UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

CIV. NO. 10-4110

Plaintiff,

vs.

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

Defendants.

NATIVE AMERICAN TELECOM, LLC's MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

Defendant Native American Telecom, LLC (NAT) requests that this Court stay all proceedings in this duplicative federal court action until Sprint Communications Company, L.P. (Sprint) exhausts all remedies in the Crow Creek Tribal Court (Tribal Court). (Doc. 14). NAT's Tribal Court action involves the same questions of law and fact that Sprint seeks to litigate in this Court. (Doc. 14).

It is an elementary tenet of federal Indian law that a party may not circumvent or collaterally attack the jurisdiction of a tribal court by filing a parallel action in federal court. The "tribal exhaustion doctrine," which promotes tribal self-government and the authority and development of tribal courts, mandates that this Court "stay its hand" until the Tribal Court has had a full and fair opportunity to determine its jurisdiction, and, if the Tribal Court finds such jurisdiction to exist, to adjudicate the merits of the dispute between NAT and Sprint.

Perhaps most important at this time, this Court should determine the tribal exhaustion issue *before* even considering Sprint's Motion for Preliminary Injunction. Sprint is simply required to exhaust its Tribal Court remedies before proceeding in this Court. Unfortunately, Sprint's Motion for Preliminary Injunction makes several incorrect and unsupported allegations to advance its argument that it should be exempt from the tribal exhaustion requirement. None of Sprint's assertions, however, suffices to exempt it from the trial exhaustion doctrine. Because the Tribal Court has jurisdiction, and Sprint has not complied with the requirement of tribal exhaustion, NAT's Motion to Stay must be granted, and Sprint's Motion for Preliminary Injunction must be denied.

Even if this Court determines that it has jurisdiction, it should deny Sprint's Motion for Preliminary Injunction. Sprint has not met the burden of proof required to support issuance of a preliminary injunction. And even if Sprint has met some of the prongs contained in the standards for issuance of a preliminary injunction, this Court should exercise its wide range of discretion and deny Sprint's Motion.

STATEMENT OF FACTS

A. The Structure and Purpose of Native American Telecom, LLC

NAT is a full-service, tribally-owned limited liability company organized under the laws of the State of South Dakota. NAT's ownership structure consists of the Crow Creek Sioux Tribe (51%) (Tribe), Native American Telecom Enterprise, LLC (25%) (NAT ENTERPRISE), and WideVoice Communications, Inc. (24%) (WideVoice).[1] Affidavit of Gene DeJordy ¶ 2 (DeJordy Affidavit).

NAT provides high-speed Internet access, basic telephone, and long-distance services on and within the Crow Creek Sioux Tribe Reservation (Reservation). NAT's services take place exclusively within the exterior boundaries of the Reservation. NAT *does not* provide services within the State of South Dakota outside the exterior boundaries of the Reservation. As a result of its efforts, NAT has created jobs and provided much-needed economic opportunities on the Reservation.[2] DeJordy Affidavit ¶ 4.

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[1] NAT's "Joint Venture Agreement" between the Tribe, NAT ENTERPRISE, and WideVoice is attached to the Declaration of Scott R. Swier (Swier Declaration) and marked as "Exhibit 1." For sake of clarity, it should be noted that NAT ENTERPRISE is a telecommunications development company and is a ***separate and distinct entity*** from NAT. The Tribe is a federally recognized Indian tribe with its tribal headquarters located on the Crow Creek Sioux Tribe Reservation in Fort Thompson, South Dakota. WideVoice is a Competitive Local Exchange Carrier (CLEC). DeJordy Affidavit ¶ 3.

[2] The lack of sufficient telephone and other telecommunications services upon Native American reservations has been a long-standing problem. While 94% of all Americans have at least one

B. NAT's Efforts on the Reservation and Sprint's Illegal Acts of "Self Help"

In 1997, the Tribe established the Crow Creek Sioux Tribe Utility Authority (Tribal Utility Authority). The Tribal Utility Authority's purpose is to plan and oversee utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents." DeJordy Affidavit ¶ 5.

On August 19, 2008, the Tribe issued its "Crow Creek Indian Reservation - Telecommunications Plan to Further Business, Economic, Social, and Educational Development" (Telecommunications Plan).[3] DeJordy Affidavit ¶ 6.

On October 28, 2008, the Tribal Utility Authority entered its "Order Granting Approval to Provide Telecommunications Service" (Approval Order).[4] Under this Approval Order, NAT was "granted authority to provide telecommunications service on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe."[5] DeJordy Affidavit ¶ 7.

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telephone in their home, the Federal Communications Commission (FCC) has found that only 47% of Native Americans living on reservations or other tribal lands have telephone service. The FCC has determined that this lower telephone subscribership is "largely due to the lack of access to and/or affordability of telecommunications services in these areas" *Federal-State Joint Board on Universal Services: Promoting Development and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order,* 15 FCC Red. 12208 (2000), at ¶¶ 20, 26 (2000 FCC Report). The FCC has also found that "by enhancing tribal communities' access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, we increase tribal communities' access to education, commerce, government and public services." *Id.* at ¶ 23. *See* Tracey A. LeBeau, *Reclaiming Reservation Infrastructure: Regulatory and Economic Opportunities for Tribal Development,* 12 Stan. L & Pol'y Rev. 237, 238 (2001) ("Reservation infrastructures, including basic services such as water, electricity, gas and telecommunications, are currently incapable of supporting tribal populations").

[3] The Telecommunications Plan is attached to the Swier Declaration and marked as "Exhibit 2."

[4] The Approval Order is attached to the Swier Declaration and marked as "Exhibit 3." The Approval Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue.

[5] The Approval Order "is akin to competitive local exchange (CLEC) approval provided to carriers outside of reservations."

As a result of the Approval Order, NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.[6] DeJordy Affidavit ¶ 8.

In September 2009, pursuant to the Approval Order, and after over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States.[7] Today, NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. Specifically, NAT's activities on the Reservation include:

- NAT provides 110 high-speed broadband and telephone installations at residential and business locations on the Reservation. Additional installations are taking place on a daily basis.
- 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.
- The demand for the Internet Library's services is so great that NAT is building 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 is scheduled to open in November 2010.
- NAT subsidizes these telecommunications services by providing them free-of-charge to Tribal members. Without NAT's subsidies, most of the Tribal members would not be able for afford these telecommunications services.

[6] The Approval Order requires 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." NAT has always complied with this portion of the Approval Order. DeJordy Affidavit ¶ 8.

[7] DeJordy Affidavit ¶ 10. The Tribe's Press Release announcing the launch of its tribally-owned telephone and advanced broadband telecommunications system is attached to the Swier Declaration and marked as "Exhibit 4."

- NAT has enabled the Reservation to escape the unfortunate and long-standing circumstances that have prevented economic growth. Before NAT's efforts, the Tribal members' inability to pay for telecommunications services was the primary reason that they were not provided with access to these modern services. As such, without the ability to pay for these modern services, economic growth and viability were impossible. Now, however, because of NAT, residents are building their own websites to sell their unique native crafts over the Internet. These unprecedented economic opportunities will continue to grow as Tribal member's familiarity with modern telecommunications services increases.

- NAT has created seven jobs (three full-time and four part-time) and an office location on the Reservation. These employment opportunities are substantial considering the well-documented fact that the Reservation's unemployment rate is estimated to be between eighty (80) and ninety (90) percent.

- NAT's business structure is composed of both Tribal and private entity ownership. As a result of this unique "tribal-private entity" partnership, NAT has attracted unprecedented financial and capital investment to the Reservation. This unique business model has replaced the "old model" of non-Tribal service providers providing limited services (at best) and having no economic incentive to ensure the Tribe's services grow, prosper, and become profitable. This "old model" has proven to be a failure. Under NAT's business model, however, the more successful NAT becomes, the more economically successful the Tribe becomes.

DeJordy Affidavit ¶ 9; Affidavit of Thomas Reiman, ¶¶ 4-15. In sum, NAT's efforts provide the Tribe with a vehicle to "pave the way" for much-needed business, economic, education, and social development on the Crow Creek Reservation.

Shortly after NAT launched its tribally-owned telephone system, Sprint improperly refused to pay NAT's lawfully-imposed Access Tariff.[8] In March 2010, NAT filed a complaint with the Tribal Utility Authority seeking enforcement of its Access Tariff. Specifically, NAT

[8] Sprint is a limited partnership that provides interexchange services on the Reservation. *It should be noted that Sprint initially paid NAT its lawfully-imposed Access Tariffs. However, shortly after making these initial payments, Sprint engaged in the improper "self help" actions that have resulted in this (and numerous other) lawsuits.* DeJordy Affidavit ¶ 15.

alleged that Sprint was not paying the required Access Tariff for services NAT rendered on the Reservation.[9] DeJordy Affidavit ¶¶ 14, 16.

On March 29, 2010, the Tribal Utility Authority entered an Order agreeing with NAT and finding that Sprint's "self help" in refusing to pay NAT's Access Tariff violated the "filed rate doctrine."[10] DeJordy Affidavit ¶ 17. Specifically, the Tribal Utility Authority found that "[Sprint's] self-help actions could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." The Tribal Utility Authority also held "[NAT] commenced providing essential telecommunications services . . . to the residents of the Crow Creek reservation pursuant to [the Tribal Utility Authority's Approval Order]. . . . It is also a matter of public record that [NAT] has commenced offering new and critically needed services on the reservation." DeJordy Affidavit ¶ 17.

The Tribal Utility Authority's Order concluded by stating:

> The Crow Creek reservation is a rural, high-cost service area. Access service revenue has historically been a critically important source of revenue for rural carriers, like [NAT], to support

[9] Sprint has taken the position, despite its earlier Access Tariff payments and the applicability of lawful tariffs in effect, that the termination of traffic by NAT on the Reservation is not subject to compensation, even though NAT incurs costs to terminate Sprint's traffic. DeJordy Affidavit ¶ 16.

[10] The Tribal Utility Authority's Order is attached to the Swier Declaration and marked as "Exhibit 5." The Order was signed by then-Crow Creek Tribal Chairman Brandon Sazue. The "filed rate doctrine" requires all customers, such as Sprint, who avail themselves of tariffed services, to pay lawfully-imposed tariff rates. The "filed rate doctrine" is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act and was later applied to the Communications Act of 1934 (as amended). The doctrine has been consistently applied to a variety of regulated industries and stands for the principle that a validly filed tariff has the force of law and may not be challenged in the courts for unreasonableness, except upon direct review of an agency's endorsement of the rate. *See, e.g. Maislin Industries, U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 117 (1990). The doctrine is premised on two tenets – (1) it prevents carriers from engaging in price discrimination between ratepayers, and (2) it preserves the exclusive role of authorities in approving "reasonable" rates for telecommunications services. *Marcus v. AT&T Corp.,* 138 F.3d 46, 58 (2nd Cir. 1998).

> operations. . . . If carriers, like Sprint, are able to take self-help actions and not pay for services rendered subject to a lawful tariff, it would not only put at risk the continued operation of carries like [NAT], but would also put at risk the services relied upon by, and in some cases essential to[,] the health and safety of, consumers."

As such, the Tribal Utility Authority found "Sprint's non-payment of [NAT's] access tariff charges to be a violation of the laws of the Crow Creek Sioux Tribe."[11] DeJordy Affidavit ¶ 18.

As of today's date, Sprint continues to entirely ignore this Order and refuses to pay the Tribal Utility Authority's lawfully-imposed Access Tariff. DeJordy Affidavit ¶ 20.

C. Sprint's Characterization of NAT's 2008 Filing with the South Dakota Public Utilities Commission is Misleading

Sprint's memorandum attempts to allege that NAT somehow acted "nefariously" in 2008 when it requested a dismissal of its certification application from the South Dakota Public Utilities Commission. (Doc. 21, pages 11-12 of 47). However, a thorough analysis reveals that Sprint's characterization of NAT's actions in this SDPUC matter is misleading.

In September 2008, NAT filed an "Application for Certificate of Authority" with the SDPUC.[12] In December 2008, NAT moved to dismiss its Application based on the Tribe's exercising jurisdiction over NAT's services within the exterior boundaries of the Reservation.[13] Shortly thereafter, Midstate Communications, Venture Communications Cooperative, and the South Dakota Telecommunications Authority intervened and opposed NAT's motion to dismiss

[11] The Tribal Utility Authority's Order also provided Sprint with an invitation to address Sprint's concerns. However, Sprint has also entirely ignored this part of the Order. DeJordy Affidavit ¶ 19.

[12] NAT's "Application for Certificate of Authority" (SDPUC TC 08-110) is attached to the Swier Declaration and marked as "Exhibit 6."

[13] NAT's "Motion to Dismiss" is attached to the Swier Declaration and marked as "Exhibit 7."

on numerous grounds (including jurisdictional, procedural, and precedential grounds).[14] NAT promptly replied to the Intervenors' objections.[15]

In January 2009, the SDPUC issued its Staff Response to NAT's motion to dismiss.[16] The Staff Response fairly couched the issue as "whether NAT has the right to voluntarily dismiss its filing for an application for a certificate of authority to provide local exchange services on the . . . . Reservation?" In recommending that NAT's motion to dismiss be granted, the Staff Response opined, "the Intervenors have raised many concerns, but there exists no special reason that the dismissal should not be granted. This docket, which is a filing for a certificate of authority, is not the forum to determine the issues that the Intervenors believe may exist." The Staff Response further explained, "[t]he Intervenors' concerns do not address NAT's technical, financial, or managerial capabilities. . . . The Intervenors would not suffer any prejudice should [NAT's] Motion to Dismiss be granted. NAT has an absolute right to voluntarily dismiss its application and there is no special reason why the dismissal should not be granted." The SDPUC adopted the Response, found "[NAT's] motion to voluntarily dismiss . . . reasonable and *not contrary to the public interest,*" and dismissed the case.[17] (emphasis added).

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[14] The "Intervenors' Response to NAT's Motion to Dismiss" is attached to the Swier Declaration and marked as "Exhibit 8."

[15] NAT's "Reply to the Intervenors' Response to Motion to Dismiss" is attached to the Swier Declaration and marked as "Exhibit 9." The Tribe also offered "Comments" in support of NAT's motion to dismiss. The Tribe's "Comments" are attached to the Swier Declaration and marked as "Exhibit 10." The substantial briefing and efforts by the respective parties leaves no doubt that this SDPUC matter was a heavily "contested" proceeding.

[16] The SDPUC's "Staff Response" to NAT's Motion to Dismiss is attached to the Swier Declaration and marked as "Exhibit 11."

[17] The SDPUC's "Order Granting NAT's Motion to Dismiss and Closing Docket" is attached to the Swier Declaration and marked as "Exhibit 12."

Sprint claims that NAT is improperly operating on the Reservation without the SDPUC's authority. (Doc. 21, pages 11-12 of 47). However, for Sprint to support this allegation, it must imply that the SDPUC's "Order of Dismissal" was somehow obtained by NAT "under color of darkness" and in a nefarious or illegal manner. These claims and implications are yet another example of Sprint's attempt to mislead this Court in support of its motion for preliminary injunction.

D. Sprint's Actions Have Resulted in Duplicative Federal Court and State Regulatory Agency Proceedings

i.) Sprint's South Dakota Public Utilities Commission Complaint

Less than two months after the Tribal Utility Authority issued its Order, Sprint filed a complaint with the South Dakota Public Utilities Commission ("SDPUC" or "Commission").[18] Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority. In its SDPUC complaint, Sprint alleges that (1) the SDPUC has the sole authority to regulate Sprint's interexchange services within the State of South Dakota; (2) the Tribal Utility Authority lacks jurisdiction over Sprint; and (3) NAT must seek a Certificate of Authority from the SDPUC and file a tariff with the Commission before NAT can charge for switched access service.

At this time, Sprint's complaint is pending before the SDPUC. NAT (along with the Tribal Utility Authority) has requested that Sprint's SDPUC complaint be dismissed (or stayed) based on the doctrine of "tribal exhaustion" and for lack of jurisdiction. The parties are currently briefing these issues for the Commission.

[18] Sprint's Amended Complaint to the SDPUC is attached to the Swier Declaration and marked as "Exhibit 13."

ii.) NAT's Complaint in Crow Creek Tribal Court

On July 7, 2010, NAT filed a complaint with the Crow Creek Tribal Court.[19] NAT's complaint asks the Tribal Court to enforce the Tribal Utility Authority's Order. In its Tribal Court complaint, NAT alleges that (1) Sprint is unlawfully refusing to compensate NAT for Access Tariffs, and (2) the Tribal Utility Authority and Tribal Court have proper jurisdiction over Sprint in this matter.

At this time, NAT's complaint is pending before the Tribal Court. Sprint has requested that NAT's Tribal Court complaint be dismissed for lack of jurisdiction. NAT has requested that a scheduling order be entered by the Tribal Court.

iii.) Sprint's Complaint in Federal District Court

On August 16, 2010, Sprint filed a complaint with this Court. Sprint's complaint concerns issues identical to those decided by the Tribal Utility Authority and contained in NAT's Tribal Court complaint. In sum, Sprint alleges that the Tribal Utility Authority and Tribal Court have no jurisdiction over its activities on the Reservation.

At the present time, Sprint's complaint is pending before this Court. NAT has filed its Motion to Stay based upon lack of subject matter jurisdiction and the "Tribal Exhaustion Doctrine." (Doc. 14). Sprint has filed its Motion for Preliminary Injunction. (Doc. 20).

E. The Underlying Dispute Between the Parties

Sprint, a national long distance carrier, would like to avoid its legal duty to pay NAT's lawfully-imposed tariffed access charges simply because Sprint's customers are calling some of NAT's customers, which in turn has increased the amount of money Sprint owes NAT under the governing tariffs. Sprint admits that it has previously paid NAT's tariffed rates. (Doc. 22, ¶ 8).

[19] NAT's Tribal Court Complaint is attached to the Swier Declaration and marked as "Exhibit 14."

Sprint must also concede, under the "filed rate doctrine," that NAT's tariffs are binding and that Sprint pays other carriers, in positions similar or identical to NAT, their tariffed rates for calls to all of Sprint's customers.

Sprint's false, misleading, and disingenuous bases for this refusal to pay is that NAT is somehow involved in an unlawful "scheme." However, Sprint provides no authority for this legally unsupportable claim and its arguments are foreclosed by binding Federal Communications Commission (FCC) precedent. In fact, by engaging in "self help" and not paying NAT's lawfully-imposed tariffed access charges, *Sprint is acting unlawfully*.

The fact of the matter is that Sprint views NAT as a competitor. Sprint's intention is to replicate what it has done in previous cases – eviscerate its competition by refusing to pay legally-imposed access charges – thereby financially "bankrupting" any potential competition.

In sum, Sprint's basis for its refusal to pay NAT is that NAT is involved in an unlawful "scheme." However, Sprint's claims have been foreclosed by previous FCC precedent and what Sprint mischaracterizes as a "scheme" is in fact perfectly legal and acceptable. Based upon its unlawful "self help" conduct alone, Sprint's untenable request for preliminary injunction should be denied by this Court.

F. Sprint's Allegations in Support of Its Motion for Preliminary Injunction are Misleading

Sprint's alleges that NAT is "exploiting a weakness in the federal regulatory scheme" and engages in "traffic pumping." (Doc. 21, pages 2, 7-16 of 47). However, Sprint's "standard" argument of NAT's "exploitation of the system" and "traffic pumping" is simply wrong, a veiled attempt to improperly argue the merits of this case, and irrelevant to the pending issues of "tribal exhaustion" and injunctive relief.

Sprint provides an incorrect and misleading explanation of NAT's services. (Doc. 21, pages 9-18 of 47). In addition to those already mentioned in this memorandum, NAT also provides the following services:

- NAT completes Sprint's customers' conference calls. Each month, Sprint bills and collects call termination fees from its customers. Yet Sprint refuses to pay NAT's termination fees for the services NAT provides. As such, Sprint profits handsomely from these calls. *In other words, Sprint bills its customers for the fees, collects the fees from its customers, improperly refuses to distribute their customer's fees to NAT, and keeps a considerable profit.*

- NAT does not engage in illegal "traffic pumping." Sprint knows that NAT's business model is perfectly legal. Sprint simply views NAT as a competitor. NAT has properly filed federal and tribal tariffs that clearly explain that NAT is offering services to conference providers. NAT's business has always been conducted with the utmost transparency. Sprint's attempts to somehow claim that NAT's services and tariffs are improper are incorrect and misleading.

- NAT's advanced telecommunications system is located on the Reservation. In fact, NAT's telecommunications system is located directly behind the Reservation's Youth Center. Sprint could have easily verified this fact by making a simple visual inspection of NAT's facilities. Instead, Sprint chooses to submit false and misleading information as to NAT's operations on the Reservation.

- Sprint incorrectly asserts that calls do not "terminate" on the Reservation. In fact, calls do "terminate" on the Reservation via NAT's advanced telecommunications system.[20]

Reiman Affidavit, ¶¶ 12-15

Sprint also submits incorrect and misleading allegations regarding NAT's technology. NAT's broadband network uses WiMax (Worldwide Interoperability for Microwave Access)

[20] It should also be noted that all of the major long distance carriers (including Sprint) offer conference calling services that compete with NAT. In fact, NAT has offered Sprint a termination rate that is similar (if not identical) to the termination rate that Sprint charges the other major carriers for terminating their own respective conferencing services. However, in an effort to drive its competition out of business, Sprint illegally invokes the doctrine of "self help" and refuses to pay smaller competitors' lawfully-imposed fees. In an effort to settle the numerous pending lawsuits between the parties, NAT even offered Sprint a "Tier-One Metro Rate" ($0.01 per minute) even though NAT is legally entitled to collect the higher "Rural Rate." Therefore, Sprint's claim that NAT is involved in a "scheme" to collect these more profitable "Rural Rates" is patently incorrect.

technology operating in the 3.65 GHZ licensed spectrum, providing service to residential, small business, hospitality, and public safety customers. WiMax is a Broadband Wireless Access technology based on the IEEE 802.16 standard that enables the delivery of high-speed personal, business, and enterprise class broadband services to subscribers anytime, anywhere. Through the use of advanced antenna and radio technology with OFDM/OFDMA (Orthogonal Frequency Division Multiplexing), NAT delivers wireless IP (Internet Protocol) voice and data communications. WiMax was selected because this technology offers flexible, scalable, and economically viable solutions that are key components to deploying in vast rural environments, such as the Reservation. DeJordy Affidavit ¶ 13.

Unfortunately, Sprint's representations regarding the technology used by NAT is incorrect and misleading in numerous ways. However, for sake of clarity and expediency, NAT asserts that five of Sprint's representations are fundamentally incorrect and misleading:

- Paragraph 10 of the Affidavit of Amy S. Clouser (Clouser Affidavit) is incorrect and misleading. (Doc. 22, ¶ 10). In fact, NAT has over one-hundred (100) residential subscribers on the Reservation.

- Paragraph 11 of the Clouser Affidavit is incorrect and misleading. (Doc. 22, ¶ 11). NAT delivers all "line side" subscriber calls to subscribers or subscriber equipment located on the Reservation. In the case of the latter, the subscriber equipment is voice application equipment situated in NAT's "radio hut." NAT's "radio hut" is owned by NAT and located on the Reservation.

- Paragraph 12 of the Clouser Affidavit is incorrect and misleading. (Doc. 22, ¶ 12). The Clouser Affidavit is partially correct in that a call is transported to a WideVoice switch in Los Angeles, California. In fact, this call is known in the industry as the "trunk side" of the call. The switch then transmits the call to NAT's subscribers and subscriber equipment located on the Reservation. This call is known in the industry as the "line side" of the call.

  This long-haul "trombone-like" transport is due to the lack of physical telephone equipment facilities in Fort Thompson, South Dakota or Sioux Falls, South Dakota. Since the time this network topology was constructed, however, WideVoice has negotiated and obtained physical accommodations to house a telephone switch/media gateway in Sioux Falls, South Dakota. When this network modification is complete, calls will be

delivered on the "trunk side" on inter-building facilities to the WideVoice switch and then be transferred to private, "line side" facilities out to the Crow Creek Reservation.

- Paragraph 21 of the Clouser Affidavit is incorrect and misleading. (Doc. 22, ¶ 21). Sprint simply dismisses the rapidly expanding technology that allows telephone switching equipment to be "Geo-Diverse." WideVoice owns and operates such "Geo-Diverse" equipment. The common call control of this "Geo-Diverse" equipment is located in Los Angeles, California, under the Local Exchange Routing Guide (LERG) designator of LSANCARD6S. This common control portion of the fabric controls diverse switch equipment in geographically-diverse locations. In this case, these locations are Los Angeles, California, and Sioux Falls, South Dakota.

- Clouser's Affidavit (Doc. 22, ¶ 21) is also incorrect and misleading in that it simply dismisses the industry's understanding and rules of jurisdictional presence in the North American telephone network (Rules). Under the Rules, a competitive telephone company is not required to have a "phone switch" in each and every rate center. Instead, the rate centers can be aggregated back to a "switching hub" such as Los Angeles, California, or Sioux Falls, South Dakota, by using a "Point of Interface" (POI) registration to provide jurisdiction. This POI designator for NAT is FFTHSDXA1MD, located on the Reservation in Fort Thompson, South Dakota, unlike the local incumbent telephone company that serves that rate center from a telephone switch in Kimball, South Dakota.

Affidavit of Keith Williams, ¶¶ 3-6.

DISCUSSION OF LAW

I. THIS COURT SHOULD GRANT NAT'S MOTION TO STAY BASED UPON THE "TRIBAL EXHAUSTION DOCTRINE"

A. NAT's Motion to Stay Based Upon the "Tribal Exhaustion Doctrine" Should be Determined *Before* Considering Sprint's Request for Injunctive Relief

Federal Courts are courts of limited jurisdiction, and in every case, a court must determine at the outset whether it has jurisdiction. Even when a party files a motion for preliminary relief, a federal court should decide whether it has jurisdiction *before* it considers whether to grant the preliminary relief, and where a moving party is unable to carry its burden to establish jurisdiction, the request for preliminary relief must be denied and the matter dismissed. *See, e.g., Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412, 1417 (8th Cir. 1996) (before

considering whether to grant temporary injunctive relief in favor of a tribe, the court first determined whether or not there is federal court jurisdiction).

Exhaustion of tribal court remedies is required before a federal court can exercise jurisdiction to consider issuing a preliminary injunction. United States Supreme Court and Eighth Circuit Court of Appeals precedent requires that tribal court remedies be exhausted before an action may be heard by a federal court. Here, Sprint has not exhausted its Tribal Court remedies. Consequently, at this time, this Court should not consider issuing a preliminary injunction.

B. The "Tribal Court Exhaustion Doctrine"

In *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) and *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845 (1985), the Supreme Court announced the doctrine of "tribal court exhaustion." This doctrine is designed to protect the integrity of tribal courts, vital as those courts are to the exercise of tribal self-government. Under this doctrine, Sprint may not, in this Court, challenge the jurisdiction of the Tribal Court or litigate the merits of the dispute already pending before the Tribal Court until Sprint first exhausts all remedies available in the Tribal Court regarding similar issues.

The federal courts have uniformly held that, under the tribal court exhaustion doctrine, a party may not circumvent or attack a tribal court's jurisdiction by filing a duplicative federal court action. Because this dispute strikes at the very heart of the Tribe's self-determination – including Sprint's efforts to pierce the Tribe's sovereign immunity and the Tribe's exercise of regulatory and adjudicatory oversight over economic development activities on the Reservation –

it presents a classic case for application of the tribal court exhaustion doctrine. Accordingly, this Court should "stay its hand" until Sprint exhausts its remedies in Tribal Court.[21]

C. The "Tribal Court Exhaustion Doctrine" Applies In This Case

"Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." *Iowa Mut.,* 480 U.S. at 14-15 (internal citation and footnote omitted). "A federal court's exercise of jurisdiction over matters relating to reservation affairs can . . . impair the authority of tribal courts[.]" *Id.* at 15 (citations omitted). Accordingly, a party may not attack or circumvent the jurisdiction of the tribal court in a collateral or parallel federal action unless and until it first exhausts all remedies available in tribal court. *Id.* at 16-17; *Nat'l Farmers,* 471 U.S. at 856-57.[22]

While the exhaustion of tribal court remedies is "required as a matter of comity, not as a jurisdictional prerequisite[,]" *Iowa Mut.,* 480 U.S. at 16 n. 8, the doctrine is a mandatory "inflexible bar" to a federal court's exercise of jurisdiction. *Duncan Energy Co. v. Three Affiliated Tribes of Fort Berthold Reservation,* 27 F.3d 1294, 1300 (8th Cir. 1994); *Bowen v. Doyle,* 230 F.3d 525, 529-30 (2nd Cir. 2000). Further, because the "federal policy of promoting tribal self-government encompasses the development of the entire tribal court system, . . ." "[a]t

[21] The duration of such a stay would turn on the Tribal Court's jurisdictional determination. Under the tribal court exhaustion doctrine, if the Tribal Court concludes that it lacks jurisdiction over Sprint or the subject matter of the dispute, this Court would then proceed to adjudicate the merits of the dispute. If, however, the Tribal Court concludes that it possesses jurisdiction, then this Court should "stay its hand" until the Tribal Court adjudicates the merits of the dispute. After the Tribal Court's adjudication on the merits, and the parties' exhaustion of any available appellate remedies, this Court could then proceed to review the Tribal Court's jurisdictional determination. If this Court upholds the jurisdictional determination under federal law, then it would not re-adjudicate the merits. If, however, this Court finds that the Tribal Court acted without jurisdiction, it would then adjudicate the merits of the dispute.

[22] The tribal court exhaustion doctrine applies regardless of whether a party collaterally attacks the jurisdiction of a tribal court directly, see *Nat'l Farmers,* 471 U.S. at 856-57, or indirectly by seeking to litigate the merits of a dispute already before a tribal court, see *Iowa Mut.,* 480 U.S. at 11-13, 16-17.

a minimum, exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determination of the lower tribal courts[,]" *Iowa Mut.,* 480 U.S. at 16-17, and a federal court must "stay[] its hand" until tribal appellate review is complete, *Nat'l Farmers,* 471 U.S. at 857. Following the exhaustion of tribal court remedies, the tribal courts' determination of tribal jurisdiction is subject to challenge in federal court – until then, "it would be premature for a federal court to consider any relief." *Id.; see also Iowa Mut.,* 480 U.S. at 19.

To NAT's knowledge, the federal courts have arrived at complete unanimity on the precise question presented here. With the exception of occasional district court opinions that have been overturned on appeal, the federal courts have uniformly held that the tribal court exhaustion doctrine precludes a party such as Sprint from litigating in federal court those very same issues that are pending in a parallel tribal court action.

For example, in *Gaming World Int'l Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840 (8th Cir. 2003), the Eighth Circuit considered a dispute stemming from a casino management agreement between Gaming World and the Band. The dispute arose when the tribal council terminated the agreement and Gaming World initiated arbitration proceedings. *Id.* at 846-47. The Band subsequently sued Gaming World in tribal court, seeking a declaration that the management agreement was invalid. *Id.* at 846. Gaming World objected to tribal court jurisdiction and, one month later, sued the Band in federal court, seeking a declaratory judgment as to the validity of the agreement and an order compelling arbitration. *Id.* Recognizing that "[t]he first filed declaratory action [in tribal court] encompasses all of the issues between the parties . . . [and that] Gaming World's subsequent petition for declaratory relief and arbitration was a clear attempt to evade tribal court jurisdiction," the Eighth Circuit held:

> [T]he district court erred by not deferring for exhaustion of tribal court remedies and by proceeding to rule on the motion to compel

> arbitration. *Our decision in* [Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412 (8th Cir. 1996)] and those in similar cases decided by the Fifth, Ninth, and Second Circuits teach that exhaustion should be required when a party tries to avoid tribal court jurisdiction by seeking an order to compel arbitration in federal court.* This is especially true if the underlying dispute involves *activities undertaken by tribal government within reservation lands.* Failure to require exhaustion in these circumstances would undermine the important federal policy to foster tribal self government through the development of tribal courts as enunciated in *Nat'l Farmers Union Ins. Co.* and *Iowa Mut. Ins. Co.*

Id. at 851-52 (emphasis added) (footnote omitted).

The Eighth Circuit was also confronted with the exhaustion doctrine in *Bruce H. Lien Co. v. Three Affiliated Tribes,* 93 F.3d 1412 (8th Cir. 1996). There, the Chairman and Secretary of the Three Affiliated Tribes Tribal Business Council, purportedly acting on behalf of the Tribes, executed a gaming management agreement with the Bruce H. Lien Company that included an arbitration clause and corresponding waiver of sovereign immunity. *Id.* at 1414-15 n.2. When the company demanded arbitration, the Tribes sued in tribal court seeking a ruling that the management agreement was "null and void under Tribal law due to lack of proper authority and failure to garner approval by the [Tribal Business Council]." *Id.* at 1415-16. After the Tribes obtained a preliminary injunction from the tribal court enjoining the company and the American Arbitration Association from proceeding with the arbitration, the company filed suit in federal court seeking to enforce the arbitration clause. *Id.* at 1416. The Eighth Circuit concluded:

> [T]he Tribes are challenging the legal validity of the contract itself, specifically the actions of its former Chairman leading to the execution of the contract. This challenge to the document itself therefore calls into question all provisions contained therein (including provisions relating to arbitration, sovereign immunity, and federal district court jurisdiction). . . .
>
> [T]he issue becomes where the decision regarding the contract's validity is to be made. In the end we are convinced that the

> question must first be promptly addressed in the Tribal Court, subject to appropriate review by the District Court.

Id. at 1417.

In *Reservation Telephone Cooperative v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996), three telephone cooperatives challenged the authority of multiple tribes to impose possessory interest tax on telephone lines and rights-of-way within their reservation. *Id.* at 182. Each cooperative provided telephone service to the reservation through telephone cables crossing reservation lands by virtue of rights-of-way granted by the Secretary of the Interior.[23] *Id.* at 182-83.

In 1990, the tribes enacted a tax on interests in real and personal property located within the exterior boundaries of the reservation and used for business or profit. This possessory interest tax was assessed on 100 percent of the actual value of the possessory interest as determined by the Tribal Tax Commission. *Id.* at 183. Under tribal law, the cooperatives' property interests situated within the reservation were subject to the possessory interest tax and to tribal remedies and appeal provisions. As such, the Tribal Tax Commission sent the possessory interest tax forms to the cooperatives with a letter indicating the tribes' intent to collect the taxes. Subsequently, the tribes sent a notice to the cooperatives setting a deadline for filing possessory interest tax returns. *Id.*

In an attempt to avoid paying the taxes, the cooperatives filed an action for declaratory judgment in the United States District Court for the District of North Dakota. The cooperatives asserted various grounds for invalidation of the tribal tax and sought to enjoin the tribes from

[23] Congress authorized the Secretary of the Interior to grant these rights-of-way in Section 3 of its Act of March 3, 1901, 31 Stat. 1083 (codified at 25 U.S.C. § 319) (1901 Act). The 1901 Act further authorizes the Secretary of the Interior to tax telephone lines for the benefit of Indian tribes, but leaves intact the authority of state, territorial, or municipal authorities to assess a tax on telephone lines laid pursuant to federal rights-of-way. *Id.* at 183.

enforcing the tax. *Id.* The district court held that the cooperatives were required to present their arguments to the tribal court before the federal court action would be allowed to proceed.[24] *Id.* at 184. In affirming the district court's decision, the Eighth Circuit found the cooperatives' opposition to the tribal exhaustion doctrine to be "both incongruous and inconsistent with the policy of tribal self-governance. . . . " *Id.* at 185. The Eighth Circuit concluded by opining that "if a federal court 'accepts the reasoning that a party does not have to exhaust tribal remedies in a case where the party says the underlying tribal action is preempted, there will never be an exhaustion rule.'" *Id.* (internal citations omitted).

In this case, Sprint seeks to litigate a dispute in this Court involving (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

NAT filed an appropriate action in Tribal Court. Approximately one month later, Sprint filed a plainly duplicative action in this Court and informed the Tribal Court that it contests the jurisdiction of the Tribal Court over it and the subject matter of the dispute. The tribal court exhaustion doctrine unquestionably bars Sprint's transparent attempt to circumvent (and disregard) the jurisdiction of the Tribal Court. Accordingly, this Court should not proceed further in this action until Sprint fully exhausts its remedies in the Tribal Court.

[24] Shortly thereafter, upon a motion by the cooperatives, the district court amended its stay order to provide instead that the case be dismissed without prejudice pending exhaustion by the cooperatives of their tribal remedies. *Id.* at 184.

D. Tribal Exhaustion in this Dispute – a Quintessential Tribal Affair Stemming from the Tribe's Exercise of Self-Government and Turning on the Interpretation of Tribal Law – Fulfills the Doctrine's Underlying Policies

The policies underlying the tribal court exhaustion doctrine underscore the importance of its application to this dispute. In addition to promoting the substantive federal policies of tribal self-government, self-determination, and the authority and development of tribal courts, the tribal court exhaustion doctrine advances several prudential policies. *See Iowa Mut.,* 480 U.S. at 14-17; *Nat'l Farmers,* 471 U.S. at 856-57. Judicial efficiency, the "orderly administration of justice," and the avoidance of "procedural nightmare[s]" demand that a tribal court be afforded full opportunity to determine its jurisdiction, evaluate any challenges thereto, rectify any errors, and develop a full record before a federal court intervenes.[25] *Nat'l Farmers,* 471 U.S. at 856-57. Moreover, exhaustion encourages tribal courts "to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857 (footnote omitted).

By contrast, allowing litigants like Sprint to evade proper exercises of tribal court authority through the filing of duplicative actions in other courts would sap tribal courts of their authority and undermine tribal self-government:

> [U]nconditional access to the federal forum *would place it in direct competition with the tribal courts,* thereby impairing the latter's authority over reservation affairs. Adjudication of such matters by any nontribal court also infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law.

[25] As a procedural matter, when a court finds that tribal exhaustion is required, the court can either stay or dismiss the action. If dismissal may result in the running of the applicable statute of limitations, the court should stay the action instead of dismissing it. *Farmers Union Oil Co. v. Guggolz, et al.,* 2008 WL 216321 (U.S.D.C. – South Dakota – Northern Division, January 24, 2008 – Honorable Charles B. Kornmann) (citing *Sharber v. Spirit Mountain Gaming Inc.,* 343 F.3d 974, 976 (9th Cir. 2003)).

Iowa Mut., 480 U.S. at 16 (emphasis added) (citations omitted). The importance of the tribal court exhaustion doctrine has accordingly been affirmed in numerous cases. *See, e.g., Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 32-33 (1st Cir. 2000) ("[H]aving a tribal court address, in the first instance, the scope of its jurisdiction over a dispute that stems from actions taken in the course of tribal governance promotes efficiency and sensibly allocates scarce judicial resources"); *Calumet Gaming Group-Kansas, Inc. v. Kickapoo Tribe of Kansas,* 987 F.Supp. 1321, 1329 (D. Kan. 1997) ("If exhaustion is not required, the legitimacy and independence of the tribal court system come into serious question. Allowing litigants to bypass tribal institutions by filing an action in federal court would undercut the tribal court system") (citations omitted).

The federal courts have not hesitated to require exhaustion in cases implicating these policies. *See, e.g., Duncan Energy,* 27 F.3d at 1300 (dispute over tribal taxation and employment rights); *Navajo Nation v. Intermountain Steel Bldgs., Inc.,* 42 F.Supp.2d 1222, 1229 (D.N.M. 1999) (case turning on tribal law and custom of insurance, contract, and tort). "Federal court restraint is 'especially appropriate' where the issues between the parties grow out of '[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World,* 317 F.3d at 850 (quoting *Bruce H. Lien,* 93 F.3d at 1420).

Disputes such as the present one between NAT and Sprint go to the heart of tribal self-government, self-determination, and the disposition of tribal resources. By filing a federal action duplicative of the Tribal Court action, Sprint seeks to place this Court and the Tribal Court on the very "collision course" that the exhaustion doctrine forbids. Sprint's strategy offends the policies of judicial efficiency, the orderly administration of justice, tribal-court development, and tribal law-making authority set forth by the Supreme Court in *Iowa Mut.* and *Nat'l Farmers.*

Therefore, in keeping with the numerous decisions set forth above, the exhaustion doctrine and the important policies underpinning it dictate that the Crow Creek Tribal Court must have the first opportunity to address this quintessential tribal affair.

E. Sprint's Unsupported Claims of "Tribal Exhaustion Exceptions" Do Not Apply

In *Nat'l Farmers*, the Supreme Court articulated three exceptions to the requirements of the exhaustion doctrine:

> We do not suggest that exhaustion would be required where an assertion of tribal jurisdiction [1] "is motivated by a desire to harass or is conducted in bad faith," or [2] where the action is patently violative of express jurisdictional prohibitions, or [3] where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction.

471 U.S. at 856 n.21 (internal citation omitted). It is clear, however, that none of these exceptions apply here.

i.) "Bad Faith or Harassment" Exception

With respect to the "bad faith or harassment" exception, NAT's decision to seek judicial relief from the Tribal Court to enforce the Tribal Utility Authority's Order arising out of NAT's activities on and within the Reservation cannot reasonably be viewed as an exercise in bad faith or harassment.

ii.) "Federal Prohibition" Exception

Under the second exception, exhaustion is not required when a federal law expressly vests jurisdiction over a dispute in the federal courts to the exclusion of other forums. *See, e.g., El Paso Natural Gas v. Neztsosie,* 526 U.S. 473, 483-87 (1999) (Price-Anderson Act); *Blue Legs v. United States Bureau of Indian Affairs,* 867 F.2d 1094, 1096-98 (8th Cir. 1989) (Resource Conservation and Recovery Act). Here, however, such is clearly not the case. And while an exhaustive jurisdiction analysis at this juncture is premature and contravenes the fundamental

purpose of the exhaustion doctrine[26] - it is clear that the Tribal Court has jurisdiction over the dispute between NAT and Sprint.

The Federal Communications Commission (FCC or Commission) has never foreclosed an Indian tribe's sovereign authority to initiate and regulate its own telecommunications system. In fact, the FCC recognizes that access to modern telecommunications services is critical to the successful development of all Indian communities. The FCC is committed to facilitating increased access to telecommunications in Indian Country and recognizes that Tribal governments have the right to set their own telecommunications priorities and goals for the welfare of their membership. In fact, the FCC has opined, "As domestic dependent nations, Indian Tribes *exercise sovereign powers over their members and territory*. . . . In this regard, the Commission recognizes that the federal government has a *longstanding policy of promoting tribal self-sufficiency and economic development*." (emphasis added). The Commission has been steadfast in "[affirming] its commitment to promote a *government-to-government relationship* between the FCC and federally-recognized Indian Tribes." *See generally* Federal Communications Commission, *Expanding Telecommunications Access in Indian Country*, pages 9, 18 (July 2006).

It is also important to note that Sprint's Complaint seeks relief from this Court under the Declaratory Judgment Act, (*see* Doc. 1 at ¶¶ 50-56), which provides that a district court "*may* declare the rights and other legal relations of any interested party seeking such declaration[.]" 28 U.S.C. § 2201 (emphasis added). However, because this Act confers "unique and substantial

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[26] *See Petrogulf Corp. v. Arco Oil & Gas Co.,* 92 F.Supp.2d 1111, 1117 (D. Colo. 2000) ("By arguing that this case falls under neither of the *Montana* exceptions, plaintiff addresses whether the tribal court has jurisdiction over this case, not whether the tribal court should be permitted to address that question *before* the case is brought in state or federal court. As the Supreme Court has stated, the questions are distinct") (emphasis in original).

discretion in deciding whether to declare the rights of litigants" rather than an "absolute right upon the litigant[,]" a court's willingness to award such relief must "yield to the applicability of the tribal exhaustion doctrine." *Malaterre v. Amerind Risk Mgmt.*, 373 F. Supp. 2d 980, 981-82 (D.N.D. 2005) (quoting in part *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286-87 (1995)). Indeed, as discussed above, courts have routinely enforced the exhaustion doctrine in declaratory judgment actions against tribes. *See, e.g.*, *Gaming World*, 317 F.3d at 847-48.

iii.) "Futility" Exception

Sprint's speculation that NAT's pursuit of Tribal Court remedies would be futile is not enough to except Sprint from exhausting its Tribal Court remedies. "As long as a tribal forum is arguably in existence, as a general matter, [the federal court] [is] bound by *National Farmers* to defer to it." *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe,* 117 F.3d 61, 66 (2nd Cir. 1997). Thus, if "the availability of a remedy at tribal law is facially apparent[,]" federal plaintiffs "must direct their arguments to the [t]ribal [c]ourt in the first instance." *Id.*

Here, the Crow Creek Tribal Court is a fully functioning and vital court system. Proceedings before the Tribal Court are governed by a comprehensive set of rules which are designed to ensure the orderly and impartial administration of justice, and litigants enjoy a right of appeal from the determinations of the Tribal Court. If Sprint chooses not to avail itself of the procedures and protections being afforded it by the Tribal Court, that decision cannot operate to undermine the application of the exhaustion doctrine. *See Bank of Oklahoma v. Muscogee (Creek) Nation,* 972 F.2d 1166, 1170 (10th Cir. 1992); *see also Williams-Willis v. Carmel Fin. Corp.,* 139 F.Supp.2d 773, 780-81 (S.D. Miss. 2001) (holding that alleged potential for bias in tribal forum does not excuse failure to exhaust).

A party cannot simply presume that it will not receive a fair trial in tribal court. "Absent any indication of bias," a tribal court should not be presumed to be "anything other than competent and impartial." *Duncan Energy,* 27 F.3d at 1301; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978) ("Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians"). Sprint's facts in this regard are nebulous, its logic is confused, and its understanding and appreciation of the implications of its argument on tribal sovereignty is non-existent.

Sprint's assertion that this Court should not adhere to the tribal exhaustion doctrine because the "bad faith," "federal preemption", or "futility" exceptions may apply is misplaced. This Court should follow the well-established exhaustion doctrine and allow the Tribal Court to first determine its jurisdiction.

F. The Federal Communications Commission – "Expanding Telecommunications Access in Indian Country"

The Federal Communications Commission (FCC or Commission) recognizes that access to modern telecommunications services is critical to the successful development of all Indian communities.[27] Federal Communications Commission, *Indian Telecom Initiatives,* pages 1-4. Among other benefits, telecommunications access enhances:

- Educational and learning opportunities through access to the Internet;
- Employment and business opportunities;
- Public safety services, including access to emergency services and long distance medical services; and

[27] The FCC's *Indian Telecom Initiatives* booklet is attached to the Swier Declaration and marked as "Exhibit 15." For more information on the FCC's efforts to recognize tribal governments' sovereignty and its Indian Telecom Initiatives, *see* www.fcc.gov/indians/.

- Access to government services.

Id. at 4. Without question, the FCC is "*committed to facilitating increased access to telecommunications in Indian Country.*" *Id.* (emphasis added).

The FCC also recognizes that Tribal governments have the right to set their own telecommunications priorities and goals for the welfare of their membership.[28] Federal Communications Commission, *Expanding Telecommunications Access in Indian Country*, pages 9, 18 (July 2006). The Commission acknowledges the unique legal relationships that exist between the federal government and Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive Orders, and numerous court decisions. *Id.* at 18. "As domestic dependent nations, Indian Tribes *exercise sovereign powers over their members and territory*. . . . In this regard, the Commission recognizes that the federal government has a *longstanding policy of promoting tribal self-sufficiency and economic development*." *Id.* (emphasis added).

The Commission has been steadfast in "[affirming] its commitment to promote a *government-to-government relationship* between the FCC and federally-recognized Indian Tribes."[29] Federal Communications Commission, *In the Matter of Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes,* Policy Statement (June 8, 2000) (emphasis added). In fact, the FCC recently established an Office of Native Affairs and Policy, which recognizes the importance of "Tribal Nations and Native communities

[28] The FCC's *Expanding Telecommunications Access in Indian Country* document is attached to the Swier Declaration and marked as "Exhibit 16."

[29] The FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes* is attached to the Swier Declaration and marked as "Exhibit 17." "Notwithstanding . . . efforts to promote ubiquitous service, the Commission has recognized that certain communities, *particularly Indian reservations and Tribal lands, remain underserved, with some areas having no service at all*." *Id.* at page (emphasis added).

exercis[ing] their sovereignty and self-determination to ensure a bright future for their generations. . . ."[30] Federal Communications Commission, *FCC Establishes Office of Native Affairs and Policy,* August 12, 2010.

G. Tribal Regulatory Jurisdiction and Adjudicatory Jurisdiction

As previously indicated, NAT believes that an exhaustive jurisdiction analysis at this juncture is premature and contravenes the fundamental purpose of the tribal exhaustion doctrine. Nonetheless, Sprint provides an exhaustive jurisdictional analysis and predictably concludes that this case does not fall within either of the exceptions in *Montana v. U.S.,* 450 U.S. 544 (1981). (Doc. 21, pages 32-40 of 47). However, Sprint's *Montana* analysis disregards the fundamental principle of the tribal exhaustion doctrine – the issue currently before this Court is *not* whether the Tribal Court *has jurisdiction* over this case, but *whether* the Tribal Court *should be permitted* to address that question *before* the case is brought in federal court. And although NAT believes it inappropriate at this time, NAT will provide this Court with an abbreviated *Montana* analysis.

Among the most vexing issues in Indian law is the scope of federal, tribal, and state civil *regulatory jurisdiction* and *adjudicatory jurisdiction* in Indian country. Since *Worcester v. Georgia,* 31 U.S. 515 (1832), the United States Supreme Court has struggled to articulate general principles to resolve these issues. Analysis of civil regulatory authority in Indian country invariably begins with identifying relevant codified statutes, and in some instances, pertinent

[30] The FCC's Press Release announcing the establishment of the Native Affairs and Policy Office is attached to the Swier Declaration and marked as "Exhibit 18." *See generally* "Statement of Commissioner Michael J. Copps" (dated August 12, 2010) (recognizing the establishment of the FCC's Native Affairs and Policy Office). Commissioner Copps's statement is attached to the Swier Declaration and marked as "Exhibit 19." *See also* FCC Press Release (dated June 22, 2010) "Commissioner Michael J. Copps Applauds the Appointment of Geoffrey Blackwell to Lead New Initiatives for Indian Country" (ensuring "robust government-to-government consultation with Tribal governments"). This FCC Press Release is attached to the Swier Declaration and marked as "Exhibit 20."

treaty provisions. When Congress has directly spoken, its wishes must be honored. In most cases, however, no federal statute or treaty authorizes or prohibits explicit assertion of state or tribal regulatory power in a particular situation, and the issue will become whether, under general judge-made principles, states or tribes (or both), have that power.

The basic standards are easily summarized: (1) Congress possesses broad authority to establish the range of state, federal, and tribal authority in Indian country, including the power to delegate federal authority to tribes and the power to restore inherent tribal authority lost through application of federal policies; (2) tribes possess a substantial measure of inherent, or non-congressionally conferred, authority over their members but somewhat limited power over nonmembers; (3) states may regulate nonmembers engaged in Indian country transactions with the resident tribe or its members unless the balance of federal, state, and tribal interests emanating from applicable federal statutes, regulations, treaties, or tribal self-government rights counsels preemption; (4) states may regulate purely nonmember activities within Indian country absent express congressional direction to the contrary; and (5) states generally may not regulate the Indian country activities of the resident tribe or its members absent exceptional circumstances or congressional authorization. *See generally*, *American Indian Law Deskbook (Fourth Edition),* Conference of Western Attorneys General, Chapter 5 (2008).

In other words, it is a fundamental principle of Indian law and United States federal policy that, absent Congressional authorization, jurisdiction over the actions of American Indians and of Tribal Governments, *especially for actions arising on and within the exterior boundaries and on lands reserved in trust for American Indians*, is prohibited. In *Worcester,* the Supreme Court found that Indian tribes have the inherent right to regulate their internal affairs and state officials may only intervene through congressional consent. Indeed, the exercise of state

jurisdiction over Indians (in Indian country), "would interfere with tribal sovereignty and self-government," and is preempted "as a matter of federal law." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15 (1987).

H. The Tribal Utility Authority Has *Regulatory Jurisdiction* In This Case

The Tribe is undoubtedly endowed with the inherent *regulatory jurisdiction* to establish the Tribal Utility Authority. The Tribal Utility Authority's purpose is to plan and oversee utility services on the Reservation and to promote the use of these services "to improve the health and welfare of the residents."

In furtherance of this purpose, the Tribe issued its Telecommunications Plan. The Tribal Utility Authority then issued its Order granting NAT the ability to provide telecommunications service on the Reservation subject to the jurisdiction of the laws of the Tribe. NAT properly filed two Access Service Tariffs (Access Tariff) governing termination of telephone traffic on the Reservation. One Access Tariff was filed with the Federal Communications Commission (FCC) for interstate traffic. A second Access Tariff was filed with the Tribal Utility Authority.

After over one year of planning and infrastructure development, NAT launched one of the first new tribally-owned telephone systems in the United States. NAT provides telephone and advanced broadband service to residential and business customers on the Reservation. NAT has physical offices, telecommunications equipment, and telecommunications towers on the Reservation. NAT also provides a computer training facility with free Internet and telephone service to tribal members. NAT will soon be opening a new stand-alone Internet Library and Training Facility, which will include Internet stations and educational facilities for classes.

The telephone and advanced broadband network system on the Reservation enables the Tribe to pursue new economic development opportunities. The broadband network supports

high-speed broadband services, voice service, data and Internet access, and multimedia. This telecommunications system is the Tribe's new vehicle for "paving the way for much-needed business, economic, social and educational development on the . . . Reservation."

The Tribal Utility Authority also created a legal and administrative process to administer complaints. Sprint refused to pay the lawfully-imposed access tariffs for services rendered by NAT on the Reservation. As such, NAT invoked the Tribal Utility Authority's legal and administrative processes. The Tribal Utility Authority then entered an Order finding that Sprint's self-help actions "could jeopardize the ability of a carrier, like [NAT], to serve the essential telecommunications needs of the residents of the Crow Creek reservation." For these reasons, the Tribal Utility Authority has properly assumed regulatory jurisdiction over this matter.

I. The Tribal Court Has *Adjudicatory Jurisdiction* In This Case

The Supreme Court's decision in *Montana,* 450 U.S. at 544, also weighs in favor of tribal *adjudicatory* jurisdiction. In *Montana,* the Supreme Court found two exceptions that allow for tribal adjudicatory jurisdiction – (1) the consensual relationship exception, and (2) the substantial tribal interest exception when the activities of the non-Indian "threatens or has some direct effect on the political integrity, political security, or the health and welfare of the tribes." *Id.* at 565-66.

First, Sprint has entered into a "consensual relationship" with the Tribe by providing telecommunications services on the Reservation. Sprint further engaged in a "consensual relationship" with the Tribe by temporarily paying the access fees at issue in this case. Clearly, Sprint has been in a consensual relationship with NAT, the Tribe, and the Tribe's members within the exterior boundaries of the Reservation. The application of tribal adjudicatory jurisdiction in this case is applicable under the first *Montana* exception.

Second, Sprint's actions directly threaten and effect the "political integrity, political security, health, and welfare of the Tribe." Sprint's actions attack the Tribe's ability to regulate and administer telecommunications services on the Reservation. Specifically, Sprint attacks the legitimacy and viability of:

- the Tribal Court;
- a tribally-owned limited liability company;
- high-speed Internet access, basic telephone, and long-distance services on and within the Reservation;
- the Tribal Utility Authority's ability to plan and oversee utility services on the Reservation;
- the Tribal Utility Authority's ability to promote the use of these utility services to improve the health and welfare of the residents;
- the Tribe's Telecommunications Plan;
- the Tribal Utility Authority's Approval Order;
- the Tribal Utility Authority's access tariffs;
- the Tribal Utility Authority's Enforcement Order;
- one of the first new tribally-owned telephone systems in the United States;
- over one hundred (100) high-speed broadband and telephone installations at residential and business locations on the Reservation;
- new high-speed broadband and telephone installations on the Reservation;
- an Internet Library with six (6) work stations that provide computer/Internet opportunities for Tribal members who do not otherwise have access to computers;
- the construction and opening of a state-of-the-art facility 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 on the Reservation;

- subsidies that provide telecommunications services, free-of-charge, to Tribal members;

- the Reservation's ability to escape the unfortunate and long-standing circumstances that have prevented economic development and growth;

- past, present, and future employment and economic development opportunities in one of the nation's poorest areas; and

- a unique business structure composed of both Tribal and private entity ownership that has attracted unprecedented financial and capital investment to the Reservation.[31]

Sprint's actions beg the question – why does Sprint want to prevent the Tribe from enhancing its members' access to telecommunications services? Is it simply because Sprint does not want advanced telecommunications services to prosper on the Reservation? Or is it because Sprint finds it economically advantageous to erect barriers to increased educational, commercial, health care, and public safety opportunities for the Tribe?

Whatever the answer, Sprint has never attempted to provide these opportunities despite the FCC's determination that the Tribe's unfortunate circumstances are "largely due to the lack of access to and/or affordability of telecommunications services in these areas." Conversely, NAT's efforts unquestionably enhance the Tribe's access to high-quality telecommunications services. NAT provides these critically-needed educational, commercial, health care, and public safety opportunities for the Tribe on the Reservation. Where Sprint has strenuously labored to prevent progress, NAT has succeeded in leading the way to growth and technological advancement on the Reservation.

[31] A number of photographs showing NAT's activities on the Reservation are attached to the Swier Declaration and marked as "Exhibits 21-40."

Therefore, the application of tribal adjudicatory jurisdiction in this case is also proper under the second *Montana* exception. Sprint's actions undoubtedly threaten and have a direct impact on the political integrity, political security, health, and welfare of the Tribe.

II. A PRELIMINARY INJUNCTION IS AN EXTRAORDINARY REMEDY AND AN ANALYSIS OF THE *DATAPHASE* FACTORS DOES NOT SUPPORT INJUNCTIVE RELIEF

Even if this Court finds that it has jurisdiction over this matter, it should not issue the preliminary injunction requested by Sprint. A federal district court may enter a preliminary injunction pursuant to Fed. R. Civ. P. 65(a). However, a preliminary injunction is an extraordinary remedy. *Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). A preliminary injunction should only be issued in cases clearly warranting it, not in doubtful cases. The factors which a court must consider in determining whether to issue a preliminary injunction are well established. They are "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc*., 640 F.2d 109, 113-14 (8th Cir. 1981).

While no one of these four factors alone is determinative, the movant bears the burden of proof for all of the factors and is at least "required to show the threat of irreparable harm." *Modern Computer Sys., Inc. v. Modern Banking Sys., Inc.*, 871 F.2d 734, 738 (8th Cir. 1989). Even if the movant succeeds in demonstrating all four factors, the trial court has wide discretion in determining whether or not to issue a preliminary injunction. *Am. Home Inv. Co. v. Bedel*, 525 F.2d 1022, 1023 (8th Cir. 1975). In this case, an analysis of the four factors reveals that Sprint is not entitled to the preliminary injunction it seeks, and the Court is compelled to deny Sprint's motion.

A. Irreparable Harm

Sprint is correct in its assertion that although this Court must consider all of the *Dataphase* factors, the most crucial one – the one described as the "threshold inquiry" – is whether the moving party has shown a possibility of irreparable harm in the absence of injunction relief. *See Glenwood Bridge, Inc. v. City of Minneapolis,* 940 F.2d 367, 371 (8th Cir. 1991) (stating that "in any case" involving a motion for preliminary injunction, "the threshold inquiry is whether the movant has shown the threat of irreparable injury" . . . and that a "movant's failure to sustain its burden of proving irreparable harm ends the inquiry"). Sprint must meet its burden of proof with regard to irreparable harm. *Modern Computer Sys.*, 871 F.2d at 738. Sprint, however, has not met its burden of proving that it will suffer irreparable harm if this Court does not grant its request for a preliminary injunction.[32]

Sprint asserts, but has presented this Court with no facts upon which to conclude, that the Tribal Court would be biased, that the Tribal Court would deny Sprint an opportunity to make its argument, and that the Tribal Court would somehow harm Sprint's due process and equal protection rights. The facts presented by Sprint are simply insufficient to constitute irreparable harm and to serve as grounds for this Court to issue a preliminary injunction.[33]

Sprint's unsupported reasoning and assertions that its due process or equal protection rights would be violated in Tribal Court are woefully insufficient to meet its burden of proving

[32] Sprint's assertions regarding the "irreparable harm" it will suffer if this Court does not grant its motion for preliminary injunction is disingenuous at best. In reality, because of Sprint's illegal "self help" actions and refusal to pay NAT's lawfully-imposed tariffs, NAT's ability to continue operating as a thriving, economically-viable, tribally-owned telecommunications company has been put in jeopardy. Of course, attempting to financially bankrupt its competition has been Sprint's (unfortunate) *modus operandi* in other cases. *It is NAT, therefore, that will be irreparably harmed by Sprint's illegal actions, not Sprint.*

[33] Of course, Sprint could still pursue its jurisdictional argument once it has exhausted Tribal Court remedies, should it be inclined to do so.

irreparable harm. In order to meet its burden, Sprint has to actually offer some proof, which it has not done.[34] It is not enough to merely assert bias or incompetence, because tribal courts are presumed to be competent. *Duncan Energy Co.*, 27 F.3d at 1301.

In reality, Sprint is in no danger of irreparable harm if the Court does not grant its request for a preliminary injunction. Instead, what will happen is that Sprint will have the chance to bring its claims and defend the claims against it in Tribal Court. The Tribal Court will resolve the core issues underlying this case, including whether the Tribal Court has jurisdiction over these matters. Sprint may or may not like the outcome of the Tribal Court process.

Depending on the outcome of the Tribal Court process, Sprint may decide to pursue additional remedies in this Court. Sprint may end up spending a bit more money than it would like to. However, additional expense does not constitute irreparable harm. *See, e.g., Entergy, Ark., Inc. v. Neb.*, 210 F.3d 887, 899 (8th Cir. 2000) ("The expense of prosecuting an action through administrative proceedings does not generally constitute irreparable harm, even if unrecoverable"). Sprint has failed to meet its burden of proof to establish that irreparable harm will result if the injunction is not granted. As such, no preliminary injunction should be issued and this Court should stay (or dismiss) this federal court suit.

B. Balance of Harms

Likewise, Sprint entirely fails to meet its burden of proof with regard to the balance of harms. Sprint's attempt at balancing the harm to itself if injunctive relief is not granted, and the harm to NAT if injunctive relief is granted, is unconvincing. Sprint appears to assert that having to proceed with this case in the "biased" Tribal Court before a "biased" Tribal Court Judge

[34] Sprint's allegations of bias and the invocation of the futility exception to the exhaustion requirement are predicated on "information and belief." However, Sprint offers nothing but its speculation and "speculative futility" is insufficient to escape the constraints on federal court jurisdiction where a tribal court has a colorable claim to jurisdiction.

outweighs principles of comity and tribal self-government. As discussed above, no harm will result if Sprint's motion for injunctive relief is denied. "[I]llusory harm to the movant will not outweigh any actual harm to the nonmovant." *Uncle B's Bakery, Inc. v. O'Rourke*, 920 F. Supp. 1405, 1436 (N.D. Iowa 1996).

Conversely, NAT (and the Tribe) would suffer actual harm if this Court were to issue the injunction. The Tribal Court would be precluded from interpreting its own jurisdiction; the Tribe would be denied the right to determine the validity and legality of its own regulatory actions; the Tribe, Tribal Court, and Tribal Judge would be subjected to a suit in a foreign court which would determine issues uniquely within the province of the Tribal Court; and the Tribe would be enjoined from pursuing its claims in the forum of its choice, which is a convenient forum with proper jurisdiction over this matter. Further, the Tribe's sovereignty and sovereign immunity would be impermissibly intruded upon by a federal court's exercise of jurisdiction prior to the Tribal Court's jurisdictional determination.

Sprint's argument that any harm to the Tribe is counteracted by enjoining the Tribal Court from proceeding in this uniquely tribal matter is misguided. On the contrary, it is the Tribe that will suffer harm, while Sprint makes only unsupported assertions of illusory harm. Thus, Sprint has failed to meet its burden of proof regarding the balance of harms and its request for an injunction must be denied.

C. Probability of Success on the Merits

Sprint's probability of success on the merits is slight. Sprint has chosen to sue a tribally-owned telecommunications company that (1) has placed advanced telecommunications equipment on the Reservation, (2) offers unprecedented economic stimulus and employment opportunities to the Tribe, and (3) provides vital services to the Tribe. Sprint would have to

show that despite all of NAT's direct connections to the Tribe and Reservation, the Tribe does not have authority to exercise any regulatory authority within the Reservation's boundaries.

Sprint seems to imply that it only has to provide a small quantum of evidence to support its position that it has a "probability of success on the merits." As discussed above, however, tribal exhaustion is always required unless a limited exception applies. No exception will save Sprint from the tribal exhaustion mandates. Even if, under Sprint's version of this scenario, Sprint has to defend itself against claims brought by NAT in the "biased" Tribal Court, that is insufficient to permit Sprint to escape the requirement that it exhaust tribal remedies before this Court might consider whether to entertain its cause. Once Sprint has exhausted Tribal Court remedies, it can determine what other options might be available to it.

Here, Sprint has not succeeded in meeting its burden to show that a probability of success on the merits exists. While there is support in the law for the proposition that exceptions to the tribal exhaustion requirement exist, the law also supports the proposition that none of these exceptions apply in this case.

D. The Public Interest

Finally, Sprint has failed to meet its burden of proof regarding the public interest. It has asserted that the public interest would be promoted by the granting of preliminary injunctive relief. It has also asserted that the "interests of justice" favor injunctive relief. However, Sprint has failed to provide any explanation to support its assertions.

On the other hand, if this Court exercises jurisdiction over a matter properly within the jurisdiction of the Tribal Court, the authority of the Tribal Court would be impaired and tribal sovereignty would be diminished. *See, e.g., Bruce H. Lien Co.*, 93 F.3d at 1420. This result is not in the public interest. As discussed above, the public policy of encouraging tribal self-

government is well established. *Duncan Energy,* 27 F.3d at 1299 (citations omitted). Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development. *Iowa Mut.,* 480 U.S. at 14-15; *Duncan Energy*, 27 F.3d at 1299. Impairing the authority of the Tribal Court, as Sprint desires, would not only be contrary to the public interest, it would violate federal law and policy.

In sum, a thorough analysis of the *Dataphase* factors reveals that Sprint has failed to meet its burden to prove even one of the factors. And even if Sprint has succeeded in meeting its burden for one or more, or even all of the factors, this Court would have the discretion to deny Sprint's Motion for Preliminary Injunction. Considering Sprint's failure to meet its burden of proof, this Court must deny the Plaintiff's Motion for Preliminary Injunction.

CONCLUSION

This dispute involves, among other things, (1) NAT (a tribally-owned company), (2) NAT's actions on and within the exterior boundaries of the Reservation, (3) the Tribe's and Tribal Utility Authority's regulatory authority, (4) the Tribal Court's adjudicatory authority, (5) the Tribe's financial stability, (6) the Tribe's economic development efforts, (7) employment opportunities for the Tribe's members, and (8) the Tribe's sovereign immunity.

This Court is bound by governing federal precedent to resolve the jurisdictional issues in this matter before turning its attention to considering whether to grant injunctive relief. An analysis of the jurisdictional issues leads to the conclusion that proper regulatory jurisdiction and adjudicatory jurisdiction rests with the Tribe, the Tribal Utility Authority, and the Tribal Court.

Finally, even if this Court determines that it has jurisdiction over this matter, it should not issue the preliminary injunction requested by Sprint because Sprint falls far short of meeting its

burden of proof for any of the four *Dataphase* factors. As such, Sprint's motion for preliminary injunction should be denied.

Dated this 12th day of October, 2010.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
133 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
www.SwierLaw.com
scott@swierlaw.com
Attorney for Defendant Native American Telecom, LLC

LOCAL RULE 7.1 - WORD COUNT CERTIFICATE OF COMPLIANCE

I, Scott R. Swier, certify that *Native American Telecom, LLC's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction,* contains *14,549 words*. This word count certification includes all text, including headings, footnotes, and quotations.

Dated this 12th day of October, 2010.

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
133 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
www.SwierLaw.com
scott@swierlaw.com
Attorney for Defendant Native American Telecom, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *October 12th, 2010,* the foregoing *Native American Telecom, LLC's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction,* was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Scott R. Swier