that would
16 serve the Ft. Thompson area. We then brought in equipment.

17 This whole time we've involved the people of Crow
18 Creek and also the Tribal Council. That was where -- they
19 looked at this with excitement. Then after we got the
20 system up and running, which took approximately a year, we
21 put in an Internet Cafe in the Tribal Hall where we put in
22 six computers.

23 What we found out is it was fine and dandy to bring
24 Internet to the households, but in many cases these people
25 were not able to afford a computer. So we decided to give

1 them an opportunity by putting in six computers and them
2 having access to them, also, from phone service.

3 Q. You talked about you did all this infrastructure and
4 provided these services. When you talk about "you," who
5 has done this?

6 A. Native American Telecom, LLC. Without the Tribe's
7 consent, this could not be done.

8 Q. Talk about some of the other either equipment NAT has
9 invested or talk a little bit more about what's going on
10 out there on the Reservation with these services.

11 A. As far as the equipment we've invested in the hut,
12 it's thousands of dollars.

13 Q. When you talk about the structure where the telecom
14 equipment is located, talk about that a little bit.

15 A. We put a shelter in out there that houses all this
16 electronic equipment. What that does is provide the WiMax
17 system. It provides other services that we would like to
18 start out there and have started.

19 We also have invested in CPEs, which are
20 customer-premises equipment, and that is a piece of
21 equipment required to get that signal to the home. So we
22 have invested those. Each install is approximately \$500.
23 A hundred of those is \$50,000 that we've invested, plus
24 time and labor. We've invested a lot of money with the
25 thinking we could continue to invest out there by bringing

1 this service to other parts of the Reservation.

2 Right now we serve the Ft. Thompson area. We would
3 love to serve the village of Crow Creek, the town of
4 Stephan where the school is located, Big Bend, also, so we
5 could serve the entire Reservation. That's what our
6 thoughts were, and that's what we would like to do.

7 Q. You talked about the equipment and infrastructure
8 investment that NAT has made. Where is that equipment
9 located?

10 A. It's housed at our shelter behind the old ambulance
11 and the new ambulance building and our new Internet and
12 Learning Center that we just completed construction and
13 plan on opening in November, which will be a Learning
14 Center.

15 Q. Is all the equipment NAT has invested and erected, is
16 that located in Ft. Thompson? Correct?

17 A. Yes.

18 Q. Is all of that equipment and investment and
19 infrastructure located within the exterior boundaries of
20 the Crow Creek Reservation?

21 A. Yes.

22 Q. The Internet Library that you talked about. Is that
23 structure and those services, are those all provided on the
24 Reservation?

25 A. Yes.

1 Q. Is the equipment and infrastructure you talked about
2 owned by Native American Telecom?

3 A. Yes.

4 Q. Is Native American Telecom a majority Tribally-owned
5 business?

6 A. Yes.

7 Q. Tom, as a result of NAT's effort and infrastructure
8 investment, share with the Court what is going on on the
9 Reservation from an employment and economic development
10 standpoint.

11 A. From an employment, we have hired four full-time
12 people, and I think seven part-time people to actually help
13 us with our operations out there.

14 Q. Are those people and their work and their offices, are
15 they all located on the Reservation?

16 A. Yes, they are.

17 Q. Go ahead.

18 A. With that we provide the training, too. There are a
19 lot of capable people out there doing this. They just
20 haven't had the opportunity to do this. So when we come
21 out there as a company offering some jobs, we have a lot of
22 inquiries, because people do not have the opportunities on
23 the Crow Creek Reservation that they may have otherwise.
24 There are not a lot of corporate infrastructure out there.

25 So what we decided, because of our Internet Cafe with

1 the six computers being booked all the time, we open at
2 10:30 and people come in and they do research and their
3 papers and stuff like that, we decided to invest additional
4 funds to build a Native American Telecom Communication and
5 Learning Center, which we have -- the construction is done.
6 We just haven't gotten the equipment put in there yet. We
7 are excited about that. The Tribe is excited, and the
8 people on the Crow Creek Indian Reservation are excited
9 about it.

10 Q. These new efforts, are these all located again on the
11 Reservation?

12 A. Yes. We took an old building pretty much run down and
13 rebuilt it. Now it looks like a brand new building in
14 Ft. Thompson, which is in the confines of the Crow Creek
15 Sioux Indian Reservation.

16 MR. SWIER: May I approach?

17 THE COURT: You may.

18 Q. I'm showing you Exhibits 42 -- start with Exhibit 42.
19 Will you share with the Court what Exhibit 42 shows?

20 A. That is our recently completed Native American Telecom
21 Communication and Learning Center, which used to be an old
22 ambulance storage area, run down.

23 Q. Where is that building located?

24 A. In Ft. Thompson.

25 Q. On the Reservation?

1 A. On the Reservation.

2 Q. Who had made the investment to rebuild and provide the
3 service?

4 A. Native American Telecom, LLC.

5 Q. Again, what is the intended purpose of this facility?

6 A. To provide Internet access, learning capabilities, GED
7 certification. With our network being what it is, like a
8 fourth generation, high-tech, high-speed network, we are
9 looking at putting Skype televisions in there so learning
10 can be done.

11 You'll have Tribal members able to have instruction,
12 and the instructor doesn't have to be on the ground. He
13 can be anywhere in the world. We'll be offering classes
14 that they can further their education.

15 What we've seen so far is people have developed
16 websites there and are now accessing outside resources
17 because of the Internet.

18 Q. Before NAT made this investment, was any of this type
19 of learning or economic development taking place on the
20 Crow Creek Reservation?

21 MR. KNUDSON: Objection. Foundation.

22 THE COURT: Sustained.

23 BY MR. SWIER:

24 Q. Were you aware of the economic shape of the Tribe and
25 the economic, I guess the noneconomic things that were

1 going on out there, for lack of a better word?

2 Were you familiar with how it was economically on the
3 Tribe before NAT came?

4 MR. KNUDSON: Objection. Foundation.

5 THE COURT: Overruled.

6 A. Yes. I spent a lot of time out there and had
7 firsthand experience of the situation and living
8 circumstances out there.

9 Q. Describe for the Court the difference between pre-NAT
10 and current-NAT from a technological standpoint.

11 A. What we saw out there, pre-NAT would be homes without
12 any Internet access. The telephone company, Midstates
13 would say everybody has access. Well, they may have wires
14 to every home, but affordability is a big issue out there.

15 Q. How were people affording NAT services then?

16 A. Subsidized by NAT.

17 Q. So NAT is providing the infrastructure and subsidizing
18 the services for Tribal members.

19 A. Correct.

20 Q. Why would you do that?

21 A. Otherwise they wouldn't get it. They don't have it.
22 They don't have the funds to be able to. Are you going to
23 buy food, or are you going to buy Internet?

24 Q. Explain to the Court the subsidies NAT is providing on
25 the Reservation.

1 A. We are providing the hookup to the Reservation people
2 to the homes. We provide the service. We provide the
3 telephone. In some cases we have worked out where we can
4 provide computers.

5 Q. In their submissions Sprint almost made fun of NAT
6 because you weren't accepting any government handouts or
7 Universal Service Funds. Are you familiar with the
8 Government subsidies and USF funds that may be available to
9 NAT?

10 MR. KNUDSON: Object to the tone of the question,
11 but that's all.

12 THE COURT: Overruled. You may answer.

13 A. I am familiar with eligible telecommunication carrier
14 status. That's how you go about getting Universal Service
15 Funding. You have to get that status prior to getting
16 Universal Service Funding. We looked at that, knowing it
17 was going to take us a few years to get there.

18 Q. So you knew that NAT would ultimately -- could avail
19 themselves of government subsidies. Did you decide to
20 pursue that ultimately?

21 A. Ultimately, yes.

22 Q. But what happened was ultimately your business model
23 changed. Right?

24 A. Yes.

25 MR. KNUDSON: Objection. Leading.

1 THE COURT: Sustained as leading.

2 BY MR. SWIER:

3 Q. How did your business model ultimately change in that
4 regard?

5 A. The business that the Tribe and us set up was getting
6 funds from long-distance carriers, and then they ceased to
7 pay what they were being billed.

8 Q. Is Native American Telecom's business model to be a
9 profitable, privately-held business, not reliant on
10 government subsidies?

11 A. Yes.

12 Q. Why not just take the easy money and not worry about
13 having to compete in the marketplace? Why not take the
14 easy government funds?

15 A. Because our business model was able to train
16 individuals out there. We could work for what we were
17 going to get. We offered it as a business. It to me makes
18 more sense to do that. Obama had stimulus funds out there
19 for buildout of this particular purpose.

20 In the first round we saw all these telephone
21 companies objecting to anybody that filed, because they
22 think it's their sacred land. We decided to build our own
23 business model and depend on our knowledge to make this
24 business happen.

25 Q. When you were negotiating with the Tribe, was it

1 important to the Tribe to actually be able to have and to
2 own a self-sustaining, competitive, privately-held
3 telecommunications company?

4 MR. KNUDSON: Objection. Hearsay.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. What was important to the Tribe in how this business
8 model was ultimately crafted?

9 MR. KNUDSON: Objection. Vague. Hearsay.

10 THE COURT: Sustained.

11 BY MR. SWIER:

12 Q. Tom, what was your company's intent in how this
13 Tribally-owned company was going to make money without
14 government funds?

15 A. By offering services out there. We looked at several
16 different opportunities and different organizations to be
17 involved with to bring into this. Our ultimate plans were
18 to start a conference service out there, a telephone
19 communication center where we could employ not seven to
20 eight people, but possibly a hundred people by building a
21 communications center out there, where we could do customer
22 service on the Reservation, where we could bring
23 infrastructure there, a corporation majority owned by the
24 Tribe to make a difference out there.

25 Q. Was the Crow Creek Sioux Tribe on board with your

1 vision?

2 MR. KNUDSON: Objection. Hearsay.

3 THE COURT: Sustained.

4 MR. SWIER: May I approach?

5 THE COURT: You may.

6 BY MR. SWIER:

7 Q. I'll show you Exhibits 43, 44, and 45. Going back to
8 NAT's investment on the Reservation. Can you take a look
9 at Exhibit 43 and explain to the Court what that is?

10 A. This is the interior of the building we remodeled out
11 there. This is the old ambulance building that was being
12 used for storage of different things.

13 Q. That's now going to be what?

14 A. That is going to be the Native American Telecom
15 Communication and Learning Center.

16 Q. When is the projected opening date of that facility?

17 A. November 2010.

18 Q. And is that building located within the boundaries of
19 the Reservation?

20 A. Yes, it is.

21 Q. Look at the next exhibit, please. I think it's
22 Exhibit 44. Explain to the Court what that exhibit shows,
23 please.

24 A. That is the remodeled interior of the photo, Exhibit
25 43. This is how it currently looks today. That would be

1 one of the classrooms.

2 Q. Exhibit 43 is a before. Exhibit 44 is an after?

3 A. Yes, but it's a partial after, because there are other
4 rooms in this building.

5 Q. If you look at Defendant's Exhibit 45, please.

6 Explain to the Court what that shows.

7 A. That's another office in that same building.

8 Q. And Exhibit 46, please.

9 A. I don't have 46.

10 MR. SWIER: Your Honor, at this time I would move
11 to admit Defendant's Exhibits 42, 43, 44, and 45 into
12 evidence.

13 THE COURT: Any objection?

14 MR. KNUDSON: We'd like copies, but otherwise no
15 objection.

16 THE COURT: Exhibits 42, 43, 44, and 45 are
17 received.

18 BY MR. SWIER:

19 Q. Tom, financially how does NAT try to make this work?

20 A. We do conferencing out there. The reason is, you have
21 to have that to be able to provide what we're trying to
22 build out there. We get funded by IXCs, interexchange
23 carriers, AT&Ts, Sprints, for the traffic they got paid
24 for, and we have a tariff, that it's a legal tariff and
25 it's been filed with the FCC and also with the Tribal

1 Utility. We bill those companies, and that's how this
2 whole big picture works. That's how the business model is
3 based on.

4 Q. So you are a Tribally-owned private company that wants
5 to make a profit.

6 A. That's correct, and make things better out there.

7 Q. How dare you.

8 MR. KNUDSON: Objection.

9 THE COURT: Sustained.

10 MR. KNUDSON: Move to strike.

11 THE COURT: Motion to Strike is granted.

12 BY MR. SWIER:

13 Q. Explain to the Court -- Keith did this somewhat, but
14 explain how the conference calling is part of NAT's
15 business plan.

16 A. We run conferencing minutes out there, and we get paid
17 on those. We set up a competitive local exchange carrier
18 status. I can get into the background on how that got
19 started, if you wish.

20 Q. Sure.

21 A. We initially went to the Public Utilities Commission
22 to get our competitive local exchange carrier status to be
23 a telephone company. Every telephone company in South
24 Dakota intervened objecting to us becoming a competitive
25 local exchange carrier.

1 We then went to the Public Utilities Commission to get
2 our application returned or dismissed. Once again, every
3 telephone company in South Dakota intervened and said, "You
4 cannot dismiss this." The PUC granted that dismissal,
5 because we are the ones that admitted to even try to get it
6 initially.

7 So what we did was went in front of the Crow Creek
8 Sioux Tribal Utility Authority and were granted competitive
9 local exchange carrier status from them.

10 Q. Let's talk about that for a moment. Do you know when
11 the Crow Creek Tribe started the Tribal Utility Authority?

12 MR. KNUDSON: Objection. This is cumulative of
13 the DeJordy Affidavit. It's really not in dispute here.

14 THE COURT: Overruled. You may answer.

15 A. I believe it was 1997.

16 Q. How many years was that before you approached the
17 Tribe to come together in this partnership?

18 A. We approached the Tribe in 2008.

19 Q. So the Tribal Utility Authority had been up and
20 running for 10 years before you approached the Tribe?

21 A. Yes.

22 MR. KNUDSON: Objection. Vague. What does
23 "running" mean?

24 THE COURT: Overruled. The answer will stand.

25 BY MR. SWIER:

1 Q. So NAT went to the Tribal Utility Authority. What
2 happened?

3 A. We explained to them what we wanted to do, utilizing
4 their utility code to establish a competitive local
5 exchange carrier, a Tribally-owned telephone company on the
6 Crow Creek Sioux Indian Reservation.

7 Q. What did the Tribal Utility Authority do with your
8 request?

9 A. They granted our application.

10 Q. By granting your application, what did they provide
11 NAT with the power to do?

12 A. Start a telephone business and telephone company on
13 the Crow Creek Sioux Indian Reservation within the
14 boundaries of it.

15 Q. Based on your knowledge of this Reservation, had this
16 type of business model ever been presented to the Tribal
17 Utility Authority before?

18 A. Not that I'm aware of.

19 Q. So you got the Tribal Utility Authority's permission.

20 A. Yes.

21 Q. After you received that Utility Authority permission,
22 what did NAT do?

23 A. We had to design our business model and how we were
24 going to do this. Now we become a telephone company. To
25 start a telephone company is very expensive. So we had to

1 put together a business model for economic development on
2 the Crow Creek Sioux Indian Reservation. We had to look at
3 outside parties to invest in our telephone company.

4 Q. So in order to make this work, in order to make this
5 Tribally-owned telecommunications company work, you needed
6 to have private outside investment.

7 A. That's correct.

8 Q. Before NAT, how much off-Reservation private
9 investment was going on on the Reservation?

10 A. From the looks of it, I would say very little.

11 Q. Not any?

12 A. Well, there were a couple stores out there,
13 convenience stores that sold high-priced goods and
14 high-priced gasoline.

15 Q. Then what happened?

16 A. We did a lot of research and found a company,
17 WideVoice, that was interested, also, in making a
18 difference in Indian country. So we went in front of the
19 Council and talked about how we were going to establish a
20 business. That's when we formed the partnership with the
21 Tribe and with WideVoice.

22 Q. The Tribal Government on Crow Creek, that is headed by
23 the Tribal Council. Is that correct?

24 A. Yes.

25 Q. Did you get the support and the okay from the Tribal

1 Council to move forward with NAT's business model?

2 A. Yes. It was done through resolutions.

3 Q. Explain to the Court then between the time the Utility
4 Authority gave you permission until the time that things
5 started getting going, which was about a year before the
6 telephone company was up and running. What were NAT's
7 efforts, in addition to what you already talked about, in
8 that year time to get things going?

9 A. We had to secure land, and that had to be done through
10 the Resolution of Tribal Grounds and also through the BIA.
11 We had to get our FCC license to offer WiMax out there.
12 Just a lot of things that take a lot of time.

13 We had to buy phone numbers from the incumbent out
14 there, which is Midstates, a block of phone numbers to be
15 able to offer our own phone numbers. We had to develop
16 relations with SDN, which had the only link into there. So
17 we had to do that. We had to get an interconnect agreement
18 with Midstates Communications, which dragged out for six,
19 eight months. They are not all that excited about another
20 telephone company being started on the Crow Creek Indian
21 Reservation. They seemed to drag their feet in everything
22 we did. SDN, also. It took a long time.

23 Q. All of these preparatory activities were done by NAT,
24 the Tribally-owned company, within the boundaries of the
25 Reservation?

1 A. Yes.

2 Q. So the year of planning takes place. After a year
3 what happens?

4 A. We became live, meaning our tower was turned on,
5 emitting a WiMax signal, that we could now offer
6 communication services to Tribal members within that area
7 that site covered.

8 Q. What was the Tribe's reaction? What did you do to
9 exclaim to everyone, "This is what we've done. Look at
10 what we've done."

11 A. You know, we did not have a big ceremony. What we did
12 is started offering service. We were a small company. If
13 we went public, I might have three, four hundred people
14 coming to my door, coming to us, "We want this service."

15 So what we did is what we call a soft launch, offering
16 it to people that had computers in their homes that wanted
17 it.

18 Q. On the Reservation.

19 A. On the Reservation in Ft. Thompson.

20 Q. What was the Tribal Government's reaction after
21 seeing, "Wow, here is what we have."

22 A. They were excited. They saw somebody that actually
23 did what they said they were going to do. That's what we
24 were doing. The Tribal Government was excited. But the
25 people that got the service were the excited ones. They

1 were the ones that could experience firsthand the
2 technology they've never had before or couldn't afford
3 before coming to their home.

4 I held an appreciation dinner out there one time in
5 Ft. Thompson. The majority of the people came up to me and
6 said, "We should be holding the appreciation dinner for you
7 for doing what you are doing here, which no one else has
8 done before."

9 Q. Tom, for all of this to come to fruition after a year,
10 did, indeed, the financial part of it with the Tribal and
11 private investment partnership, is that what it took to get
12 this communication system up and running?

13 A. Yes. Otherwise it would not be going at all.

14 Q. So without the private off-Reservation investment on
15 the Reservation, this doesn't happen.

16 A. That's correct.

17 Q. Tom, you talked briefly about the high-tech equipment
18 that makes Native American Telecom work. Where is all of
19 that equipment located?

20 A. It's housed in our shelter on Ft. Thompson.

21 Q. On the Reservation?

22 A. On the Reservation.

23 Q. Are you employing Tribal members with seven jobs you
24 have created?

25 A. Yes.

1 Q. So we're up and running. You indicated, of course,
2 the conference calling would be part of NAT's business
3 model.

4 A. That's correct.

5 Q. I want to clear this up, because I think you will get
6 asked about it. In the submissions Sprint alleged this
7 conference calling scheme, as they called it, was doing
8 chat line and maybe some things maybe some of us think are
9 vices or not in good character. Do you understand what I'm
10 talking about?

11 A. Yes.

12 Q. What is NAT's perception or what is their business
13 model regarding funding their business and making money
14 through chat lines or porn lines or things of that nature?

15 A. We will not do it, and that was stated upfront, that
16 we would not do that.

17 Q. Have you ever done that?

18 A. No, we have not.

19 Q. Are you doing that right now?

20 A. We are not doing that right now.

21 Q. According to NAT's business model, will you ever
22 consider doing that in the future?

23 A. No.

24 Q. But couldn't you make a lot more money if you did chat
25 and porn?

1 A. It's just something we're not going to go to.

2 Q. Answer my question. Could you make a lot more money?

3 A. Yes, you could. I'm sure you could increase your
4 minutes considerably.

5 Q. But NAT has taken the position it doesn't want to do
6 chat or porn.

7 MR. KNUDSON: Objection. Relevancy.

8 THE COURT: Overruled. You may answer.

9 A. We have taken the position we will not do chat or
10 porn.

11 Q. So what do you do with your conferencing services?

12 A. We offer a service to the people of the United States
13 to be able to bring parties together, similar to what
14 Mr. Williams mentioned and how it works where you have
15 different parties that want to get together via
16 conferencing. We offer our phone numbers to them, and then
17 they call them. You can jointly add -- I mean you can have
18 a call together without being in person. It's called
19 conference bridge or conferencing.

20 Q. And the only way people from Texas and West Virginia
21 and New York can get together to conduct their business
22 would be through this conference calling opportunity.

23 A. That is correct.

24 Q. So as part of the business model, NAT assists
25 companies with conference calling.

1 A. Yes.

2 Q. Mr. Williams went through pretty well how the
3 technology of that works. Ultimately because of the
4 technology on the Reservation, is that what allows these
5 conference calls to occur and, in turn, helps make NAT
6 profitable?

7 A. Yes.

8 Q. Could NAT be profitable without this conference
9 calling part of your plan?

10 A. No.

11 Q. When Mr. Williams was talking about how the call all
12 works, there are certain fees that are supposed to be paid
13 by companies who use CLEC or an LEC, a local incumbent
14 carrier's infrastructure facilities. Correct?

15 A. Correct.

16 Q. What are those fees commonly known as?

17 A. Tariffs.

18 Q. Tariffs. I know you don't know the technical part of
19 this, so I'm not going to ask you. But with NAT's business
20 plan, is the payment of those tariffs what allows NAT to
21 make money through their equipment on the Reservation?

22 A. Yes.

23 Q. Have you had a problem getting, let's say, Sprint to
24 pay these tariffs to NAT?

25 A. Yes. They disputed these charges.

1 Q. What's been the result of the fact that Sprint just
2 flat out won't pay NAT for its services?

3 A. It's tying our hands on expansion.

4 Q. Financially?

5 A. Financially.

6 Q. Are you aware of any companies that are maybe similar
7 to NAT that this has also happened to?

8 MR. KNUDSON: Objection. Relevancy.

9 THE COURT: Sustained.

10 BY MR. SWIER:

11 Q. Have you asked Sprint to pay the tariffs?

12 A. Yes.

13 Q. What have they told you?

14 A. That's handled by our legal people. What I was told
15 is they feel they do not deserve or that payment should not
16 be made.

17 Q. In other words, NAT has asked for payment, and Sprint
18 said no.

19 A. Yes, that is correct.

20 Q. What did NAT do then to try to have Sprint pay NAT for
21 these services?

22 A. We went to the Tribal Utility and filed a document
23 with them to get Sprint to pay.

24 Q. The Tribal Utility Authority, which is a subdivision
25 of the Tribal Government. Correct?

1 MR. KNUDSON: Objection. Foundation.

2 THE COURT: Sustained.

3 BY MR. SWIER:

4 Q. Is the Tribal Utility Authority, according to your
5 knowledge, a subportion of the Tribal Government?

6 MR. KNUDSON: Objection. Foundation.

7 THE COURT: Sustained.

8 BY MR. SWIER:

9 Q. Are you familiar with how the Tribal Authority falls
10 in the government structure of the Tribe?

11 MR. KNUDSON: Objection. Foundation.

12 THE COURT: You may answer yes or no.

13 A. Yes.

14 Q. How does it fall?

15 A. It's part of the Crow Creek Sioux Tribe. The Utility
16 Authority is an organization within the Crow Creek Sioux
17 Tribe.

18 Q. So you went to the Tribal Utility Authority, and you
19 complained, "Hey, Sprint is not paying us on our tariffs."
20 Is that correct?

21 MR. KNUDSON: Objection. Leading.

22 THE COURT: Sustained as leading.

23 Q. What did you go to the Tribal Utility Authority and
24 do?

25 A. We filed a complaint with them that Sprint was not

1 paying their bill.

2 Q. What was the result of that complaint?

3 A. I don't even think they acknowledged it that I'm aware
4 of. I don't know.

5 Q. Did you get your money?

6 A. No.

7 Q. Tom, are you familiar with the parties or players in
8 the conference calling business?

9 A. Companies that are involved in conference calling?

10 Q. Yes, as a general matter.

11 A. Somewhat, yes.

12 Q. Is Sprint involved in the conference calling business?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Overruled. Your may answer.

15 A. I think they have their own conferencing business,
16 yes.

17 Q. In fact, is Sprint a competitor of NAT in the
18 conferencing business?

19 MR. KNUDSON: Objection. Foundation.

20 THE COURT: Overruled. You may answer.

21 A. If they are offering the same type of business, I
22 would say they would be a competitor.

23 Q. So it would be to Sprint's advantage to not pay a
24 competitor for services so their conferencing business can
25 flourish?

1 A. Yes.

2 Q. What efforts has Sprint ever made on the Reservation
3 to make technology happen?

4 MR. KNUDSON: Objection. Relevancy.

5 THE COURT: Sustained.

6 BY MR. SWIER:

7 Q. Tom, how has the business plan worked with the
8 majority Tribal ownership?

9 A. Very good. I mean you can see some of the things
10 we've done out there and accomplished, how things are
11 working. We get along very well with the existing Tribal
12 Council. Everybody that has our service is elated.
13 Everything is working as planned, except for the payments
14 coming in.

15 Q. NAT has all of its equipment on the Reservation?

16 A. Correct.

17 Q. NAT has employees on the Reservation?

18 A. That is correct.

19 Q. NAT is receiving outside financial investments on the
20 Reservation?

21 A. Yes.

22 Q. Tribal members are benefiting from the service?

23 A. Yes.

24 Q. The Tribal Government is a vital part of NAT's
25 business model?

1 A. That's correct.

2 Q. The Tribe and their government is a majority owner of
3 NAT?

4 A. Yes, they are.

5 Q. Has NAT made a difference on the Reservation with
6 Tribal members?

7 MR. KNUDSON: Objection. Relevancy.

8 THE COURT: Sustained.

9 BY MR. SWIER:

10 Q. Tom, how do you see NAT proceeding in the future
11 regarding its activities on the Reservation?

12 MR. KNUDSON: Same objection.

13 THE COURT: Sustained.

14 MR. SWIER: May I have a moment, Your Honor?

15 THE COURT: You may.

16 MR. SWIER: Your Honor, I don't have any further
17 questions. Thank you.

18 THE COURT: Miss Roberts, do you have any
19 questions of this witness?

20 MS. ROBERTS: No, Your Honor.

21 THE COURT: Mr. Knudson, I think you'll go for
22 more than a few minutes. Why don't we take a 10-minute
23 break. We'll be in recess until about ten after 11:00.

24 MR. KNUDSON: Your Honor, I have a number of
25 documents that I would be offering as exhibits. Given the

1 expedited nature, I'll need some indulgence getting copies,
2 so for the Court's convenience and Mr. Swier's convenience.

3 THE COURT: If you go to the Clerk's office, they
4 can help you. We'll be in recess.

5 (Recess 10:56 until 11:13)

6 THE COURT: Please be seated. If you'd take the
7 stand again. Mr. Knudson?

8 CROSS-EXAMINATION

9 BY MR. KNUDSON:

10 Q. Good morning. I represent Sprint Communications. I
11 have a few questions for you based on what you testified to
12 in your direct examination. Let's just confirm. You are
13 the President of Native American Telecom. Isn't that true?

14 A. Native American Telecom Enterprise.

15 Q. You are also listed in the records with the South
16 Dakota Secretary of State as President of Native American
17 Telecom. Isn't that true?

18 A. That's how it was initially filed, yes.

19 Q. You are one of the founders of Native American
20 Telecom. Correct?

21 A. Yes.

22 Q. In the recorded filings on behalf of Native American
23 Telecom with the Secretary of State, you are one of the
24 individuals who is liable for the debts of Native American
25 Telecom. Isn't that true?

1 A. Yes.

2 Q. The other individual that is also liable for the debts
3 of Native American Telecom is Mr. DeJordy. Correct?

4 A. Yes.

5 Q. Mr. DeJordy is also one of the founders of Native
6 American Telecom. Correct?

7 A. Yes.

8 Q. You live in Sioux Falls?

9 A. Yes.

10 Q. How is it your Affidavit was signed in Wyoming?

11 A. It was signed there, because I was there visiting my
12 daughter.

13 Q. And you are not a member of the Crow Creek Sioux
14 Tribe. Are you?

15 A. No.

16 Q. You are not a Native American, are you?

17 A. No.

18 Q. Mr. DeJordy, as far as you know, is not a member of
19 the Crow Creek Sioux Tribe?

20 A. As far as I know of, he is not.

21 Q. And he is not a Native American either, is he?

22 A. Not that I'm aware of.

23 Q. Mr. DeJordy now lives in Connecticut?

24 A. That is correct.

25 Q. In the City of Fairfield?

1 A. Yes.

2 Q. Now, you provided an Affidavit here --

3 MR. KNUDSON: Your Honor, a housekeeping matter.

4 This is the Keith Williams Affidavit, which I had marked.

5 I would like to offer it as Exhibit 101.

6 THE COURT: Any objection?

7 MR. SWIER: No objection.

8 MS. ROBERTS: None, Your Honor.

9 THE COURT: 101 is received.

10 BY MR. KNUDSON:

11 Q. You recall preparing an Affidavit to be filed in
12 connection with this proceeding?

13 A. Yes.

14 Q. Mr. Reiman, I'm handing you what's been marked for
15 identification as Plaintiff's Exhibit 102. Tell me if you
16 can identify that document.

17 A. It's the Affidavit I signed.

18 Q. That's your signature at the back?

19 A. Yes.

20 Q. If you could, direct your attention, sir, to Paragraph
21 4 of your Affidavit.

22 A. No. 4?

23 Q. Yes. Do you see that, sir?

24 A. Yes.

25 Q. Do you see where you say that -- could you read the

1 second sentence for me, please?

2 A. Starting with "NAT does not provide"?

3 Q. "NAT's services."

4 A. "NAT's services take place exclusively within the
5 exterior boundaries of the Reservation."

6 Q. Third sentence?

7 A. "NAT does not provide services within the State of
8 South Dakota outside the exterior boundaries of the
9 Reservation."

10 Q. Do you recall seeing this handwritten map?

11 A. Yes.

12 Q. Let's see if we can get this on the Elmo. Do you have
13 that on the screen in front of you?

14 A. Yes.

15 Q. I'd like to go back now. Just thinking about what you
16 said about Paragraph 4 and the two sentences you read to
17 us. "NAT's services take place exclusively within the
18 exterior boundaries of the Reservation." That's the second
19 sentence you read.

20 Now, is it then your position the people calling from
21 New York and Florida and Texas who get bridged on equipment
22 in Ft. Thompson are not getting services from you?

23 A. They are, but they are on the Reservation.

24 Q. But they're not calling from the Reservation. Are
25 they?

1 A. The services are on the Reservation. Our bridge is on
2 the Reservation.

3 Q. But they are outside the Reservation. Right?

4 A. Yes.

5 Q. So when they hear -- the person in New York hears an
6 answer from the person in Florida, that person in New York
7 isn't on the Reservation. Right?

8 A. Correct.

9 Q. And the voice, the sound that is carrying over to the
10 person in New York is coming off the Reservation. Correct?

11 A. Yes.

12 Q. Likewise, when the person in Florida is talking, that
13 person's voice is going into the Reservation. Correct?

14 A. Yes.

15 Q. Through a roundabout way. It has to go to Los Angeles
16 first.

17 A. Yes.

18 Q. That's coming from outside the boundaries of the
19 Reservation. Isn't it?

20 A. Yes.

21 Q. Now, you mentioned, and we heard from Mr. Williams,
22 about the WiMax technology, and that's kind of a step up,
23 isn't it, from Wi-Fi technology?

24 A. It's a different technology.

25 Q. It has the ability to go farther out. Doesn't it?

1 A. Yes.

2 Q. You heard Mr. Williams say it might go out as far as
3 20 miles. Right?

4 A. I heard him say that.

5 Q. Do you dispute that?

6 A. The tower we built projects a signal around two miles.
7 But that technology, by building a larger tower, you could
8 get it to go that far.

9 Q. You are talking about expanding your services to other
10 parts of the Reservation. Aren't you?

11 A. Yes.

12 Q. It's possible for these radio waves to go outside the
13 boundaries of the Reservation.

14 A. Depending where they are located.

15 Q. They don't stop at the boundary. Do they?

16 A. We can erect a tower and point our antennas towards
17 the Reservation.

18 Q. The Reservation is irregular in shape, isn't it?

19 A. Yes.

20 Q. In order to get coverage over all the Reservation, you
21 have to go outside the boundaries, as well, won't you?

22 A. Depending where the tower is positioned.

23 Q. But it's possible.

24 A. It's possible.

25 Q. There's nothing from the boundary itself that would

1 stop the radio waves from going outside the boundaries of
2 the Reservation. Correct?

3 A. Correct.

4 Q. Let's go back to the handwritten map. This person who
5 is calling here from New York, and they make a connection
6 to the person in Florida, and maybe they even talk to the
7 person in Texas at the same time. Do they pay per minute
8 for that call?

9 A. Depending what type of arrangements they have with
10 their long-distance carriers.

11 Q. In fact, isn't it true, Mr. Reiman, that your business
12 model, looking for minutes of usage, depends on callers who
13 effectively have unlimited calling plans?

14 A. I am not aware of that.

15 Q. That's how people can talk for an hour without
16 worrying what it cost. Isn't that true?

17 A. You can set up the plans.

18 Q. But if you are paying 25 cents a minute, you would be
19 more mindful of the cost of the call. Wouldn't you?

20 A. If who is paying the 25 cents?

21 Q. The initial caller.

22 A. They would be mindful, yes.

23 Q. In fact, if it's an unlimited calling plan, the
24 interexchange carriers, the long-distance carriers, they're
25 not getting any additional revenue from that call. Are

1 they?

2 MR. SWIER: Objection. Lack of foundation and
3 speculation.

4 THE COURT: Overruled. You may answer, if you
5 know.

6 A. I don't know.

7 Q. You can't say one way or the other if there's any
8 incremental revenues from one of your calls to the
9 long-distance carrier. Can you?

10 MR. SWIER: Same objection.

11 THE COURT: Overruled. You may answer.

12 A. I don't know what plan they are on.

13 Q. My question is you don't know if the long-distance
14 carrier gets any more incremental revenue from the person
15 using your conference bridge?

16 A. I don't know.

17 Q. But if the caller in New York or Florida or Texas has
18 one of these unlimited calling plans, that person wouldn't
19 pay any more to be on your bridge. Would that person?

20 A. If they have an unlimited plan, no.

21 Q. In fact, as you testified earlier in your direct, your
22 business model depends on lots of people calling in on your
23 conference bridge. Doesn't it?

24 A. Yes.

25 Q. When you set up this network and based your business

1 model on freeconferencecall.com or some equivalent, you
2 realized that you were walking into an area of the
3 telecommunications business where the long-distance
4 carriers were disputing the validity of terminating access
5 charges for this kind of service.

6 MR. SWIER: Objection. Irrelevant to this
7 proceeding.

8 THE COURT: Sustained.

9 BY MR. KNUDSON:

10 Q. Well, you testified your business model depends on the
11 success of being able to collect terminating access charges
12 from people using your conference bridge. Correct?

13 A. Right.

14 Q. Weren't you also aware in companies like Sprint or
15 Qwest or AT&T were objecting to having to pay terminating
16 access charges for callers who called and terminated on a
17 conference bridge?

18 MR. SWIER: Same objection. Irrelevant to this
19 proceeding.

20 MR. KNUDSON: I can link it up.

21 THE COURT: Sustained. You can link it up?

22 MR. KNUDSON: I can link it up to why I believe
23 it's relevant.

24 BY MR. KNUDSON:

25 Q. You are aware of the dispute?

1 A. No.

2 Q. So that's not something you told the Tribe, that there
3 was a possibility that Sprint, Qwest, AT&T might object to
4 your business model?

5 A. I was not aware that they --

6 Q. The point is, did you tell the Tribe that?

7 MR. SWIER: Objection, Your Honor. Irrelevant to
8 this proceeding.

9 THE COURT: Overruled. You may answer.

10 A. I could not tell them. I was not aware Sprint was not
11 paying for this service.

12 Q. Now, the person who is calling from New York, and they
13 dial this 477-1112 number, that's what Mr. Williams said
14 was a conference bridge number, that person is not a
15 subscriber. Is he?

16 MR. SWIER: I'll object, number one, as a legal
17 conclusion. Number two, this goes well beyond the scope of
18 my direct examination.

19 THE COURT: Overruled. You may answer.

20 A. They would be a subscriber if they are using our
21 calling bridge.

22 Q. Are you billing them directly for that service?

23 A. No.

24 Q. So it's your position you can be a subscriber without
25 being invoiced from NAT for any service?

1 A. Yes.

2 Q. When you were -- withdraw that. You said something
3 about Universal Service Funds, and that Mr. Swier was
4 suggesting that it would take too long to get approval as
5 an ETC, eligible telecommunications carrier. Do you
6 remember that testimony?

7 A. Yes.

8 Q. Have you ever applied for ET status?

9 A. I said it was in our business plan, and to build out
10 the system, then we would apply and go after the eligible
11 telecommunication carrier status within the FCC.

12 Q. And that would subject you to FCC regulation. Would
13 it not?

14 A. Yes.

15 Q. You talked about something here in Skype. Can you
16 explain what Skype services are?

17 A. Skype is where you have interactive computers. Your
18 computer will have a camera on it. Someone else on another
19 end will have a camera on it. An instructor could be in
20 front of someone, say they were in New York. They can
21 instruct a classroom in Ft. Thompson in our Learning
22 Facility.

23 Q. Let me get this straight. You can create a classroom
24 where you transmit information back and forth from teacher
25 to students. Right?

1 A. More economically than bringing an instructor in.

2 Q. But you could transmit this information.

3 A. Yes.

4 Q. That's one of the services you want to provide on the
5 Reservation. Right?

6 A. We would like to provide that to the students of the
7 Reservation and people of the Reservation so they have
8 access to those technologies.

9 Q. So I take it the answer to my question is, yes, that's
10 something you want to provide, informational services you
11 want to provide to the people on the Reservation?

12 A. Yes.

13 Q. I'm curious a bit about WideVoice. They own the big
14 switch down here in Los Angeles. Right?

15 A. I assume they have a switch in Los Angeles. I've
16 never been there.

17 Q. In terms of the funding for this buildout, that money
18 is coming from WideVoice. Isn't it?

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

20 THE COURT: Overruled. You may answer.

21 A. We have a company named Native American Telecom, and
22 we get monies from outside people to be able to invest in
23 this.

24 Q. WideVoice is one of those sources, isn't it?

25 A. Yes.

1 Q. In fact, WideVoice takes back a security interest in
2 the proceeds. Right?

3 A. Not that I'm aware of.

4 Q. Have you looked at the Joint Venture?

5 A. Yes.

6 Q. You talked about the Tribal Utility Authority, and
7 it's been up and running since 1997. Who is the current
8 chairman of the Tribal Utility Authority?

9 A. I don't know.

10 Q. Do you know how many Commissioners or members are on
11 the board?

12 A. No.

13 Q. Were you aware -- I think you testified about the
14 approval you got from the Tribal Utility Authority to start
15 this project. Correct?

16 A. Yes.

17 Q. Mr. Reiman, I'm handing you what's been marked
18 Plaintiff's Exhibit 103. Take a minute to look at it.
19 Tell me, sir, if you can identify it.

20 A. That is the Order Granting Approval from the Crow
21 Creek Utility Authority to Native American Telecom, LLC,
22 the telecommunication services on the Crow Creek Indian
23 Reservation.

24 Q. Do you see where I've highlighted some language?

25 A. Yes.

1 Q. The Tribal Utility Authority authorized you to provide
2 basic telephone service. Is that right?

3 A. Yes.

4 Q. That would be consistent with the Federal Universal
5 Service requirements of 47 USC 214(e). Right?

6 A. Yes.

7 Q. You are generally familiar with those requirements.
8 Right?

9 A. Somewhat.

10 Q. You know the rules of the Federal Communications
11 Commission. Right?

12 A. Yes.

13 Q. So, in other words, when the Tribal Utility Authority
14 granted you or Native American Telecom authority to set up
15 this network on the Reservation, it was to be subject to
16 Federal law. Wasn't it?

17 MR. SWIER: Objection. Calls for a legal
18 conclusion.

19 THE COURT: Sustained.

20 BY MR. KNUDSON:

21 Q. Your understanding, as a layman who has your
22 experience in the telecommunications industry, you would
23 have to operate the system under Federal law. Wouldn't
24 you?

25 MR. SWIER: Objection, Your Honor. Same

1 objection.

2 THE COURT: Sustained.

3 BY MR. KNUDSON:

4 Q. Did you ever appeal this order the Tribal Utility
5 Authority issued?

6 A. Appeal?

7 Q. Yes.

8 A. What's that mean?

9 Q. Did you ever contest the terms or wording of that
10 order?

11 A. No.

12 Q. Are you aware there are people living within the
13 boundaries of the Reservation who are not members of the
14 Crow Creek Sioux Tribe?

15 A. Yes.

16 Q. You provide services to those people, too, if they
17 want it. Don't you?

18 A. Yes.

19 Q. You went into -- excuse me. I'll start over.

20 When NAT went on the Crow Creek Reservation, you said
21 there was an existing local exchange carrier?

22 A. Yes.

23 Q. That's Midstates Communications?

24 A. Along with Venture Communications.

25 Q. There are two existing incumbent local exchange

1 carriers?

2 A. Yes.

3 Q. I believe you testified that they wired up the
4 Reservation with land lines. Correct?

5 A. Yes.

6 Q. You and Gene DeJordy set up Native American Telecom
7 with the idea you would make money. Correct?

8 A. Yes.

9 Q. How much have you invested, you and Mr. DeJordy
10 personally, into the business?

11 MR. SWIER: I object. May we approach?

12 THE COURT: You may.

13 (Bench conference with Mr. Swier and Mr. Knudson:)

14 MR. SWIER: My objection, Your Honor, is I don't
15 have any problem with the Court knowing what the amount of
16 the investment would be. However, I think that investment
17 amount, that monetary amount would be proprietary
18 information which I don't want to have exclaimed to the
19 entire world what that amount would be. So I don't have
20 any problem with the Court knowing it. I don't think we
21 should have him in open Court talking about the financial
22 investment. If I asked Sprint about their financial
23 investments, they would go haywire.

24 THE COURT: Do you want me to clear the
25 Courtroom, all spectators, and have him answer the

1 question?

2 MR. SWIER: That's fine. We don't want it
3 proclaimed to the world.

4 MR. KNUDSON: We can do that now or wait until
5 the end of my examination.

6 THE COURT: All right. We'll wait until the end
7 of the examination.

8 (End of bench conference)

9 (In open Court, all parties present)

10 THE COURT: We're going to reserve this question
11 until later.

12 BY MR. KNUDSON:

13 Q. Back to your Affidavit, if you would. If you look at
14 Paragraph 10, it says there, if I read it correctly,
15 "Through NAT's efforts, seven jobs (three full-time and
16 four part-time) have been created on the Reservation." Did
17 I read that correctly?

18 A. Yes.

19 Q. If I recall, my notes say in your direct that there
20 were four full-time employees and seven part-time
21 employees. Is that correct?

22 A. That's what I said, but we have different part-time
23 people that come and go. We have day laborers that we
24 provide jobs for.

25 Q. So the permanent employment at the moment is three

1 full-time and four part-time?

2 A. Yes.

3 Q. Now, there's assertions I believe by your colleague,
4 Mr. DeJordy, that NAT has created jobs on the Reservation.

5 Are you aware of any other jobs your investment has
6 created on the Reservation besides these three full-time
7 and four part-time jobs?

8 A. There are, by us providing Internet, there are other
9 jobs I've heard that people are utilizing our system to
10 expand opportunities.

11 Q. Do you know who they are?

12 A. I was told there was a bead maker out there that has
13 their beads on our website that they designed.

14 Q. Those beads were being developed before you got on the
15 Reservation.

16 A. But not being offered off the Reservation. This
17 service gives them that ability.

18 Q. Any other jobs that were created by your investments
19 besides your own employees?

20 A. Internet provides lots of opportunities for people.
21 What they are doing in their homes, I would expect to
22 provide opportunities. They are able to access things they
23 never could in the past.

24 Q. Do you have a specific number of jobs created by your
25 investment?

1 A. I do not have specific numbers.

2 Q. You said Sprint competes with NAT in the offering of
3 conference bridge services.

4 A. I thought they did. I don't know.

5 Q. You have no firsthand knowledge of that fact. Do you?

6 A. No.

7 Q. Let's go then to Paragraph 12 of your Affidavit. Do
8 you see the fourth sentence there? "As such, Sprint
9 profits handsomely from these calls."

10 A. Yes.

11 Q. What facts do you have firsthand knowledge of that
12 Sprint is collecting access charges from its customers and
13 not paying them over to NAT?

14 A. From you guys set up long-distance plans with them, so
15 you've gotten paid for that.

16 Q. What firsthand knowledge -- go back to my question.
17 What firsthand knowledge do you have of the fact that
18 Sprint is, as you claim, profiting from these calls by
19 billing for access services that it doesn't pay over to
20 NAT?

21 A. They offer telephone services, long-distance services
22 and got paid for it.

23 Q. Do you know for a fact of a single customer that's
24 been billed for access services by Sprint that hasn't been
25 paid over to NAT?

1 A. No.

2 Q. So what you are saying is simply speculation. Isn't
3 that correct? You are guessing. Aren't you?

4 A. That's why you guys have long-distance bills. You go
5 to customers, they use the phone, and you've gotten paid
6 for that.

7 Q. You are just guessing about the access charges.
8 Aren't you?

9 A. No. Isn't it true you have customers you charge
10 long-distance fees?

11 Q. How about access charges?

12 A. I think that's part of it.

13 Q. If they are not paying them, why would they be
14 charging them to their customers?

15 A. Who is not paying them?

16 Q. Sprint.

17 A. Sprint is not paying us?

18 Q. Not paying the access charges --

19 A. There's a legal tariff we have in place.

20 MR. SWIER: Your Honor, he asked the question.

21 MR. KNUDSON: He's arguing with me.

22 THE COURT: Start out with a new question.

23 BY MR. KNUDSON:

24 Q. Sprint, you say, is not paying access charges you
25 claim are due. Correct?

1 A. Correct.

2 Q. But you are saying Sprint is charging those access
3 charges to its customers and keeping the money?

4 A. Yes.

5 Q. Do you have any firsthand evidence of that fact?

6 A. No.

7 Q. I think you heard your technical expert say Sprint's
8 traffic, when it comes from grandma in Fargo to
9 granddaughter in Ft. Thompson, the call is headed off the
10 South Dakota Network. Correct?

11 A. Yes.

12 Q. You agree with that.

13 A. Yes.

14 Q. Likewise, New York, Florida, Texas, all those calls
15 get delivered to South Dakota Network. Correct?

16 A. I'm taking his word for it. I'm not the expert on it.

17 Q. Now, NAT applied for a Certificate of Authority from
18 the South Dakota Public Utilities Commission. Do you
19 recall that?

20 A. Yes.

21 Q. That ultimately NAT elected to withdraw that
22 application. Did it not?

23 A. Yes, because of all the intervention that was
24 happening by the local exchange carriers.

25 Q. Mr. Reiman, I am handing you what the court reporter

1 has marked for identification as Plaintiff's Exhibit 104.

2 THE COURT: This is actually the Clerk over here.

3 Q. I'm sorry, what the Clerk has marked as Plaintiff's
4 104. Could you take a moment to look at it?

5 A. I'm familiar with this document.

6 Q. Can you identify it for us, please?

7 A. It was our Application for Certificate of Authority
8 before the Public Utilities Commission of South Dakota.

9 Q. Is there anywhere in this Application where you
10 disclose to the South Dakota Public Utilities Commission
11 you intend to offer conference bridge services?

12 MR. SWIER: Objection. Irrelevant.

13 THE COURT: Overruled. You may answer.

14 A. Not that I'm aware of.

15 Q. Turn to Page 3 for a moment. You see there the
16 Question No. 9 on Page 3. What did NAT Telecom represent
17 to the South Dakota PUC it would be providing?

18 A. It would be what?

19 Q. Providing.

20 A. "A service area map or narrative description
21 indicating with particularity the geographic area as
22 proposed to be served by the applicant."

23 Q. What did the applicant of Native American Telecom say
24 to the PUC? Can you read the highlighted language, sir?

25 A. Directly below it?

1 Q. Yes.

2 A. "Native Telecom will provide service only within the
3 exterior boundaries of the Crow Creek Indian Reservation."

4 Q. Native Telecom is Native American Telecom?

5 A. That is correct.

6 Q. You mentioned something about an interconnect
7 agreement between Midstates Communications and Native
8 American Telecom?

9 A. Yes.

10 Q. That was something you had to set up in order for
11 Native American Telecom to start its operations?

12 A. Yes.

13 Q. Mr. Reiman, I am handing you what the Clerk has marked
14 as Plaintiff's Exhibit 105. Tell me, sir, if you can
15 identify that document for us.

16 A. Agreement for Interconnection and Ancillary Services
17 Between Native American Telecom, LLC, and Midstate
18 Communications.

19 Q. If you go to the back of the document, Page 24, who
20 executed that document on behalf of Native American
21 Telecom?

22 A. Who? Gene DeJordy.

23 Q. That's his signature?

24 A. Yes.

25 Q. Is it fair to say this is the interconnect agreement

1 between Midstates and Native American Telecom?

2 A. Yes.

3 Q. This is marked as Exhibit 105.

4 MR. KNUDSON: Offer 105.

5 THE COURT: Any objection?

6 MR. SWIER: May I look at that quickly?

7 THE COURT: You may.

8 MR. SWIER: I'll object on relevancy. Beyond
9 that, if the Court admits the exhibit, may counsel be kind
10 enough to provide us a copy? I have never seen this
11 before.

12 MR. KNUDSON: It's available on the PUC website.
13 I would be happy to provide a copy.

14 THE COURT: Exhibit 105 is received. The
15 objection is overruled. Plaintiff needs to provide a copy
16 to the Defendant.

17 MR. KNUDSON: Another housekeeping matter. 102,
18 103, and 104 have not been offered, and I do now.

19 THE COURT: Any objection?

20 MR. SWIER: No.

21 THE COURT: 102, 103, and 104 are received.

22 BY MR. KNUDSON:

23 Q. Mr. Reiman, these are agreements and negotiations
24 between Midstates Communications and Native American
25 Telecom. Right?

1 A. Right.

2 Q. I would like to direct your attention to Page 14.

3 A. Mine goes 13, 11, and then 14. Okay.

4 Q. Let's look here at 6.21.3. Do you see that language
5 there? "The parties agree that this Agreement does not
6 create a consensual relationship that would subject
7 Midstate or Midstate's provisioning of any service under
8 this Agreement to the jurisdiction of any Tribal authority
9 that may be the parent of, affiliate of, or that may have
10 or develop any other business or Tribal relationship with
11 Native Telecom." Do you see that?

12 A. Yes.

13 Q. Do you have a layman's understanding of what that
14 means?

15 MR. SWIER: Objection. Obviously asks for a
16 legal conclusion as to what that means.

17 THE COURT: In light of the fact he's one of the
18 principals of Native American Telecom, he would have been
19 involved in negotiating it, I'm going to overrule the
20 objection. You may answer.

21 A. Restate the question, please.

22 MR. KNUDSON: Can we have the question read back?
23 (The requested portion of the record was read by the
24 reporter.)

25 A. My partner is an attorney. He's the one that

1 negotiated this, Gene DeJordy.

2 Q. So you have no individual understanding?

3 A. I have somewhat. I know how it reads. He's the one
4 that negotiated it.

5 Q. What is your understanding?

6 A. It does not create a consensual relationship with
7 Midstate or provisioning of any service, as it reads, or
8 any Tribal authority. So, yes, I have a layman's
9 understanding.

10 Q. In other words, this does not provide that for
11 Midstate to consent to any other relationship with any
12 Tribal Authority. Right?

13 MR. SWIER: Objection. Asks for a legal
14 conclusion.

15 THE COURT: Sustained.

16 BY MR. KNUDSON:

17 Q. Let's take a look at the top here of this page. Take
18 a look and read the whole section. I want you to focus on
19 the highlighted language, but read the whole paragraph, if
20 you would.

21 A. "Governing law."

22 Q. Don't read it out loud. Just tell me when you are
23 finished reading.

24 MR. SWIER: Your Honor, may we approach?

25 THE COURT: You may.

1 (Bench conference with Mr. Swier and Mr. Knudson:)

2 MR. SWIER: Mr. Knudson is asking him to read an
3 arbitration provision of this agreement. It's never been
4 pled in this case whatsoever that any of the parties have
5 to submit themselves to binding arbitration. That's always
6 an issue that is affirmatively pled, and I think it has to
7 be. It's never been done. We are now bringing up
8 arbitration on the first time. Midstate is not a party
9 here. The litigants here are Sprint and NAT. This doesn't
10 have any relevance to Sprint and NAT's relationship. This
11 is a totally different contract. If Midstate wants to come
12 in and intervene and they want to try to say the
13 arbitration provision applies, they can. That's not
14 relevant between these two parties.

15 THE COURT: Mr. Knudson?

16 MR. KNUDSON: I'm offering this document, because
17 I believe what will be argued later today with respect to
18 the application of the second Montana exception, which was
19 gone into in some length in direct testimony of Mr. Reiman
20 in terms of the impact on the Reservation or the Tribe.
21 The fact of the matter is, it's clear here Native American
22 Telecom is agreeable to stay out of Tribal Court and submit
23 to binding arbitration, which bears directly on the issue
24 whether the second Montana issue applies.

25 THE COURT: Mr. Swier?

1 MR. SWIER: It's not an agreement between the two
2 parties to this litigation. It doesn't say anything about
3 the fact NAT would be I believe willing to arbitrate any
4 argument between Sprint and NAT. If Midstate wants to come
5 in and say that, they have that ability. That is not a
6 contract between the parties to the litigation. We've
7 never heard anything that this has to be subject to
8 arbitration, and that should have been done in the initial
9 pleading or they waive it. It doesn't apply.

10 THE COURT: There may be some limited relevance.
11 I'll let the questioning continue. We don't have a jury
12 here. You can argue from back there.

13 (End of bench conference)

14 THE COURT: The objection is overruled.

15 BY MR. KNUDSON:

16 Q. Mr. Reiman, you are aware of the arbitration process.
17 Are you not?

18 A. How arbitration works?

19 Q. You are aware that it exists. Right?

20 A. Yes.

21 Q. And you've read then 6.20.3 then, sir?

22 A. The contract between us and Midstates? Yes.

23 Q. It calls for binding arbitration. Doesn't it?

24 MR. SWIER: Object, Your Honor. That's a
25 misstatement of what it says. It says that such disputes

1 may be submitted to binding arbitration. It's not
2 mandatory.

3 THE COURT: The objection is sustained. I can
4 read the document myself, too.

5 MR. KNUDSON: If we agree it's unambiguous, that
6 would be sufficient with respect for Exhibit 105.

7 BY MR. KNUDSON:

8 Q. Mr. Reiman, I'm handing you what's been marked for
9 identification purposes by the Clerk as Plaintiff's Exhibit
10 106. Take a moment to look at it and tell me if you can
11 identify it.

12 A. It appears to be the Joint Venture Agreement Between
13 the Crow Creek Sioux Tribe and Native American Telecom.

14 Q. Is that Native American Telecom Enterprise?

15 A. Crow Creek Sioux Tribe and Native American Telecom
16 Enterprise, LLC, and WideVoice Communications, Inc.

17 Q. If you go back and see the signature on Page 33.

18 A. Yes.

19 Q. Is that again Mr. DeJordy's signature?

20 A. I don't have one with a signature on it. I have one
21 with Brandon Sazue's signature on it.

22 Q. There should be another Page 33.

23 A. Yes. That is the signature of Gene DeJordy.

24 Q. So we agree this is a copy of that Joint Venture
25 Agreement?

1 A. Yes.

2 MR. KNUDSON: I offer 106.

3 MR. SWIER: No objection, Your Honor.

4 THE COURT: 106 is received.

5 BY MR. KNUDSON:

6 Q. All right. Let's look here at a few of these
7 provisions. Page 5, if you could turn to the last recital
8 called the "Whereas." I'm directing your attention,
9 Mr. Reiman, to what I have highlighted here. Do you see
10 the language, "an array of other telecommunication services
11 outside the exterior boundaries of the Crow Creek Indian
12 Reservation"?

13 A. Yes.

14 Q. What are the services that Native American Telecom is
15 going to provide outside the exterior boundaries of the
16 Reservation?

17 A. It's yet to be determined. Business is trying to
18 develop out there.

19 Q. But if I understand correctly, the entity that is
20 being formed here is Native American Telecom-CC.

21 A. Yes.

22 Q. Crow Creek.

23 A. Yes.

24 Q. It's going to rename Native American Telecom to Native
25 American Telecom - Crow Creek. Right?

1 A. It's Native American Telecom, LLC, yes.

2 Q. So Native American Telecom-CC is going to promote
3 services outside the exterior boundaries, and that's one of
4 the purposes of this Joint Venture. Is that right?

5 A. Yes, it has the capabilities of doing that.

6 Q. Now, let's take a look then of your understanding of
7 the deal terms here that Crow Creek Sioux Tribe, Section
8 1.03, made a capital contribution in exchange for 51
9 percent of the membership units of the LLC by contributing
10 what, sir?

11 MR. SWIER: Objection. I believe that relates to
12 the financial matters earlier discussed as to how we were
13 going to handle this.

14 THE COURT: Sustained. I will allow this
15 question at the end of the hearing.

16 MR. KNUDSON: This has already been made a public
17 record. This is one of the exhibits he filed not under
18 seal. Having to delay asking the question again.

19 MR. SWIER: Obviously the exhibit that I admitted
20 doesn't have the information for a reason, and the reason
21 is because it's proprietary.

22 THE COURT: Can you point me to where the
23 information is?

24 MR. KNUDSON: Yes, Your Honor. Let's just take a
25 look here. Section 1.03. "At the closing date, CCST will

1 contribute the necessary easements and other land rights."

2 That's the quid pro quo.

3 THE COURT: Mr. Swier?

4 MR. SWIER: It talks about easements and other
5 land rights. It doesn't talk in there specifically as to
6 what was given with easement land rights. Again, I don't
7 have any trouble if we want to have that information, but
8 let's have it all grouped together with the financial
9 issues we've discussed that we are going to do later.

10 THE COURT: Mr. Knudson, did you plan to go into
11 anything more than what is contained on Page 6?

12 MR. KNUDSON: I have a question about 1.04. I'm
13 happy to hold off the dollar amount and keep that --

14 THE COURT: I'm just trying to find out. Are you
15 just asking him to say that they can ask for necessary
16 easement and land rights, or do you want him to go into the
17 particular of what those were?

18 MR. KNUDSON: I don't need the particulars.

19 THE COURT: The objection is overruled.

20 BY MR. KNUDSON:

21 Q. Mr. Reiman, as part of the deal, the Crow Creek Sioux
22 Tribe contributed land rights and easements where you could
23 erect your equipment. In exchange, they got 51 percent of
24 the ownership membership units of the LCC. Right?

25 A. Yes.

1 Q. And if I recall your testimony earlier on direct,
2 Native American Telecom Enterprises, that is you and
3 Mr. DeJordy's deal. Correct?

4 A. Yes.

5 Q. You guys get 25 percent of the ownership. If I read
6 this correctly, your 25 percent equity comes from being the
7 managers of Native American Telecom.

8 A. Yes.

9 Q. If we go to where WideVoice comes in, Section 1.05,
10 you see they get 24 percent. Right?

11 A. Yes.

12 Q. Their contribution is they will put in enough money to
13 cover all costs of construction and implementation of the
14 network. Correct?

15 A. Yes.

16 Q. This is an interesting document, and one of the things
17 I find interesting is where does the money go? Turn to
18 Page 13. I have it up on the screen. Do you see a
19 definition of net profits? "Revenue generated from the
20 provision of service to end user customers, including
21 customer payments and universal service support." Do you
22 see that?

23 A. Yes.

24 Q. Right now there's no universal service support coming
25 in. Is there?

1 A. That is correct.

2 Q. But now net profit does not include, am I right, other
3 sources of revenue such as access charges. Correct?

4 A. Correct.

5 Q. You are a business person, Mr. Reiman. The flow of
6 money is something you would pay attention to. Isn't it?

7 A. Yes.

8 Q. Where are the access charges going?

9 A. They go to build out the system.

10 Q. But if there were surplus access charges, would there
11 be net profits?

12 A. Yes.

13 Q. Why?

14 A. We haven't got the payments, though.

15 Q. Access charges are not within net profits. Are they?

16 A. That's what it says there.

17 Q. Now, this Native American Telecom has a Board of
18 Directors. Does it not?

19 A. Yes.

20 Q. If we go to Page 17, 8.01. Do you see how it's
21 divided up? Am I correct to conclude from Section 8.01
22 that the Tribe gets to appoint three members?

23 A. Correct.

24 Q. Native American Telecom Enterprise, your and DeJordy's
25 deal, gets three. Right?

1 A. Yes.

2 Q. And the WideVoice gets three. Right?

3 A. Yes.

4 Q. It's a majority vote that controls. Right?

5 A. Yes.

6 Q. This is the Joint Venture between the Tribe, yours and
7 DeJordy's enterprise, and WideVoice. Take a look at
8 Section 16.07. Do you understand what law is going to
9 govern this agreement?

10 A. Yes.

11 Q. The law of South Dakota. Is it not?

12 A. Yes.

13 Q. If there's a dispute, you have also provided how that
14 should be resolved. Isn't it true the parties to this
15 Joint Venture Agreement, if they can't resolve their
16 dispute without formal process, they submit that dispute to
17 binding arbitration in accordance with the Rules of the
18 American Arbitration Association?

19 MR. SWIER: I'll object to relevancy of the
20 question. This is an agreement between the owners of NAT,
21 how they are going to do their disputes. The owners of NAT
22 are not in dispute here. NAT is in a dispute with Sprint.
23 So the binding arbitration provision in this case is
24 irrelevant as to why we are here today.

25 THE COURT: Overruled. You may answer.

1 BY MR. KNUDSON:

2 Q. Well, you elected binding arbitration, right, to
3 govern dispute under Joint Venture?

4 A. Yes.

5 MR. KNUDSON: No further questions at this time.

6 THE COURT: Mr. Swier?

7 REDIRECT EXAMINATION

8 BY MR. SWIER:

9 Q. Mr. Reiman, Mr. Knudson asked you some questions about
10 this exhibit. He asked you some questions about these
11 calls, conference calls from New York, we have business
12 partners in New York, Florida, and Texas. Correct?

13 A. Correct.

14 Q. They are all wanting to get together to talk via
15 conference call. Correct?

16 A. Correct.

17 Q. What they do is they are provided with a conference
18 call number.

19 A. Correct.

20 Q. NAT has these conference call numbers they make
21 available.

22 A. Yes.

23 Q. The area code is 605.

24 A. Yes.

25 Q. The prefix is 477.

1 A. Correct.

2 Q. That call then ends up at Ft. Thompson. Correct?

3 A. That is correct.

4 Q. Ft. Thompson is where the technological services are
5 to bring those parties together. Isn't it?

6 A. Yes.

7 Q. If you don't have those services at Ft. Thompson, you
8 don't have a conference call. Do you?

9 A. That is correct.

10 Q. That equipment, that high-tech equipment is on the
11 Reservation.

12 A. Yes.

13 Q. The services that you are providing, which the
14 services are, tell me if you agree, allowing these people
15 to communicate by conference call. That's the service.

16 A. That is the service.

17 Q. If NAT doesn't have this equipment on the Reservation,
18 there isn't a service to provide.

19 A. That is correct.

20 Q. So the service is being provided on the Reservation.

21 A. Yes.

22 Q. Mr. Knudson also asked you about economic development
23 on the Reservation. Instead of -- we have seven employees
24 that are employed by NAT. Correct?

25 A. Yes.

1 Q. Clarify for the Court. How many full time out of
2 those seven?

3 A. Three.

4 Q. How many part time?

5 A. Four. It comes and goes. We have day laborers that
6 come and help and stuff like that, so I could name seven,
7 but they change because people are looking for work.

8 Q. They get paid by NAT?

9 A. Yes.

10 Q. They are NAT's employees?

11 A. Yes.

12 Q. They do the work on the boundaries of the Reservation?

13 A. Yes.

14 Q. We also talked about all of these efforts that have
15 been made on the Reservation. Do these efforts require
16 construction?

17 A. Yes.

18 Q. Do they require Tribal people who have skills in
19 construction to do it?

20 A. Yes.

21 Q. Are the Tribal members doing the construction of these
22 Tribally-owned entities?

23 A. Yes.

24 Q. So not only do you have seven direct employees on the
25 Reservation, but you also employ or at least you hire

1 additional Tribal members.

2 A. Yes. Whenever we have anything to do, we hire Tribal
3 employees.

4 Q. A Tribal company having seven direct employees on the
5 Reservation, where does that put NAT as far as an employer
6 on the Reservation? Are you guys the big dog with seven
7 folks?

8 MR. KNUDSON: Objection. Relevancy.
9 Argumentative.

10 THE COURT: Overruled. You may answer.

11 A. Yes. I think the jobs we provide, when you have an
12 unemployment rate of upward around 90 percent, seven jobs
13 is a big thing.

14 Q. Are you aware of, other than a convenience store, are
15 you aware of any other privately-held company that has
16 seven employees on the Reservation?

17 A. No.

18 Q. Mr. Knudson also asked you some quick questions about
19 your original application with the Public Utilities
20 Commission of South Dakota.

21 A. Yes.

22 Q. You originally filed your Application for
23 Certification with them?

24 A. That is correct.

25 Q. Ultimately you made a Motion to Dismiss that

1 application.

2 A. Yes.

3 Q. Why did you do that?

4 MR. KNUDSON: Objection. Asked and answered.

5 THE COURT: Overruled. You may answer.

6 A. Because it would tie us in Court for probably a couple
7 years, what they would like us to do, which we're a small
8 company and can't afford to do.

9 Q. Did you also decide, based upon the structure of NAT
10 and Tribal sovereignty, that actually you filed the
11 Application with the wrong entity?

12 A. Yes.

13 Q. The correct entity would have been with the Tribal
14 Utility Authority?

15 A. Yes. The state has no say-so on what goes on on the
16 Reservation.

17 Q. Mr. Knudson also asked you in the Joint Venture
18 Agreement about this binding arbitration provision. Who is
19 the Joint Agreement between in this case?

20 A. Native American Telecom Enterprise, Crow Creek Sioux
21 Tribe, and WideVoice.

22 Q. Is it your understanding if the three of you, those
23 three entities get into a dispute, that that dispute will
24 be settled through arbitration?

25 A. Yes.

1 Q. Is Sprint a signatory on that Joint Venture Agreement?

2 A. No.

3 Q. Has NAT ever agreed to arbitrate a dispute with
4 Sprint?

5 A. No.

6 Q. My final question is around these access charges.

7 Actually I have two more questions on access charges.

8 The first is how these access charges, if they are
9 ever paid, would be distributed among the NAT owners.

10 Correct?

11 A. Correct.

12 Q. What is NAT's current plan on how these access charges
13 would be used if they are ever paid?

14 A. We go in front of the Board of Directors and decide --
15 initially we decided it would be for buildout to enable the
16 service throughout the Reservation.

17 Q. So you wanted to use those access charges to make a
18 bigger and better telecommunication system on the
19 Reservation.

20 A. I would like to see the eyes light up in other parts
21 of that Reservation by offering other services.

22 Q. Access charges would allow you to do that?

23 A. Right.

24 Q. But if you don't have the charges, you can't build
25 out?

1 A. That is right.

2 Q. Mr. Reiman, I have one more question for you. You
3 indicated earlier that Sprint is not paying the access
4 charges to NAT. Correct?

5 A. Correct.

6 Q. I don't want you to give me a specific amount, but can
7 you give the Court a general idea what nonpayment of these
8 access charges is costing NAT and the Tribe?

9 MR. KNUDSON: Objection. Foundation.

10 THE COURT: Overruled. You may answer.

11 A. Millions of dollars.

12 MR. SWIER: No further questions.

13 THE COURT: Mr. Knudson?

14 MR. KNUDSON: Your Honor, I would like to
15 approach.

16 (Bench conference with Mr. Knudson and Mr. Swier:)

17 MR. KNUDSON: We have confidential information to
18 ask about. I have one question with respect to what he
19 raised on his redirect. I don't know what your scheduling,
20 if you want to take a break for lunch.

21 THE COURT: What I was planning on was having you
22 do your redirect, clear the Courtroom, confidential
23 information, and we'd break for lunch.

24 (End of bench conference)

25 (In open Court)

1 RECROSS-EXAMINATION

2 BY MR. KNUDSON:

3 Q. Mr. Reiman, we went through the Joint Venture
4 Agreement just recently, and you agreed with me access
5 charges are not within the definition of net profits of the
6 Joint Venture. Didn't you?

7 A. That's what it said.

8 Q. By way of explanation from your counsel, that access
9 charges are currently planned to use for a buildout.

10 Correct?

11 A. Yes.

12 Q. And ultimately you will complete that buildout. Won't
13 you?

14 A. Depending if you pay or not.

15 Q. If you got to the point you finished your buildout,
16 those access charges then would be surpluses. Wouldn't
17 they?

18 MR. SWIER: Objection. Speculation.

19 THE COURT: Overruled. You may answer.

20 A. Twenty years from now, possibly yes.

21 Q. You don't know when. Do you?

22 A. Right, exactly.

23 Q. Then if there are net profits, in order for them to be
24 distributed, you would have to rewrite the Joint Venture
25 Agreement. Wouldn't you?

1 A. Yes.

2 Q. The control of the Joint Venture rests by majority
3 control. Correct?

4 A. Yes.

5 Q. WideVoice and Native American Telecom Enterprise, you
6 and Gene DeJordy and WideVoice are a majority of the Joint
7 Venture. Aren't you?

8 A. The Tribe and I are a majority then, too.

9 Q. My question is WideVoice and you and Gene DeJordy are
10 a majority of the Joint Venture?

11 A. We have three shares, WideVoice has three shares, and
12 the Tribe has three shares.

13 Q. If you have six votes, that's majority.

14 A. We have three votes. I am with Native American
15 Telecom Enterprises.

16 Q. Let's pair it WideVoice and Native American Telecom
17 Enterprise. They would constitute a majority. Isn't that
18 true?

19 A. They are separate companies.

20 MR. KNUDSON: He is not answering my question.
21 We need an instruction.

22 THE COURT: You need to answer the question that
23 he asked.

24 A. I agree three plus three equals six.

25 Q. That's a majority. Isn't it?

1 A. Yes.

2 MR. KNUDSON: The questions left are the
3 confidential ones.

4 THE COURT: Mr. Swier, anything further?

5 REDIRECT EXAMINATION

6 BY MR. SWIER:

7 Q. Tom, who owns the majority of Native American
8 Telecom, LLC?

9 A. Crow Creek Sioux Tribe.

10 Q. What percentage do they own?

11 A. 51 percent.

12 Q. And what percentage do you and does NAT Enterprises
13 and WideVoice own?

14 A. 49 percent.

15 Q. And is 51 percent bigger than 49 percent?

16 A. That's a majority, yes.

17 MR. SWIER: Thank you.

18 RECROSS-EXAMINATION

19 BY MR. KNUDSON:

20 Q. Since you opened the door, the profits flow through
21 the Joint Venture. Don't they?

22 A. Yes.

23 MR. KNUDSON: Nothing further.

24 THE COURT: Anything further, Mr. Swier?

25 MR. SWIER: No.

1 THE COURT: The seven employees you have, can you
2 tell me what their job duties are?

3 THE WITNESS: Let's see, we have one full-time
4 person that takes care of the Internet Library. Then we
5 have three that constructed the Internet Cafe. There are
6 three additional people, also, that helped with
7 construction out there. We are also in the process of
8 training a couple more to do installs.

9 THE COURT: The Internet Library, the
10 construction is almost finished?

11 THE WITNESS: Yes.

12 THE COURT: Will they be laid off then?

13 THE WITNESS: We hope to have other buildouts for
14 them. We have plans to expand the service and also
15 construct another Learning Facility.

16 THE COURT: Do those questions raise any
17 questions from either of you?

18 MR. KNUDSON: No, Your Honor.

19 MR. SWIER: No, Your Honor.

20 THE COURT: We need to have a hearing outside of
21 the hearing of the spectators that are here. Just a few
22 more questions of this witness. If everyone could leave
23 the Courtroom that is not an attorney, I would appreciate
24 it. We'll recess then after we're done with that and come
25 back after lunch about 1:30.

1 (The spectators left Courtroom and a hearing was held in
2 closed session, recorded in a separate sealed document.)

3 (Recess at 12:20 until 1:25)

4
5 (In open Court, all parties present)

6 THE COURT: Mr. Swier, did you have any other
7 witnesses you wanted to call?

8 MR. SWIER: No. Defendant NAT has no more
9 witnesses.

10 THE COURT: Miss Roberts?

11 MS. ROBERTS: Yes, Your Honor. However, my
12 witness just slipped out. He's here, if we could have a
13 moment. We're ready.

14 Your Honor, I'd like to call Peter Lengkeek.

15 PETER LENGKEEK,
16 called as a witness, being first duly sworn, testified as
17 follows:

18 DIRECT EXAMINATION

19 BY MS. ROBERTS:

20 Q. Please state your full name for the record.

21 A. Peter James Lengkeek.

22 THE COURT: How do you spell your last name?

23 A. L-E-N-G-K-E-E-K.

24 Q. Can you describe your current position with the Crow
25 Creek Sioux Tribe?

1 A. I am the newly elected Treasurer of the Council, the
2 governing body of the Crow Creek Sioux Tribe, one of seven
3 members.

4 Q. To give the Court a little background about who you
5 are, can you run down just a little bit of your background
6 for the Court?

7 A. I'm an enrolled member of the Crow Creek Sioux Tribe,
8 ex-military. I served in the Marine Corps and in the Army.
9 I was self-employed there on the Reservation and decided to
10 try my hand at politics and got elected onto the Council
11 this past spring.

12 Q. What are some of the endeavors you did before going on
13 the Council?

14 A. Some of my personal endeavors were I have -- I was
15 self-employed there for many years after my tour in the
16 Marine Corps and in the Army. I started a guiding business
17 called Soldier Creek Outfitters and also contracted for a
18 couple years with a business called Native American --
19 Native Builders, which I tried to form into kind of like an
20 on-the-job training type thing for our younger members,
21 kind of like a Job Corps. I don't know if anybody is
22 familiar with Job Corps.

23 I was employed with the United Methodist Church for
24 five years with an organization called Tree of Life
25 Ministry where we repaired homes on the Reservation at no

1 cost to the home owner through donations of the United
2 Methodist Church and the work of volunteers that came there
3 every summer. We did a lot of work for the elders
4 repairing homes. Government-built homes are way past their
5 life expectancy, and they are pretty much falling around
6 our people. We came in and repaired them at no cost to the
7 homeowner with volunteer help and volunteer revenue.

8 Q. Those activities, plus others -- well, let me start
9 again. Since the Marine Corps, what has been your main
10 focus in life, since you've been back to the Reservation?

11 A. My people.

12 Q. What do you mean by that?

13 A. Want to see them succeed and get out of poverty.
14 Where we live, it's the poorest county in the nation. We
15 have an average household income of \$5200, with 85 to 90
16 percent unemployment rate. Recently here one of the
17 highest suicide rates in the world.

18 Q. Describe the Crow Creek Sioux Reservation structure in
19 relationship to the Federal government.

20 A. We are a Federally recognized Tribe. That was around
21 1864, 1865 we became the Crow Creek Sioux Reservation.
22 Where we are placed now was originally a prisoner of war
23 camp. Our people originally come from the Minnesota area,
24 but we were exiled out of there by the Government to the
25 place where we are now. Been there ever since.

1 Q. What is the relationship to the State of South Dakota?

2 A. Other than we are placed in the middle of South
3 Dakota, along with eight other Reservations, there really
4 is no other relationship.

5 Q. Briefly what is your relationship to the land that
6 encompasses the Reservation?

7 A. That's Mother Earth. She is sacred. That's where our
8 blood was spilled. That's where our ancestors are buried.

9 Q. Peter, could you describe the structure of Tribal
10 Government on the Crow Creek Reservation?

11 A. We are the governing body. We are comprised of seven
12 members. The Tribal Chairman, who is at large, and one
13 district representative council member from the Big Bend
14 District, one council member from the Crow Creek District,
15 and four members of the Ft. Thompson District. We're the
16 governing body.

17 Q. How do you get elected to this position?

18 A. By the people.

19 Q. How long is your terms?

20 A. Two-year terms.

21 Q. Where does the Utility Authority, the Crow Creek
22 Utility Authority fall within the structure of Tribal
23 government?

24 A. They are underneath the Government. We appoint them
25 or -- when it was formed, I believe in 1997, it was put out

1 to the public. People applied for it, and the governing
2 body at the time went through and chose the members of it
3 and put that in place, along with all the other boards on
4 the Reservation, the Gaming Commission, the Gaming Board.
5 Yes, it's the Tribal Council, the governing body that
6 oversees all of them.

7 Q. What about the Tribal Court?

8 A. That also belongs to the Tribe. Years ago there were
9 some funding issues and they couldn't handle it, so they
10 asked the Bureau of Indian Affairs to take it and fund it,
11 and they contracted it to -- what is it called --

12 Q. Northern Plains?

13 A. Northern Plains Tribal Court of Appeals. We just
14 recently took that back into our possession.

15 Q. How did you do that?

16 A. Through resolution.

17 Q. There was some discussion earlier today about a
18 Special Judge being appointed for this case. How is that
19 done? How was that done?

20 A. The Judge is hired by the Crow Creek Sioux Council,
21 and B.J. Jones was brought in to oversee this as a Special
22 Judge, this particular case. We wanted to be above any
23 suspicion Sprint might have, like they could come back at
24 us and say, "You know, well, this Judge here, his whole job
25 depends on his decision, so of course he is going to rule

1 in your favor." We wanted to bring in a neutral Judge to
2 oversee this, one that didn't know anything about us. We
3 wanted to be above any superstition.

4 Q. I want to take you to what your knowledge is of the
5 Tribe and NAT's relationship. What was important or what
6 is important to the Tribe in developing and working with
7 NAT to develop a telephone company?

8 A. One being economic development. The other being
9 seeing our people have the same chance as everybody else in
10 the United States has. We all know today the Internet is
11 the world. We wanted our people, that same opportunity to
12 see things. We basically just wanted the same
13 opportunities as everybody else in the United States.

14 Q. Before NAT, what was the access of members of your
15 community to these services, Internet in their home, things
16 like that?

17 A. Very, very limited. As I spoke of the poverty
18 situation there, Internet was just a couple people had it.
19 Most of the public didn't have access to the Internet or
20 the phone. It's kind of monopolized there by the one phone
21 provider, phone service provider we do have. It's kind of
22 hard to come up with that bill money every month, so a lot
23 of people didn't have access to phone or Internet.

24 Q. Economic development has been mentioned before and
25 also by you. Now that NAT has been in there and people

1 have Internet, what changes have you seen in people's
2 lives?

3 A. There are a couple people there -- Native American
4 people are natural artists. There are a lot of artists on
5 our Reservation. It's hard to get that work out there and
6 get it sold for revenue for their families. It's been said
7 there are three or four families are in one house. A lot
8 of times these artists are the only income into the house.
9 There are a couple people that have opened Ebay accounts,
10 and they are able to get their artwork out and create
11 revenue for their families in their households.

12 I think there are three or four full-time employees, a
13 couple of them that work in the Internet library that is
14 there on the Reservation, which there's never been one
15 before. A lot of days there's a waiting line just to get
16 on the Internet. There are some full-time employees there
17 that sit there and help people navigate the Internet. Even
18 myself, I'm not very computer literate, but I'm learning.

19 There are a couple full-time employees that do
20 installation of the free Internet service and free phone
21 service. Right now currently they are remodeling a
22 building. There are a couple other members of the Tribe
23 there that are remodeling an old building and turning it
24 into an Educational Technical Learning Center.

25 Q. So this has all been as a result of the Tribe

1 partnering with NAT?

2 A. Yes, ma'am.

3 Q. You are familiar with the structure and ownership of
4 NAT?

5 A. Yes.

6 Q. Who is the majority owner?

7 A. The Crow Creek Sioux Tribe owns 51 percent of it.

8 Q. As a Tribal Council member, would you say that the
9 Tribe has reaped benefits?

10 A. Yes.

11 Q. And those being what you mentioned or more?

12 A. Yes. It's supposed to create a couple hundred
13 thousand dollars of revenue for the Tribe. Of course
14 Sprint hasn't paid their bills, so we don't see any of that
15 revenue. We just see the things that Mr. Reiman and them
16 have been doing there, like the Internet library and things
17 like that.

18 Q. Who owns the land, the NAT buildings and equipment and
19 all that?

20 A. Crow Creek Sioux Tribe. It was very important to us
21 that our, you know, our land is sacred. It was very
22 important to us that it was done with some type of green
23 technology. They didn't have to burrow into Mother Earth
24 to erect that tower or the building or anything.

25 Q. Would you have sold that land to them? Why didn't you

1 sell it?

2 A. No. Our land ain't for sale.

3 Q. Today you've heard a lot of talking about telephones
4 and routing and this and all of that.

5 A. Yes.

6 Q. But basically today we're here because Sprint is
7 asking the Court to grant a preliminary injunction. Do you
8 have an understanding of what that is?

9 A. Yes.

10 Q. What is your understanding?

11 A. Basically they don't acknowledge our sovereignty and
12 our jurisdiction. They went straight to the state, when it
13 should be seen there in Tribal Court. From what I
14 understand of it, they're not recognizing who we are,
15 recognizing our sovereignty and our right to self-govern
16 and self-determination.

17 Q. Do you know what would happen if this Court grants a
18 preliminary injunction, what happens to the case?

19 A. That would mean it would go to Federal Court instead
20 of seen in Tribal Court. Right? Our sovereignty is always
21 being tested. Always. I guess in the U.S. Constitution it
22 states that Treaties are the supreme law of the land. In
23 those Treaties we were granted sovereignty. I would like
24 to think the U.S. Constitution means something.

25 It would basically mean that it would hinder any

1 further economic development by any other corporations or
2 any other organizations that would want to come in there
3 and do business. There's no way for us to protect them or
4 help them, because they can just go to the state. It kind
5 of seems to us like our sovereignty don't mean anything.

6 Q. Let's go through this a little bit. If Sprint is not
7 required to exhaust Tribal remedies, what impact would that
8 have on your self-government? You kind of touched on it.
9 What impact would it have on the Tribe's self-government?

10 MR. KNUDSON: Objection. Foundation.

11 THE COURT: Overruled. You can answer.

12 A. It would put our sovereignty and jurisdiction in
13 jeopardy.

14 Q. What impact would it have on your self-determination?

15 A. We should be able to handle our own business.

16 Q. And as far as utilities, what mechanism do you have to
17 handle that?

18 A. The Utilities Authority and the governing body, which
19 is the Council of the Crow Creek Sioux Tribe.

20 Q. If Sprint is not required to exhaust Tribal remedies,
21 what impact would it have on your political security as a
22 Tribe or integrity of the Tribe?

23 MR. KNUDSON: Objection. Foundation.

24 THE COURT: Overruled. You may answer.

25 A. It would impact a lot.

1 Q. Can you give me an example of what it would mean to
2 the Council as the governing body and the Tribe?

3 A. It would mean that we don't have the protection of the
4 Constitution and the Federal government like was granted to
5 us. It would mean we can't conduct our own business. We
6 can't invite organizations, people in businesses onto our
7 Reservation, and protect them and help them in the way we
8 should.

9 Q. What impact is this going to have, by not requiring
10 Sprint to exhaust Tribal remedies, would it have on Tribal
11 resources? You mentioned they went to the state.

12 A. Yes. The State Public Utilities Commission. When it
13 should have come to the authority that we have in place.

14 Q. So what do you have to do about that? Can you just
15 ignore it? What is the Tribe doing about the South Dakota
16 PUC case? Maybe I'm being vague. Are you sitting back
17 ignoring it, or are you addressing it?

18 A. No, we are not ignoring it. We are addressing it.
19 But with Sprint not recognizing our jurisdiction and our
20 sovereignty, who else is going to? I mean it has to stop
21 somewhere.

22 Q. So how is this impacting your Tribal resources?

23 A. Pretty much doesn't give them any clout or backbone at
24 all.

25 Q. Is it having an impact financially?

1 A. Yes, it is.

2 Q. As far as a case being at the South Dakota PUC and now
3 here in Federal Court, what sort of -- can you even
4 estimate what kind of financial impact this is having
5 against your Tribe, having to run here and there to defend
6 this? If you don't know a dollar amount, that's fine.

7 A. I don't know a dollar amount right off the top of my
8 head. For those of us that are struggling, like our
9 Reservation is, and the situation of the poverty there,
10 it's very hard to do, very hard to do. It was hard for us
11 to get travel money just to come here today.

12 We have people at home, we have elders there, they
13 weren't able to pay their electric bill, so they took their
14 meter, and they are sitting there without electricity.
15 Some of them are on oxygen and nebulizers. We had to come
16 up with money to come here even today.

17 Q. Also, what impact would not, requiring Sprint not to
18 exhaust Tribal remedies, have on the orderly admission of
19 justice on the Reservation?

20 A. What impact would it have?

21 Q. To you, as a Tribe, being able to administer justice.

22 A. We really wouldn't be able to if this did happen. It
23 would -- what word am I looking for?

24 Q. We can move on. We can come back to the justice and
25 the Court. You kind of touched on perhaps the welfare of

1 the Tribe, the health and economic development.

2 A. Yes.

3 Q. Any other specific examples you would have of how, by
4 not requiring Sprint to address this in Tribal Court, how
5 that would affect the welfare, health, or economic
6 development of the Tribe?

7 A. We would -- by them not recognizing our jurisdiction
8 and our sovereignty and going right over our heads to the
9 State PUC, like I said before, it weakens our sovereignty
10 even more, weakens our jurisdiction, our right for
11 self-governing and self-determination. It weakens all of
12 that.

13 Q. What is your objection to this Court handling the
14 matter instead of Tribal Court?

15 A. It shouldn't be here.

16 Q. Why?

17 A. Because everything is happening within the boundaries
18 of the Reservation. It's ours. We're 51 percent owners of
19 it. It's sitting on Tribal land. It doesn't -- I guess
20 being utilities, it's -- utilities pretty much run this
21 country and the revenue they generate. They have a lot of
22 power. Can you say the question again?

23 Q. Why do you think the Tribal Court should handle it
24 instead of this Court was the beginning of the question?

25 A. Okay. I pretty much answered that then.

1 Q. All right. Just lastly, economic development. You've
2 spoken about it. We heard testimony today that we may be
3 talking vast amounts of money between this telephone deal.
4 That's obviously, from your testimony, an important aspect
5 to the Tribe.

6 A. Yes.

7 Q. But what is the most important aspect you want to
8 convey to the Judge today?

9 A. Recognition of our sovereignty, of our jurisdiction,
10 our right to govern, to take care of our own business. For
11 us, there's a lot at stake here. It's not just a dollar
12 amount. It's, again, our sovereignty, our right to
13 self-govern.

14 Q. Let me clarify for the Court. The Crow Creek Tribe
15 has an operable, up and running, whatever term you want to
16 use, Utility Authority. Is that correct?

17 A. Yes.

18 Q. The Tribe has a Court system that's operating, open.

19 A. Yes. It's in control of the Tribe.

20 Q. For this specific case you have placed --

21 A. B.J. Jones, who is the Judge of the Sisseton-Wahpeton
22 Tribe, also a legal professor. Yes.

23 Q. Is it your -- can the Crow Creek Sioux Tribe and the
24 different entities in place you've described handle the
25 various aspects of Tribal exhaustion?

1 A. Yes.

2 Q. No further questions.

3 A. You know, this is a -- we finally find a way to create
4 revenue for our Tribe. As always, it's taken away from us.
5 It meant a lot to us to go into this agreement, because it
6 would provide jobs, badly needed jobs, badly needed revenue
7 to operate and to put other people to work. It's very
8 upsetting that this is even here.

9 Q. That brings up a point, and just let me clarify with
10 you. You have no idea -- you have appointed a Special
11 Judge to hear this.

12 A. Yes, ma'am.

13 Q. If it came back to Tribal Court, you have no idea or
14 no control on what would happen.

15 A. No, ma'am.

16 Q. Win or lose or whether or not the Tribe ultimately
17 would decide they have jurisdiction or not, what is
18 important? What is at stake today that is so important to
19 the Tribe? Is it winning or losing this case, or is it
20 something more important?

21 A. Something more important. Like I said earlier,
22 there's a lot at stake here. How are we going to -- how
23 are other businesses going to come to our Reservation and
24 do business with us? There's a lot more at stake than just
25 money.

1 MS. ROBERTS: No further questions.

2 THE COURT: Mr. Swier?

3 MR. SWIER: Just a few. Your Honor, we --

4 A. I mean we --

5 THE COURT: Just a minute. He has to ask a
6 question.

7 A. I'm sorry. I was just going to reiterate --

8 MR. SWIER: Go ahead if you're not done.

9 MR. KNUDSON: There should be a question pending.

10 THE COURT: Sustained. You need to ask a
11 question, Mr. Swier.

12 DIRECT EXAMINATION

13 BY MR. SWIER:

14 Q. What was going to be your finishing answer to Miss
15 Roberts' previous question?

16 A. I was just going to say that it's tough there, and
17 here we finally get a chance to make money, to create
18 revenue for our Tribe, and it's being questioned now.

19 Q. Mr. Lengkeek, can I call you Peter?

20 A. Yes, sir.

21 Q. Peter, I have a few questions. I want to touch on
22 something you indicated earlier about the land being your
23 sacred land. Is that correct?

24 A. Yes, sir.

25 Q. Talk a little bit more about the sacredness that your

1 Tribe sees on your Reservation land. Why is that so
2 important?

3 A. To us, we don't believe we inherit the land. We
4 borrow it from our grandchildren. That's what we believe.
5 This is our mother. When we're done praying, we say,
6 "Mitakuye Oyasin." That means, "We're all related." That
7 doesn't mean just you and I are brother. It means we are
8 brother and sister to everything on this earth. We all
9 come from one place, that's Mother Earth. She is not to be
10 desecrated. She is not to be mutilated, like she is today.

11 Q. Along the lines of the sacred land, you're familiar
12 obviously, as part of the majority owner, you are familiar
13 with Native American Telecom. Correct?

14 A. Yes, sir.

15 Q. You're familiar with the efforts and activities of NAT
16 on your Reservation.

17 A. Yes.

18 Q. Peter, is it true that NAT's equipment is located on
19 your sacred land?

20 A. Yes.

21 Q. Is it true that NAT's technologically advanced
22 equipment is housed on your sacred land?

23 A. Yes, sir.

24 Q. Is it true NAT's services, your company's services are
25 provided on your sacred land?

1 A. Yes, sacred and Tribal.

2 Q. Is it true NAT is providing employment opportunities
3 for your members on your sacred land?

4 A. Yes, sir.

5 Q. Is it true that NAT's new Internet Cafe is located on
6 your sacred land?

7 A. Yes, sir.

8 Q. Is it important to you that new economic development
9 opportunities occur on your sacred land?

10 A. It is very important.

11 Q. Is NAT providing those economic development
12 opportunities on your sacred land?

13 A. Yes.

14 Q. Have NAT's activities led to technological
15 advancements on your sacred land?

16 A. Yes, it has. More and more of our people are learning
17 to use the Internet. More and more of our people are able
18 to stay in communication with each other, especially like
19 during emergency situations.

20 Q. That was one question, Peter, I was going to ask you.
21 Will you explain to the Judge how NAT's services are used
22 in emergency situations on your sacred land?

23 A. A lot of the people there, as I mentioned earlier,
24 cannot afford a basic phone and a telephone company that
25 comes out of Chamberlain there. When NAT came here, they

1 offered the subsidized phone, which we get free phone
2 service, free Internet service.

3 Before that, to get a hold of the ambulance or 911 or
4 the police station, you either have to run a couple doors
5 down to somebody who can afford a phone or try to get there
6 yourself to the police station or fire department on foot,
7 bike, car, horse, however you can. Now most of them people
8 pick up the phone, and emergency services are there.

9 Q. Before NAT, were those emergency services available to
10 your Tribal members?

11 A. They were available, yes. Are you talking the police
12 department, the fire department, and the EMTs?

13 Q. Yes. Before NAT described how those services were
14 limited to your members.

15 A. Really the only thing that was limited was getting a
16 hold of them when you needed them.

17 Q. What has NAT done to fill that gap?

18 A. They provided our members with free phone service.

19 Q. Describe for the Judge the technology before NAT
20 started. Describe for the Judge what the technology was
21 like on your sacred land.

22 A. Very limited. Like I said, I know some people down
23 the street would open their homes to the neighbors so they
24 could come in and get on the Internet and try to learn
25 about it or try to sell their artwork on it, or just to see

1 what resources are out there.

2 Now there's getting to be more and more of it. They
3 also provide in some instances free computers.

4 Q. Talk about that. I think Mr. Reiman testified that
5 NAT, your Tribally-owned company, is actually providing
6 hardware and software to your members for free on your
7 sacred land. Is that right?

8 A. Yes.

9 Q. Talk about that briefly. Share with the Judge what
10 that is all about.

11 A. As in -- well, are you talking about the Internet
12 Cafe?

13 Q. Sure. Start with that, Peter.

14 A. The Internet Cafe is housed in an office in the Tribal
15 building there. My office -- it used to be my office when
16 I used to be the director of the Tree of Life Ministry. I
17 gave that up so they could move in there. It's a badly
18 needed service. Like I said, that's the world now, the
19 Internet. That along with the Educational Technical
20 Learning Center, I can't wait until it's open.

21 A lot of our people are looking forward to it. A lot
22 of our people are talking about getting their GEDs through
23 there. Elders are talking about it. It's creating a lot
24 of buzz in the community.

25 Q. Positive buzz?

1 A. Oh, yeah.

2 Q. Is it safe to say, Peter, before NAT no one ever made
3 an effort to pave a technological highway for you and your
4 members on your sacred land?

5 A. It's safe to say that.

6 Q. Has NAT paved that technological highway for you?

7 A. Yes, they have.

8 Q. Peter, you talked about the Learning Center. I don't
9 know if it's in the record. Is the Learning Center also
10 placed within your Reservation boundaries on your sacred
11 land?

12 A. Yes, it is.

13 Q. Peter, describe briefly for the Judge. We talked
14 about the fact that NAT has allowed you, as the Tribe, to
15 be the majority owner of this company.

16 A. Yes.

17 Q. But outside private-company investment has been
18 necessary to get it up and running. Is that right?

19 A. Yes.

20 Q. Before NAT was formed and before you guys became the
21 majority owners, describe for the Judge what type of
22 private economic investment, outside of private companies
23 or individuals, describe what type of private investments
24 were coming onto the Reservation to make life better on
25 your sacred land.

1 A. Other than a nonIndian-owned grocery store there, I
2 can't think of too many more than that.

3 Q. Other than your Tribal government, is NAT one of, if
4 not the largest, employers on your sacred land?

5 A. Yes.

6 Q. Other than NAT, are there any other private
7 investments that are coming on to your Reservation?

8 A. No.

9 Q. We heard before testimony that the economic impact on
10 NAT, and we didn't put an exact number on it, but based on
11 your knowledge, is it millions of dollars that NAT is being
12 negatively affected?

13 MR. KNUDSON: Objection. Foundation.

14 THE COURT: Overruled. You may answer.

15 A. Yes.

16 Q. You don't know the exact numbers, but millions is in
17 the ballpark.

18 A. Yes. It's cost millions already so far.

19 Q. What could your people do with millions of dollars to
20 invest on your sacred land?

21 A. Oh, geez.

22 Q. Is it almost unfathomable?

23 A. Yes, it is. Our people have been forced to do this
24 since the late 1800s by the Government. That's all we know
25 now.

1 Q. In other words, to hold out your hands --

2 A. To beg for everything we need and want. That's all
3 our people know now. Our young people, that's all they
4 know. This is one of the mechanisms to get away from that,
5 to instill pride, to instill dignity, to work and be able
6 to -- a young father to buy diapers and food for his baby.
7 This is what we want to get away from is holding our hand
8 out for everything we need. This is one of the things that
9 will help get us away from that.

10 Q. As a Tribal member and majority owner of NAT, are you
11 afraid to compete with off-Reservation companies?

12 A. No.

13 Q. Do you think, if given the opportunity, that you can
14 provide services and compete and take you and your people
15 to a different economic level?

16 A. Why can't we? Shouldn't we have that right? There
17 again, our sovereignty and jurisdiction is being tested
18 right now.

19 Q. The Tribal Utility Authority, which you talked about
20 earlier, they ordered that Sprint pay these fee payments.
21 Is that right?

22 A. Yes.

23 Q. To the best of your knowledge, has your Tribally-owned
24 company, NAT, received any of these payments?

25 A. No. Isn't that how we were able to remodel the

1 building? There had to be -- to tell you the truth, I
2 don't really know. I'm not involved in the everyday
3 workings of NAT.

4 Q. Peter, you talked about the impact of millions of
5 dollars on the Reservation. You can obviously buy more
6 bottles and diapers than you can ever imagine with a
7 million dollars.

8 But what other impact would that amount of money have
9 for the greater good of your people on your sacred land?

10 MR. KNUDSON: Objection. Speculation.

11 THE COURT: Sustained.

12 BY MR. SWIER:

13 Q. Peter, in your view has Sprint entirely ignored the
14 Tribe's Tribal sovereignty here?

15 A. Yes.

16 Q. And everything that NAT is doing is taking place on
17 your sacred land. Is that correct?

18 A. Yes, it is.

19 Q. And it's made a difference.

20 A. Yes.

21 Q. And you expect it to continue to make a difference, if
22 you get paid.

23 A. Yes, and I guess it will be based on a decision today.
24 I mean where does it say that we can't -- show me in
25 writing where it says we can't have the same opportunity as

1 everybody else in this country?

2 Q. Peter, you are simply asking to compete in the same
3 marketplace of ideas as other companies, but you are doing
4 it on your sacred land. Is that right?

5 A. We're trying to make our own way.

6 MR. SWIER: No further questions.

7 THE COURT: Thank you. Mr. Knudson?

8 MR. KNUDSON: We'll pass on cross.

9 THE COURT: You can be excused.

10 (Witness excused)

11 THE COURT: Miss Roberts, any further witnesses?

12 MS. ROBERTS: No, Your Honor.

13 THE COURT: Mr. Knudson, any rebuttal?

14 MR. KNUDSON: No, Your Honor. I would just refer
15 to the Affidavit and evidentiary evidence we submitted
16 along with our Motion and Memorandum of Law.

17 THE COURT: All right. Then, Mr. Knudson, we'll
18 do argument, and we'll take a break after you are finished.

19 MR. KNUDSON: Notwithstanding the testimony you
20 just heard, Your Honor, the question here is relatively
21 straightforward. With respect to what Sprint is
22 requesting, in contravention to what NAT is asking, we
23 believe this Court has a primary jurisdiction, that
24 exhaustion is not required, and, therefore, this Court
25 should enjoin the Tribal Court from further proceedings

1 against Sprint brought by NAT. There are a number of
2 well-settled principles that lead to that result.

3 We take a look first at one of the leading cases on
4 the issue of Tribal exhaustion, *A-1 Contractors v. Strate*,
5 decided in 1997, authored by Justice Ginsburg, unanimous
6 decision 9 to 0. It establishes that where there is no
7 grant of Federal authority over a nonmember, there is no,
8 as a general rule, jurisdiction of a Tribal Court or a
9 Tribe to have adjudicatory or regulatory power over a
10 nonmember. *Strate* was applying the two exceptions also
11 found in *Montana versus United States*. I would like to
12 address those two limited exceptions later.

13 But as a general proposition, the rule is that Tribes
14 do not have regulatory or adjudicatory power over
15 nonmembers. So absent the Federal grant, there is simply
16 no way for this Tribal Court to resolve NAT's complaint
17 against Sprint. It's significant if we look at *Strate*, and
18 what Justice Ginsburg said at the end of the opinion in
19 Footnote 14, where there is no Federal jurisdiction and
20 that issue is clear, exhaustion, as a requirement, must
21 give way.

22 I find it interesting that NAT has not mentioned
23 *Strate* in its Brief to this Court here in response to our
24 Motion for a Preliminary Injunction. I also want to point
25 out about *Strate* that it involved a situation, this was a

1 traffic accident on Fort Berthold Reservation in North
2 Dakota. The injured Tribal members brought suit in Tribal
3 Court. Jurisdiction was contested. It was affirmed on
4 appeal by the Tribal Court of Appeals.

5 Before the Tribal Court could get to the merits, the
6 Defendants in that action brought a suit in Federal
7 District Court seeking a declaration there was no Tribal
8 Court jurisdiction. Ultimately the Supreme Court
9 determined there was no Tribal Court jurisdiction, and in
10 that circumstance exhaustion was not required.

11 Then we go to Hicks, Nevada v. Hicks, a 2001 decision,
12 authored by Justice Scalia. It's not unanimous in terms of
13 the opinion, but it's unanimous in terms of the judgment
14 that's reached in that case. Hicks reaffirms Strate and
15 says that Strate expanded the exceptions to exhaustion that
16 were first articulated with Iowa Mutual and National
17 Farmers Union cases.

18 What held in Hicks was that Strate, in its exhaustion
19 rule, applied the conduct on both Tribal land as well as
20 fee land. So what happened in Hicks was a situation where
21 Nevada Game Wardens obtained a warrant in State Court and
22 also a warrant in Tribal Court, and went onto the
23 Reservation looking for evidence of one of the Tribal
24 members who lived on Tribal land had taken an endangered
25 species in violation of state law. The person subject to

1 the search ultimately brought a Section 1983 claim against
2 the Game Warden Officers.

3 Hicks established the rule that Tribal Courts are not
4 courts of general jurisdiction. They do not have the power
5 to adjudicate Section 1983 claims against nontribal
6 members. I think, similarly, you find a situation here
7 where the Tribal Court lacks adjudicatory power under
8 47 USC 207 to hear NAT's complaint against Sprint.

9 So if you look at the governing principles of Strate
10 and Hicks, which are also applied in Atkinson, that one can
11 conclude in this circumstance, there being no Federal grant
12 of jurisdiction of the Tribal Court over Sprint, and the
13 Montana exceptions not applying, there's no power for the
14 Tribal Court to adjudicate NAT's claim against Sprint in
15 Tribal Court.

16 Another important point here is we talk about the
17 starting proposition, absent Federal grant. What we have
18 here, in contrast, is an expressed provision in 47 USC 207
19 to divest both State Courts and Tribal Courts of any
20 jurisdiction involving the Federal Communications laws.

21 Sprint's complaint in this Court alleges unreasonable
22 practices in violation of Federal law, which must be
23 brought into Federal Court or under 207 before the Federal
24 Communications Commission and nowhere else.

25 So let's take a look at the AT&T case that is cited in

1 their Brief. It's a Ninth Circuit decision, where the
2 Tribal Court ordered AT&T to provide toll-free service,
3 allowing people off the Reservation, as well as on the
4 Reservation, to use that toll-free number for access to
5 what was going to be a Native American Lottery.

6 THE COURT: You are referencing AT&T vs.
7 Coeur D'Alene Tribe case?

8 MR. KNUDSON: Yes. Notwithstanding, Tribal Court
9 went forth and ordered AT&T to comply and to provide that
10 service. The Ninth Circuit is unambiguous in its decision
11 that the Tribal Court lacks jurisdiction. It construes
12 47 USC 207 and simply holds that the Tribal Court in that
13 instance lacked jurisdiction.

14 If we take the AT&T-Coeur D'Alene decision construing
15 207, we get to the question addressed in Footnote 14 of
16 Strate; where the lack of Tribal Court jurisdiction is
17 clear, requiring exhaustion would serve no other purpose
18 but delay, and, therefore, this prudential rule of comity
19 must give way.

20 THE COURT: So in your brief right before you
21 cited the AT&T vs. Coeur D'Alene case, you cited Alltel
22 Communications vs. Oglala Sioux Tribe. That's Judge
23 Viken's case. In that case he did not grant the
24 preliminary injunction, and indicated that the Tribal Court
25 would exhaust their remedies first. He maintained

1 jurisdiction over the case.

2 Why would this Court not follow that same rationale,
3 based on the case you cited in your brief?

4 MR. KNUDSON: I understand. The distinction here
5 is what Judge Viken was addressing was an issue of
6 arbitrability, and there were two portions of that case
7 that dealt with different arbitration issues. But he
8 looked at one particular arbitration provision, and said
9 with respect to that one, it's sort of unambiguous. Under
10 the Federal Arbitration Act, that no exhaustion would be
11 required. He quotes this Coeur D'Alene case with approval.
12 So I think it's fair to interpret that decision in the
13 Alltel case to provide support for the proposition we're
14 articulating here.

15 THE COURT: You are arguing because Section 207
16 expressly puts jurisdiction either before the FCC or the
17 Federal Court, that that is different than the arbitration
18 provisions which don't designate what Court would have
19 jurisdiction.

20 MR. KNUDSON: I think we have to step back and
21 look at what Congress has provided. What Congress has
22 provided in Section 207 is unambiguous. There can be no
23 dispute. When you bring a question of Federal
24 Communications law, the challenge under Section 201, 203,
25 206 of Title 47, you must bring that in Federal Court or

1 before the Federal Communications Commission. That is the
2 holding in the Ninth Circuit decision in Coeur D'Alene.

3 I would argue it's easier and simpler and clearer to
4 look at the Ninth Circuit decision, look at Section 207,
5 and I think there can be only one conclusion. There's no
6 point to sending us back to Tribal Court when Congress has
7 divested both the State Courts and the Tribal Courts of any
8 jurisdiction over these Federal laws. Congress has
9 preempted it, expressly so. So there isn't any room for
10 debate on that point.

11 THE COURT: So if you are arguing there is field
12 preemption, you would make that same argument whether the
13 entity was trying to go into State Court as compared to
14 trying to go into Tribal Court here?

15 MR. KNUDSON: Yes. Now, there's a distinction
16 with respect to the proceeding we brought before the Public
17 Utilities Commission. That distinction is there is clearly
18 a delineation in the Federal Communications law allowing
19 State Public Utilities Commission to regulate intrastate
20 service of the traditional sort, the legacy services.

21 THE COURT: Do you have any idea of the
22 percentage of traffic here that is intrastate as compared
23 to interstate?

24 MR. KNUDSON: No, we don't. Our traffic analysis
25 was all the traffic flowing through the South Dakota

1 Network switch ultimately to the Ft. Thompson phone number.
2 How much of that traffic would be traditional intrastate
3 service, we couldn't determine from that analysis. But as
4 you heard today, I mean it's all going to Los Angeles. So
5 in all probability, it's all Federal. We don't have a
6 determination yet and no discovery on that particular point
7 to find out.

8 If the PUC proceeding ends up finding there isn't any
9 intrastate traffic, as such, I suppose we would be forced
10 to dismiss our action there. But the PUC is entitled to
11 exercise its regulatory authority over the area of
12 communication services that Congress has left to the states
13 to regulate.

14 We think if NAT had sued under the FCC tariff, which
15 we have attached to our Federal Complaint, there shouldn't
16 be any doubt that that must be brought in Federal Court or
17 before the FCC. Instead, it tries to do a run-around
18 Section 207 by suing Sprint under its so-called Tribal
19 tariff.

20 But I think if you examine the Tribal tariff, you will
21 see the language of the tariff creates a scope that
22 attempts to regulate all traffic into, out of, and within
23 the State of South Dakota. It overreaches any possible
24 regulatory authority of the Tribal Utility Authority, or
25 the power of the Tribal Utility Authority would be limited

1 to traffic that starts and ends within the exterior
2 boundaries of the Reservation and to only members of the
3 Tribe.

4 But it doesn't limit itself in that fashion. And what
5 we saw today from Mr. Williams' testimony, which was
6 reaffirmed by Mr. Reiman, that this traffic has little to
7 do with the Reservation, except for the fact that they put
8 a piece of electronic device apparently in Ft. Thompson.
9 We can have people from Massachusetts, New York, Texas, and
10 Florida talking to each other. Apparently their voices go
11 through this device so they can talk to each other. But to
12 say that's a service only within the Reservation to me is
13 sophistry.

14 THE COURT: So if you had a conference call of
15 people between Pierre, Sioux Falls, and Rapid City calling
16 into this number, that would be an intrastate.

17 MR. KNUDSON: It would appear to be so, yes.

18 THE COURT: Although the people do not live on
19 the Crow Creek Indian Reservation, do you believe the
20 Tribal Utility Authority would have power to regulate that
21 intrastate call?

22 MR. KNUDSON: No. Because the power of the
23 Tribal Utility Authority ends at the exterior boundaries of
24 the Reservation.

25 THE COURT: So if it were calls of three people

1 in Ft. Thompson doing a conference call, would the Tribal
2 Utility Authority have power to regulate that call?

3 MR. KNUDSON: It might, if those three people on
4 that call were all enrolled members of the Tribe. The
5 distinction, and I think if you look at Cheyenne River and
6 the Western Wireless FCC decision, you draw a distinction
7 between -- even if you are within the boundaries of a
8 Reservation, as to whether or not the people being
9 regulated are members of a Tribe or nonmembers of a Tribe,
10 and that the state retains regulatory jurisdiction for
11 nonmembers living within a Reservation.

12 Therefore, the PUC would have some power to regulate
13 NAT's activities to the extent they purport to provide
14 service to nonmembers within the Reservation. You heard
15 Mr. Reiman say they don't limit their services purely to
16 enrolled members of the Crow Creek Tribe.

17 So given the type of tariff the Tribe purports to
18 enforce, it must come along, too, into Federal Court,
19 because it really attempts to regulate the same type of
20 traffic as the Federal tariff.

21 I think there's another important point drawn out with
22 both the testimony of Mr. Williams and Mr. Reiman. Why
23 there is an important Federal question that extends beyond
24 the tariff itself. You heard Mr. Reiman say that what they
25 are providing is information service, the Skype,

1 opportunity to create an Internet classroom. You heard
2 Mr. Williams testify that when you go the third leg, that's
3 the one after it gets to Los Angeles on WideVoice's switch,
4 it comes back as Internet protocol signal.

5 This is important because Congress has set up two
6 regulatory regimes for interstate telecommunication
7 services. If it's a legacy telecommunications service,
8 it's regulated under the old tariff regime. But when
9 Congress passed legislation in 1996, it attempted to open
10 up the marketplace and the newer forms of services. You
11 heard Mr. Williams and Mr. Reiman talk about the new
12 technology and how progressive it was.

13 The new technology that Congress is dealing with in
14 1996 was to be regulated through competitive activities; in
15 other words, for the VoIP, the Voice Over Internet Protocol
16 Service, for the Skype service, for all these other
17 activities that are nontraditional. That's everything that
18 is going into the Ft. Thompson switch or Ft. Thompson
19 device, the WiMax device. Congress has said if NAT wants
20 to collect a charge, a fee for terminating service, it has
21 to negotiate with the long-distance carriers from whom it
22 wants to collect that fee.

23 So if we are going to get to the merits of whether NAT
24 can collect what it's been charging Spring, we are now
25 addressing important questions of Federal Communication

1 law. Section 207 speaks to that. It says it's in Federal
2 Court or to the FCC.

3 In addition, the WiMax service they talk about, that
4 plainly looks to be able to go beyond the borders of the
5 Reservation. So it raises both state law questions of
6 providing service off the Reservation, as well as again
7 whether it's subject to tariff access charges or
8 competitively negotiated fees.

9 THE COURT: Although at this time with regard to
10 WiMax, the witness testified it only has a two-mile radius.
11 I know the Crow Creek Indian Reservation is much bigger
12 than two miles when this is set up to serve Ft. Thompson.
13 As it currently exists, it doesn't go beyond the borders of
14 the Reservation.

15 MR. KNUDSON: Well, Mr. Williams said it could go
16 as far as 20 miles. Certainly if Mr. Reiman's expansion
17 plans follow, they will have to put that signal in places
18 where it clearly could go across the Reservation
19 boundaries. And he didn't deny that.

20 THE COURT: But don't I look at the case as the
21 technology currently exists, rather than what the future
22 capacity may be?

23 MR. KNUDSON: Well, yes and no. Yes, obviously
24 if they are 500-foot radius, they could say that's safely
25 confined to the Reservation boundaries. But let me point

1 out, that raises to the type of service and how it gets
2 regulated and how NAT can collect for so-called termination
3 services.

4 But also, as we've indicated, there are nonmembers
5 living on the Reservation. There is fee land on the
6 Reservation. This signal can go on those properties and
7 could go to nonmembers. Mr. Reiman said they are perfectly
8 able to serve nonmembers with their service.

9 THE COURT: So under the FCC regulations with
10 regard to nonlegacy traffic, and it's negotiated with the
11 long-distance carrier, does that normally result in a
12 contract entered into between the two parties, or what's
13 the end result of those negotiations?

14 MR. KNUDSON: The end result is that under that
15 regime, you have to negotiate a competitive access price.
16 It's subject to bargaining between the parties.

17 We cited a number of cases, Pay-Tel being one of the
18 leading ones that we've cited, indicating that's the regime
19 we are talking about. That applies to this commercial
20 radio service, applies to voice over Internet protocol,
21 anything where we talk about an information service. I
22 think Mr. Reiman said that's what they are providing.

23 So I think what we have here is the tariff regime they
24 want to use does not apply. Certainly that's a Federal
25 question, and not a Tribal Court question. That's why I

1 believe the Tribal Court should be enjoined from proceeding
2 further. This is an important question of Federal law
3 where Congress wants some relative uniformity of result.

4 Then I think it's also important, if we could move on
5 to another reason why exhaustion is not required. Sprint's
6 activities are not on the Reservation. I don't think
7 there's any doubt now, as Amy Clouser testified in her
8 Affidavit, but confirmed by Mr. Williams and Mr. Reiman,
9 the traffic that ultimately goes to Ft. Thompson, the first
10 leg coming into South Dakota ends at the switch in
11 Sioux Falls owned and operated by South Dakota Network.

12 What we ultimately heard was after it goes through
13 this convoluted routing to Los Angeles and back again, it
14 hits the South Dakota Network equipment and goes over South
15 Dakota Network's fiberoptic into Ft. Thompson.

16 Sprint simply is not on the Reservation, has no
17 equipment on the Reservation. It provides no services on
18 the Reservation. If it's not on the Reservation, there is
19 no Tribal Court jurisdiction over it.

20 We have two cases that I think are compelling on that
21 particular point. It's the Hornell case, for one, decided
22 by Judge Lay, where the Court of Appeals held the conduct
23 that was subject of the lawsuit did not take place on the
24 Reservation, and remanded back to the District Court with
25 instructions to vacate the Referral Order that the District

1 Court issued, referring, yet again, the question of Tribal
2 Court jurisdiction to the Tribal Court to determine whether
3 it had jurisdiction.

4 Now, Hornell involved the Crazy Horse, malt liquor
5 dispute. The allegations in that case brought by the
6 Plaintiffs in Tribal Court included tort claims that one
7 would argue indicated injury taking place on the
8 Reservation. Nevertheless, the Court of Appeals said that
9 does not place Hornell, as a brewing company, on the
10 Reservation. Likewise, the Internet marketing the brewery
11 didn't do so. The fact that the brewery may have had some
12 other products that were sold on the Reservation did not
13 create or invest the Tribal Court with jurisdiction over
14 the complaint about this particular product the brewery was
15 making.

16 We have the Christian Children's Fund case decided by
17 Judge Kornmann. That's an interesting one, but because we
18 had a Virginia charity, Christian Children's Fund, engaged
19 with a South Dakota nonprofit called Hunkpati, and
20 Christian Children's Fund hired Hunkpati to provide
21 services on the Crow Creek Reservation. Ultimately there
22 was a falling out, and Christian Children's Fund elected
23 not to continue using Hunkpati for those services.

24 Hunkpati sued in Tribal Court. Ultimately the Federal
25 District Court concluded there was no jurisdiction in

1 Tribal Court, because the activities complained of occurred
2 off the Reservation. Among the factors the Court looked at
3 was that the decision to terminate the relationship was
4 made off the Reservation. Another factor was that payment
5 to Hunkpati took place off the Reservation.

6 So even though there were some activities that might
7 have been done on the Reservation, the Court looked at
8 Atkinson and Plains Commerce Bank, although that was
9 decided later, but Atkinson set forth sort of this
10 aphorism, that you are not in for a penny for a pound
11 sympathy because you might have some contact with the
12 Reservation. The activities that lead to the lawsuit have
13 to occur on the Reservation.

14 Now, here we overlap now with what we think is really
15 the first Montana exception to the general rule. The first
16 exception deals with the establishment of a consensual
17 relationship between the parties that would vest the Tribal
18 Court with jurisdiction.

19 I don't think there's any dispute as to how this
20 dispute happened or got started. There's testimony from
21 Amy Clouser in her Affidavit that Sprint received two
22 invoices from a company called CABS Agent. CABS Agent is a
23 billing company that bills for various local exchanges or
24 competitive local exchange carriers. So it's an entity
25 with whom Sprint is familiar.

1 CABS Agent is based in Austin, Texas. The first two
2 invoices sent to Sprint were sent to Sprint in Overland
3 Park. They were payable to CABS Agent and sent to Austin,
4 Texas. So like Christian Children's Fund, we have payment
5 off the Reservation.

6 I think it's interesting that NAT would hire CABS
7 Agent to do this, because it's further indication of how
8 remote much of NAT's activity is from the Reservation, and
9 particularly the managerial decisions of NAT. The
10 principal office of NAT, according to the papers on file
11 with the Secretary of State of South Dakota, places its
12 principal office in Sioux Falls, apparently where
13 Mr. Reiman lives.

14 So once Sprint determined that while the third invoice
15 came in, it was much larger than the previous one, that
16 engendered a review. That review determined that in
17 Sprint's view this was a traffic-pumping activity. In
18 Sprint's view, traffic pumping is not legitimate local
19 access service. Therefore, it disputed the previous two
20 payments and refused to pay the next, and it continues in
21 that position.

22 THE COURT: I know that's Sprint's position, not
23 only in this case, but in multiple other cases.

24 MR. KNUDSON: Yes, Your Honor. You've had three
25 others, I believe, before you.

1 THE COURT: I think more than that.

2 MR. KNUDSON: So, in fact, in our Brief we cite
3 to a number of cases going back to 2007. So this issue has
4 been percolating around. People like Mr. Reiman, who are
5 knowledgeable in the telecommunications industry, surely
6 were aware of this issue when they engaged in a business
7 model where they knew the interexchange carriers would not
8 go along with. There's certainly an assumption of risk
9 here that the atmospherics that have been painted here
10 about a poor Tribe, and I don't dispute the Crow Creek
11 Tribe is poor, need to be taken with a grain of salt.

12 This whole thing originates with people who are not
13 members of the Tribe, who are familiar with the
14 telecommunications industry and the regulatory regime, and
15 also know this is something that the interexchange carriers
16 don't go along with. So they put together this business
17 plan, knowing full well that they are not going to get
18 cooperation from the long-distance carriers once they
19 figure out what is going on.

20 The point of that history is to say, look, there is no
21 consensual relationship being formed by the nature of two
22 invoices being billed through a third-party agent in Texas,
23 paid for out of Kansas and delivered to Texas. We didn't
24 form a consensual relationship with someone on the
25 Reservation.

1 Also, we've cited authority that merely offering
2 telecommunication services that may end up to a customer on
3 the Reservation is not forming a consensual relationship
4 with someone on the Reservation, as both the Reservation
5 Telephone Cooperative, the District of North Dakota, and
6 then the Ottertail Power Company case cited by the North
7 Dakota Supreme Court.

8 In order to form a consensual relationship, there has
9 to be some knowledge and awareness and a knowing decision.
10 I don't think you can infer that from two invoices that
11 were paid inadvertently, in which NAT is holding there was
12 a consensual relationship formed.

13 In the absence of a consensual relationship, you have
14 to find some other way to hold Tribal Court jurisdiction
15 over Sprint. That would be the second exception in
16 Montana.

17 THE COURT: It seems to me that's the exception
18 that the Tribe is putting forth or primarily putting forth.

19 MR. KNUDSON: That's what we heard a lot about
20 today. What I'd like to say about that first is we don't
21 need to go there, because as Hornell teaches, that has to
22 be on the Reservation. It's the same conclusion in
23 Christian Children's Fund. Montana addresses the situation
24 where there's activity within the confines of the
25 Reservation.

1 What we have seen here today is that this conference
2 bridge traffic, and they don't dispute it's 99.98 percent
3 of all that is being delivered to this 477 exchange,
4 involves people anywhere in the country. They want to
5 create a regulatory regime where Sprint and its
6 shareholders will subsidize the business model and business
7 plan that Gene DeJordy and Tom Reiman came up with. Unless
8 there's actually activity on the Reservation, we don't need
9 to get to the second Montana exception.

10 What we heard from Mr. Reiman and the last witness,
11 the Treasurer of the Tribal Council --

12 MR. SWIER: Peter.

13 MR. KNUDSON: I know it's Peter. I wanted to
14 call him by his last name, but I didn't want to
15 mispronounce it.

16 It's one thing to say we have plans, and we have a
17 business plan we might be able to get some revenue from
18 someone else to finance it. But I think we don't have a
19 situation here where we meet the second Montana exception.

20 First, I want to refer the Court back to Justice
21 Ginsburg's opinion in *Strate*. She says that this exception
22 can be misperceived. I think her observation there is very
23 important. She is looking back at the precedent upon which
24 Montana relied to come up with that second exception. It
25 largely involved efforts by the Tribe to regulate the

1 activities of its own members.

2 So if you look at, for example, how Justice White
3 characterizes the exception in the Brendale decision, which
4 is the Yakima Reservation case, Justice White talks about
5 activities that imperil the existence of the Tribe.

6 Now, that's been further interpreted by the Cohen
7 treatise on Federal Indian law. Cohen says that the
8 conduct has to be catastrophic and threaten the very
9 existence of the Tribe. The fact that we challenge the
10 Tribal Court's jurisdiction to adjudicate NAT's dispute
11 with Sprint doesn't reach that high threshold.

12 The Tribal Council Treasurer may talk about the
13 Tribe's ability to self-regulate, to accomplish its goals,
14 to manage its own affairs. Well, that's fine. But what
15 NAT is doing is suing Sprint over a business charge that
16 Sprint isn't paying, and would prefer to litigate that
17 issue in a Federal District Court where Congress said it
18 should be.

19 So the fact we challenged Tribal Court jurisdiction
20 isn't by itself relevant to the Montana second exception,
21 because anytime a party challenges Tribal Court
22 jurisdiction, if we follow that argument we're hearing
23 here, it would necessarily imperil or challenge Tribal
24 sovereignty.

25 But in Hicks, Supreme Court said Tribal Courts are not

1 courts of general jurisdiction. Therefore, they don't have
2 unlimited power over nonmembers. By calling into question
3 that power, you are not threatening the integrity of the
4 Tribe. The Tribe can regulate lots of activities. It can
5 regulate perhaps a true Tribal telecommunication service.

6 But it can't reach out beyond the exterior boundaries
7 of the Reservation to nonmembers and say, hey, this is a
8 dispute over a business entity and a business plan and a
9 business program that reaches outside the Reservation
10 boundaries. It doesn't matter they put a piece of
11 equipment in Ft. Thompson that might allow these people in
12 Massachusetts, Florida, Texas, New York, to talk to each
13 other. That's not a Tribal activity that can be regulated
14 by the Tribal Utility Authority. That belongs in Federal
15 Court or the FCC.

16 Likewise, Cheyenne River and the Western Wireless
17 cases said, look, just because we are asserting
18 jurisdiction over some of these activities doesn't
19 implicate the second Montana exception. The FCC looked at
20 this, who is getting argument from the Tribe on this
21 particular point, the FCC says our ruling on the ETC
22 decision, eligible telecommunication carrier, does not
23 impair all the Tribe. It doesn't reach the high standard
24 of the second Montana exception. So it went ahead and
25 reached the merits.

1 I want to address some of the other facts here that
2 talk about why in this particular instance you don't have
3 to look at the particulars of NAT itself to say Sprint's
4 business dispute with NAT is a business dispute. We think
5 it should be decided -- Congress has deregulated that
6 particular service. Congress has said that question is a
7 question of Federal law, and under Section 207, Title 47,
8 it has to be decided in a Federal tribunal.

9 But notwithstanding their argument that but for NAT,
10 they wouldn't have all these activities on the Reservation,
11 I mean these activities are occurring without Sprint paying
12 those charges. It's pretty clear that all the telecoms,
13 the interexchange carriers who are paying these charges,
14 adding up to a significant sum of money, we looked at the
15 Joint Venture Agreement, those are access charges they want
16 to collect.

17 They don't become net profits of NAT, absent an
18 Amendment of the Joint Venture Agreement, which is under
19 the control of NAT Enterprise, that is, Gene DeJordy and
20 Tom Reiman and WideVoice, so it would take an agreement of
21 nonmembers to share those profits in some way directly to
22 the Tribe.

23 So the idea somehow there is a direct connection
24 between the nonpayment of access charges and all those
25 hoped-for Tribal activities, there is still a barrier that

1 has to be jumped over by people who invested in this deal
2 for a profit. So we have a ways to go before anything the
3 Tribal Treasurer talked about is even at issue.

4 THE COURT: Although under the agreement, the
5 money that is now net profits, according to the testimony,
6 is being used to improve the infrastructure of the Tribe.
7 So the Tribe may not be benefiting by cash, but they are
8 certainly benefiting by having their infrastructure
9 improved.

10 MR. KNUDSON: The money for that is coming from
11 WideVoice. WideVoice is putting money in there to make a
12 profit. More important --

13 THE COURT: But if Sprint was paying the bills
14 that were sent to them, that money would be going in to
15 improving the infrastructure.

16 MR. KNUDSON: At this point they would say we're
17 going to use it for buildout. Again, I say whether they
18 are entitled to charge Sprint for those services and use it
19 for that purpose is still a question of Federal law and
20 should be decided in this Courtroom or the FCC.

21 So what they would like to use that for, and we don't
22 know what their ultimate overall investment plan is or how
23 much they really need, I mean a million dollars goes a long
24 ways when you are only serving a Reservation, even
25 including nonmembers, of just over two thousand people.

1 So to put everyone on a wireless system shouldn't cost
2 two million dollars, if it's approximately a hundred
3 dollars to put one of these ATA pieces in a home, which is
4 what we heard Mr. Williams say.

5 So take a look at the Joint Venture Agreement. Let's
6 talk again about what we were hearing by way of the threat
7 to Tribal sovereignty and the challenged Tribal Court
8 jurisdiction. This is why I brought in the Joint Venture
9 Agreement and the Midstate Interconnection Agreement. Both
10 of these agreements elect arbitration.

11 The Joint Venture Agreement speaks to binding
12 arbitration. What that means is that parties that are
13 entering into an agreement with the Tribe are telling the
14 Tribe, "We don't want to be part of the Tribal Court
15 system." The Tribe or NAT, in terms of the Midstate deal,
16 are voluntarily electing to go along with that position.
17 So it follows they cannot argue today that Sprint's
18 challenge to Tribal Court jurisdiction somehow implicates
19 Tribal sovereignty or Tribal self-government.

20 THE COURT: Isn't that an exercise itself of
21 Tribal sovereignty, that you make the choice to waive
22 sovereignty in some instances, or you make the choice to
23 agree to arbitration in other instances, that that in and
24 of itself is an act of Tribal self-governance? That they
25 are involved in making that choice?

1 MR. KNUDSON: The point being is it is not so
2 essential to Tribal self-government to the existence of the
3 Tribe. They are willing to go along with it for business
4 reasons to meet the Montana second exception. Their
5 willingness to agree to that must mean that willingness to
6 waive Tribal Court jurisdiction doesn't threaten
7 catastrophic implications to Tribal survival. It doesn't
8 imperil Tribal self-government. So the high threshold that
9 they claim to meet is belied by their own willingness to
10 voluntarily agree to binding arbitration off the
11 Reservation under South Dakota law, which is what they
12 elect, or Federal law in some circumstances.

13 So what we have here is a situation where they are
14 entering into voluntary agreements saying, okay, we don't
15 need to be in Tribal Court. It's not that important.
16 Well, my point is the same. Challenging Tribal Court
17 jurisdiction, where we are being involuntarily hailed into
18 Tribal Court, likewise doesn't threaten Tribal Court
19 jurisdiction. Otherwise no one could ever challenge Tribal
20 Court jurisdiction.

21 That argument, you would always run up to what we are
22 hearing today. If that's the rule, there's no point to
23 Strate, because it would be an imperative. Strate says
24 it's not an imperative. It's a prudential rule of comity.
25 If it's a prudential rule in comity, it's not automatic.

1 Therefore, Strate controls here, because 207 plainly,
2 unambiguously says jurisdiction belongs in Federal Court or
3 the FCC. Likewise, with no conduct on the Reservation, we
4 don't get to the second Montana exception.

5 THE COURT: Let's say the Court finds all of the
6 claim here falls under 207. Do I need to address other
7 issues if I find there's then field preemption?

8 MR. KNUDSON: If you hold that Section 207 vests
9 this Court with exclusive jurisdiction over this dispute,
10 that gets us the resolution of where this case goes
11 forward. The Court should issue an injunction against
12 further proceedings in Tribal Court.

13 THE COURT: My question is would I then need to
14 address A-1 Contractors, Nevada v. Hicks, Montana?

15 MR. KNUDSON: You wouldn't need to look to A-1
16 Contractors v. Strate and Hicks, because they have alleged
17 this Court should stay because of the exhaustion rule.
18 Strate says where jurisdiction so clearly doesn't rest in
19 Tribal Court, you don't need to exhaust because it would
20 just be delay. So that rule of exhaustion falls away.

21 I think you would analytically have to reach Strate
22 and Hicks, but you would be looking towards the
23 jurisdiction prerogative Congress set up putting
24 jurisdiction over this dispute in Federal Court or the FCC.

25 We wouldn't need to get to Montana as a result. It

1 would be unnecessary to address the consensual part of it
2 or the second Montana exception. You could do as an
3 alternative holding, since we're not on the Reservation,
4 Hornell controls. Likewise, there's no need to refer to
5 Tribal Court. Hornell did direct the District Court to
6 vacate the Referral Order, because the conduct wasn't on
7 the Reservation.

8 THE COURT: What if I find this traffic doesn't
9 fall under 207? I find, for some reason, 207 doesn't
10 apply?

11 MR. KNUDSON: If you find 207 doesn't control,
12 you have to address the question of whether or not the
13 conduct is on the Reservation or off. If it's off, Hornell
14 controls it. Back with Strate, saying exhaustion is not
15 required.

16 The final analysis is assuming there's some conduct on
17 the Reservation, even if it's not consensual, then you go
18 to the second Montana exception. Absent presence on the
19 Reservation, you don't need to get there either.

20 I just want to conclude that they talked about other
21 businesses coming on the Reservation. This is an issue
22 limited to telecommunications activities. There was an
23 existing incumbent local exchange carrier. Businesses that
24 think they can make a profit doing business on the
25 Reservation don't need free service to come onto the

1 Reservation. So the idea of attracting off-Reservation
2 investments doesn't depend on NAT's existence. It depends
3 on market activities that might otherwise exist. They
4 could use Midstate or Venture Cooperative as local exchange
5 carriers for their service. So the idea that this is going
6 to cause people --

7 THE COURT: But both of those entities have been
8 there for a long time and have not provided the service.
9 Why would they now?

10 MR. KNUDSON: What we heard, even from the
11 Treasurer, isn't that they don't provide the service, is
12 that --

13 THE COURT: The members can't afford their
14 service.

15 MR. KNUDSON: Their price is too high. But when
16 we are talking about parties coming from outside the
17 Reservation and looking for business activities, if they
18 perceive one, it isn't because there's free telephone
19 service. The telephone service from Midstates or Venture
20 Cooperative was available and they could set up and had
21 interstate access, if they needed it as part of their
22 business, coming onto the Reservation. I think it
23 overstates the case. Somehow NAT's free service to a
24 hundred Tribal members or the people living on the
25 Reservation somehow opens up this Reservation to new

1 economic investment, because that opportunity was
2 available, but before the fact. So I think they exaggerate
3 when they say that.

4 I find it important that the Universal Service Funds
5 they've turned down. It's clear they don't want Federal
6 regulatory oversight. They don't want the Federal
7 government looking at what the business plan is, because it
8 opens a can of worms. This is a very important issue which
9 even the FCC is taking a hard look at what this means with
10 respect to the overall implications for the local access
11 service charge regime under the legacy system.

12 So, yet again, belies and undercuts their argument
13 that something NAT is doing is critical to Tribal survival.
14 That is not the case. Why would you turn down free money?
15 All I can say is they are turning down free money because
16 they don't want to be under the glare of the Federal
17 Communications Commission for their services.

18 I think with respect to the other aspects of our
19 Preliminary Injunction Motion, we believe we meet the
20 Dataphase factors of irreparable harm, balance of harm, and
21 the public interest. If Congress has said Section 207
22 controls, then Congress has said where the public interest
23 lies and where this should be decided.

24 Sprint will undergo irreparable harm if it is forced
25 to litigate in a forum where it has -- basically Congress

1 says it's entitled to a Federal forum under Section 207.
2 We have serious reservations, notwithstanding what the
3 Tribal Council has done, as to the due process we would
4 receive in Tribal Court. Clearly they've switched Judges
5 in the middle of this, and hired somebody from North Dakota
6 who is not a telecommunications expert to take a look at
7 this. We do worry about going forward in that particular
8 Tribunal.

9 THE COURT: But Judge Jones is a very experienced
10 Tribal Judge and a Law Professor at the University of North
11 Dakota School of Law.

12 MR. KNUDSON: He is also an advocate for Tribal
13 causes. The neutrality that we would hope for is also
14 something we worry about. I don't doubt his intellectual
15 acumen at all.

16 THE COURT: Well, what is the irreparable harm
17 Sprint would have if Tribal Court determined they had
18 jurisdiction, and if this Court stayed the matter until
19 that determination was made, and ultimately decided whether
20 or not -- whether Tribal Court did have jurisdiction, what
21 would be the irreparable harm to Sprint at that point?

22 MR. KNUDSON: Well, I think it's the same
23 analysis we're entitled to a ruling now under Hornell,
24 under Strate. We're not required to endure the delay of
25 getting a resolution of this case. So a prompt resolution

1 of where we stand is important. Denying us that
2 opportunity would constitute irreparable harm.

3 THE COURT: As I understand it, you are not
4 paying the bills that are being sent to you, anyway.

5 MR. KNUDSON: We have hanging over us a claim
6 which they say is very substantial. They also have brought
7 punitive damages claims in Tribal Court. There's a lot of
8 uncertainty that sits here.

9 I go back again to what Justice Ginsburg said in
10 Strate. Exhaustion must give way if jurisdiction is clear
11 that it doesn't exist in Tribal Court. That being a
12 prudential rule, you are causing Sprint to endure another
13 round of litigation in a forum, denying it an opportunity
14 to decide this in a forum that Congress has set up and said
15 Sprint is entitled to use, and forcing it to go through a
16 tribunal where Judge Jones is subject to serve at the
17 pleasure of the Tribal Council. That's clear in the Tribal
18 ordinances that create that position.

19 So that's where our irreparable harm comes from is
20 what the Supreme Court said in Strate, and what it
21 amplified in Hicks, and what Judge Lay said to the District
22 Court in Hornell. If it doesn't belong in Tribal Court,
23 don't go through the exercise of having the Tribal Court
24 conclude otherwise, and then come back to this Court for
25 relief.

1 On that basis we would argue we would suffer
2 irreparable harm if we were forced to continue litigation
3 in Tribal Court. That concludes our argument. I would
4 like to reserve some rebuttal, if I may.

5 THE COURT: You may. Thank you. Mr. Swier?

6 MR. SWIER: Your Honor, with the Court's
7 indulgence, could Ms. Roberts make her short argument
8 first, and then I could conclude?

9 THE COURT: Sure. Ms. Roberts?

10 MS. ROBERTS: Thank you, Your Honor. A party can
11 challenge Tribal Court jurisdiction all they want. What we
12 would like the opportunity for them to do is to do it in
13 Tribal Court.

14 THE COURT: So why do you think Section 207
15 doesn't exclusively give jurisdiction to either Federal
16 Court or to the FCC?

17 MS. ROBERTS: Your Honor, the reason NAT brought
18 suit in Tribal Court was to enforce a Tribal Utility
19 Authority Order. The Tribal Utility Order addressed this
20 to begin with. It was being ignored. Instead of Sprint
21 coming to talk, discuss, attend a hearing, any of the
22 above, they went and ignored the Utility Authority Order.

23 THE COURT: Isn't the Utility Authority Order
24 claiming damages based on a common carrier?

25 MS. ROBERTS: Your Honor, I think this is where

1 it comes down to.

2 THE COURT: I mean you would agree Sprint is a
3 common carrier.

4 MS. ROBERTS: Yes.

5 THE COURT: And you are trying to get damages
6 against a common carrier.

7 MS. ROBERTS: Your Honor, that in itself goes to
8 the very merits of the case. For a moment, and we're not
9 even to the point of arguing the merits of the case.

10 THE COURT: This is just a jurisdictional
11 statute, 207. It doesn't go to the merits of who wins
12 what. It goes to who has jurisdiction of the claim. That
13 is the issue you are addressing is you think it should be
14 Tribal Court. I want to know why you think 207 doesn't
15 apply.

16 MS. ROBERTS: I'm not arguing where jurisdiction
17 lies. That is for the Court to decide. I am hoping it's
18 the Tribal Court to decide where jurisdiction lies. Just
19 because this is argued in Tribal Court doesn't mean Tribal
20 Court will assume jurisdiction. It can go in front of
21 Judge Jones, which I would like to state for the record,
22 would in no way -- the --

23 THE COURT: Insinuation.

24 MS. ROBERTS: Thank you. Of counsel that in some
25 way his rulings would be determined because he's been hired

1 by Tribal Council or in some way his rulings would be
2 biased is offensive. He is one of the most outstanding --
3 it would be like him coming in and questioning you
4 yourself. I am appalled by what I heard him saying.

5 THE COURT: Well, and I have no doubt Judge Jones
6 would be very fair. I have known Judge Jones for a long
7 time. He's extremely competent, very bright, and
8 everything I've read he's written has been very well
9 briefed and fair to all of the parties that are in front of
10 him. I don't think there's any question he wouldn't be a
11 competent Judge to hear this case in Tribal Court.

12 The issue I have to look at is if you apply the
13 principles of A-1 Contractors and Nevada v. Hicks, and if
14 there's no question that either Federal Court or the FCC
15 has jurisdiction, then this Court would not wait until
16 Tribal Court exhausted their remedies. That's why I'm
17 trying to think why you think Section 207 doesn't apply.
18 Or if it does apply, why would Tribal Court have
19 jurisdiction over this matter?

20 MS. ROBERTS: Your Honor, maybe if I could
21 explain it in a roundabout way. The fundamental issue
22 today, I believe, in front of this Court is not whether
23 Tribal Court has jurisdiction, but whether or not Tribal
24 Court should address the question of where jurisdiction
25 lies. Congress has made it very clear that they should

1 have first initial exclusive jurisdiction over actions
2 arising within the Reservation. That's the point.

3 We're hearing arguments today over what is happening
4 on the Reservation or what would apply to give jurisdiction
5 and whatnot. Those types of arguments argue against Tribal
6 Court jurisdiction, but do it in the forum and give them,
7 as Congress has outlined in the Tribal Court exhaustion, to
8 address that very argument.

9 Basically they should be able to -- when it involves
10 Indian parties or non-Indian parties, when it involves
11 Reservation affairs, they need to expend all Tribal
12 remedies. In the National Farmers Union case they listed
13 the three reasons for it. That was there is a very strong
14 Congressional policy of strengthening Tribal
15 self-government. The second one is to serve the orderly
16 administration of justice. Thirdly, to provide the parties
17 in Court involved with the benefit of Tribal Court
18 expertise, as they outlined in National Farmers Union.

19 All three of these purposes for exhaustion are aimed
20 at strengthening the Tribal system. That is something the
21 Federal government has continually and strongly encouraged.

22 I am not arguing who has jurisdiction. What I am
23 arguing is that it should be fought out in Tribal Court.
24 They may decide they don't have jurisdiction, but to give
25 them the respect, because when counsel argues none of this

1 took place on the Reservation and that it doesn't deeply
2 impact their actual existence, and he kind of mocked that
3 or poo-pooed the idea that it has consequences, that simply
4 is not true.

5 This involves a Tribally-owned company. It involves
6 actions on and within the exterior boundaries of the
7 Reservation. It involves the Tribal Utility Authority's
8 regulatory authority that is being questioned. They don't
9 even want to acknowledge it. It acknowledges the Tribal
10 Court's adjudicating authorities. It involves the Tribe's
11 financial stability, as you heard in the testimony.

12 It involves the Tribe's economic development effort.
13 As counsel was saying, "I don't think free phone service is
14 going to attract another business to come on on economic
15 development." That is not the point at all. We're not
16 talking about that.

17 We're talking about why in the world would any other
18 business risk investment, time, energy, to come on and try
19 to start something when they could be hauled to Federal
20 Court like this, when if they set something in motion, if
21 there's some sort of in the Tribal code or some sort of
22 regulation the Tribe has made, you just can ignore it. You
23 have bills? Don't pay it because the Tribal Authority,
24 they can't do anything about it. Counsel can't do anything
25 about it. Utility Authority can't do anything about it.

1 You can't take them to Tribal Court. So you get hauled to
2 Federal Court.

3 It's not that NAT giving away free phones is what
4 attracts businesses. It's the absolute disaster and
5 destruction of a friendly economic environment for
6 entrepreneurs and for businesses to come on to the
7 Reservation. No one would risk going on that Reservation
8 if this is the way disputes are handled, and when Sprint
9 can just walk over every part of Tribal government.

10 THE COURT: But under National Farmers Union,
11 which is one of the cases you just relied on, it recognizes
12 three exceptions to exhaustion. The second one is where
13 the case is patently violative of expressed jurisdictional
14 prohibitions. That's why I keep going back to Section 207,
15 which indicates where a person claiming to be damaged by a
16 common carrier files a complaint, that it has to be handled
17 either by the FCC or by Federal Court.

18 So under National Farmers Union, how do you get around
19 that second exception?

20 MS. ROBERTS: I would love to have it in front of
21 me to address it. It does. I'll leave that up to
22 Mr. Swier to address it, if you don't mind, Your Honor.

23 THE COURT: Okay. I would think when you are
24 representing the Tribal Court, I thought the question was
25 appropriate for you, because you are trying to argue that

1 there should be exhaustion first before this Court would
2 decide. It seemed really relevant for you to address that
3 issue.

4 MS. ROBERTS: It is, and I apologize. Maybe I'm
5 just not understanding exactly what you are asking and
6 where you are coming. I'm not understanding exactly --

7 THE COURT: Well, you were arguing National
8 Farmers Union indicates this Court should not decide in the
9 first instance whether the Tribal Court has jurisdiction,
10 that the Tribal Court should be able to exhaust that issue
11 themselves to decide whether or not they have their own
12 jurisdiction.

13 But National Farmers Union established three
14 exceptions to that exhaustion doctrine. The second
15 exception to that exhaustion doctrine was if the case is
16 patently violative of expressed jurisdictional
17 prohibitions. Here the Plaintiffs are arguing there is
18 field preemption because of Section 207. That would make
19 it that there is an expressed jurisdictional prohibition
20 with regard to Tribal Courts handling these matters.

21 So I'm wondering why, under the case you cited,
22 National Farmers Union, why that second exception to
23 exhaustion wouldn't apply? Are you arguing it doesn't fall
24 under Section 207? What is your position as to why there
25 is not field preemption under Section 207?

1 MS. ROBERTS: I would either argue there would
2 not be, and I would also argue the other exceptions and
3 provisions outlined by the Court would preempt -- they need
4 to be addressed before.

5 I think that the Courts have made it clear that
6 disputes such as this go to the very heart of
7 self-government and self-determination, and Congress has
8 over and over made it very clear that that is a perfect
9 case for Tribal exhaustion to occur. I don't know if that
10 particularly answers your questions, and Mr. Swier can more
11 fully address it.

12 But the one, I think, point that case law makes clear
13 is that the first opportunity to evaluate these factual
14 issues that you are addressing and the legal basis for the
15 challenge, such as what we've been talking about today is
16 in Tribal Court. The risk of what is happening today and
17 the procedural nightmare that's happening, when it's in
18 Tribal Court and in the South Dakota PUC and it's here, are
19 exactly the types of situations that the exhaustion remedy
20 or doctrine seeks to remedy.

21 THE COURT: I guess the thing that concerns me is
22 I've had many cases in this same posture where I have
23 stayed my ruling and allowed the Tribal Court to exhaust
24 the determination of whether they have jurisdiction or not.
25 I've done that multiple times.

1 I've never had a case before, though, where there was
2 a statute that indicated if that statute applied, the
3 jurisdiction lied only in Federal Court or in a Federal
4 regulatory agency.

5 So that's what I'm trying to figure out. When there's
6 field preemption under a statute, why would I allow the
7 Tribal Court to exhaust?

8 MS. ROBERTS: I would argue that doesn't. What
9 I'm also arguing is -- I guess I would argue that it would
10 not.

11 THE COURT: I understand your position. Why are
12 you taking that position? That would be more helpful to
13 me. I can't just write in there, "The Tribe says it
14 doesn't apply." I have to articulate why it doesn't apply.

15 MS. ROBERTS: I understand, Your Honor.
16 Basically what we have here is a dispute over a bill not
17 being paid. That is the fundamental dispute. I don't
18 think that we even get to the rest until basically they
19 bring in all the FCC and telecommunications and Federal law
20 and whatnot, which is a new position of theirs, because
21 they started over in South Dakota PUC addressing this
22 issue.

23 But it fundamentally comes down to, and I think they
24 are just using that to muddy the water, it is a dispute
25 over whether or not they need to pay a bill for services.

1 That is a simple matter that can be addressed in Tribal
2 Court, if that's where it stops.

3 THE COURT: If it's just a dispute about a bill
4 not being paid, that's why I'm concerned Section 207
5 applies. That says if it's any person claiming to be
6 damaged by a common carrier, that's when Section 207
7 applies. That's basically what it is is a dispute about a
8 bill not being paid by a common carrier. You'll have to
9 explain to me why Section 207 doesn't apply then.

10 MS. ROBERTS: Your Honor, the reason why it
11 wouldn't apply is because -- my argument or the Tribe's
12 argument is to get it back into Tribal Court, so these
13 facts can be laid out. It's more than just whether or not
14 a bill is being disputed. It's that NAT used the Tribal
15 Utility Authority. They used the Authority that was in
16 place to make a complaint. They issued an order. That has
17 been ignored.

18 So NAT has gone and sought the next remedy in that
19 jurisdiction, which is Tribal Court, to come and address
20 these issues. If once it's in Tribal Court and the Judge
21 determines there is an injury caused by a common carrier or
22 whatnot, then at that point they would have to say this
23 Court wouldn't have jurisdiction.

24 But the main point of this whole dispute is the Tribal
25 Court gets to take first look at these issues. Just

1 because it ends up in Tribal Court does not mean, of
2 course, they will accept jurisdiction.

3 Before we get to the merits of whether or not someone
4 has been injured by a common carrier, it should go back to
5 Tribal Court or be allowed to progress through Tribal
6 Court, so that those facts can come out.

7 The more important issue before this Court -- yes, the
8 ultimate question is jurisdiction, whether this case should
9 be heard in this Court or Tribal Court. That is the
10 ultimate question. However, the first question that needs
11 to be addressed is exhaustion. Who should make the initial
12 decision on the ultimate decision?

13 We have a policy that's encouraging Tribal
14 self-government. We recognize Indian Tribes, and that they
15 retain the attributes of sovereignty over their members,
16 their territory, and in Court cases it's been made clear
17 over nonmembers, as well, in civil matters. This is an
18 important matter of Tribal sovereignty.

19 THE COURT: So if this Court did stay its
20 decision and allow the Tribal Court to exhaust, how long of
21 a time period would that take for the Tribal Court to
22 exhaust?

23 MS. ROBERTS: Well, Your Honor, the Tribal Court
24 has already set a briefing schedule in this matter. As far
25 as I know, the briefing schedule extends into November, and

1 then I believe there will be an evidentiary hearing simply
2 on, from my understanding, simply on the jurisdiction issue
3 alone. Not on the merits of the case.

4 The Tribal Court first has to determine whether they
5 have jurisdiction. They may say they don't, if they come
6 to the conclusion that a common carrier has caused the
7 injury. But that's going to the ultimate question of who
8 has jurisdiction. I apologize for stumbling over your
9 inquiries.

10 But before we even get to that question, there's a
11 first question of whether or not this is the very
12 appropriate case for Tribal exhaustion. That's the first
13 question. Whether or not who has jurisdiction is the
14 ultimate question, which then that would apply.

15 But in this case, if I just could point out, Sprint is
16 attacking the legitimacy of the Tribal Court, a
17 Tribally-owned limited liability company, services within
18 the boundaries of the Reservation, a Tribal Authority's
19 ability to plan and oversee utility services, the Tribe's
20 own telecommunications plan, the Utility Authority's Order,
21 their economic stability, their political stability, their
22 financial stability.

23 This dispute does go to the very heart of their
24 self-determination, their resources, and the administration
25 of justice. Sprint's actions do directly threaten and

1 affect the political integrity, political security, health
2 and welfare of the Tribe. All of those are satisfied, and
3 all of those point towards Tribal exhaustion.

4 In asking questions of whether it's a common carrier
5 and if that common carrier has injured somebody, that is
6 already addressing who has jurisdiction. What I'm asking
7 the Court for today is to allow Tribal Court to determine
8 jurisdiction.

9 THE COURT: You agree that Sprint is a nonmember?

10 MS. ROBERTS: Yes, Your Honor. I also believe
11 there is plenty of case law that allows in some civil
12 disputes the Tribe to exercise jurisdiction over
13 nonmembers. It would be like saying -- I want to come up
14 with an example, but I don't have one coming quickly to
15 mind. Nonmembers are in Tribal Court all the time in civil
16 matters of divorce or custody. They exercise jurisdiction.

17 THE COURT: Where they are married to a member?

18 MS. ROBERTS: Yes.

19 THE COURT: You wouldn't have two nonmembers
20 coming into Tribal Court for a divorce or custody issue?

21 MS. ROBERTS: You can if they submit. That's
22 different. I was struggling to come up with the exact
23 example. Simply because they are not a member, they are --
24 their presence is on the Reservation and they are doing
25 business with a company, NAT, that's 51 percent owned by

1 the Tribe.

2 THE COURT: How do you distinguish this case from
3 A-1 Contractors?

4 MS. ROBERTS: In this case I believe you have all
5 the prongs, all the elements necessary that satisfies every
6 area. As far as you have Sprint, the telephone, you know,
7 getting into the merits perhaps. But they have to use each
8 other's lines. Everyone does use everyone's lines. AT&T
9 uses Sprint's lines. NAT uses other people's lines and
10 provides services, and there's this back and forth use of
11 business. They are conducting business together. That's
12 just the way it is.

13 If you cross over from one place to the other -- even
14 NAT. Some of the sections of lines are owned by someone.
15 They have to pay them. Another section is owned by someone
16 else. They have to pay them. Sprint is doing business
17 with NAT, and NAT is 51 percent owned by the Tribe. This
18 is not two nontribe -- this is not a nontribal entity in
19 this case. It is a Tribal business. It is governed by the
20 Tribe. There is a presence on the Tribe.

21 Just because Sprint doesn't have any facilities on the
22 boundaries of the Reservation does not mean they are not
23 doing business with NAT, like there would be with Sprint or
24 AT&T. It's the exact same instance. Just because Sprint
25 doesn't have facilities or an office on the Reservation

1 doesn't change the facts. They may not -- I don't know if
2 this is true or not. They may not have an office or lines
3 within the State of South Dakota, but they still use
4 people's lines across the State of South Dakota.
5 Therefore, they have a presence in South Dakota, and
6 they're doing business in South Dakota.

7 THE COURT: Thank you. Anything further?

8 MS. ROBERTS: Your Honor, just with the
9 preliminary injunction, you brought it up with the other
10 counsel. This should only be issued in cases clearly
11 warranting it. Not doubtful cases. They could not come up
12 with a threat of irreparable harm. I would argue if you do
13 grant it, it would cause irreparable harm to the Tribe.

14 The movant bears the burden of proof for all the
15 factors. I do not believe they met that burden and did not
16 have any specifics of where harm could be by requiring them
17 to exercise Tribal exhaustion.

18 So we would ask that the Court deny Sprint's Motion
19 for an Injunction and require them to exercise Tribal
20 exhaustion in this matter. Thank you.

21 THE COURT: Mr. Swier? We're going to take a
22 10-minute recess.

23 (Recess from 3:37 until 3:52)

24 THE COURT: Mr. Swier?

25 MR. SWIER: Your Honor, I presume the Court is

1 going to ask me the preemption question on Section 207. I
2 am going to get right to that.

3 First of all, I think we have to keep in mind what we
4 are here for today. Sprint has filed a Complaint
5 requesting a Preliminary Injunction be issued. That is why
6 we are here today. NAT's Motion for a Stay based on Tribal
7 exhaustion is pending, but that issue has not been resolved
8 through the briefing. I am still allowed to issue my reply
9 brief to that.

10 So I think, even though we're going to talk about it,
11 I think for today it's incredibly premature for the Court
12 to decide on anything other than the preliminary injunction
13 issue. We're going to talk about the exhaustion, but I
14 don't think today, because the parties can still submit
15 some briefing on the issue, that unless the Court deems it
16 appropriate, I don't think that issue can be foreclosed
17 today or decided.

18 THE COURT: I gave both sides an opportunity to
19 file their reply brief. So I won't decide either issue
20 today until I've gotten both of those reply briefs in. But
21 I think you can tell the issue with Section 207 is an issue
22 you need to focus on in your reply brief, and if you can
23 address it today, I would appreciate that, too.

24 MR. SWIER: I will. Let me tell you why Section
25 207 does not apply in this case.

1 Number one is the Federal Communications Commission
2 and Congress has never foreclosed on a Tribe's sovereign
3 authority to regulate its own telecommunications system.
4 Let me go through that once more. The FCC and Congress has
5 never foreclosed on a Tribe's sovereign authority to
6 regulate its own telecommunications system.

7 Here is why that's important, especially when we are
8 dealing with telecommunications and FCC laws and
9 regulations. First of all, the FCC has always recognized
10 that telecommunications are absolutely critical to Tribal
11 development.

12 Next, the FCC has always recognized that Tribal
13 governments, quote, have the right to set their own
14 telecommunication priorities and goals for the welfare of
15 their membership. These policy statements and these
16 policies by the FCC are included in our Brief in Opposition
17 to Preliminary Injunction.

18 So that I think takes this entire telecommunications
19 area, when we're dealing with a Tribe, and puts it in its
20 own unique genre. That is different from just a flat-out
21 textual reading of Section 207. Let me give you an
22 example.

23 Probably the seminal Tribal exhaustion case in the
24 Eighth Circuit is the Bruce Lien case, 93 F.3d 1412. That
25 was a case decided by the Eighth Circuit in 1996.

1 In that case the parties were fighting about an issue
2 that undoubtedly came under the Indian Gaming Regulatory
3 Act, IGRA, which I know this Court is familiar with. In my
4 job in the Attorney General's office, I became extremely
5 familiar with IGRA. The argument, of course, that the
6 nontribal entity made was this. They said that IGRA
7 entirely preempted the field of Indian gaming, and it
8 directs -- excuse me, and it divests Tribal Courts of
9 jurisdiction. That was the company's argument, that this
10 gaming dispute cannot be in Tribal Court, because IGRA
11 encompasses all Tribal gaming issues. So they said because
12 IGRA preempts, you can't do anything in Tribal Court
13 regarding Tribal gaming. It has to be in Federal Court
14 under IGRA.

15 Here is what the Court said on that. It said, "IGRA
16 says nothing about divesting Tribal Courts of jurisdiction
17 regarding" -- this is the key -- "Reservation affairs."
18 The field of Indian gaming under IGRA has as big or even a
19 larger preemption umbrella than does the Federal
20 Communications Act.

21 THE COURT: So do you think *Strate vs. A-1*
22 *Contractors* in any way affects the holding in *Bruce Lien*?
23 That came the following year.

24 MR. SWIER: It did. My answer is no. Here is
25 why. The *Strate* case, we were talking about everybody was

1 a non-Indian party. No Indians involved in that case at
2 all. And it involved a car accident on the Reservation.
3 The key is that the Strate case was entirely non-Indian
4 parties.

5 In this case NAT is a majority Tribally-owned company.
6 Without question, without any reasonable question, all the
7 activities are occurring on the Reservation. Now, whether
8 we want to bicker about that or not, that would be an issue
9 regarding jurisdiction in the Montana exceptions. But A-1
10 Contractors v. Strate I feel is entirely inapplicable.
11 Again, you are dealing with non-Indian parties and a car
12 accident case.

13 Nevada v. Hicks is one of the other five cases Sprint
14 relied on. Nevada v. Hicks was a civil rights and tort
15 claim case which arose from state officials trying to serve
16 process for an off-Reservation crime. Again, the unique
17 facts in this case, nothing even remotely similar to what
18 was in Strate and Nevada vs. Hicks. Entirely different
19 factual scenarios.

20 The other cases that Sprint relied on, the Christian
21 Children's Fund case. That was a 2000 decision here in
22 South Dakota. In that case it makes our argument even
23 stronger. In Christian Children's Fund, Tribal remedies
24 were actually exhausted. They went through the Tribal
25 exhaustion process there. We were dealing in that case

1 with all non-Indian parties again. No Indians were
2 involved in that case. The Tribe was not a party to any
3 agreement in that case, unlike the facts here. There were
4 no Tribal relations or activities whatsoever in the
5 Children's Fund case.

6 THE COURT: You said "unlike the facts here."
7 The Tribe is a party to an agreement here? Is there
8 actually an agreement between the Tribe and any of the
9 entities here?

10 MR. SWIER: I think the Tribe, as the majority
11 owner of NAT, the Tribe is a party here, because the Tribe
12 is a majority owner of NAT.

13 THE COURT: I guess what I mean, is there an
14 agreement between the Tribe and Sprint? Any agreements
15 with Sprint?

16 MR. SWIER: Not any written agreements. I don't
17 know this for sure, but I don't think that Sprint has an
18 official written agreement with every single competitive
19 local exchange carrier and local exchange carrier in the
20 country. This routing of these calls is how this works.

21 THE COURT: What about Sprint's argument that
22 because it's a nonlegacy, the last link is a nonlegacy
23 link, that there needs to be a negotiated agreement.

24 MR. SWIER: I think, Your Honor, if we're going
25 to get all the way to the point that we are talking about

1 trunk links and line sides, that goes to the incredibly
2 complex merits of the case. But that doesn't go to the
3 issue we're talking about today of preliminary injunctive
4 relief or of Tribal exhaustion.

5 THE COURT: It does go to the issue of whether
6 there is an agreement.

7 MR. SWIER: I'm aware of no written agreement
8 Sprint and NAT have. However, Sprint has customers who
9 make calls. Sprint does not have the infrastructure around
10 the country to keep its customers' calls entirely on its
11 privately-owned infrastructure. They need the local
12 exchange carrier up in Aberdeen, or they need the local
13 exchange carrier out in Winner to carry their calls. They
14 pay for those. They pay the tariff rates for those.

15 But now because we're dealing with an exchange carrier
16 that's Tribally-owned and based within the boundaries of
17 the Reservation, they don't want to pay. What's the
18 difference between those calls getting routed up to Winner
19 and those get paid, and the calls going to Ft. Thompson and
20 those calls getting paid? There is no difference, other
21 than the fact that it's a Tribal entity that is supposed to
22 be paid, and it occurs within the exterior boundaries of
23 the Reservation.

24 So I don't think Sprint has a written contract between
25 Sprint and let's say Northern Valley Communications up by

1 Aberdeen. I think if you are going to be a common carrier
2 and deliver calls, you pay your tariffs. Under the filed
3 rate doctrine, once those tariffs are accepted by either
4 the FCC or by the Utility Authority, there is an implied
5 agreement there that you pay those tariffs.

6 THE COURT: Although I know they are not paid the
7 Northern Valley tariff either, since you threw their name
8 out.

9 MR. SWIER: I know that, too, because I'm
10 involved in that now, also. But you can see where I'm
11 going. There are tariffs, of course, that are paid to
12 Northern Valley. It's just that these tariffs they say
13 comes from the majority of traffic pumping are the ones
14 they aren't paying. They are paying the other ones.
15 That's because to play ball in this area, that's how it's
16 done. You make your payments.

17 Otherwise a Sprint customer would try to call from
18 Omaha, Nebraska, up to Groton, and let's say Sprint has
19 facilities in Omaha. Great. Well, as soon as Sprint's
20 facilities end in Omaha and they don't have facilities in
21 Groton, their customer can't make a call from Omaha to
22 Groton, because it relies on that infrastructure in between
23 Omaha and Groton, and those tariffs are paid, because
24 Sprint then uses the infrastructure of other companies.

25 To compensate those other companies for their

1 infrastructure investments, they pay the tariffs. That's
2 why the direct contract issue between Sprint and NAT is
3 really a red herring. I don't see that applicable here at
4 all. They presented no evidence that they have individual
5 contracts with every CLEC or LEC in the country. I don't
6 think that's how it works.

7 THE COURT: I interrupted you on the discussion
8 about the Christian Children's Fund. Do you want to go
9 back to why you think that's different?

10 MR. SWIER: Here is why it's different. Four
11 reasons. Number one, of course, you had that case where
12 Tribal remedies were actually exhausted in that case. The
13 parties went through the exhaustion procedure.

14 Number two, we're talking in Christian Children's
15 about nontribal parties, entirely nontribal parties in
16 Christian Children's.

17 Number three, the Tribe was not a party in that case
18 to any agreement. Again, it may be an implied agreement
19 between Sprint and NAT, but there's an agreement. In
20 Christian Children's, no agreement whatsoever.

21 Finally, Your Honor, the fourth reason this Children's
22 Fund case is different is there were no Tribal activities
23 or relations whatsoever. Everything took place off site of
24 the Tribe. It wasn't on the Reservation. It didn't
25 involve Tribal members. That's why Christian Children's

1 Fund not only doesn't help Sprint, but I think it helps my
2 case because exhaustion was gone through.

3 The other case, Your Honor, if I may, the Hornell
4 Brewing case. That's a case that's been relied on by
5 Sprint heavily here. In that case I only think one fact is
6 relevant that totally differentiates that case. In that
7 case the brewery did not conduct any activities on the
8 Reservation. Pure and simple. The Court found you can't
9 bring the brewery into Tribal Court, because the brewery
10 didn't conduct any activities on the Reservation. There
11 were no Reservation activities.

12 Again, as we've shown today, dozens and dozens of
13 activities in this case take place on the Reservation by
14 Tribally-owned company. So that's how the Hornell Brewing
15 case can be differentiated from this case.

16 Finally, Your Honor, the AT&T vs. Coeur D'Alene Tribe
17 case, Ninth Circuit case. That also involved IGRA. That
18 was an IGRA case, just like the Eighth Circuit's decision
19 in the Bruce Lien case. It was an Indian gaming case. It
20 was a case where the Tribe was seeking an enforcement of a
21 Tribal Court judgment. In that case, probably key again
22 for our side is that Tribal exhaustion was done. The
23 Tribal remedies were exhausted in that case.

24 So that case leads again to the fact that in these
25 type of circumstances, the cases relied upon by Sprint

1 either, number one, show Tribal exhaustion was actually
2 proceeded with, or, number two, are so factually distinct
3 that they really don't have any precedential value when it
4 comes to this unique set of circumstances.

5 THE COURT: Are you familiar with El Paso Natural
6 Gas Company case, a U.S. Supreme Court opinion?

7 MR. SWIER: Your Honor, I'm familiar with it.
8 I'm not familiar with it to a point that I could provide
9 the Court a detailed analysis, like I could in the others,
10 but in our brief to the Court I could certainly address
11 that at that time. What was that case, Your Honor?

12 THE COURT: El Paso Natural Gas Company. It's at
13 526 U.S. 473, a 1999 U.S. Supreme Court opinion.

14 MR. SWIER: I will address that. Your Honor,
15 just at that point, I think that NAT has a very good
16 argument that Section 207 does not provide exclusive
17 jurisdiction in Federal Court or in front of the FCC.
18 Again, it says nothing about divesting Tribal Court
19 jurisdiction.

20 THE COURT: So are you drawing a distinction
21 between complete preemption and field preemption when you
22 say it doesn't totally divest?

23 MR. SWIER: Well, I think that's subject to
24 interpretation on that case. Again, that's something that
25 because we are getting into a very technical part of total

1 preemption, field preemption, at this point, because of the
2 late stage we tried to get this whole hearing done today, I
3 would like to give the Court a reasoned analysis through
4 the briefing instead of something off the top of my head,
5 if that's all right with the Court.

6 THE COURT: Sure.

7 MR. SWIER: Here is why I also think this is
8 different. Again, the Federal Communications Commission
9 has said this, "The FCC recognizes Indian Tribes exercise
10 sovereign authority over their members and their
11 territory." So the FCC itself has said, "We recognize
12 sovereign authority of the Tribe over their members and
13 their territory."

14 In this case we are dealing with the Crow Creek Tribe
15 members, and we are definitely dealing, as Peter said, with
16 their sacred land on the Reservation. The FCC recognizes
17 that. The FCC also promotes Tribal "self-sufficiency and
18 economic development."

19 As the Court can see from the testimony and from the
20 filings, this is the biggest economic development issue
21 that's hit Crow Creek probably forever. Again, the FCC
22 recognizes the importance of that on the Reservations,
23 which again makes this situation unique in regard to
24 Section 207.

25 Next, Your Honor, and this is very important. The FCC

1 is "steadfastly committed to promoting
2 government-to-government relations between the FCC and
3 Indian Tribes." What possible better way to promote
4 government-to-government relations and to recognize
5 sovereignty than to allow the Tribally-owned company, based
6 exclusively on Tribal ground, to put a telephone company
7 together and to enforce what it thinks is improper conduct
8 by a carrier.

9 Finally, Your Honor, the FCC recognizes "the
10 importance of Tribes exercising their sovereignty and
11 self-determination."

12 So when you look at Section 207 in light of the FCC's
13 policy, in light of the fact of the Bruce Lien divestiture
14 argument, when you differentiate the cases Sprint has
15 relied on from what is actually happening in this case, I
16 think that's a pretty strong argument why Section 207 does
17 not apply when we are dealing with Indian Tribes with
18 telecommunication issues, which we're dealing with here
19 owned by a Tribal corporation exclusively on Tribal
20 jurisdiction and Tribal ground. That's where I think 207
21 can be looked at a little bit differently.

22 May I continue with another issue?

23 THE COURT: You may.

24 MR. SWIER: Again, Issue 1, the Tribal exhaustion
25 doctrine. As the Eighth Circuit has made clear, that has

1 to be decided before the Court can issue any preliminary
2 injunction relief, and as we've said, we're still briefing
3 that issue. And I think based on Sprint's testimony today
4 with the Dataphase factors, which I'll talk about, I almost
5 think they have taken that argument and thrown it away
6 because they realize the four factors of Dataphase aren't
7 met here.

8 Nonetheless, I would like to talk about again real
9 quickly the Tribal exhaustion issue. Here is what Sprint
10 is attacking, and here is why Tribal exhaustion is proper.
11 Number one, we are dealing with a majority Tribally-owned
12 LLC. Sprint is also attacking high-speed telecommunication
13 services on the Reservation. Sprint is also attacking the
14 Tribal Utility Authority, their governmental authority,
15 along with the telecommunications plan that the Tribal
16 Utility Authority issued years ago, which the Court again
17 in our filings has a copy of. Sprint also attacks the
18 Tribal Utility Authority and their attempt to improve the
19 health and safety of Tribal residents.

20 Sprint is also attacking, if not ignoring, the
21 enforcement of the Tribal Utility Authority's Order that
22 says, "Sprint, you have to pay." They are ignoring that
23 order. They are attacking the very sovereignty of that
24 Utility Authority by just ignoring it.

25 They are also attacking the tariffs that were issued

1 by the Tribal Utility Authority. What Sprint is saying is,
2 "Hey, those folks on the Reservation don't have any
3 authority to be issuing tariffs." I don't see anywhere
4 where it says that. They are a governmental body, a
5 quasi-governmental body under the Tribal Council. They
6 have the ability to issue tariffs, just like the South
7 Dakota PUC can, and they've done that. Those Tribal
8 tariffs are now being attacked by Sprint.

9 No. 7. Sprint is attacking one of the first
10 Tribally-owned telephone systems in the United States.

11 No. 8. Sprint is attacking over 100 high-speed
12 broadband and telephone installations on the Reservation in
13 a place that before NAT had little, if any, of those type
14 of services.

15 No. 9. Sprint is attacking the Internet Library for
16 Tribal members, which was built and paid for by NAT and
17 placed on Tribal Court -- excuse me, within the boundaries
18 of the Reservation.

19 Sprint is next attacking any future construction of
20 state-of-the-art communications facilities on the
21 Reservation. They are attacking that.

22 Next, Sprint is attacking economic development
23 opportunities for the Tribe, undoubtedly. As Peter said,
24 before NAT, there was absolutely no outside private
25 investment coming into the Crow Creek Reservation. NAT has

1 not only brought those private investments onto the
2 Reservation, but they have actually flourished that
3 business with those. So they are attacking private
4 investment.

5 THE COURT: Rather than attacking all of these
6 things, aren't they, in essence, questioning whether the
7 tariff applies to this particular type of traffic?

8 MR. SWIER: They are. They are questioning the
9 tariff, but by questioning the tariff, they are saying all
10 these things don't count.

11 THE COURT: If the tariff doesn't apply, don't
12 they have the right to question its application?

13 MR. SWIER: They have the right to question its
14 application, sure. But they do not have the right to
15 self-help, which is what they are doing. Because of their
16 illegal self-help actions, it's affecting this laundry list
17 of everything that's going on on the Reservation. So in a
18 way the two issues dovetail. Because by not paying the
19 tariff and using self-help, which is supposed to be
20 improper, all of these are being affected.

21 Whether we want to use affect or attack, of course
22 that's semantics. That's why this is important. This is
23 the result of their self-help actions. Again, the
24 self-help is affecting the Tribal company and all of these
25 Tribal interests. That's why I think this laundry list is

1 important, and from our view it is an attack.

2 Your Honor, I thought it was probably most telling and
3 somewhat ironic that Sprint is attacking NAT because it's
4 not accepting government handouts and government subsidies.
5 For hundreds of years -- I know when I used to work for
6 Senator Johnson, one of his primary roles was to try to
7 increase economic activity on the Reservation, and it's a
8 tough, tough job. Mostly the way it can be done is through
9 the Government giving handouts. As Peter said, that's the
10 way it's been done, that's what they've become used to on
11 the Reservation.

12 For NAT to say we're not going to accept subsidies,
13 we're not going to accept Universal Service Funds, and then
14 to have that used against them somehow I think is not only
15 disingenuous, but it just defies logic on what NAT is
16 trying to do out there. They want to be a self-sustaining
17 competitive business, not having to rely on government
18 handouts. So to say that somehow reflects negatively on
19 NAT, I guess I just don't understand that. I don't
20 understand that.

21 Finally, NAT and Sprint are competitors. They compete
22 in the conference calling business. As the Court is well
23 aware, in reviewing the other cases that are pending, this
24 is their modus operandi. Sprint is one of the largest
25 companies in the country, if not the world. They compete

1 with companies like NAT who have a really unique and kind
2 of cool business model and have an opportunity to make
3 money. And Sprint brings them into Court and crushes them
4 down, because eventually the little guys will run out of
5 money. That's what happened throughout the country.

6 Luckily, NAT has put their foot down and has some
7 resources that they can fight this. But that's the modus
8 operandi is to wipe out competition. Any reasonable view
9 of how Sprint has reacted to this, that's the only
10 reasonable way you can look at it. That's what's
11 happening. NAT is owed millions of dollars on the
12 Reservation, which, as Peter said, can buy a heck of a lot
13 of diapers.

14 Mr. Knudson made the comment, "Well, isn't a million
15 dollars enough? Can't you do a lot with a million dollars?
16 How much more money do you need?" How much money does
17 Sprint need? Are we going to put a cap on what they can
18 make? Are we going to say, "Sprint, five million dollars
19 is a big enough profit for you, your shareholders, and
20 executives." But that's what they are proposing. A
21 million dollars is enough for those folks out there. You
22 can buy your hundred dollar cell phone and diapers and
23 food, but a million dollars is enough.

24 The reason for that is because they don't want the
25 competition. They don't want to see this entity succeed.

1 They know what they are doing is not illegal, because they
2 are working in Congress right now to try to get the laws
3 changed.

4 I've been out there. We have talked with the
5 Congressional delegation. We have talked with my former
6 boss' office, Senator Johnson. They are trying to get that
7 changed right now.

8 The only illegal activity that is going on is they are
9 not paying. They are using self-help, and they can't do
10 that. But because no one has the resources until this
11 point to call them on that, that's what they continue to
12 do.

13 So what in reality they are doing, in addition to
14 attacking all the Reservation contacts, they are attacking
15 a competitor. NAT is the competitor, and they don't want
16 to go to Tribal Court, and whatever else they don't want to
17 do, but the facts are that. That is a very reasonable way
18 to view what's going on here.

19 As I said before, we think the Tribal exhaustion issue
20 has to be decided first, because it's the threshold
21 jurisdictional issue.

22 Let's talk about real quickly the exhaustion
23 exceptions, if I may. Of course Montana -- excuse me.
24 Farmers Union, National Farmers Union set forth the three
25 basic exceptions for exhaustion. Bad faith, which, of

1 course, we don't have here. I don't think there's any way
2 you can reasonably argue that.

3 The second exception is the futility exception.
4 Again, doesn't apply here whatsoever.

5 The third, which is the one we were talking about, is
6 the Federal preemption exception. I think we have shown
7 why that Federal preemption exemption to the exhaustion
8 doctrine doesn't apply in these unique circumstances.

9 So because of that, Your Honor, I think, without
10 question, the Tribal exhaustion doctrine applies here. The
11 Eighth Circuit has been very steadfast that Tribal
12 exhaustion is appropriate, if not mandatory, in situations
13 such as this. That's why Christian Children's Fund,
14 Hornell, Hicks, Strate simply do not apply. We're in a
15 unique set of circumstances here.

16 THE COURT: So if you are under Montana then --
17 are you arguing that there is both a consensual
18 relationship exception that applies and Tribal health and
19 welfare exception?

20 MR. SWIER: I think they both apply. Here is
21 why. We go now to the Montana exceptions, as the Court
22 said. Of course we have the two exceptions. The
23 consensual activity. Let's talk about the consensual
24 activity.

25 Sprint provides telecom services on the Reservation.

1 Sprint has customers on the Reservation. If a Sprint
2 customer from New York City calls the Crow Creek
3 Reservation, that is a Sprint customer in New York City who
4 is trying to call a resident on Ft. Thompson. The way they
5 get that call, under some circumstances, is to go through
6 NAT's equipment on Ft. Thompson. If that equipment doesn't
7 exist, Sprint's call potentially can't go through.

8 So to say Sprint and their customers are not customers
9 of NAT is wrong. Otherwise those calls can't get to
10 Ft. Thompson, especially conference calling. If Sprint has
11 three customers, business clients, and they are given the
12 605-477 number, those calls go to the equipment in
13 Ft. Thompson. If that equipment is not there, that call
14 doesn't go through. It doesn't go through.

15 So to say that Sprint doesn't provide services on the
16 Reservation is wrong when you look at the scheme of how
17 telecommunications works now and how it's going to rapidly
18 change in the future. So there is a consensual
19 relationship.

20 Second consensual relationship is Sprint admits they
21 paid NAT's first bills. They say, "Well, we paid these
22 because NAT gave these to us under color of darkness. They
23 snuck these bills by us." Your Honor, Sprint is one of the
24 largest companies in the United States. If I have a
25 contract with someone and I make them a payment, I can't

1 come back and say, "Oops, I guess you snuck that by me. I
2 guess we don't have any type of relationship."

3 They paid the first few tariffs. To say it was all a
4 mistake, I think, number one, is disingenuous. Number two,
5 from a legal standpoint, they paid. They created a
6 consensual relationship by paying.

7 THE COURT: If it's a consensual relationship
8 that they entered into by paying, aren't they able to end
9 that consensual relationship by not paying?

10 MR. SWIER: Under the FCC laws they can't,
11 because they can't use self-help. When they made the
12 initial couple of payments, they were doing everything
13 according to the law.

14 THE COURT: If they hadn't made the first two
15 payments, isn't it still self-help?

16 MR. SWIER: Absolutely it's self-help.

17 THE COURT: So how does the fact they made two
18 payments turn it into a consensual relationship?

19 MR. SWIER: By banking the two payments to NAT,
20 they created a relationship where NAT provide services on
21 the Reservation, and in exchange for those services, they
22 are paid by Sprint for providing those services to their
23 customers. It may be an implied consensual relationship.
24 NAT provided a service. In exchange for that service,
25 Sprint paid NAT. Typical commercial transaction. It was

1 consensual. Again, to play this game and how these routing
2 calls work, that's what you do.

3 So that creates a consensual relationship right there,
4 so we have two of them.

5 For them to say -- they used this example of this
6 company in Texas, CABS I think is the name of it. CABS is
7 a billing company for NAT and numerous other telecom
8 companies in the United States. They do their billing. It
9 would be like if you and I had a law practice, and we sent
10 our billings over to Pullen McGladrey here in town, one of
11 the accounting firms. You and I did the legal work. We're
12 just having McGladrey & Pullen do our bookkeeping and our
13 billing for us.

14 THE COURT: I'm assuming the bill reflects NAT
15 was the provider?

16 MR. SWIER: You know, I don't know that. I don't
17 know. I can find that out for the Court. I'm not a
18 hundred percent sure on that.

19 THE COURT: Your argument only makes sense if
20 CABS identifies each individual provider. If they lumped
21 them all together, your argument wouldn't hold as much
22 weight.

23 MR. SWIER: We can find that out as part of the
24 briefing. I don't know the answer to that right now. I
25 don't want to make an improper and unknowing representation

1 to the Court.

2 THE COURT: Mr. Knudson may know, since he was
3 making that argument initially.

4 MR. SWIER: But to somehow say using CABS under
5 the cloak of darkness billing company, again, that's simply
6 incorrect. So the first Montana exception, the consensual
7 exception. We think we have that. Again, number one, if
8 the services aren't available on the Reservation, Sprint's
9 customers can't call the Reservation. So the services
10 aren't being provided. They couldn't be completed without
11 NAT's services.

12 THE COURT: So between the consensual
13 relationship exception and Tribal health and welfare
14 exception, which do you think is a stronger argument?

15 MR. SWIER: I think consensual relationship is
16 strong. I think the second Montana exception is incredibly
17 strong. I say that knowing that the Supreme Court and the
18 Federal Appellate and District Courts have always been
19 extremely limiting on that second Montana exception.

20 However, if you look at political integrity, if you
21 look at that issue -- political integrity, political
22 security, health, safety and welfare. That's our second
23 Montana exception. Based on the testimony that's been
24 provided and based on our filings, how can you not find
25 that what NAT is doing and what Sprint is doing doesn't

1 have an impact on the political integrity, political
2 security, health, safety, and welfare of Tribal residents?

3 THE COURT: But when you are arguing for
4 exhaustion, wouldn't the Tribe always have an argument that
5 political integrity is at stake here? In that event,
6 wouldn't they always win under the second exception to
7 Montana?

8 MR. SWIER: That's why very few Tribes have one
9 under that second exception, because it has been so tightly
10 limited by the Courts. But if that exception is going to
11 have any type of meaning whatsoever, I can't imagine any
12 facts that would be more damaging to the political
13 integrity, political security, et cetera, than what we have
14 seen here. This is the textbook case that the second
15 Montana exception attempts to encompass. We've gone
16 through the laundry list, and you have that in front of
17 you.

18 But when you look at everything this affects on the
19 Crow Creek Tribe, textbook exception under here. If this
20 doesn't meet that exception, I don't know what would.

21 THE COURT: So you are saying it's all of the
22 things you listed, not just the integrity of Tribal Court.

23 MR. SWIER: Absolutely, because it talks about
24 political integrity. This entire phone system is majority
25 owned by the Crow Creek Tribe. We've heard how it has an

1 impact on the health, safety and welfare of Tribal members.
2 Again, if these laundry list of facts don't meet the second
3 Montana exception, then that exception really has no
4 meaning whatsoever, and it's simply dicta.

5 Mr. Knudson also indicated, he talked about the, I
6 believe it was the Plains Commerce case. Talked about that
7 the second Montana exception required a catastrophic impact
8 on the Tribe. First of all, I think that's an incorrect
9 reading of the case. I think the catastrophic language
10 used was dicta, and was not meant to be read as Mr. Knudson
11 read it. That can be subject to interpretation.

12 But even if it is. Let's say catastrophic is one of
13 the qualifiers for exception. What could be more
14 catastrophic to this Tribe than to continue going along
15 with what's happening? When millions of dollars are not
16 being paid, whether it's noble reasons Sprint may put up,
17 or whether it's more the nefarious ones that we happen to
18 think is why they are doing this. But what could be more
19 catastrophic? We don't think catastrophic applies. But,
20 again, if it does, this is the textbook case.

21 Your Honor, I want to very briefly talk about what we
22 are really here for today, and that is the preliminary
23 injunction. As the Court knows, the Dataphase case has
24 four factors. Of course the preliminary injunction, first
25 of all, is an extraordinary remedy. It's not something the

1 Court issues on a whim and a prayer. It's an extraordinary
2 remedy.

3 The first factor under Dataphase is irreparable harm.
4 That has been cited by the Courts as probably the most
5 crucial factor when issuing a preliminary injunction.

6 For the Court's information, we had a hearing in front
7 of Judge Jones yesterday in Tribal Court. There was a
8 briefing schedule issued by the Court. Sprint appeared
9 telephonically, as did all parties for this hearing.

10 THE COURT: So what is the briefing schedule?

11 MR. SWIER: The briefing schedule is Judge Jones
12 wants to know everybody's view on the preemption issue,
13 first of all. So he went to the exact issue this Court
14 did. Where are we at with preemption? He gave me I
15 believe 30 days in which to present our preemption
16 argument, and I believe he gave Sprint an additional 30 for
17 their response. So we had a hearing.

18 THE COURT: So you are looking at the middle of
19 September? Do you have a chance to do a reply brief, or is
20 it just the two briefs?

21 MR. SWIER: I think I will have a chance to do a
22 reply brief, which would probably be like a 15-day time.

23 THE COURT: So getting towards the end of
24 December.

25 MR. SWIER: Probably, yes. That's barring any

1 extensions.

2 MR. WHITING: Your Honor, may I interject? If
3 counsel is going to go into somehow Sprint waived their
4 denial of jurisdiction, that absolutely didn't occur. I
5 made it very plain. The Judge said he would put it in the
6 order that this was a special appearance we were making
7 yesterday. Nothing beyond that.

8 MR. SWIER: Mr. Whiting is exactly right. I
9 don't contest they waived jurisdiction by appearing
10 yesterday at all. What I'm showing through that is we had
11 this hearing. Dates were scheduled by the Court, and the
12 world didn't come to an end. There was no irreparable harm
13 that occurred because we are in Tribal Court right now, in
14 addition to this Court.

15 THE COURT: Did Judge Jones schedule any type of
16 evidentiary hearing then?

17 MR. SWIER: Judge Jones, and Mr. Whiting can
18 clarify if I'm wrong on this, but Judge Jones indicated he
19 thought an evidentiary hearing may be necessary on that
20 issue, but until the briefing was completed, he didn't want
21 to schedule an evidentiary issue.

22 MR. WHITING: The exact words were, Your Honor,
23 that he would give the parties until the 15th of December
24 to stipulate to all the facts. And if they didn't, he
25 would want to have an evidentiary hearing after that. That

1 was under the Montana Exception No. 2 is what he was
2 speaking about.

3 MR. SWIER: Your Honor, under irreparable harm.
4 So we've had a hearing in Tribal Court which they've tried
5 to stop. There's been no irreparable harm. I think the
6 most ironic part of this entire Preliminary Injunction
7 Motion is that Sprint is alleging irreparable harm. If
8 anything, I should have brought a Preliminary Injunction
9 Hearing in Tribal Court. Because who is suffering
10 irreparable harm? It's NAT losing millions of dollars in
11 revenue because Sprint won't pay. If anybody is suffering
12 irreparable harm, it's this company, who may go out of
13 business eventually, because Sprint is using improper
14 self-help.

15 THE COURT: But what about Mr. Knudson's argument
16 that irreparable harm arises based on a combination of the
17 reading of Strate, Hicks, and Hornell, that they shouldn't
18 have to go through Tribal Court to determine jurisdiction,
19 that it should be determined here, if, in fact, there's no
20 basis for Tribal Court jurisdiction?

21 MR. SWIER: If the facts in those three cases
22 would be anything even in the facts of the ballpark we have
23 here, I may agree to that. Those cases are so different
24 from the facts in this case, that I don't know how you can
25 take those facts and that reasoning and extrapolate it to

1 what we have here. That to me is a very large leap in
2 logic.

3 THE COURT: So, in essence, what you are saying
4 is those three cases didn't recognize that that would be
5 irreparable harm?

6 MR. SWIER: I think what I'm saying there is I
7 believe in those cases -- what I'm saying is I think in
8 those cases, again, we are dealing with different facts and
9 issues than here. I think those cases can be easily
10 differentiated as opposed to a Tribally-owned
11 telecommunications company.

12 Of course some of those cases that were cited, like
13 Christian Children's, actually went through the exhaustion
14 process. The AT&T vs. Coeur D'Alene case, Tribal remedies
15 were exhausted there.

16 So for Sprint to come in today and argue they are
17 going to suffer irreparable harm, compared to the harm
18 suffered from NAT, is ironic, at best.

19 Also, they say the Tribal Court is biased. The Tribal
20 Judge is biased. We're going to have our due process and
21 equal protection rights violated if we have to go to Court
22 in Crow Creek. Eighth Circuit has said plainly: Unless
23 you can present evidence, other than mere speculation, the
24 fact you think the Court or the Judge or jury might be
25 biased, that does not constitute the suffering of

1 irreparable harm. I guess I'm not going to comment anymore
2 on those bias and equal protection claims.

3 Your Honor, that's the irreparable harm factor. Not
4 only does that not weigh in favor of Sprint's position, the
5 irreparable harm actually weighs much more in favor of our
6 case here. So under the irreparable harm factor, Sprint's
7 Preliminary Injunction Motion has to be denied.

8 Balance of Harms, same thing. I provided the Court
9 with the analysis there.

10 The next factor, probability of success on the merits,
11 again, that's what exhaustion is for. I don't think
12 anybody can say with a hundred percent what the probability
13 of success here is going to be.

14 Finally, the public interest. Again, the public
15 interest is in observing Tribal sovereignty, of observing
16 the sovereignty of a Tribally-owned telecommunications
17 company and all the activities that are going on out there.
18 The public interest is giving people on the Reservations
19 phone and Internet and broadband service, when no one,
20 including Sprint, had ever done that before, and they've
21 had centuries almost to do it, and no one has done it but
22 NAT.

23 Finally, Sprint indicated the Federal Communications
24 Act, when it was amended back in 1996, was designed to,
25 quote, open up the marketplace for telecommunications.

1 That was the policy behind the new Communications Act.
2 That is exactly what NAT is doing. It has opened up a
3 brand new marketplace on the Reservation. Sprint may not
4 like the competition, but the fact is what NAT is doing is
5 consistent with the open market theory of the new
6 Telecommunications Act.

7 Your Honor, why does NAT exist? It exists to provide
8 opportunities for the Crow Creek Tribe and the Tribal
9 members, which it's doing. It's a Tribally-owned entity,
10 which luckily has received private investment from private
11 companies who have the capital to invest, or like
12 Mr. Reiman, has the brain power to know how a
13 telecommunications company could exist and thrive on the
14 Reservation.

15 That, Your Honor, is what the open market was designed
16 to do. That's what has been done here. Again, competition
17 sometimes isn't well-liked. But in this case, as you can
18 see, what it's done for the Tribe and its members has been
19 incredible. Thank you, Your Honor.

20 THE COURT: Thank you, Mr. Swier. Mr. Knudson?

21 MR. KNUDSON: Yes, thank you. In view of the
22 lateness of the day, I'll be brief.

23 THE COURT: And you will get a chance to do your
24 reply brief in writing, too.

25 MR. KNUDSON: I understand. If the Court has

1 recognized, the legal lay of the land changed with Strate.
2 Before I address that further, the comments Mr. Swier made
3 about that, I would like to clarify that Sprint is entitled
4 to seek to protect its legal rights. If it has a good
5 faith basis to believe the nature of a traffic scheme,
6 their conference calling bridge doesn't constitute
7 legitimate terminating accessing service, it is entitled to
8 seek relief in Federal Court to protect itself. It's done
9 so numerous times.

10 This is not the first one of these that has happened.
11 NAT is not the first competitive local exchange carrier to
12 try to attack what the long-distance carrier's position is
13 with respect to these types of schemes.

14 THE COURT: Based on my own caseload, I can vouch
15 for that.

16 MR. KNUDSON: What is at issue here, I think the
17 Court has zeroed in on the critical question. I noticed
18 you reference El Paso. That case was the Price-Anderson
19 Act. There the Supreme Court in a 1999 decision overturned
20 the Ninth Circuit, which held exhaustion was required.
21 There was an issue with respect to claims being brought
22 against uranium mines on Tribal territory.

23 The Court said Congress had to, "express an
24 unmistakable preference for a Federal forum at the behest
25 of the defending party, both for litigating a

1 Price-Anderson claim on the merits, and for determining
2 whether a claim falls under Price-Anderson when the removal
3 is contested."

4 That's authority for when Congress has decided where a
5 case should be. This Court then should follow that
6 authority, because Congress in Section 207 has clearly
7 written a statute that says any person, which would be NAT,
8 claiming to be damaged, that's what they are claiming, by
9 any common carrier, which is Sprint, that shall be brought
10 to the Commission or to any District Court of the United
11 States of Competent Jurisdiction.

12 Congress knows how to write a provision like that to
13 exclude Indian Tribes from its application. It has done so
14 with age discrimination claims, sex discrimination claims.
15 It didn't do so in 1996.

16 THE COURT: Do you think the Price-Anderson Act
17 is field preemption or complete preemption?

18 MR. KNUDSON: I think with respect to what is
19 before the Court, it probably doesn't matter. I think
20 Price-Anderson would have probably been complete
21 preemption.

22 THE COURT: Here we have field preemption.

23 MR. KNUDSON: Probably, because we do have
24 some --

25 THE COURT: So is there a distinction as a result

1 of that?

2 MR. KNUDSON: Not with respect to exhaustion,
3 Your Honor.

4 THE COURT: Are there any exhaustion cases that
5 address the difference between field and complete
6 preemption?

7 MR. KNUDSON: Not that I'm aware of, Your Honor.
8 I think it's because the issue seems to be so clear with
9 what Congress wrote in Section 207, that it shouldn't
10 necessarily come up very often.

11 The only Appellate authority we have found so far is
12 the Coeur D'Alene case. There, although counsel tries to
13 characterize that as an IGRA case, what was involved, first
14 of all, was whether or not AT&T could be required by a
15 Tribal Court to provide a service that amounted to a
16 telecommunication service, a toll-free number that would
17 facilitate the development of this national Indian lottery.

18 On the telecom side of things, the Ninth Circuit is
19 unmistakably clear and compelling. It said there was no
20 jurisdiction in the Tribal Court to hail AT&T and to
21 adjudicate whether or not it was required to offer that
22 toll-free service. It went on, over a vigorous dissent, to
23 address the IGRA question. But that isn't the issue in
24 this case.

25 What we are talking about is an interpretation of

1 47 USC 207. On that point, the Coeur D'Alene case is
2 unequivocal.

3 THE COURT: Except it's not binding on this Court
4 because it's a Ninth Circuit. It is certainly something I
5 would look at.

6 MR. KNUDSON: I understand that. It's very
7 persuasive authority. But if you then take a look at the
8 question following Hicks, which says that Tribal Courts are
9 courts of limited jurisdiction. One has to examine what
10 authority they have.

11 The Hornell case, seems to me, would be binding on
12 this Court, because it holds if it's off the Reservation,
13 there is no Tribal Court jurisdiction, and you don't let
14 the Tribal Court decide that in the first instance. That
15 was the directive back down to the District Court.

16 THE COURT: But because the phone calls -- let's
17 take the conferencing phone calls -- come to the Tribe to
18 use equipment that's located within the Tribal
19 jurisdiction, can it properly be characterized as being off
20 the Reservation?

21 MR. KNUDSON: Yes.

22 THE COURT: Why?

23 MR. KNUDSON: Because the people involved on that
24 call are off the Reservation. The phone currents that
25 travel back and forth are off the Reservation. This piece

1 of equipment that is apparently housed in Ft. Thompson
2 could be housed right next to WideVoice's equipment in
3 Los Angeles. It could be located anywhere. So it raises a
4 question of Federal law.

5 Therefore, however you look at it, the question of
6 where that service is being provided is a question of
7 Federal Communications law, and under 207 must be decided
8 in a Federal forum. Congress has decided that. If you
9 conclude it's off Reservation, Hornell would say we don't
10 need to address that. If you say it's on the Reservation,
11 you still fall back to the Section 207 issue, which I
12 believe compels this Court to enjoin the Tribal Court from
13 proceeding further.

14 We talk about irreparable harm. But if you look at
15 Strate and Hicks, you look at Hornell, those cases have
16 little meaning -- take a look at the footnote Justice
17 Ginsburg wrote in Strate. If jurisdiction is so clearly
18 absent in Tribal Court, then the rule of comity, and that's
19 what it is, gives way. The only reason to require parties
20 to go through Tribal Court is delay.

21 So by extension, that's a conclusion that it's
22 irreparable harm, forcing Sprint to have to litigate in
23 Tribal Court, when there is no jurisdiction, is a violation
24 of its rights to be in Federal Court and, therefore,
25 irreparable harm, by definition.

1 Now, there's also the issue of delay. Let's look at
2 the Plains Commerce case. That case ultimately came down,
3 and exhaustion was not required. That was in 2008.

4 THE COURT: Going back to irreparable harm. If
5 the Court found because of comity, a matter should go into
6 Tribal Court, wouldn't the party seeking a preliminary
7 injunction always be able to argue there would be delay and
8 costs and that would be the irreparable harm? Let's say
9 Section 207 didn't exist.

10 MR. KNUDSON: Well, if Section 207 is not in this
11 case, then we would be looking at a situation like Hornell.
12 The conclusion is there's nothing on the Reservation,
13 Hornell would say no jurisdiction to adjudicate.
14 Therefore, no exhaustion is required.

15 You can get to that result either way, but Congress
16 has enacted 207. That's the first point is it directs
17 jurisdiction into this Court. Strate says in circumstances
18 like that, there's no point to delay. So it follows, as a
19 matter of logic, that that must be the irreparable harm.
20 We are being denied our venue for reasons that don't apply.
21 The comity argument is unnecessary.

22 So what they've done, the Supreme Court has done in
23 Strate, Hicks, Atkinson, is carve out a large exception to
24 National Farmers, Iowa Mutual in terms of exhaustion. They
25 are saying you don't have to go to Tribal Court to get a

1 ruling on its jurisdiction. We don't have to spend years
2 of litigation, because if we're in Tribal Court, we have an
3 evidentiary hearing on jurisdiction, and then we're into
4 the merits and then up to an appeal before we get back to
5 this Court to see whether or not there was ever
6 jurisdiction in this case. It could be an extensive and
7 expensive process, which Congress has said is unnecessary,
8 and the Supreme Court said in *Strate* it only accommodates
9 delay and is unnecessary. So the exhaustion rule must give
10 way on that basis.

11 A couple other points. I find it interesting that
12 they say the services are being provided to these callers
13 on the Reservation merely because there's bridge equipment
14 being located on the Reservation. These people don't care
15 where the equipment is located. They only like the fact
16 it's free, and they find out what number to call.

17 We think that's an issue where we need a clear Federal
18 rule. That's been the issue that's been presented to this
19 Court and other Courts. Whether that's a legitimate
20 service, given Federal Telecom policy as to promoting local
21 exchange services, how far do you go with this kind of
22 activity before you transgress what Congress and the FCC
23 have intended.

24 I think then you are back to the 207 situation. It
25 should be decided in this Court or the Federal

1 Communications Commission.

2 Again, I agree with the Court's inference here that
3 there's no expressed contract between Sprint and Native
4 American Telecom with respect to these calls that were
5 billed by CABS Agent.

6 I point out with respect to Christian Children's Fund
7 a couple of points here. It said exhaustion was not
8 necessary. It's not distinguishable on the grounds
9 exhaustion took place. It stands for the proposition that
10 exhaustion is unnecessary in those facts, which if they had
11 been able to get to a Federal Court early enough, they
12 would have enabled the Court to say, "Stop, Tribal Court,
13 this belongs in Federal Court." And where the payments
14 took place is one of the dispositive factors in Christian
15 Children's Fund.

16 THE COURT: Did you know the answer to my
17 question on the billing that came from CABS, whether it
18 identified it was from the Defendants?

19 MR. KNUDSON: CABS Agent billed a large number of
20 CLECs at one time. There was probably a line item that
21 said submitted by Ft. Thompson, a dollar amount in the ten
22 to fifteen thousand dollar range, the first two invoices
23 that were paid. What happened on the third was it went up
24 by nearly 700 percent, and that's when Sprint took a hold
25 of it. So in the ordinary course, it wasn't large enough

1 to raise any red flags, so you can't say that was a
2 consensual relationship, from that circumstance.

3 THE COURT: So you don't know for sure if it
4 identified NAT as the carrier or if it just had
5 Ft. Thompson?

6 MR. KNUDSON: I don't. If that's a dispositive
7 fact, we could supplement with our reply on that particular
8 detail and address it for the Court.

9 THE COURT: I'm not sure it's dispositive, but I
10 never know for sure what the one thing may be.

11 MR. KNUDSON: So, yes, you would like us to
12 resolve that. Very good. I could go on, but I would
13 prefer not to, and I think you would like to finish up,
14 too.

15 THE COURT: Thank you. I will wait to get both
16 of your reply briefs. This is a different posture than
17 usual where we have the evidentiary hearing before the
18 reply briefs, but I actually think it works out pretty
19 well. You know what the issues are on my mind, and you can
20 address them in the reply briefs and weave in the evidence
21 we heard today. I'll issue a ruling shortly after I get
22 your reply briefs. Mr. Swier?

23 MR. SWIER: One question. I was looking at the
24 dates, and it looks like my reply brief to our Motion to
25 Stay Based on Exhaustion is due on either Monday or

1 Tuesday. I need to look for sure. I think in light of
2 what's been presented here today and some of the narrow
3 focus I think the Court wants on this reply, would the
4 Court be willing to grant me an extension, and then
5 obviously, in turn, I wouldn't have any objection if they
6 needed an extension, also. I think to get this done by
7 Monday, in light of what has gone on here today, may be
8 somewhat unreasonable.

9 The other reason is my sister-in-law partner is
10 getting married this weekend. I don't think she would be
11 very happy with me if I was doing an exhaustion brief
12 during the wedding.

13 THE COURT: How about if I give you both until
14 next Friday to do your reply briefs. Is that agreeable?

15 MR. KNUDSON: I believe the rules provide I get
16 two weeks, and the brief was filed yesterday.

17 THE COURT: Okay. Mr. Swier, I'll give you until
18 Friday. Did you want any extra time?

19 MR. SWIER: So my reply on the exhaustion issue
20 would be due Friday?

21 THE COURT: A week from tomorrow. Does that give
22 you enough time, Mr. Swier?

23 MR. SWIER: We can get it done, Your Honor.

24 THE COURT: Anything else anybody wanted to bring
25 up today? If not, I'll wait to hear from you. We'll be

1 adjourned.

2 (End of proceedings at 5:01 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 - 239.

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 19th day of October, 2010.

17 /s/ Jill M. Connelly

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