

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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IN THE MATTER OF THE COMPLAINT  
FILED BY SPRINT COMMUNICATIONS  
COMPANY, LP, AGAINST NATIVE  
AMERICAN TELECOM, LLC REGARDING  
TELECOMMUNICATIONS SERVICES

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TC10-026

**NATIVE AMERICAN TELECOM, LLC'S  
MEMORANDUM IN RESPONSE TO  
SPRINT COMMUNICATIONS COMPANY, L.P.'S  
MOTION FOR SUMMARY JUDGMENT**

Native American Telecom, LLC ("NAT"), by its undersigned counsel, submits its Memorandum in Response to Sprint Communications Company, L.P.'s ("Sprint") Motion for Summary Judgment.

**FACTUAL BACKGROUND**

**A. NAT'S CORPORATE STRUCTURE**

1. NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. (Affidavit of Scott R. Swier dated January 10, 2013 ["Swier Aff.,"] at Exhibit 1). The Crow Creek Sioux Tribe has not established a Uniform Commercial Code, and as a consequence, NAT could not apply for a business license from the Tribe.

2. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) ("Tribe"), P.O. Box 50, Fort Thompson, SD 57339-0050, Native American Telecom Enterprise, LLC (25%) ("NAT Enterprise"), 747 S. 4th Ave., Sioux Falls, SD 57104, and WideVoice Communications, Inc. (24%) ("WideVoice"), 410 South Rampart, Suite 390, Las Vegas, NV 89145. (Swier Aff. at Exhibit 1).

3. NAT Enterprise possesses telecommunications regulatory and managerial experience and experience working in Indian Country. The Principals, Gene DeJordy and Tom Reiman, having worked in telecommunications on tribal lands for Western Wireless and Alltel. (Affidavit of Gene DeJordy at ¶¶ 1-4).

4. Gene DeJordy served Western Wireless as Vice President of Regulatory and Legal Affairs and served Alltel as Senior Vice President for Regulatory Affairs. (Affidavit of Gene DeJordy at ¶¶ 1-4).

5. Tom Reiman served Western Wireless and Alltel as a sales manager in Indian Country. (Affidavit of Gene DeJordy at ¶ 3c).

6. Wide Voice Communication, Inc. is a 24% owner of NAT and possesses telecommunications engineering and management expertise, with the CEO and management team having many years experience building and managing telephone companies. (Swier Aff. at Exhibit 1 and 2).

7. The Tribe is a federally-recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation (“Reservation”) in Fort Thompson, South Dakota. (Swier Aff. at Exhibit 2).

8. NAT’s business address is 253 Ree Circle, Fort Thompson, South Dakota 57339. (Swier Aff. at Exhibit 1).

9. NAT has a certificate of authority from the South Dakota Secretary of State to transact business in South Dakota. (Swier Aff. at Exhibit 1).

**B. NAT’S TRIBAL UTILITY AUTHORITY ORDER AND TARIFF**

10. In 1997, the Crow Creek Sioux Tribal Council established the Crow Creek Sioux Tribe Utility Authority (“Tribal Utility Authority”) for the purpose of planning and overseeing utility services on the Reservation and to promote the use of these services “to improve the health and welfare of the residents.” (Swier Aff. at Exhibit 1 & 2).

11. On October 28, 2008, the Tribal Utility Authority entered its *Order Granting Approval to Provide Telecommunications Service* (“Approval Order”). (Swier Aff. at Exhibit 1 & 2).

12. Under this Approval Order, NAT was “granted authority to provide telecommunications service on the . . . Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.” (Swier Aff. at Exhibit 1 & 2).

13. The Approval Order required that the basic telephone service offered by NAT must be “consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission.” (Swier Aff. at Exhibit 1 & 2).

14. Pursuant to the Approval Order, on September 1, 2009, NAT filed its Access Tariff with the Tribal Utility Authority (“Tribal Tariff”), governing the termination of telephone traffic on the Reservation. (Swier Aff. at Exhibit 1 & 2).

15. NAT’s Tribal Tariff became effective on September 1, 2009. (Swier Aff. at Exhibit 1 & 2).

16. NAT’s Tribal (intrastate) terminating access tariff rate is the same as its interstate terminating access rate which is \$.006237 per minute of use, which is considerably less than what NAT could otherwise charge for Intrastate terminating access and is considerably less than what other South Dakota LECs charge for terminating access. (Swier Aff. at Exhibit 1 & 2).

### **C. NAT'S FEDERAL TARIFFS**

17. On September 14, 2009, NAT filed its "Tariff No. 1" with the Federal Communications Commission ("FCC"). The terminating access rate for Tariff No. 1 was \$.05494, matching the NECA rate. (Swier Aff. at Exhibit 3).

18. The Effective Date of Tariff No. 1 was September 15, 2009. (Swier Aff. at Exhibit 3).

19. On November 15, 2010, NAT filed its "Tariff No. 2" with the FCC. The terminating access rate for Tariff No. 2 was based on a sliding scale where the price of terminating access service declined as traffic volumes increased. This rate was designed to address the concerns of IXC's who felt that terminating access rates should be lower for higher call volume. The only interstate rate charged to Sprint during this time was \$.05494, matching the NECA rate. (Swier Aff. at Exhibit 4).

20. On November 22, 2010, Sprint (along with other IXC's), filed a "Joint Petition" asking the FCC to reject, or in the alternative, suspend and investigate, Tariff No. 2. (Swier Aff. at Exhibit 5).

21. On November 24, 2010, NAT filed its response to the IXC's "Joint Petition." (Swier Aff. at Exhibit 6).

22. On November 30, 2010, the FCC denied the IXC's "Joint Petition" finding that:

[T]he [IXCs] . . . have not presented compelling arguments that [NAT's] transmittals are so patently unlawful as to require rejection. Similarly, we conclude the [IXCs] have not presented issues regarding the transmittals that raise significant questions of lawfulness that require investigation of the tariff transmittals. . . . Accordingly, the [IXCs'] petition[] . . . [is] denied, and the transmittals will, or have, become effective on [November 30, 2010].

(Swier Aff. at Exhibit 7).

23. As such, the Effective Date of Tariff No. 2 was November 30, 2010. (Swier Aff. at Exhibit 7).

24. On June 13, 2011, NAT filed its "FCC Tariff No. 2 - Revised" ("Revised Tariff No. 2") with the FCC. (Swier Aff. at Exhibit 8). NAT revised Tariff No. 2 because of an Order by the FCC to Northern Valley Communications ("NVC") directing NVC to change the definition of "End User" in their federal tariff. NAT was using the same definition as NVC at that time. (Swier Aff. at Exhibit 8).

25. No objections were made to Revised Tariff No. 2. (Swier Aff. at Exhibit 8).

26. The Effective Date of Revised Tariff No. 2 was June 26, 2011. (Swier Aff. at Exhibit 8).

27. On August 8, 2011, NAT filed its "FCC Tariff No. 3" with the FCC. (Swier Aff. at Exhibit 9). NAT's Tariff No. 3 was taken directly from CenturyLink/Qwest's tariff. It was drafted by Carey Roesel of TMIC,

the consulting group that works for both IXC's and LEC's. In Tariff No. 3, NAT lowered its interstate and intrastate terminating access rates to the composite rate of \$.006327 per minute of use for all terminating access services, both interstate and intrastate. (Swier Aff. at Exhibit 9).

28. No objections were made to Tariff No. 3. (Swier Aff. at Exhibit 9).

29. The Effective Date of Tariff No. 3 was August 23, 2011. (Swier Aff. at Exhibit 9).

30. Tariff No. 3 remains in place as of today's date. NAT was not required to revise its interstate tariff following the Federal Communications Commission's November 18, 2011 *Intercarrier Compensation Order*, because NAT had already adopted rates and terms that complied with this Order. In fact, NAT's rate is lower than that which it could charge according to this Order. (See generally *Report and Order and Further Notice of Proposed Rulemaking, Connect America Fund, WC Docket No. 10-90 et al., FCC 11-161*) ("*Intercarrier Compensation Order*"); Swier Aff. at Exhibit 9).

#### **D. NAT'S SERVICES**

31. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. (Swier Aff. at Exhibit 1 & 2).

32. NAT is using WiMAX (Worldwide Interoperability for Microwave Access) technology operating in the 3.65 GHz licensed spectrum providing service to residential, small business, hospitality and public safety. (Swier Aff. at Exhibit 1 & 2).

33. Wide Voice Communications, Inc. loaned NAT the money to build the telecommunications facilities on the Crow Creek Reservation. The loan is a non-recourse loan, the physical equipment is the collateral. (Affidavit of Jeff Holoubek at ¶¶ 23-24).

34. The network supports high-speed broadband services, voice service, data and Internet access, and multimedia. (Swier Aff. at Exhibit 1 & 2).

35. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT is able to deliver wireless IP (Internet Protocol) voice and data communications. (Swier Aff. at Exhibit 1 & 2).

36. This 4G technology offers flexible, scalable and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. (Swier Aff. at Exhibit 1 & 2).

37. NAT has established a toll-free number and email address for all customer inquiries and complaints, and has a physical location on the Reservation to handle customer complaints and inquiries within twenty-four (24) hours. (Swier Aff. at Exhibit 1 & 2).

38. NAT has established connectivity with telecommunications carriers to provide its customers with access to 911, operator services, interexchange services, director assistance, and telecommunications relay services. (Swier Aff. at Exhibit 1 & 2).

39. NAT provides a computer training facility with free Internet and telephone service to tribal members. (Swier Aff. at Exhibit 1 & 2).

40. NAT currently provides 142 high-speed broadband and telephone installations at residential and business locations on the Reservation. (Second Affidavit of Jeff Holoubek at ¶ 2).

41. NAT has established an Internet Library with six (6) work stations that provide computer/Internet opportunities for residents that do not otherwise have access to computers. (Swier Aff. at Exhibit 1 & 2).

42. The demand for the Internet Library's services is so great that NAT built an additional facility on the Reservation that will serve as a full-service communications center offering free Internet, online education classes, computer classes and instruction, and free telephone access to individuals who would otherwise not have access to even these

basic services. This state-of-the-art facility will open later this year.

(Affidavit of Jeff Holoubek at ¶ 29).

43. The communications center would have already opened but for the very costly litigation brought on by Sprint, consisting of a lawsuit in State Court, a lawsuit in Federal Court, a referral of issues to the Federal Communications Commission, and a challenge to NAT's application for a CLEC license. (Affidavit of Jeff Holoubek at ¶ 30).

44. NAT's largest customer is Free Conferencing Corporation. (Affidavit of Jeff Holoubek at ¶ 7).

45. Free Conferencing has a Marketing Agreement ("Agreement") with NAT. (Affidavit of Jeff Holoubek at ¶ 8).

46. This Agreement between NAT and Free Conferencing Corporation contains a sliding scale between 75% and 95% of gross revenues to be paid to Free Conferencing depending upon the volume of Free Conferencing traffic that is terminated by NAT. (Affidavit of Jeff Holoubek at ¶ 9).

47. Free Conferencing has never received more than 75% of collected revenues, never intended to receive more than 75% of collected revenues, and following the inception of the litigation with Sprint, agreed to never enforce the provision of the contract to receive more than 75% of revenues. (Affidavit of Jeff Holoubek at ¶ 10).

48. This clause was put in the Agreement because there was an understanding between Gene DeJordy, Tom Reiman, and Free Conferencing that Mr. DeJordy and Mr. Reiman would assemble a diverse network of no less than ten (10) tribes into a tribal telephone conglomerate whereby Free Conferencing would become a customer and direct its customers' traffic, because Free Conferencing does not wish to have too much traffic in any one location (diversification is valued). (Affidavit of Jeff Holoubek at ¶ 11).

49. The sliding percentage scale of 75%-95% was included in the Agreement as a deterrent, or negative incentive, for Mr. DeJordy and Mr. Reiman so that they would not simply help only one or two tribes. In other words, Native American Telecom Enterprise ("NATE") owns 25% of NAT, and if Mr. DeJordy and Mr. Reiman stopped with only one tribal telephone company, then they would receive a diminishing percentage of profit from their ownership. (Affidavit of Jeff Holoubek at ¶ 12).

50. If Mr. DeJordy and Mr. Reiman wanted to receive a greater reward, then they would have to continue to expand the network. This seemed like a good plan because it would help the various tribes, would expand telecommunications to some of the most underserved areas in the United States, would help Free Conferencing

diversify (reduce business risk), and would help to carry out President Obama's mandate and that of the FCC to expand telecommunications and broadband to the underserved. (Affidavit of Jeff Holoubek at ¶ 13).

51. This plan for a Tribal Telephone Network was communicated to the Crow Creek Sioux Tribe and to the FCC, including Commissioner Michael Copps, during the many meetings that Free Conferencing held with FCC Commissioners and their Staffs. (Affidavit of Jeff Holoubek at ¶ 14).

52. Free Conferencing typically receives between 50% and 80% of revenues collected on its traffic, depending upon the location and risk involved. (Affidavit of Jeff Holoubek at ¶ 15).

53. Free Conferencing does not receive any other remuneration from NAT. (Affidavit of Jeff Holoubek at ¶ 16).

54. NAT keeps 100% of the revenues it receives from other customers. (Affidavit of Jeff Holoubek at ¶ 17).

55. Free Conferencing is responsible for all costs associated with its customer acquisitions, including but not limited to: advertising costs; corporate facilities costs; salaries and employee costs for sixty (60) or more employees; product development costs; software development costs; customer service costs, regulatory costs, and all other costs associated with customer acquisition. Free Conferencing serves upwards

of 20,000,000 users each month, from approximately 186 countries and has international installations in 34 countries. Free Conferencing's services are used by many of the major corporations in the United States, by almost every office of Congress, including both the Republican and Democratic Presidential campaign offices, non-profits, religious organizations, colleges and universities, just to name a few. (Affidavit of Jeff Holoubek at ¶ 18; Second Affidavit of Jeff Holoubek, at ¶ 3).

56. NAT receives 25% of the gross revenues for traffic from Free Conferencing's customers, and bears no risk whatsoever. (Affidavit of Jeff Holoubek at ¶ 19).

57. Free Conferencing Corporation pays NAT "end-user" customer fees in accordance with NAT's tariffs. (Affidavit of Jeff Holoubek at ¶ 20).

58. NAT pays to USAC the appropriate USF tax on all customer revenues. (Affidavit of Jeff Holoubek at ¶ 21).

## LAW & ANALYSIS

### **I. SPRINT STATES THAT “SPRINT IS ENTITLED TO A DECLARATION FROM THE COMMISSION THAT: (1) NAT CANNOT PROVIDE TELECOMMUNICATIONS ANYWHERE WITHIN THE STATE OF SOUTH DAKOTA WITHOUT A CERTIFICATE OF AUTHORITY FROM THE COMMISSION”**

#### **A. THE COMMISSION HAS ALREADY RULED ON THE INTRASTATE JURISDICTIONAL ISSUES ENCOMPASSED IN SPRINT’S MOTION FOR SUMMARY JUDGMENT**

Sprint’s Motion for Summary Judgment encompasses the *same intrastate jurisdictional issues* that the Commission (and Buffalo County Circuit Court) previously ruled upon in this case.

On May 4, 2011, the Commission issued its “Order Denying NAT’s Motion to Stay” (“Order”). This Order specifically states that “[t]he Commission has clear jurisdiction over intrastate telecommunications.” (Order, page 2) (citing SDCL chapters 49-13, 49-31, and 47 U.S.C. §152(b)) (emphasis added).

NAT appealed this Order and the Circuit Court affirmed the Commission’s jurisdictional decision. (Buffalo County Circuit Court – Civ. 08-11 – Memorandum Opinion – dated August 23, 2011). The Circuit Court noted that “the issue presented in this case is whether or not the PUC or the Tribal Utility Authority has *jurisdiction* over this matter with respect to *intrastate* telecommunications.” (Circuit Court Decision, page 4) (emphasis added). The Circuit Court then said that

“[t]he South Dakota Supreme Court has reviewed this jurisdictional dispute under a similar context and has *found that the tribe does not have jurisdiction* [over intrastate telecommunications services].” (Circuit Court Decision, page 7) (emphasis added). As such, the Commission has already asserted its authority over NAT’s *intrastate* activities. (In fact, that is a principle reason why NAT applied to the Commission for a Certificate of Authority in SDPUC TC 11-87 – to be recognized by the Commission as a CLEC). The Commission’s decision was affirmed by the Circuit Court. Sprint has already received all of the *intrastate* jurisdictional relief that the Commission can provide.

**B. IS IT SPRINT’S INTENTION TO EXPAND ITS AMENDED COMPLAINT’S PRAYER FOR RELIEF TO INCLUDE A BAN ON NAT’S PROVISION OF INTERSTATE TELECOMMUNICATIONS SERVICES?**

Sprint’s Motion for Summary Judgment could be interpreted as an expanded request for a declaration that “NAT cannot provide telecommunications anywhere within the State of South Dakota without a certificate of authority from the Commission,” including *interstate* telecommunications. The Commission’s Order specifically states that “[t]he Commission has clear jurisdiction over *intrastate* telecommunications.” (Order, page 2) (citing SDCL chapters 49-13, 49-31, and 47 U.S.C. §152(b)) (emphasis added).

After the Commission's and Circuit Court's jurisdictional decisions, NAT submitted to the Commission's intrastate authority and filed an Application for Certificate of Authority ("Application"). (See SDPUC TC 11-087). This proceeding is currently pending before the Commission. Of course, Sprint's intervention in SDPUC TC 11-087 has delayed NAT from receiving its Certificate of Authority.

It is apparent that Sprint's request that the Commission rule that NAT cannot provide telecommunications *anywhere* within the state of South Dakota without a Certificate of Authority from the Commission is inviting the Commission to make a ruling that impacts NAT's *interstate* activities. Sprint desires NAT to "go dark" until the Application proceeding is completed. (See Sprint's Memorandum in Support of Motion for Summary Judgment, page 18). Of course, the Commission must refrain from taking any actions that would impact NAT's *interstate* activities.

The Telecommunications Act of 1996 ("the Act"), Pub.L. No. 104; 110 Stat. 56 (1996), limits the power of the states to oversight of *intrastate* communications.<sup>1</sup> Because certain aspects of telecommunications regulation are uniquely the province of the federal

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<sup>1</sup> It is purely a question of federal law as to the proper interpretation of the provisions of the Act. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880 (8<sup>th</sup> Cir. 2006).

government, Congress has narrowly circumscribed the role of state governments in this arena. Specifically, ***no state statute or regulation, or other state legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.*** 47 U.S.C. § 253(a). The Federal Communications Commission (“FCC”) may preempt any state statute or regulation that violates this provision. 47 U.S.C. § 253(d). Therefore, if the Commission interprets Sprint’s request “(1) that NAT cannot provide telecommunications ***anywhere*** within the State of South Dakota without a certificate of authority from the Commission” as a request to ban NAT from engaging in any telecommunications activities ***anywhere*** within the State, then this case must be dismissed for lack of subject matter jurisdiction, as this is clearly a decision reserved by the FCC.

The FCC has also recognized the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States. In sum, the Commission must refrain from taking any actions that would impact NAT’s *interstate* activities as these decisions must be left to the FCC. (*See Sprint Communications Company, L.P. v. Native American Telecom, LLC, et al.* - DSD Civ. 10-4110).

**II. SPRINT STATES THAT “SPRINT IS ENTITLED TO A DECLARATION FROM THE COMMISSION THAT: (2) NAT CANNOT INVOICE FOR INTRASTATE TELECOMMUNICATIONS SERVICES UNTIL IT HAS A LAWFUL TARIFF ON FILE WITH THE COMMISSION”**

Sprint’s Motion for Summary Judgment requests the Commission to declare that “NAT cannot invoice for intrastate telecommunications services until it has a lawful tariff on file with the Commission.” After the Commission’s and Circuit Court’s jurisdictional decisions, NAT ceased invoicing Sprint for intrastate telecommunications services and retracted all invoices for intrastate access charges previously issued to Sprint, a fact that Sprint neglected to communicate to the Commission in Sprint’s Statement of Facts. Consequently, this issue is moot.

**III. SPRINT STATES THAT “SPRINT IS ENTITLED TO A DECLARATION FROM THE COMMISSION THAT: (3) NAT’S INVOICES TO SPRINT FOR INTRASTATE SERVICES THAT NAT HAS ISSUED WITHOUT A CERTIFICATE OF AUTHORITY AND LAWFUL TARIFF ON FILE WITH THE COMMISSION ARE VOID.”**

Sprint’s Motion for Summary Judgment requests the Commission to declare that “NAT’s invoices to Sprint for intrastate services that NAT has issued without a certificate of authority and lawful tariff on file with the Commission are void.” Once again, after the Commission’s and Circuit Court’s jurisdictional decisions, NAT ceased invoicing Sprint for intrastate telecommunications services and withdrew previously issued invoices. Additionally, NAT was advised by Sprint’s counsel that

Sprint's entire money damages in this case constitute an *intrastate* refund claim of \$281.00. (See Affidavit of Scott R. Swier in Support of Native American Telecom, LLC's Motion to Dismiss Based on Mootness, ¶ 3 - filed April 23, 2012). NAT informed Sprint's counsel that NAT would pay Sprint's intrastate refund claim of \$281.95. *Id.* at ¶ 5. And indeed, NAT paid Sprint's intrastate refund claim of \$281.95. It is perplexing that Sprint refuses to cash NAT's intrastate refund check.

**IV. SPRINT STATES THAT "SPRINT IS ENTITLED TO A DECLARATION FROM THE COMMISSION THAT: (4) THE COMMISSION HAS SOLE AUTHORITY TO REGULATE SPRINT'S INTEREXCHANGE SERVICES WITHIN THE STATE OF SOUTH DAKOTA, AND CONVERSELY, THE CROW CREEK SIOUX TRIBAL UTILITY AUTHORITY CANNOT REGULATE SPRINT'S ACTIVITIES IN THIS STATE."**

Sprint's Motion for Summary Judgment requests the Commission to declare that "[t]he Commission has sole authority to regulate Sprint's interexchange service within the State of South Dakota, and conversely, the Crow Creek Sioux Tribal Utility Authority cannot regulate Sprint's activities in this State." Once again, the Commission and Circuit Court have already found that the Commission has the authority to regulate *intrastate* telecommunications matters. However, the Commission clearly does not have the authority to determine what (if any) jurisdiction the Crow Creek Sioux Tribal Utility Authority may have over Sprint

regarding *interstate* activities or Sprint’s activities on the Crow Creek Sioux Reservation.

It is well-established that “Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (citations and quotations omitted). The Supreme Court has declared that tribes possess “inherent powers of limited sovereignty which have never been extinguished” and described the tribes as “domestic dependent sovereigns.” *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1931). Most often, state regulatory agencies have assumed jurisdiction over telecommunications services within the boundaries of tribal lands by default, because the tribes on those lands have not exercised their authority to regulate these services. Unlike federal law, state law does not apply generally to tribal lands or tribal activities. Some States assert, however, that they have an important interest in regulating tribal telecommunications and should possess the right to regulate such activities. However, if a State intends to exert control over tribal telecommunications activities at all<sup>2</sup>, such control, when appropriate,

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<sup>2</sup> Some states such as California and Arizona have acknowledged that they lack jurisdiction over Native American-owned telecommunications companies that operate on Native American reservations.

should be limited to situations where the tribe has essentially acquiesced to state regulation by failing to assert its own regulatory authority over telecommunications.

Therefore, in cases like the one before the Commission, where the Crow Creek Sioux Tribe has (1) established its own utility authority, (2) entered an “Order Granting Approval to Provide Telecommunications Service,” (3) issued a “Telecommunications Plan to Further Business, Economic, Social, and Educational Development,” (4) established a telecommunications company, (5) filed a federal tariff approved by the Federal Communications Commission, (6) filed a tariff with the Crow Creek Tribal Utility Commission, (7) built its own state-of-the-art WiMax telecommunications facility located on the Reservation, (8) undertaken the responsibility to provide high-speed telephone and broadband services to residences and businesses located on the Reservation, and (9) made contributions to USAC based upon revenues received and in compliance with its tariffs, it is clear that the Tribe has chosen to exercise its self-governance over telecommunications activities.

Therefore, the Tribe should be given deference to control these activities which occur on the Reservation.

Sprint not only disputes the Tribe’s authority to govern its activities within the boundaries of the Reservation, calling into question the Tribe’s

sovereignty and the Tribe's right to self-govern, but also appears to request that the Commission actively control NAT's interstate activities, this case now presents issues for federal determination, not this Commission.

Sprint might argue that because the Crow Creek Sioux Tribe shares managerial control with two other owners,<sup>3</sup> NAT does not qualify as a tribal entity subject to the protections afforded to tribal activities that take place on the Reservation. However, it is well-established that tribal sovereignty extends to arms or agencies of Indian tribes. *See e.g., Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8<sup>th</sup> Cir. 2000); *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581, 583-84 (8<sup>th</sup> Cir. 1998). “[A]n action against a tribal enterprise is, in

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<sup>3</sup> Native American Telecom Enterprise, “NATE”, is a 25% owner of NAT and possesses telecommunications managerial experience, the Principals having worked in telecommunications on tribal lands for Western Wireless and Alltel. Wide Voice Communication, Inc. is a 24% owner of NAT, possesses telecommunications engineering and management expertise, the CEO Patrick Chicas having 34 years experience, was a Co-founder and CTO of CommPartners from 2000-2008, was VP of Data Services at Mpower Communications from 1999-2000, was VP of Operations for Digital Island, Inc. from 1997-1998, with other experience in telecommunications dating back to 1979 as Co-Founder and CTO of Hawaii Online, Operations Manager for GTE Mobilnet, Hawaii, PacTel Cellular in Los Angeles and Pacific Bell in California. No one on the Wide Voice team has less than 15 years of telecommunications experience, and at least one has 40 years of experience building and managing telephone companies. (Second Affidavit of Jeff Holoubek at ¶ 4).

essence, an action against the tribe itself.” *Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393 (E.D. Wis. 1995).

Sprint has asked the Commission to summarily find that “NAT cannot provide telecommunications **anywhere** (emphasis added) within the State of South Dakota without a certificate of authority from the [South Dakota Public Utility] Commission”. Sprint has also Motioned this Court to summarily find that “The [South Dakota Public Utility] Commission has sole authority to regulate Sprint’s interexchange services within the State of South Dakota, and conversely, the Crow Creek Sioux Tribal Utility Authority cannot regulate Sprint’s activities in this State.” If the Commission sides with Sprint on this issue, then the effect will be that the State will determine if the State can control *all* the telecommunications activities of the Tribe, both intrastate and interstate telecommunications, “...anywhere within the State of South Dakota...”, and these decisions clearly belongs to the Federal Government and this case should be dismissed for lack of subject matter jurisdiction.

Finally, the FCC has expressed great interest in the telecommunications activities of the tribes, and it is likely that the FCC would not want its efforts and rules undermined by preemptive action of this Commission. In the *Intercarrier Compensation Order*, the FCC states, “[t]he deep digital divide that persists between the Native Nations

of the United States and the rest of the country is well-documented. Many residents of Tribal Lands lack not only broadband access, but even basic telephone service. Throughout this reform proceeding, commenters have repeatedly stressed the essential role that Tribal consultation and engagement play in the successful deployment of service on Tribal lands.” *Intercarrier Compensation Order*, ¶ 636. For example, the National Tribal Telecommunications Association, National Congress of American Indians, and Affiliated Tribes of Northwest Indians have stressed the importance of measures to “specifically support and enhance tribal sovereignty, with emphasis on consultation with Tribes.” NAT plays a vital role on the Crow Creek Sioux Reservation, providing advanced telecommunications and broadband service at a substantially reduced cost to the residents of the Reservation who previously (before NAT’s arrival) had to, due to economic and geographic constraints, go without these vital services. Sprint certainly is not providing these vital services to the Tribe’s residents.

The FCC has dictated that the provision of telecommunication services on tribal lands must be in “compliance with Tribal business and licensing requirements.” *Id.* at 637. Also, “[t]ribal business and licensing requirements” include business practice licenses that Tribal and non-Tribal business entities, whether located on or off Tribal lands, must

obtain upon application to the relevant Tribal government office or division to conduct any business or trade, or deliver any goods or services to the Tribes, Tribal members, or Tribal lands. These include **certificates of public convenience and necessity** (emphasis added), Tribal business licenses, master licenses, and other related forms of Tribal government licensure.” *Intercarrier Compensation Order*, ¶ 637 fn. 1052.

### **CONCLUSION**

NAT is doing exactly what the FCC has deemed to be of paramount importance regarding the provision of telecommunication services on Tribal lands. Sprint’s actions threaten to undermine the stated goals of the Federal Communications Commission. If the Commission provides Sprint with the expansive Declaratory Relief that it seeks in its Motion for Summary Judgment, then this case must be dismissed for lack of subject matter jurisdiction.

Dated this 11<sup>th</sup> day of January, 2013.

SWIER LAW FIRM, PROF. LLC

*/s/ Scott R. Swier*

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 11<sup>th</sup> day of January, 2013, the foregoing *NATIVE AMERICAN TELECOM, LLC'S MEMORANDUM IN RESPONSE TO SPRINT COMMUNICATIONS COMPANY, L.P.'S MOTION FOR SUMMARY JUDGMENT* was served was delivered *via electronic mail* on the following parties:

*Service List (SDPUC TC 10-026)*

/s/ Scott R. Swier  
Scott R. Swier