BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE:	Docket No. TC14-084
SPRINT COMMUNICATIONS COMPANY L.P.,	
Complainant,	
v.	
NATIVE AMERICAN TELECOM – PINE RIDGE, LLC,	
Respondent.	

MEMORANDUM OF NATIVE AMERICAN TELECOM – PINE RIDGE, LLC IN SUPPORT OF MOTION TO DISMISS

Native American Telecom – Pine Ridge, LLC ("NAT PR") submits this memorandum in support Of Native American Telecom - Pine Ridge, LLC's Motion To Dismiss Complaint (the "Motion"). The complaint of Sprint Communications Company L.P. ("Sprint") should be dismissed because Sprint's sole claim for relief, a request for a declaratory ruling, fails as a matter of law and NAT's activities as of now are subject to regulation by the FCC and not the Commission.

FACTUAL BACKGROUND[1]

NAT PR is majority owned by the Oglala Sioux Tribe. The sovereign Nation of the Oglala Sioux Tribe is located on the Pine Ridge Indian Reservation in South Dakota ("Pine Ridge"). Today, Pine Ridge is the eighth-largest reservation in the United States, greater in area than Delaware and Rhode Island combined. Depending upon how you define reservation boundaries, the Pine Ridge reservation encompasses, at a minimum, the entirety of Shannon

[1] The facts described below are supported by the *Affidavit of Gene DeJordy In Support Of Motion To Dismiss* ("DeJordy Aff."), filed contemporaneously herewith.

County, the southern half of Jackson County, and the northwest portion of Bennett County. Shannon County is the poorest county in the nation, and Jackson and Bennett Counties are among the poorest.

NAT PR was conceived as a local phone company committed to serving rural, underserved populations like the Sioux Tribes of South Dakota. Originally, the concept of NAT PR's founder, Gene DeJordy, was to establish a network of telephone companies throughout South Dakota and North Dakota, each serving their own reservation. He began by establishing two tribal telephone companies, one for the Crow Creek Sioux Tribe and another for the Oglala Sioux Tribe. He reached out to potential investors and technology providers before establishing the ownership structure of the businesses. He was able to secure the support of NAT PR's first anchor customer, Free Conferencing Corporation. Free Conferencing Corporation committed to directing a small portion of its traffic to the reservation. The traffic commitment would be instrumental for the initial success of the telecommunications company. Free Conferencing Corporation has consented to the jurisdiction of the Tribe. *See* Dejordy Aff., Exh. B.

In June 2009, the Oglala Sioux Tribe Utility Commission granted NAT PR approval to provide telecommunications services on Pine Ridge, including local telephone and broadband service. *See* DeJordy Aff., Exh. A. In 2010, NAT PR filed its first interstate tariff with the Federal Communications Commission.

NAT PR constructed physical offices, telecommunications equipment, and telecommunications towers on Pine Ridge. It is currently using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHZ spectrum providing service for residential, small business, hospitality, and public safety. Its infrastructure is capable of providing 4G high-speed broadband services, voice service, data and Internet

access, and multimedia. Through the use of advanced antenna and radio technology with OFDMA (Orthogonal Frequency Division Multiplexing), NAT PR's network is designed to deliver wireless IP (Internet Protocol) voice and data communications.

NAT has established interconnection with the incumbent local exchange carriers serving Pine Ridge (Golden West Telecommunications Cooperative). NAT also has connectivity with long distance carriers and other service providers to enable the exchange of telecommunications and information services throughout the world.

NAT has built out its telecommunications network to serve tribal government offices, residential tribal members, and various locations on Pine Ridge. It also operates an Internet Library and a Technology Center on Pine Ridge that enable residents to obtain free access to Internet service and the use of more than a dozen personal computers and Apple computers. NAT PR also provides telecommunications and information services to end user customers, such as businesses, residences, and tribal offices, located on the reservation, including, but not limited to, Free Conferencing Corporation and the Oglala Sioux Tribe Office Of Economic Development.

NAT PR is continuing to extend its network and services to more Tribal members who are residential customers on the reservation. It does not, however, currently provides any telecommunications service that originates on the Pine Ridge Reservation and terminates in South Dakota off the reservation (hereafter referred to as "Intrastate Off-Reservation Traffic").

During the period from September 2010 through May 2012, NAT PR was handling Intrastate Off-Reservation Traffic. NAT PR is an enterprise operating under the authority of the Tribal Utility Commission and, pursuant to a federal interstate tariff, NAT PR's Off-Reservation Traffic was interstate traffic, and thus it did not require a certificate of authority from the South

Dakota Public Utility Commission ("PUC"). However, in proceedings involving Native American Telecom, LLC ("NAT CC"), a local exchange carrier that is majority owned by the Crow Creek Sioux Tribe, the PUC expressed the view that PUC CLEC authority was required for Intrastate Off-Reservation Traffic. Out of respect for the PUC, both NAT PR and NAT CC stopped originating Intrastate Off-Reservation Traffic.

No bills were to be sent to Sprint for intrastate access charges after May 10, 2010. As of that date, Sprint was billed a total of $2014.36 for intrastate switched access, which Sprint never paid, and which NAT PR credited back to Sprint for reasons involving comity and respect for the SDPUC's position in the NAT CC CLEC application proceeding. For the period between May 11, 2010 and July 2014, Sprint was not billed anything for intrastate switched access.

On June 13, 2014, in connection with a CLEC application of NAT CC, the PUC issued a Final Decision And Order; Notice Of Entry Of Order, which granted NAT CC a certificate of authority to provide local and interexchange telecommunications services in the Fort Thompson exchange. In The Matter Of The Application Of Native American Telecom, LLC For A Certificate Of Authority To Provide Local Exchange Service Within The Study Area Of Midstate Communications, Inc., Docket No. TC11-087. Shortly thereafter a certificate of authority was issued by the PUC. With the issuance of that certificate, NAT CC began providing service for Intrastate Off-Reservation Traffic.

NAT CC informed its CABS billing agent that it had restarted service for Intrastate Off-Reservation Traffic, and the CABS agents sent the first bill for such service to Sprint in August 2014. The CABS agent, however, mistakenly also began to bill Sprint for intrastate switched access at NAT PR, and bills were sent in August 2014, September 2014, and October 2014, before NAT PR was informed of the mistake. The bills for those months were, respectively,

$37.61, $46.73, and $61.11. Sprint was thus mistakenly billed a total of $145.45. As soon as the mistake was discovered, Sprint was credited for the $145.45 erroneously assessed charges.

NAT PR currently has no operations outside the Pine Ridge reservation and serves no customers off the reservation. It also has no intention of providing any time in the immediate future Intrastate Off-Reservation Service. If it does, it plans to seek CLEC authority from the PUC.

ARGUMENT

I. THERE IS NO JUSTICIABLE CONTROVERSY HERE AND THUS, SPRINT'S COMPLAINT SHOULD BE DISMISSED.

Sprint's sole claim for relief, a request for a declaratory ruling under ARSD 20:10:01:34 and SDCL 21-24-1, fails to state a claim as a matter of law because there is no justiciable controversy on which the Commission may issue a ruling.

SDCL 21-24-1, South Dakota's Uniform Declaratory Judgment Act, permits the declaration of legal rights or relations before an actual injury occurs. There are, however, four jurisdictional requirements for declaratory relief:

> "(1) ***There must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it***; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination."

Danforth v. City of Yankton, 25 N.W.2d 50, 53 (S.D.1946) (quoting *State v. Dammann*, 220 Wis. 17, 264 N.W. 627, 629 (1936)) (emphasis added).

Sprint's entire complaint is based on erroneous statements of fact and thus fails to establish a justiciable controversy. Sprint claims that "an actual controversy between Sprint and NAT-Pine Ridge with respect to whether NAT-Pine Ridge legitimately provides intrastate

switched access services for calls to Free Conferencing Corporation…and whether NAT-Pine Ridge has properly billed intrastate switched access for those calls." Complaint, ¶ 20. However, there is no such controversy.

NAT does not charge terminating access fees to Sprint for intrastate traffic. DeJordy Aff., ¶¶ 10-12. The CABS agent mistakenly began to bill Sprint for Intrastate Off-Reservation Traffic at NAT PR, and bills were sent in August 2014, September 2014, and October 2014, before NAT PR was informed of the mistake. DeJordy Aff.,¶ 14. The bills for those months were, respectively, $37.61, $46.73, and $61.11. *Id.* Sprint was thus mistakenly billed a total of $145.45. *Id*. As soon as the mistake was discovered, Sprint was credited for the wrongly billed amount. *Id*. NAT PR currently has no operations outside the Pine Ridge reservation and serves no customers off the reservation. *Id*., ¶ 15. It also has no intention of providing any time in the immediate future Intrastate Off-Reservation Service. *Id*. If it does, it plans to seek CLEC authority from the PUC. *Id*.

NAT PR is not maintaining that it should have billed Sprint for Intrastate Off-Reservation Service, nor is it currently seeking the right to do so. Consequently, there is no present controversy making this a justiciable issue and the Complaint should thus, be dismissed. *See Pennington Co. v. State ex rel. Unified Judicial System*, 641 N.W.2d 127, 132 (SD 2002).

Further, Sprint requests declaratory relief from the Commission pursuant to ARSD 20:10:01:34, which provides in relevant part: "Any person wishing the commission to issue its ruling as to the applicability ***to that person*** of any statutory provisions or rule or order of the commission may file with the commission a petition for declaratory ruling." ARSD 20:10:01:34. However, Sprint seeks a declaration concerning the applicability of statutory provision or rules on ***NAT PR***, rather than itself. Even if the statute could be read to cover persons and entities

effected by the application of state statutes and rules, Sprint is not being affected because it not being billed and will not be billed by NAT for intrastate terminated access fees absent CLEC authority from the state.

II. NAT'S ACTIVITIES AS OF NOW ARE SUBJECT TO REGULATION BY THE FCC AND NOT THE COMMISSION.

A. The Commission Does Not Have The Power to Control Businesses Regulated By Federal Law.

Ignoring the deep-rooted history in South Dakota to relinquish all jurisdiction and regulation of Indian nations to the US Congress, Sprint contends that the Commission was granted the authority to regulate all telecommunications companies, even NAT PR. *See* Complaint, ¶ 11. However, the very language of Sprint's Complaint and the Commission's enabling statute establishes that this is not accurate.

Sprint's own Complaint introduces its action as follows: "Sprint … brings this action … to bring to an end [NAT's] pumping operations in South Dakota in violation of state law." However, NAT has no operations in South Dakota, except those on the Pine Ridge Reservation. In the second sentence of its Complaint, Sprint states: "NAT-Pine Ridge claims the right to charge Sprint terminating switched access services for calls allegedly made into the Pine Ridge Reservation under tariffs allegedly on file with the **Oglala Sioux Tribe Utilities Commission** (OSTUC) and with the **Federal Communications Commission.**" (Emphasis added.) But this Commission does not regulate or otherwise oversee the Oglala Sioux Tribe Utilities Commission, the FCC, or any activities governed by them.

The Commission is a creature of statute. *See* SDCL § 49-31-3 According to its enabling statute, the Commission "has general supervision and control over all telecommunications companies offering common carrier services within the state ***to the extent such business is not otherwise regulated by federal law or regulation***." SDCL § 49-31-3 (emphasis added). This

Commission's own enabling statute was crafted to incorporate limitations inherent to the nature of our republic, which would include the rights of Indian tribes under the U.S. Constitution, federal laws, and treaties. *See* SDCL § 49-31-3.

In *Cheyenne River Sioux Tribe Tel. Auth. v. PUC*, 595 N.W.2d 604 (S.D. 1999), the South Dakota Supreme Court described the nature of tribal power and its scope:

> [T]he [U.S.] Supreme Court stated that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Furthermore, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." However, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

Id. (citations omitted). The Supreme Court then made clear that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 566., *Cheyenne River*, 595 N.W.2d 604, 609.

As outlined in detail above, the courts of this country for over 150 years recognized that states are excluded from all matters relating to Native Americans. NAT PR, as a business majority-owned by and only servicing the Oglala Sioux Tribe or others located on the reservation, is fully regulated by federal law and tribal law. In June 2009, the Tribal Utility Commission granted NAT PR approval to provide telecommunications services on Pine Ridge, including local telephone and broadband service. DeJordy Aff., ¶ 6. In 2010, NAT PR filed its first interstate tariff with the Federal Communications Commission. *Id*.

The Tribal Utility Commission and the FCC clearly has the authority to grant NAT PR approval to provide telecommunications service on the reservation to tribal members and interstate service originating or terminating on Pine Ridge to other states in the union. Not even Sprint contends otherwise. The Tribal Utility Commission can also, as the U.S. Supreme Court has said and as restated in *Cheyenne River,* regulate the activities of non-members "who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Any person or entity who signs up for service wholly on the reservation enters into a "consensual relationship." Thus, Free Conferencing Corporation, and other non-Indian businesses located on Pine Ridge, are subject to the jurisdiction of the Tribal Utility Commission jurisdiction as well. To avoid any doubt, Free Conferencing Corporation has confirmed that it consents to the jurisdiction of the Tribe. DeJordy Aff., Exhibit B.

Therefore, in light of the fact that NAT PR is not providing Intrastate Off-Reservation Traffic, NAT PR's current activities currently come with the jurisdiction of the Tribal Utility Commission and the Federal Communications Commission. Thus, this Commission is without jurisdiction to hear Sprint's Complaint.

B. NAT PR's Incorporation Under South Dakota Laws Is A Red Herring.

Sprint claims, without citing any legal authority to support its claim, that because NAT PR was organized under the laws of South Dakota, the Commission has jurisdiction over its intrastate services. Complaint, ¶ 14. This argument is flawed in fact and is not supported by the law.

First, NAT PR does not provide any intrastate services. *See* DeJordy Aff., ¶ 11. NAT PR currently has no operations outside the Pine Ridge reservation and serves no customers off the reservation. DeJordy Aff., ¶ 15. It also has no intention of providing Intrastate Off-Reservation

Service at any time in the immediate future. *Id*. If it does, it plans to seek CLEC authority from the PUC. *Id*. Thus, the factual underpinning of Sprint's jurisdiction argument is wrong.

Second, Sprint appears to be claiming that because NAT PR is an entity organized under South Dakota laws, it is a non-Indian and thus, may be regulated by the State and its agencies. Even if NAT PR was classified as a "non-Indian," the law is well-established that a state may not regulate "non-Indians inside Indian Country" if certain criteria are present.

When a state desires to regulate non-Indians inside Indian Country, the U.S. Supreme Court has employed a balancing test to determine whether the state's authority has been preempted by federal law. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,145 (1980). In *Bracker,* the Arizona Highway Department and the Arizona Highway Commission sought to impose the state's motor carrier tax and excise fuel tax on a non-Indian logging contractor hired by the Tribe for on-reservation logging activities. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136,145 (1980). Because of comprehensive federal regulation of all aspects of Indian timber harvesting, the Court found the additional taxation burdensome, and without justification in terms of state regulatory or service interest. Arizona had "no duties or responsibilities respecting the reservation Indians," and all of the logging activities were conducted on the reservation. Therefore, it frustrated federal policy by reaching onto the reservation to tax even non-Indian participants in on-reservation activities, creating tax impact on the tribe. *Bracker*, 448 U.S. at 152.

The *Bracker* case is well known for establishing the factors a Court must examine in confronting the question of whether a State may assert authority over the conduct of non-Indians engaging in activity solely on a Native American reservation. In *Bracker,* the U.S. Supreme Court stated that:

> In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144-45 (1980) (citations omitted).

Courts have framed the *Bracker* criteria as a three-part test: (1) whether the regulated conduct occurs on or off a reservation; (2) whether or not the party being regulated is a tribal member; and (3) if the conduct being regulated does occur on a reservation, whether State interests outside the reservation are implicated. *State, ex rel. Wasden v. Maybee*, 148 Idaho 520, 534, 1123 (2010). Under *Bracker* and its progeny, the location of the activity is an essential factor in analyzing whether a state can regulate "non-Indian" activity. *Wasden v. Native Wholesale Supply Co.*, 155 Idaho 337, 343 (2013). Courts will not apply the protections set forth in *Bracker* when the conduct occurs off-reservation, *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 110 (2005) ("We have applied the balancing test articulated in *Bracker* only where…a nontribal entity engaged in a transaction with tribes or tribal members,' ***on the reservation***." (internal quotation omitted)(emphasis added) (*quoting Arizona Dep't. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 37 (1999)).

In a number of cases even before *Bracker*, the U.S. Supreme Court held that state authority over non-Indians acting on tribal reservations is pre-empted even though Congress has offered no explicit statement on the subject matter of the litigation. *See Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *Williams v. Lee*, 358 U.S. 217 (1959); *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

The Supreme Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains controlling as to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits. "'The cases in this Court have consistently guarded the authority of Indian governments over their reservations.' " *United States v. Mazurie, supra,* 419 U.S., at 558, quoting *Williams v. Lee,* 358 U.S. at 223.

NAT PR's intrastate telecommunications services are solely confined to the Pine Ridge reservation. DeJordy Aff., ¶ 15. It does not currently originate any telecommunications service from the reservation to the rest of South Dakota off the Pine Ridge Reservation. DeJordy Aff., ¶ 10. NAT PR's services do not touch the state of South Dakota, and thus there are no state interests at stake here. Moreover, as explained above, NAT PR is fully regulated by tribal and federal law. Thus, the fact that NAT PR is organized as a South Dakota business is a red herring in determining whether the State and this Commission has jurisdiction over NAT PR for the services it currently provides.

Finally, the cases examining the jurisdiction of non-Indians conducting business solely on reservations hold that any proposed exercise of state authority is impermissible where the economic burden of the asserted regulation will fall mostly on the tribe. *See White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 151(1980). Sprint spent four years contesting the business operations and plans of Native American Telecom, LLC, which operates a majority owned Native American phone company on the Crow Creek reservation, only to have its expert testify in its CLEC hearing that the company was complying with all applicable rules and regulations. With this new complaint, Sprint was erroneously billed ***$145.45***, for which it has received a full credit. Now that NAT PR is beginning to build out its residential services to tribal

members, Sprint wants to stifle those efforts by forcing on NAT PR the economic burden of a costly administrative proceeding. It is to prevent just this type of interference and abuse for which the law does not countenance the outside intrusion into Native American affairs.

Dated this 8th day of December , 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of MEMORANDUM OF NATIVE AMERICAN TELECOM – PINE RIDGE, LLC IN SUPPORT OF MOTION TO DISMISS was delivered via electronic mail on this 8th day of December, 2014, to the following parties:

Service List (SDPUC TC 14-084)

/s/ Scott R. Swier
Scott R. Swier

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