BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN RE: SPRINT COMMUNICATIONS COMPANY L.P., Complainant, v. NATIVE AMERICAN TELECOM, LLC, Respondent.	Docket No. TC10-026 **REPLY MEMORANDUM OF LAW OF SPRINT COMMUNICATIONS COMPANY L.P. IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Native American Telecom ("NAT") tries to complicate the record before the Commission, with a long litany of facts relating to NAT's operations. Those facts simply are irrelevant to the motion of Sprint Communications Company ("Sprint"). The material facts that support Sprint's motion for summary judgment, however, are undisputed:

- NAT is a limited liability company organized under the laws of the State of South Dakota.
- Sprint is a Delaware limited partnership with its principal place of business in Overland Park, Kansas. Sprint is an inter-exchange carrier certificated by the South Dakota Public Utilities Commission ("Commission") to provide intrastate telecommunications services in South Dakota. Sprint has never consented to being regulated by the Crow Creek Sioux Tribal Utility Authority.

- NAT was formed in 2008 by Gene DeJordy and Tom Reiman, neither of whom is an enrolled member of the Crow Creek Sioux Tribe or any other Indian tribe.

- Reiman and DeJordy were the original owners of NAT. In 2010 Reiman and DeJordy restructured NAT, and the Crow Creek Sioux Tribe became a 50% owner of NAT, DeJordy and Reiman (through their South Dakota LLC Native American Telecom Enterprise) reduced their ownership to 25%, and Widevoice Communications Inc. (also a non-Indian entity) became a 24% owner. NAT is managed by a Board of Directors, and each owner has the right to appoint three directors.

- NAT does not have a Certificate of Authority from the Commission to provide telecommunications services within the State of South Dakota, as required by state law.

- NAT does not have an intrastate tariff on file with the Commission.

- NAT started providing telecommunications services in South Dakota in September 2009.

- NAT has invoiced Sprint for intrastate services, for which Sprint paid the first two invoices received.

- NAT provides service via a WiMax technology. This service is not restricted to the exterior boundaries of the Crow Creek Sioux Reservation. Within the Reservation there are many nontribal residents and land owners. NAT has also stated that it will provide service to both tribal and nontribal individuals and businesses.

- NAT has a revenue sharing agreement with an entity called Free Conferencing Corporation.

- The NAT-Free Conferencing Corporation agreement provides that Free Conferencing Corporation will receive from 75% to 95% of NAT's revenues.

- NAT claims to be providing local exchange services to Free Conferencing Corporation.[1]
- Free Conferencing Corporation is a non-tribal entity.[2]

These facts are sufficient for the Commission to grant Sprint its requested declaratory relief. NAT in the main has admitted to these facts. *See* NAT's Combined Statement of Material Facts and Response to Sprint's Statement of Material Facts at 13-19 (filed Jan. 11, 2013). In its response to Sprint's Statement of Material Facts, however, NAT now claims to deny serving non-members. But in its sworn discovery responses in Docket TC 11-087, NAT stated it would not discriminate between tribal members and non-members and would serve both. *See* Knudson Aff. dated Dec. 11, 2012 at ¶ 5 and Ex. D. NAT is bound by its earlier sworn admission. Moreover, a party opposing summary judgment cannot cannot rely on mere denials, but must come forward with sworn testimony or other admissible evidence to rebut the moving party's record. *See State Farm Fire & Cas. Co. v. Harbert*, 2007 SD 107 ¶11, 741 N.W.2d 228, 233; *see also Federal Deposit Ins. Corp. v. Indian Creek Warehouse J.V.*, 143 F.3d 1111, 1113 (8th Cir. 1998) (defendant failed to

[1] This fact is one NAT admitted to in Docket TC 11-087. *See* Affidavit of Scott G. Knudson dated February 20, 2013 ("Knudson Aff.") at Ex. 1, p. 25.

[2] This is a fact NAT also admitted in TC 11-087. *See* Knudson Aff. at Ex. 1, p. 25.

produce any records or evidence which contradicted the plaintiffs, he therefore "failed to advance any facts that create a genuine issue of fact for trial. Under these circumstances, summary judgment was proper.").

ARGUMENT

I. The Commission Must Rule That NAT Cannot Provide Local Exchange Services Without a Certificate of Authority From the Commission.

Sprint is seeking a declaration by the Commission that NAT cannot operate within the State of South Dakota without a certificate of authority from the Commission. NAT does not dispute that what Sprint seeks is the law of this State; it merely argues that the Commission has already asserted that it has jurisdiction over intrastate communications, an assertion of jurisdiction that the Circuit Court for Buffalo County affirmed on NAT's appeal. NAT Brief at 14-15 (filed January 11, 2013). It is true that in denying NAT's motion to stay pending a ruling by the Crow Creek Sioux Tribal Court, the Commission asserted its jurisdiction to rule on Sprint's complaint. But it has yet to state what Sprint is requesting. It is time now for the Commission to declare squarely what Sprint has requested.

NAT makes another argument on this point, that Sprint's request could be interpreted as an effort by Sprint to have the Commission assert jurisdiction over interstate telecommunications services. NAT Brief at

15-17. This is a straw man argument the Commission should ignore. Sprint knows full well the dichotomy Congress made in the Communications Act of 1934. Very simply, in enacting 47 U.S.C. § 152(b), Congress reserved to the Federal Communications Commission ("FCC") the authority to regulate interstate rates. But conversely, Congress left to the states, and only to the states, authority over intrastate telecommunications services. That division of jurisdiction means that this Commission regulates NAT's intrastate telecommunications services, including the local exchange services NAT claims to provide Free Conferencing Corporation.[3]

II. NAT Cannot Invoice Sprint (or Anyone Else) Until it has a Valid Certificate of Authority from the Commission.

NAT asserts a mootness argument against Sprint's request for a declaration that NAT cannot invoice for intrastate telecommunications services until it has a valid tariff on file with the Commission. The only "intrastate" access tariff NAT claims to have is one allegedly now on file with the Crow Creek Sioux Tribal Utility Authority. NAT asserts without any legal authority that because it is no longer invoicing Sprint for intrastate access charges, Sprint's request is moot. NAT Brief at 18.

[3] NAT tosses out another false concern about the "unique relationship" between the federal government and Indian tribes, NAT Brief at 17, but nothing Sprint seeks from the Commission will impact that relationship.

In its opening brief, Sprint demonstrated that, assuming the mootness doctrine applies at all to an adminstrative agency, NAT cannot deprive the Commission of jurisdiction by declining to invoice Sprint for intrastate services. The undisputed facts are that NAT did so for many months, continues to provide local exchange services in South Dakota and unquestionably invoices other interexchange carriers for intrastate services, all without a certificate of authority from the Commission. NAT does not dispute its conduct violates South Dakota law or that it is a criminal enterprise. The Commission certainly has the power to declare NAT in violation of state law and determine the consequences for its flagrantly illegal conduct.

III. NAT's Invoices Issued Without a Valid Certificate of Authority are Void.

Sprint seeks a declaration that NAT's previously issued intrastate invoices are void. NAT attempts to rebut this request by arguing, as discussed above, that it has ceased invoicing Sprint for intrastate services and tendered a refund for the amounts previously paid. NAT Brief at 18-19. This argument is simply a rehash of its mootness claim.

NAT does not dispute Sprint's legal analysis that without a certificate of authority, NAT's invoices are invalid under South Dakota law. *See, e.g., Nature's 10 Jewelers v. Gunderson*, 2002 SD 80, 648 N.W.2d 804 (without valid state registration, franchisor could not sue to

enforce franchise agreement); *Beverage Co. v. Villa Marie Co.,* 69 S.D. 627, 13 N.W.2d 670 (1944) (beer wholesaler could not sue to recover on note that contravened state law). The South Dakota Legislature has made NAT's conduct in invoicing for services a criminal violation of state law. As a consequence, NAT's invoices are simply void. Without a tariff on file with the Commission, the filed rate doctrine is similarly inapplicable. NAT's suspension of invoicing Sprint is not sufficient to deprive the Commission of jurisdiction to grant Sprint its requested relief.

IV. Only the Commission Can Authorize NAT to Offer Intrastate Services.

Sprint has requested a declaration by the Commission that it has the sole authority to regulate NAT's intrastate activities. NAT conjures up a number of arguments why the Crow Creek Tribe may be able to regulate NAT's activities on the Crow Creek Reservation, NAT Brief on 19-25, but none of these arguments vitiates the Commission's jurisdiction over NAT or obviates the requirement that NAT must have a certificate of authority from the Commission before it starts providing intrastate telecommunications services, such as the local exchange services NAT claims to be providing Free Conferencing Corporation. In fact, in Docket 11-087, NAT recently identified the services it provided to Free Conferencing Corporation as intrastate telecommunications

services, including local calling and 911 access, all without a certificate of authority from the Commission to provide such services.[4]

NAT does not confine its services solely to tribal members living within the boundaries of the Crow Creek Sioux Reservation. In these circumstances, the Commission unequivocally has the right to regulate NAT and is the only agency with authority to permit NAT to provide intrastate telecommunications services in South Dakota. *See Cheyenne River Sioux Tribe Tel. Auth. v. Public Utils. Comm'n of South Dakota,* 1999 SD 60, ¶21, 595 N.W.2d 604, 609 (Commission could regulate sale of telephone exchange located within a reservation.) The Commission exercises that authority to protect all citizens of South Dakota, tribal and non-tribal alike. Importantly, the Commission must assert its jurisdiction here to provide NAT's intrastate customers and the IXC's NAT wishes to charge for terminating access service a viable forum for relief from unreasonable rates or practices, now and in the future.

NAT suggests that it is a tribal entity cloaked with tribal sovereignty. NAT Brief at 22-23. It has never asserted this argument before, for good reason. While some tribal entities qualify as an extension of the tribe itself, NAT is not such an entity. As an initial response, the Commission can deem this assertion waived by NAT's

[4] *See* Knudson Aff. Ex. 2, p. 4 (Bates 000002).

application for a certificate of authority, first in 2008, and again in 2011, in Docket TC 11-087. And, under the *Cheyenne River* precedent, the Commission need not reach this issue.

NAT's claim for tribal sovereign immunity also fails as a matter of law. In *Wright v. Prairie Chicken*, 1998 SD 46, 579 N.W.2d 7, the South Dakota Supreme Court articulated a multi-factor analysis to determine whether "a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit …." ¶10, 579 N.W.2d at 9. These factors include whether:

(a) the entity is organized under the tribe's laws or constitution;

(b) the entity's purposes are similar or serve the interests of the tribal government;

(c) the entity's governing body is comprised mainly of tribal officials;

(d) the tribe has legal title or ownership of the property the entity uses;

(e) tribal officials control administrative and accounting functions of the entity;

(f) the tribe's governing body can dismiss members of the entity's governing body.

Id., 579 N.W.2d at 9-10. The court also noted that whether the entity generates its own revenue was significant, as well as whether the entity could bind the tribe or if a suit against the entity would affect the tribe's financial resources. *Id.* 579 N.W. 2d at 10. Indeed, the fact that NAT

was formed by two non-Indians under South Dakota law before the Crow Creek Sioux Tribe became a member of NAT should be dispositive that NAT is not a tribal entity cloaked with tribal sovereign immunity. *See American Property Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 502, 141 Cal. Rptr. 802, 810 (2012); *accord Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 604 (N.D. 1983) (majority Indian-owned corporation not entitled to sovereign immunity because corporation formed under North Dakota law).

NAT effectively fails all of these factors. NAT is a South Dakota LLC controlled by non-tribal members who manage NAT from outside the Crow Creek Reservation. NAT operates with a nine-member board of directors, and Crow Creek Sioux Tribal Council has no power to remove the six non-tribal directors, nor does the tribe itself claim ownership of NAT's equipment. The tribe may own the land on which NAT's equipment sits, but that is of no moment. Nor is there anything in NAT's organizing documents or its agreement with Free Conferencing Corporation that give NAT the power to bind the Crow Creek Sioux Tribe. If Sprint ever gets a refund claim established against NAT, it will have to pursue NAT for recovery, not the tribe. NAT has never before claimed to be an arm of the Crow Creek Sioux Tribe, and under *Wright*, it cannot.

Sprint is not arguing that NAT cannot consent to the regulatory jurisdiction of the Crow Creek Sioux Tribe, or that the tribe may be able to regulate businesses that choose to do business within reservation boundaries with tribal members. Even if the Crow Creek Sioux Tribal Utility Authority might in some circumstances properly regulate NAT's activities with tribal members,[5] that possibility does not empower the Crow Creek Sioux Tribal Utility Authority to authorize NAT to provide intrastate telecommunications services within this State. That power rests solely with the Commission.

Finally, nothing Sprint is seeking transgresses federal Indian policy, as NAT suggests. NAT Brief at 23-25. The FCC may have articulated a general policy directive to promote better infrastructure on tribal lands, but the FCC cannot dictate what powers a tribe may have over non-members. Moreover, Sprint is not asking the Commission to regulate interstate telecommunications services, and it is false for NAT to imply otherwise. *See* NAT Brief at 22.

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[5] In *Plains Commerce Bank v. Long Family Land and Cattle Co.* 554 U.S. 316 (2008), the Supreme Court held that tribal court jurisdiction did not exist over a bank that did business with tribal members residing within tribal boundaries. Hence, the Crow Creek Sioux Tribe does not necessarily have the inherent power to regulate any business that does business with tribal members on a reservation. *See In re Application of Otter Tail Power Co.,* 451 N.W.2d 95, 105 (N.D. 1990) (holding no tribal authority to regulate utility providing service to tribal members).

V. The Commission Should Disregard SDN's Request to Decide Issues Alive in Docket TC 09-098.

SDN takes no position on whether Sprint is entitled to summary judgment on the issues raised in its Motion. SDN Brief at 2. Instead, SDN appears to seek its own affirmative declaratory relief relevant only to TC 09-098:

> Regardless of this Commission's decision [on Sprint's Motion], Sprint should remain liable to SDN for its tariffed charges for the services Sprint ordered and uses.
>
> …
>
> Whether or not NAT is billing Sprint for intrastate charges does not affect the services SDN provides to Sprint.
>
> …
>
> Regardless of the outcome in this matter, Sprint should be precluded from later arguing that because NAT did not have a certificate of authority, a tariff on file, or did not bill intrastate services, that SDN's charges are also not valid.

SDN Brief at 5-6. It would be procedurally improper for the Commission to decide issues beyond the scope of the pleadings and Sprint's Motion. The Commission should thus disregard SDN's request for relief and focus on matters that have been properly raised. The issues still alive in Docket TC 09-098 must be left for another day.

A. It would be procedurally improper for the Commission to award SDN its requested relief.

SDN has not followed the procedure necessary to obtain affirmative declaratory relief. The Legislature has authorized the Commission to

adopt rules parties can use to obtain declaratory relief. SDCL § 1-26-15. Under those rules, a person can obtain declaratory relief only by filing a petition that "shall contain … [t]he precise issue to be answered by the Commission's declaratory ruling." ARSD 20:10:01:34. SDN has no such petition pending at this time.

Nor has SDN moved for summary judgment on any such affirmative claim. The Rules of Civil Procedure allow the Commission to award summary judgment only to a claimant that has filed and supported a motion, not to an intervenor without an affirmative claim. SDCL § 15-6-56(a).

SDN's failure formally to seek declaratory relief is a procedural bar that compels the Commission to disregard SDN's request. The issues SDN raises are alive in Docket TC 09-098 and must be adjudicated there. The Commission should decide Sprint's motion as presented.

B. A Commission decision here may be used by either SDN or Sprint in Docket TC 09-098

If the Commission does not disregard SDN's request on procedural grounds, it should deny SDN's request because a decision here that NAT is operating illegally may very well impact Docket TC 09-098. Sprint expects to argue that SDN's tariff does not authorize the imposition of access charges when calls are delivered to an uncertificated carrier operating in violation of state law. SDN will be free to argue its position –

that its decision to do business with NAT, despite NAT's illegal operations, does not impact whether its access charges are due. The Commission will decide that dispute in TC 09-098, but will not re-analyze whether NAT operated unlawfully without a certificate.

SDN's position that Commission action here cannot impact TC 09-098 is directly at odds with what it has previously told the Commission:

> SDN seeks intervention in this proceeding not only because the Commission's decisions regarding the broader jurisdictional and Commission authority issues over switched access traffic will affect SDN and its member companies, but also because the Commission's decision in this docket will directly impact SDN's interests in Docket TC 09-098.

SDN's Petition to Intervene ¶ 6 (May 21, 2010) (emphasis added).

> SDN filed a petition to intervene on May 21, 2010, not only because the jurisdictional and Commission authority issues raised in Sprint's Complaint will affect SDN and its member companies, but also because of the potential impact of any Commission decisions in this docket on Docket TC 09-098 (SDN complaint against Sprint).

Opposition of SDN, SDTA, and Midstate to NAT's Motion to Stay and Support of Sprint's Motion to Establish Briefing Schedule ¶ 2 (Aug. 5, 2010).

The only thing that has changed since these earlier admissions is that SDN now recognizes that NAT is operating illegally. (If SDN believed NAT were operating legally it would certainly have opposed Sprint's motion.) Having seen the writing on the wall, SDN now backpedals on its

previous statements and asks the Commission to decide that such illegality is irrelevant to Docket TC 09-098. Yet as SDN must know, the Commission should decide the pending motion on the merits, and then will address any application to Docket TC 09-098 at the appropriate time. Accordingly, the Commission should disregard SDN's request.

CONCLUSION

Free Conferencing Corporation has used NAT to exploit a regulatory system for lucrative gain. The Commission should no longer tolerate this and grant Sprint's motion for declaratory relief.

Respectfully submitted,

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BRIGGS AND MORGAN, P.A.

By *s/Scott G. Knudson*
Scott G. Knudson
Philip R. Schenkenberg
2200 IDS Center
Minneapolis, MN 55402
(612) 977-8400

TOBIN LAW OFFICES
Tom D. Tobin
PO Box 730
422 Main Street
Winner, SD 57580
(605) 842-2500

Counsel for Sprint Communications Company, L.P.