UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

THERESA MAULE IN HER OFFICIAL CAPACITY AS JUDGE OF TRIBAL COURT, CROW CREEK SIOUX TRIBAL COURT, AND NATIVE AMERICAN TELECOM, LLC.,

Defendants.

File No. 4:10-cv-04110-KES

REPLY MEMORANDUM OF PLAINTIFF SPRINT COMMUNICATIONS COMPANY L.P. IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Sprint Communications Company L.P. ("Sprint") has moved for a preliminary injunction because under *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Nevada v. Hicks*, 533 U.S. 353 (2001), Sprint is undeniably entitled to a federal forum to decide its dispute with Native American Telecom, LLC ("NAT"). *Montana v. United States*, 450 U.S. 544 (1981), establishes that a tribe's regulatory and its tribal court's adjudicatory jurisdiction over non-members extends only to conduct on the reservation. But the undisputed evidence before the court is that Sprint's involvement with NAT ends in Sioux Falls, South Dakota, and all acts relating to its decision not to pay CABS Agent for the invoices it sent

Sprint on NAT's behalf occurred off the Crow Creek Sioux Reservation ("Reservation").

The Supreme Court in *Strate* stated that where a tribal court's lack of jurisdiction is clear, tribal court exhaustion must give way, for the opposite would only lead to delay. 520 U.S. at 459 n. 14. Here, Congress unequivocally established in 47 U.S.C. § 207 that NAT's claims against Sprint for claims involving NAT's tariffs *must* be decided by a federal tribunal. As a result, this Court must enjoin NAT and the Tribal Court and any Tribal Judge hearing NAT's claims from proceeding further.

SUPPLEMENTAL BACKGROUND

A. The Services Sprint is Alleged to Provide NAT are Entirely off the Reservation.

The testimony of WideVoice employee Kevin Williams corroborates what Amy Clouser testified to in her first affidavit – that Sprint's role as an interexchange carrier ("IXC") ends at the switch that South Dakota Network operates in Sioux Falls. (Hearing Transcript ("Tr.") at 30.) Williams' testimony and NAT's Exhibit 41 show that South Dakota Network (*not* Sprint) then sends the calls destined to NAT's 477 exchange as a TDM voice connection (*i.e.*, a traditional long distance call) to WideVoice, a Nevada limited liability company, which operates a switching center in Los Angeles, California. (Tr. 17-18.) WideVoice

converts the TDM voice signal to a Voice over Internet Protocol ("VoIP"), which is then sent over dedicated internet access provided by AT&T back to South Dakota Network, which then routes WideVoice's VoIP signal to NAT's WiMax base in Fort Thompson. (Tr. 18-20.)

Williams' testimony relating his holograph Exhibit 41a similarly shows Sprint's absence from the Reservation. This exhibit illustrates that a call from Fargo, North Dakota (Grandmother) (Tr. 15) to a called person in Fort Thompson (Granddaughter) (Tr. 21) follows the same path illustrated in Exhibit 41 – the convoluted route through WideVoice's Los Angeles switch. Exhibit 41a also shows how three callers from New York, Florida and Texas all talk to each other on NAT's conference call equipment (by dialing 605-477-1112), with none of the three callers being on the Reservation. Exhibit 41 shows that NAT's voice application service is separate and apart from its WiMax service. Indeed, as a piece of "geodiverse" technology, NAT's voice application service equipment could be anywhere on the Internet, as no user of NAT's conference bridge service needs to be on the Reservation, or as Exhibit 41a shows, even anywhere close to the Reservation.

B. NAT Provides Information Services to its Subscribers on the Reservation.

Both Williams and NAT President Tom Reiman testified that the VoIP signal coming from WideVoice's Los Angeles switch and ending up

at NAT's Fort Thompson radio hut is an information service. (Tr. 18-20, 40-41, 91-92.) When enacting the Telecommunications Act of 1996, Congress intended to bring competitive telecommunications to all areas of the country. *See* H.R. Rep. No. 104-458, at 126 (1996) (Conf. Rep.) (section 254(a) preempts barriers to both interstate and intrastate service). The VoIP Service NAT uses is outside the tariff regime, as Sprint noted in its opening brief. Thus, as an information service provider, NAT cannot employ the tariff rate regime available now only to legacy telecommunications services. Instead, NAT must negotiate contracts with interexchange carriers like Sprint in order to bill them for an information service.

C. NAT's Services are Interstate in Nature.

The testimony of Williams and Exhibits 41 and 41a establish the essential interstate nature of the services NAT is offering. All calls to NAT's equipment in Fort Thompson go from South Dakota to Los Angeles and back to South Dakota. Exhibit 41 does not illustrate where a call from one of NAT's subscribers on the Reservation would go if the called party was an End User on the Reservation. But if the called party were outside the WiMax range of NAT's tower, the call, if it is to be completed, would have to find a call path that goes outside the Reservation. Calls from a NAT subscriber on the Reservation to another Reservation

resident (tribal member or not) who uses an incumbent LEC would, in the case of MidState (an incumbent LEC), go off the Reservation. NAT has not shown that any of its calls remain entirely within the Reservation (much less only on non-fee land).

D. NAT is not a Tribal Company.

NAT repeatedly calls itself a tribal entity, but critical facts contradict that assertion:

- NAT was formed under South Dakota law as a limited liability company. Knudson Aff. Ex. A.
- NAT was formed by two non-Indians, Gene DeJordy and Tom Reiman. Knudson Aff. Ex. A; Tr. 82.
- DeJordy, NAT's CEO, lives in Connecticut. Knudson Aff. Ex. E; Tr. 82-83.
- Reiman, NAT's President, lives in Sioux Falls. Knudson Aff. Ex. D; Tr. 82.
- Only DeJordy and Reiman are responsible for NAT's debts. Knudson Aff. Ex. A; Tr. 81-82.
- No tribal member manages NAT; DeJordy and Reiman do. (Joint Venture [Swier Aff. Ex. 1, Dkt. No. 45] § 1.04, § 6.01(b)).
- A majority of NAT's Board are non-members (DeJordy/Reiman 1/3, WideVoice 1/3, Tribe 1/3). (Joint Venture § 8.01).
- NAT is governed by state or federal law. (Joint Venture § 16.07).
- Disputes among NAT's partners are resolved under binding arbitration. (Joint Venture § 16.12).

NAT offers no proof that the land on which the equipment sits – the leases and permits constituting the consideration the Tribe gave for its equity in NAT – is tribal land. If tribal land, title is held in trust by the United States, and special rules and federal government approval is required to record an interest in trust land. *See* 25 C.F.R. Part 162.[1]

E. Sprint does not profit from NAT.

Reiman testified in his affidavit and in court that Sprint is profiting from NAT's traffic pumping scheme. (Tr. 99-101.) That assertion was made without foundation and is simply untrue. As explained by Randy Farrar in his affidavit, "Sprint (or any other IXC) is not authorized to bill switched access termination charges, nor does it bill or pass on to its end-user customers such switched access termination charges." Affidavit of Randy G. Farrar dated October 26, 2010, at ¶ 9. Thus, Sprint does not charge back to its customers who have these plans any of the terminating access charges a local exchange carrier charges Sprint. This would include NAT.

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[1] At the hearing Reiman testified NAT erected its radio tower without digging into the ground. (Tr. 54.) That construction technique enabled NAT to avoid disturbing an undisclosed burial site or archeological resources. Federal law imposes strict standards to follow if potential Native American remains are encountered or an archeological site disturbed. *See* Native American Graves Protection and Repatriation Act, 25 U.S.C. § 2001 *et seq.*, and the Archeological Resources Protection Act, 16 U.S.C. §§ 470aa-470mm.

The traffic pumping business model NAT employs works only if the vast majority of the users of the service have no incentive to monitor call usage. Sprint has call plans which provide its customers with unlimited calling anytime or during non-peak times. Farrar Aff. ¶¶ 13-16. These plans simply do not produce incremental revenue to Sprint from traffic pumpers like NAT. *Id.* In short, any possible incremental revenue to Sprint from its end users would be from a miniscule number of callers paying Sprint per minute who call one of NAT's conference bridge numbers. Farrar Aff. ¶ 20.[2]

F. Sprint does not compete with NAT.

Reiman also claimed, again without foundation, that Sprint competes with NAT for conference call services. (Tr. 78.) This assertion is irrelevant to the question before the Court, but in any event, Reiman is simply incorrect. Sprint does *not* offer conference calling services. *See* Affidavit of Jack Buettner dated October 27, 2010, at ¶ 2. Sprint provides a means for its customers to obtain conferencing services from a company called InterCall, but Sprint does not receive any compensation for its customers' use of InterCall's service. *Id.* ¶ 3.

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[2] On a relevant point, in response to a leading question, the Tribal Treasurer testified that NAT had cost millions. (Tr. 148.) This individual never testified as to the basis for that assertion, but as far as what CABS Agent and WideVoice have invoiced Sprint, the amount invoiced adds up to approximately $425,000, which is not millions of dollars. Second Affidavit of Amy Clouser dated October 27, 2010 at ¶ 3 and Ex. A.

ARGUMENT

I. THE SUPREME COURT DECISIONS IN *STRATE* AND *HICKS* AUTHORIZE AN INJUNCTION AGAINST FURTHER TRIBAL COURT PROCEEDINGS.

NAT'S response to Sprint is to declare the tribal exhaustion rule an "inflexible bar" to a federal court exercising jurisdiction. NAT Brief at 18. NAT asserts that the federal courts are unanimous that a party cannot litigate the same issues in federal court if one of the parties has won the race to the courthouse by filing first in tribal court. Because it has filed a complaint in tribal court that raises the very issues before this Court, NAT also claims federal courts have uniformly held that exhaustion is required. This argument overlooks what the Supreme Court said in *Hicks*:

> [W]e added a broader exception in *Strate*: "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule," so the exhaustion requirement "would serve no purpose other than delay."

533 U.S. at 369 (quoting *Strate*, 520 U.S. at 459-60 and n. 14).

Judge Murphy, writing for the panel in the Eighth Circuit decision in *Plains Commerce Bank*, said that when the *Strate* exception applies, the non-member could go immediately to federal court:

> If the bank was convinced that it was defending against a federal claim over which the tribal court had no jurisdiction, it could have gone immediately to federal court to seek a declaratory

> judgment that the tribal courts lacked authority to hear the case. *See Hicks*, 533 U.S. at 369, 374 … (holding exhaustion requirement inapplicable where jurisdiction already lacking).

Plains Commerce Bank v. Long Family Land & Cattle Co., 491 F.3d 878, 892 n. 11 (8th Cir. 2007). As Judge Murphy explained, the process for invoking the *Strate* exception is to do what Sprint has done; in fact, it is the only way to avoid the delay *Strate* said is unnecessary.

As Sprint pointed out in its brief in opposition to NAT's motion to stay, NAT's primary reliance on *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians,* 317 F.3d 840 (8th Cir. 2003), and *Bruce H. Lien Co. v. Three Affiliated Tribes of the Fort Berthold Reservation,* 93 F.3d 1412 (8th Cir. 1996), another case NAT cites, is misguided. NAT Brief at 10. Both of these cases involved the enforceability of arbitration clauses in gaming contracts with a tribe. The non-tribal entity had entered into a written agreement with the tribe – a fact absent here. But just as significant, neither *Lien* nor *Gaming World* addressed the Supreme Court's decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), or *Nevada v. Hicks*, 533 U.S. 353 (2001).[3]

[3] *Lien* predates *Strate*, so the omission is understandable. *Gaming World's* failure to address *Strate* or *Hicks* can be explained by the litigants' failure to cite those decisions to the court of appeals. Sprint Brief at 18 n. 4.

NAT's briefs exalts tribal court exhaustion, citing a number of decisions from around the country upholding that rule in different circumstances. One of these, *Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294 (8th Cir. 1994), involved a challenge to a tax imposed on oil companies operating within the reservation, significant parts of which were owned in fee by non-tribal members. One oil company sued to enjoin the imposition of the tax on oil leases on fee land owned by non-members. *Id.* at 1296. *Duncan Energy* predates *Strate* and *Hicks*. *See* AMERICAN INDIAN LAW DESKBOOK at 241 n. 93 (4th ed. 2008) ("The case presents a situation where *Strate's* footnote 14 would now likely control, changing not only the result but also eliminating the need to determine whether the exhaustive doctrine applies in the absence of an ongoing tribal proceeding.").

Another case NAT cites for exhaustion, *Bowen v. Doyle*, 230 F.3d 525 (2d Cir. 2000), is wholly inapplicable. *Bowen* involved litigation in tribal, state and federal courts over issues of tribal governance. The appellate court held that tribal exhaustion was not required, but under the circumstance of the case, the federal district court could enjoin the state court from proceeding to rule on the tribal governance issues. The

only comparison to this case is the presence of three forums. Otherwise *Bowen* is simply irrelevant to this case.

NAT cites *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21 (1st Cir. 2000), to support the "application of the exhaustion doctrine," even when off-reservation contacts are involved. NAT Reply Brief on Stay at 5. NAT neglects to mention that the court in *Ninigret* was squarely presented with a "forum selection clause" agreed to by the parties, including the housing authority and the construction company in which a tribal member was a principal.

There is no forum selection clause at issue in the instant case. As a result, the fact that the forum selection clause prompted the court in *Ninigret* to find exhaustion appropriate is probative of nothing. This is especially so because other circuits have disagreed with even this conclusion, including, importantly, the Eighth Circuit. As explained in *Larson v. Martin*, 386 F. Supp. 2d 1083, 1088 (D.N.D. 2005):

> [T]he answer in the Eighth Circuit appears rather clear: when the negotiating parties have agreed to an appropriate forum, exhaustion of tribal remedies is not required. *See FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1233 (8th Cir. 1995).

Ninigret's reasoning is further flawed because it never discussed *Montana's* general rule that tribal court jurisdiction over non-members

anywhere is presumptively invalid. Moreover, *Ninigret* predates *Hicks*, which further expanded the exception to tribal court exhaustion. Of course, the Eighth Circuit was unmistakable in *Hornell* – no tribal court jurisdiction exists over conduct off the reservation. *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1093-94 (8th. Cir. 1998). Finally, as the Supreme Court held in *Plains Commerce Bank*, even disputes involving Indian-owned land within the reservation will not confer tribal court jurisdiction. *Plains Commerce Bank v. Long Family Land & Cattle Co.*, ___ U.S. ___, 128 S. Ct. 2709, 2720 (2008).

NAT also cites *Calumet Gaming Group – Kansas, Inc. v. The Kickapoo Tribe of Kansas*, 987 F. Supp. 1321 (D. Kan. 1997), which involved a dispute over enforcement of an arbitration clause in a tribal gaming contract. The non-tribal management company sued in federal district court to compel arbitration as specified in the gaming contract. The district court required tribal court exhaustion. *Id.* at 1330 (staying case pending exhaustion). The court rejected the company's argument that *Strate* controlled. Although *Calumet* does not address *Strate's* footnote 14, unlike this case, the gaming company could point to nothing divesting the tribal court of jurisdiction.

Another case NAT cites is *Navajo Nation v. Intermountain Steel Bldgs., Inc.*, 42 F. Supp. 2d 1222 (D.N.M. 1999). There, the tribe sued a

contractor for negligently erecting a structure on tribal land that later burned down. *Id.* at 1225. All parties stipulated to federal court jurisdiction, *id.*, but because several key legal issues would involve Navajo law, the district court elected to refer the entire case to tribal court under exhaustion, rather than refer discrete questions of Navajo law. While the district court held tribal exhaustion non-waivable, that proposition is not at issue here, nor has the Eighth Circuit so held. In any case, *Navajo Nation* did not address *Strate* and pre-dates *Hicks*, so it is of little relevance here.

In the end, NAT's failure to cite either *Strate* or *Hicks* is telling. That oversight must be deliberate, for both decisions eviscerate NAT's exhaustion argument. As Sprint pointed out in its opening brief at 31-32, in the absence of a federal grant, under *Montana's* main rule, a tribal court has no adjudicatory authority over non-members. Justice Ginsberg, writing for a unanimous court in *Strate*, expanded the exceptions to the exhaustion rule when she wrote: "[T]he otherwise applicable exhaustion requirement . . . must give way, or it would serve no purpose other than delay." 520 U.S. at 459 n. 14.[4]

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[4] NAT also mistakenly relies on *Reservation Tel. Coop. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996). That case also predated *Strate*, and the precise question at issue in *Strate*, the non-reservation status of a state highway right-of-way, was decided in *Strate* in a way that not only was the tribe's authority to tax

The issue of exhaustion must be analyzed based on the teachings of *Strate* and *Hicks*. Tribal exhaustion has a firm place in Indian law jurisprudence, but the Supreme Court has made it plain that the doctrine does not apply where it would only cause delay. Neither NAT's case law nor its legal analysis of the doctrine refutes the conclusion that the Tribal Court here has no jurisdiction over non-members like Sprint off the Reservation. Likewise, it lacks jurisdiction to decide questions of federal communications law.

II. CONGRESS HAS DIRECTED IN 47 U.S.C. SECTION 207 THAT NAT'S DISPUTE MUST BE ADJUDICATED IN A FEDERAL FORUM.

In its response to Sprint's opening brief, NAT wholly ignores what Congress set out in 47 U.S.C. § 207: "Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission . . . or may bring suit . . . in any district court of the United States . . . but such person shall not have the right to pursue both such remedies."

On its face, the provision applies to NAT's claims against Sprint. NAT is a South Dakota limited liability company: it cites no authority that such an entity is not a "person" under Section 207. NAT is

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the utility's right of way eliminated, but the exhaustion requirement was also reversed. *Reservation Tel. Coop.* would come out differently today. *See* AMERICAN INDIAN LAW DESKBOOK at 242 n. 98 (4th ed. 2008) (footnote 14 of *Strate* would govern).

asserting a claim that it was "damaged" by Sprint, which unquestionably is a common carrier subject to the provisions of Chapter 5 of Title 47. NAT cites nothing in any of its briefs to this Court to contradict that Section 207 applies to its claims against Sprint.

The only appellate authority to squarely address this issue was the Ninth Circuit in *AT&T Corp. v. Coeur D'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), which held unequivocally:

> By its express language, § 207 establishes concurrent jurisdiction in the FCC and federal courts only, leaving no room for adjudication in any other forum – be it state, tribal or otherwise.

295 F.3d at 905 (emphasis added). NAT does not address the *Coeur D'Alene* decision in any of its brief. But *Coeur D'Alene* gave full force to the intent of Congress in Section 207. This Court should do likewise.

Where applicable, *Alltel* unequivocally supports Sprint's position in this proceeding. Judge Viken recognized and clearly relied upon the preemptive scope of the FCA, as well as the leading case recognizing this aspect of the Act.

> The Federal Communications Act ("FCA"), 47 U.S.C. § 151 *et seq.*, established the nationwide system for the regulation of the electromagnetic spectrum for radio transmissions. Congress delegated the authority, solely and exclusively, to the FCC, to license the use of radio transmissions. 47 U.S.C. § 301. "The Tribe has *no recourse to its own courts* for vindication of its [Federal Communication Act] based claim and-like any

> other plaintiff-*could choose only* between filing a complaint with the FCC or suing [Alltel] in federal district court." *AT&T Corporation v. Coeur D'Alene Tribe*, 295 F.3d 899, 905 (9th Cir.2002). "By its express language, [the FCA] established concurrent jurisdiction in the FCC and federal district courts *only*, leaving no room for adjudication in any other forum-be it *state*, *tribal* or *otherwise*." *Id.*

Alltel Communications, LLC v. Oglala Sioux Tribe, 2010 WL 1999315, at *12 (D.S.D. 2010) (emphasis added).

Moreover, the fact that a formal "Service Agreement" was signed by WWC License LLC ("WWC LCC") with the Tribe and the "Service Agreement" resulted in a history of reservation activities that was acknowledged by the parties, prompted Judge Viken to also recognize the very *limited* role for the Tribal Court.

> This court must respect the Tribal Court, and the right of that court to issues decisions *within* the scope of its authority. This court must also recognize and give judicial comity to the action and decision of the federal district court for the District of Columbia as expressed in the Consent Decree … Authority to mandate arbitration is and remains a decision *solely* within the jurisdiction of the federal district court in this instance … Chief Judge Lee asserted the Tribal Court has "ancillary jurisdiction over tribal interests that are subject *exclusively* to Tribal jurisdiction." … Because the Tribal Court has expressed its intent to assume *limited* jurisdiction over specific issues, this federal court will not interfere with that process.

Id. at 12-13 (emphasis added).

In this light, the court was clearly correct in concluding that arbitration should proceed forthwith (without the delay that unlimited exhaustion would otherwise have caused). "The court, therefore, has the authority to compel the parties to participate in arbitration as dictated by the Service Agreement." *Id.* at 14. The tribal court was allowed to proceed to address a limited set of undisclosed tribal questions involving a non member which had entered into consensual relations with the tribe.

NAT tries to avoid the sweep of Section 207 by arguing that the use of the word "may" in Section 207 indicates that Congress did not intend to preclude tribal court jurisdiction. This interpretation is simply untenable. Section 207 addresses claims involving interstate telecommunications and information services – where Congress has intended federal law to control. Section 207 mandates only a federal forum for claims against interstate common carriers like Sprint. The use of the term "may" in Section 207 simply indicates that a party seeking damages has the choice of two federal forums – it may file *either* with the FCC or with a federal court – but not *both*. *See, e.g., Mexiport, Inc. v. Frontier Commc'ns Servs, Inc.* 253 F.3d 573 (11th Cir. 2001) (appellant could not file in federal court after having filed informal complaint with FCC).

In its reply brief, NAT now attempts to vaunt *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473 (1999), a case cited but not discussed in its opposition brief at 25, as the example of how Congress must divest tribal courts of jurisdiction over claims of federal law. *El Paso* addressed whether tribal court exhaustion was required for claims asserted under tribal law which, if brought in state court, would have been removable to federal court. In enacting Price-Anderson, Congress had statutorily overruled the well-pleaded complaint rule, ordaining instead federal court jurisdiction over complaints that on their face raised only state law claims of liability for conduct otherwise covered by Price-Anderson.

> The Act not only gives a district court original jurisdiction over such a claim, ... but provides for removal to a federal court as of right if a putative Price-Anderson action is brought in a state court[.] ... Congress thus expressed an unmistakable preference for a federal forum, at the behest of the defending party, both for litigating a Price-Anderson claim on the merits and for determining whether a claim falls under Price-Anderson when removal is contested.

Id. at 484-85. The Supreme Court held that the same rule should apply to tribal courts, thereby negating an exhaustion requirement. The fact that Congress had not expressly mentioned tribal courts was immaterial.

Preventing the "mischief of duplicative determinations" was one of the goals of Price-Anderson and, thus, in *El Paso*, the Supreme Court pretermitted tribal exhaustion.

> We are at a loss to think of any reason that Congress would have favored tribal exhaustion. Any generalized sense of comity toward nonfederal courts is obviously displaced by the provisions for preemption and removal from state courts, which are thus accorded neither jot nor tittle of deference. The apparent reasons for this congressional policy of immediate access to federal forums are as much applicable to tribal – as to state – court litigation.

Id. at 485-86.[5] *Cf. Blue Legs v. Bureau of Indian Affairs*, 827 F. 2d 1094 (8th Cir. 1989) (Congress prescribed exclusive federal court jurisdiction over RCRA claims).

NAT attempts to distinguish Price-Anderson from the Federal Communications Act ("FCA"), arguing that the FCA enacts a less elaborate regulatory structure. But the FCA has been held to be "a comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957). The FCA sets out standards by which carriers file tariffs and forbids carriers from charging

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[5] NAT alleges that Sprint has failed to demonstrate that an injunction would serve the public interest, and instead espouses that tribal exhaustion will serve the public interest in this case. NAT Brief at 40-41. NAT, however, ignores the principles of "duplicative determination" which complex regulatory structure of the FCA helps combat. By specifying two possible forums for rate and tariff determinations, and eliminating all others, Section 207 helps ensure that duplicative determinations will not be made. 47 U.S.C. § 207. Following NAT's argument to its logical conclusion, the tribal court could be issuing decisions concerning the FCA at odds with standing federal law or FCC regulations. Such a result cannot be maintained. The public interest and the overall regulatory structure of the FCA will only be served if NAT claims are heard in and decided by the proper body.

unreasonable rates or engaging in unreasonable practices. *See* 47 U.S. §§ 201-203. The FCC also has broad powers to enforce these provisions. *Id.* at 204-05, 207. Courts have held that, based on these provisions, "federal law completely occupies the field of interstate communications, thereby preempting state law." *MCI Telecommc'ns Corp. v. O'Brien Mktg., Inc.*, 913 F. Supp. 1536, 1540 (S.D. Fla. 1995).

How far this preemptive force reaches is open to debate especially in view of the Telecommunications Act of 1996. *See e.g.*, *In re Universal Service Fund Billing Practices Litig.*, 247 F. Supp. 2d 1215 (D. Kan. 2002). But it is certain that in this Circuit, NAT's efforts to enforce its tariffs implicate the FCA and must be brought in federal court. In *MCI Telecommc'ns Corp. v. Garden State Investment Corp.*, 981 F.2d 385 (8th Cir. 1992), the IXC sued a customer for unpaid telecommunication charges. *Id.* at 386. The district court dismissed the complaint for lack of subject matter jurisdiction, *i.e.*, no federal question jurisdiction. *Id.* Reversing, the Eighth Circuit noted that

> Although a user's refusal to pay charges fixed by a tariff will often arise in the contest of a broken contract, the carrier's claim for payment is necessarily based on the filed tariff. The district court was thus confronted with a proposition of federal law in deciding what, if anything, MCI could recover.
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> * * *

> Here, Garden States' obligation to "pay for [interstate telephone service] at the rate fixed by tariff 'grow[s] out of and depend[s] upon' the Communications Act in the same way that a shipper's duty to pay for interstate freight service depends on the Interstate Commerce Act."

Id. at 387-88 (quoting *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 494 (2nd Cir. 1968) (citations and other internal quotations omitted)). *Accord Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998) (customer's state law claims were removable as they relied on FCC tariff).

Congress made limited jurisdictional concessions in the FCA. State commissions may regulate intrastate calls. *See* 47 U.S.C. § 152. By extension, the Tribe could argue that it may be able to regulate purely intra-Reservation calls, from one tribal member to another on the Reservation. As noted in Sprint's opening brief at 25-26, NAT's tribal tariff is not so limited. Beyond that, however, the FCC had held that either it or the state utilities commission may regulate services. *See In re Western Wireless Corp.*, CC Dkt No 96-45, at ¶¶ 16, 23-24 (FCC regulates ETC determination where state cannot; state to regulate services to non-members on reservation). In fact, it was NAT that involved the FCA by specifically referring to the FCA provisions in its tribal complaint. Hence, NAT must adhere to the jurisdictional prerequisites of the FCA.

The same result attends here. Congress has set a regulatory regime that ordains an exclusive Federal forum to decide questions of

interstate telecommunications or information services. The Tribal Utility Authority's order against Sprint on its face attempts to enforce NAT's FCC tariff. This raises the same "mischief" the Court saw in *El Paso* of "duplicative determinations."[6]

NAT points to no federal grant of authority to adjudicate a FCA claim against Sprint in tribal court. It cites numerous statements of general FCC policy to promote communications services on reservations, but none of those pronouncements amount to a congressional grant of adjudicatory authority over Sprint to the Tribal Court. Addressing a similar lack of authority in *Hicks*, the Supreme Court articulated:

> Because the Fallon Paiute-Shoshone Tribes lacked legislative authority to restrict, condition, or otherwise regulate the ability of state officials to investigate off-reservation violations of state law, they also lacked adjudicative authority to hear respondent's claim that those officials violated tribal law in the performance of their duties. Nor can the Tribes identify any authority to adjudicate respondent's § 1983 claim. And since the lack of authority is clear, there is no need to exhaust the jurisdictional dispute in tribal court.

Hicks, 533 U.S. at 374. NAT cannot proceed in tribal court, and exhaustion is not required.

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[6] In fact, as noted at the hearing, Congress knows how to draft statutory language to exclude tribes for the reach of legislation. *See*, *e.g.*, Title VII of the Civil Rights Act, 42 U.S.C. § 2000(b)(1) and the Americans with Disability Act, 42 U.S.C. § 12111(b).

III. THE GENERAL RULE OF *MONTANA* APPLIES TO PRECLUDE TRIBAL COURT JURISDICTION OVER SPRINT.

A Sprint is not Doing Business on the Reservation.

In order for the *Montana* exceptions to apply at all, Sprint must be doing business on the Crow Creek Reservation. It is undisputed that Sprint's services as an interexchange carrier end at the switch South Dakota Network has in Sioux Falls. There is also no dispute that Sprint does not have a presence on the Reservation. Without a presence on the Reservation, Sprint is outside the Tribal Court's jurisdiction. *Hornell,* 133 F.3d at 1093-94; *accord Christian Children's Fund, Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161 (D.S.D. 2000).[7]

After Sprint hands off a call to South Dakota Network, any calls to NAT's exchange are sent as a traditional long distance signal to WideVoice's switch in Los Angeles. From there, the signal is converted to VoIP and sent via the Internet back to South Dakota Network, which

[7] Counsel for NAT repeatedly implied at oral argument that exhaustion was required in *Christian Children's Fund*. Tr. at 201, 205, 206. While the parties had exhausted tribal court remedies, it was not because the district court refused injunctive relief. The court said: "The present case is *very likely a case in which exhaustion is not required*. Exhaustion, however, has occurred and there is no need to deal with or decide the question of any exhaustion requirement." *Christian Children's Fund Inc.,* 103 F. Supp. 2d at 1164 (emphasis added).

further carries the signal to NAT's WiMax radio tower in Fort Thompson. It is undisputed that all of this traffic moves in interstate commerce.[8]

The decision not to pay the third and subsequent invoices was made by Sprint at its headquarters in Overland Park, Kansas. All of the material decisions for the first three invoices were made outside the Reservation. The off-reservation nature of the transaction is reinforced by the fact that NAT's management Reiman and DeJordy are non-tribal members living off the reservation – DeJordy not even in South Dakota.

NAT's Reiman claims that the people calling NAT's conference bridge services are subscribers receiving services on the Reservation. This assertion is simply not credible. The people using the conference call service are not subscribers under NAT's tariffs, nor are they subscribers of NAT in any business sense – NAT does not bill them and owes them no local service responsibilities under NAT's tariffs.[9]

Similarly, the people using NAT's conference call device do not care where that equipment is located. In NAT's parlance, this "geodiverse" device could be located anywhere in the world the Internet reaches. The services that users want is to be able to hear the voices of other people,

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[8] Indeed, a call made by one local customer of NAT to another local subscriber would have to travel off the reservation if that called party was out of range of NAT's WiMax tower.

[9] Kevin Williams of WideVoice did not believe the conference call users were NAT subscribers.

none of whom need to be on the Reservation (and probably none are). To say that this activity constitutes a legitimate local phone service makes a mockery of federal communications policy to promote local phone services. In any case, the legitimacy of that activity is incontestably one of federal law.

B Sprint has no Consensual Relationship with NAT.

To circumvent the obvious lack of Sprint's presence on the Reservation, NAT argues that Sprint entered into a consensual relationship with NAT when Sprint paid the first two invoices from CABS Agent. A consensual business relationship is formed when a party being fully informed of the material facts agrees to enter into business agreement with the other party. Here Sprint was unaware of a critical material fact, that NAT was setting up a traffic pumping scheme, which NAT was careful to conceal until the volume of traffic gave away its scheme.

NAT hired a third party, CABS Agent, out of Austin, Texas to bill Sprint. CABS Agent is an existing billing service, already on Sprint's system. The invoices do not disclose that NAT's business office location, and it is not until page six of the invoice that there is any clue that Fort Thompson may be involved. Second Reiman Aff. Ex. 8. Sprint receives over 20,000 of these CLEC and ILEC invoices monthly. *Id.* *See* Second

Clouser Affidavit dated October 27, 2010, at ¶ 4. Moreover, this CABS invoice on its face said nothing about conference bridge services.

NAT now relies on an unsigned and undated letter purportedly authored by DeJordy as CEO of NAT. If this letter were sent by CABS Agent to Sprint, it would not have alerted Sprint to NAT's traffic pumping plans.[10] There is absolutely no mention of NAT's conference call equipment or that virtually all of its business would be from people off the Reservation talking to each other in some type of conference call or chat room. Instead, the letter says the exact opposite: NAT will be "providing affordable local telephone, broadband, and other telecommunications services *to tribal members and others living on the reservation*." Second Reiman Aff. Ex. 7 (emphasis added). This statement is misleading in the extreme. Once Sprint knew the truth – that NAT was running a traffic pumping business – it stopped paying CABS Agent for NAT's invoices and asked for a refund.

As noted in Sprint's opening brief, the regulated nature of telecommunications also factors in here. Congress has determined that "It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor[.]" 47 U.S.C. § 201(a). This

[10] Sprint has no record of receiving that letter. *See* Second Clouser Aff. at ¶ 5.

provision applies to Sprint as a common carrier. The FCC has weighed in with an order that specifically prohibits IXC's like Sprint from blocking access to local exchange carriers engaged in traffic pumping, deeming such blocking to be an unreasonable practice under 47 U.S.C. § 201(b). *In re Establishing Just and Reasonable Rates for Local Exch. Carriers*, 22 F.C.C.R. 11629, WC Docket No. 07-135, at ¶ 12 (June 28, 2007). In short, Sprint has no choice but to accept calls from its customers that are directed to NAT's exchange. In these circumstances there is no way to conclude there was a meeting of the minds on all material terms. *Vander Heide v. Boke Ranch, Inc.*, 2007 SD 69 ¶ 12, 736 N.W.2d 824, 832. Further, "consent is not mutual unless the parties all agree upon the same thing in the same sense." SDCL 53-3-3. Obviously, here Sprint was unaware of what NAT was up to until CABS Agent sent its third invoice.

C Sprint's Efforts to Involve *Strate* does not Implicate the Second *Montana* Exception.

Long on rhetoric but short on logic, NAT enumerates over a dozen ways Sprint's efforts to use a federal forum to resolve its dispute with NAT[11] amounts to an attack on the Tribe's sovereignty. This dispute started in March 2010, when Sprint discovered NAT's traffic pumping

[11] Sprint is also entitled to seek relief from the State Public Utilities Commission for NAT's violation of state telecommunications law.

operation and refused to pay the charges CABS Agent was billing Sprint. NAT refused to return the amounts Sprint had paid. On March 23, NAT filed an ex parte complaint against Sprint with the Tribal Utility Authority, which issued an ex parte order three days later signed by then Tribal Chairman Brandon Sazue in his capacity as Chair of the TUA. Sprint exercised its right to seek relief from the SD PUC on May 4, 2010, when it initiated a complaint against NAT before the SD PUC. It is no coincidence that NAT subsequently filed a tribal court complaint against Sprint and has since used that complaint to seek to stay or dismiss the PUC proceeding. Sprint then sought relief in this Court from having to defend the tribal court action. And, unsurprisingly, NAT now tries to use the tribal complaint to stay proceedings in this Court.

The Court needs to address the second *Montana* exception only if Sprint is found to be on the Reservation. In *Hornell*, the Eighth Circuit held the breweries' conduct in making Crazy Horse malt liquor was not on the reservation, and thus tribal court jurisdiction was lacking. 133 F.3d at 1093-94. It reached this decision notwithstanding claims that the conduct caused harm within the reservation, and the breweries had other products marketed on the reservation. *Id.* at 1089, 1093. *Hornell* would not place Sprint's actions on the Reservation.

NAT's argument both proves too much and greatly overstates the case for the second *Montana* exception. This is a business dispute with a South Dakota limited liability company, formed and managed by non-tribal members, who manage the company off the Reservation and who are the only two people personally liable for NAT's debt. NAT is also financed by WideVoice, a Nevada limited liability company operating in Los Angeles. NAT ownership structure places 51 percent of the equity in the Tribe, which had to only contribute easement or licenses to the venture. Management of NAT rests with DeJordy and Reiman (who run NAT Enterprises); NAT's board is controlled by non-tribal interests (NAT Enterprise and WideVoice have 2/3 of the board). NAT's argument that this business arrangement implicates tribal sovereignty would make the second *Montana* exception swallow the rule. NAT's tribal identity – if in fact it can claim one at all[12] – is in name only. In substance, NAT is still managed and controlled by non-members.

The second *Montana* exception applies only to conduct of a non-member on the reservation that imperils the very existence of the Tribe, a standard NAT wholly ignores in its briefs. The Tribe's existence does not turn on requiring Sprint to subsidize free Internet or other information

[12] *Cf. Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977) (non-profit corporation had no racial identity entitling it to assert discrimination claim).

services to residents (both tribal and non-tribal) on the Reservation (on both trust and fee land). There are two incumbent LEC's already serving the Reservation. The question of access is really one of cost, but then, NAT refuses existing public subsidies to build out its system, despite the joint venture provision requiring the opposite. Joint Venture § 3.11. Indeed, when faced with this same argument regarding the Pine Ridge Reservation, the FCC concluded that the tribal interests did not "meet the Supreme Court's exacting standards." *Western Wireless Corp.* at ¶ 23.

Nor does Sprint's efforts to stay in federal court amount to an attack on the tribal court. The very fact there are exceptions to exhaustion in *National Farmers Union*, which were expanded in *Strate* and confirmed and expanded in *Hicks*, means that Sprint or others similarly situated can seek injunctive relief to avoid the delay and expense of a tribal court proceeding. Moreover, the Tribe elected binding arbitration in its joint venture with NAT Enterprise and WideVoice, which indicates its sovereignty interests can yield to doing business with NAT Enterprise and WideVoice. NAT did so as well when it signed an interconnection agreement with Midstate. Very simply, the Tribe agreed that every business dispute does not need to be Tribal Court. The fact

that Sprint wants the more familiar confines of federal court simply does not imperil the Tribe's existence.

CONCLUSION

There is no basis to require Sprint to endure the delay that litigating first in tribal court would entail. Sprint has done what Judge Murphy said it should do to avail itself of the relief *Strate* provides. This Court should enjoin any further tribal court proceedings.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 27, 2010, the foregoing Reply Memorandum Of Plaintiff Sprint Communications Company L.P. In Support Of Its Motion For A Preliminary Injunction was filed and served on all counsel of record via the Court's CM/ECF system.

/s/ Stanley E. Whiting