

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA

**FILED**

SEP 30 2014

  
CLERK

AT&T CORP.,

Plaintiff,

vs.

Civil Action No. 14-4150

OGLALA SIOUX TRIBE UTILITY  
COMMISSION, and JOE RED CLOUD,  
IVAN BETTELYOUN, DAVID "TERRY"  
MILLS, and ARLENE CATCHES THE  
ENEMY, in their official capacities as  
Commissioners,

Defendants.

**COMPLAINT**

Plaintiff AT&T Corp. ("AT&T") brings this Complaint against Defendants Oglala Sioux Tribe Utility Commission (the "OSTUC" or "Commission") and the Commissioners of the OSTUC, Joe Red Cloud, Ivan Bettelyoun, David "Terry" Mills, and Arlene Catches The Enemy, in their official capacities (collectively, "Defendants"), and states as follows:

**Introduction**

1. AT&T brings this action to obtain declaratory and injunctive relief regarding the Commission's unlawful attempt to assert jurisdiction over AT&T.

2. AT&T is a long distance carrier, also referred to as an interexchange carrier. AT&T has been involved in a dispute regarding interstate "access charges" that AT&T has been billed by Native American Telecom-Pine Ridge, LLC ("NAT"), which purports to be a local telephone company that provides services within the Pine Ridge Reservation.

3. When a long distance customer places an interstate call, the customer's long distance carrier generally transports the call to the local telephone company (or "local exchange

carrier”) who then carries the call the rest of the way to its customer, the called party. (Alternatively the long distance carrier may transport the call to a third-party intermediary chosen by the called party’s local exchange carrier who then delivers the call to the local exchange carrier for completion.) The local exchange carrier then bills interstate “access charges” to the long distance carrier for completing the call on the local exchange carrier’s network, pursuant to federal tariffs filed by the local exchange carrier with the Federal Communications Commission (“FCC”).

4. The Federal Communications Act gives the FCC exclusive jurisdiction over the provision of interstate services, including wireline long distance services. *See* 47 U.S.C. §§ 151, 152. In the FCC’s words, “Congress intended interstate communications to be regulated *exclusively* by the Commission.” *In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corporation*, 7 FCC Rcd. 1619, ¶ 6 (FCC 1992) (emphasis added). Accordingly, “[i]nterstate communications are totally entrusted to the FCC.” *NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

5. NAT has billed significant amounts of interstate access charges to AT&T under the purported authority of NAT’s federal tariff. AT&T has disputed and refused to pay these charges because AT&T contends that NAT is engaged in an unlawful “traffic pumping” scheme and is not entitled to collect the access charges under governing federal communications law (the “Payment Dispute”).

6. The FCC has described traffic pumping, also called “access stimulation,” as where a local exchange carrier (or “LEC”) “with high switched access rates enters into an arrangement with a provider of high call volume operations such as . . . ‘free’ conference calls.” *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, Report and Order and Further



Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 656 (2011) (“*USF/ICC Transformation Order*”), *petitions for rev. denied sub nom, In re* FCC 11-161, 753 F.3d 1015 (10th Cir. 2014). “The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the ‘free’ service provider . . . .” *Id.* The “scheme[]” “almost uniformly make[s] the LEC’s interstate switched access rates unjust and unreasonable” in violation of the Federal Communications Act. *Id.* ¶ 657. “Access stimulation imposes undue costs on consumers,” and “also harms competition.” *Id.* ¶¶ 663, 665.

7. On August 21, 2014, AT&T filed an informal complaint against NAT with the FCC, asserting that AT&T is not liable for the charges that NAT seeks to collect from AT&T. Among other things, AT&T alleged that NAT is engaged in impermissible “traffic pumping,” that the access charges NAT seeks to collect from AT&T are inconsistent with federal law, that NAT has not provided services consistent with its own federal tariff, and that NAT’s charges are unjust and unreasonable in violation of federal law.

8. On September 24, 2014, the Commission issued a Final Order in Case No. T-3-2014 (the “Order”) (attached hereto as Exhibit A) declaring that the Commission has jurisdiction and authority over AT&T and its dispute with NAT. While NAT had filed no complaint with the Commission against AT&T, the Commission nevertheless “on its own motion” addressed the dispute. It ruled, based upon no apparent record or facts, that NAT had established lawful federal tariffs, that NAT “is operating in compliance with all applicable tribal laws and federal requirements,” that NAT was “providing service in accordance with its [federal] tariffs,” and that it is unlawful for AT&T to withhold payment for the federal access charges billed by NAT.

Order at 6. The Commission found that this alleged violation “is subject to forfeitures and penalties to be separately established by this Commission.” *Id.* at 7.

9. The Oglala Sioux Tribe (the “Tribe”), located on the Pine Ridge Reservation, has a direct financial interest in collecting the access charges billed by NAT because the Tribe is a part-owner of NAT. NAT also is owned in part by non-Tribal members who originally formed NAT.

10. AT&T seeks declaratory and injunctive relief because neither the Commission nor its Commissioners have jurisdiction over AT&T or its dispute with NAT over federally tariffed access charges. AT&T is not a member of the Tribe, and AT&T is not located on the Pine Ridge Reservation. The activities of AT&T over which the Tribe has purported to exercise jurisdiction occurred entirely outside the Pine Ridge Reservation. In addition, as a South Dakota district court previously held in enjoining a tribe in virtually identical circumstances, an action to collect federally tariffed access charges must be brought before the FCC or a federal court, and tribes lack jurisdiction over such claims. *Sprint Communications Co., L.P. v. Native American Telecom, LLC*, 2010 WL 4973319 (D.S.D. Dec. 1, 2010) (granting a preliminary injunction to prevent Crow Creek Sioux Tribal Court from proceeding on NAT’s claim to enforce a tribal utility commission order requiring Sprint to pay federally tariffed access charges that Sprint claimed resulted from improper traffic pumping).

#### Parties

11. AT&T provides wireline long distance services throughout the United States. AT&T is a New York corporation with its principal place of business in New Jersey. AT&T is not a member of the Oglala Sioux Tribe.



12. The Commission is an entity purporting to act on behalf of the Oglala Sioux Tribe, a federally recognized Indian tribe located on the Pine Ridge Reservation in South Dakota, with its primary offices in Pine Ridge, South Dakota. Although it is not clear that the Commission has been properly constituted under Tribal law, the Commission purports to exercise authority delegated to it by the Tribe and is made a party to this action in that capacity.

13. Defendants Joe Red Cloud, Ivan Betteleyoun, David "Terry" Mills, and Arlene Catches The Enemy purport to be the Commissioners of the OSTUC, and are made a party to this action in those official capacities.

#### **Jurisdiction**

14. This Court has subject matter jurisdiction over AT&T's claims for relief pursuant to 28 U.S.C. § 1331 because they arise under the Constitution and laws of the United States. The scope of a tribe's jurisdiction over a non-member is a question of federal law. *E.g., Gaming World Int'l v. White Earth Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003).

15. Pursuant to 28 U.S.C. § 2201, AT&T seeks a declaration of its rights in this "case of actual controversy," and seeks injunctive relief against Defendants pursuant to 28 U.S.C. § 2202.

#### **Venue**

16. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b)(1), (b)(2), and (b)(3) because Defendants are located in and can be found in this District and because a substantial part of the events or omissions giving rise to AT&T's claims for relief occurred in this District.

#### **Additional Facts**

17. AT&T has no assets or operations on the Pine Ridge Reservation.

18. AT&T is not directly interconnected with NAT, on or off the Pine Ridge Reservation, and AT&T has no contractual agreement with NAT.

19. AT&T does not and has not delivered traffic directly to NAT on the Pine Ridge Reservation. Until mid-2014, AT&T delivered NAT-bound traffic to an intermediary chosen by NAT, South Dakota Network, LLC ("SDN"), in Sioux Falls, South Dakota, and the traffic was transported over SDN facilities from Sioux Falls to the Reservation. Since mid-2014, AT&T has delivered NAT-bound traffic to another intermediary chosen by NAT, Inteliquent, which is a third-party entity in Minneapolis, Minnesota.

20. NAT has on file with the FCC a federal tariff, pursuant to which NAT purports to bill the interstate access charges it seeks to collect from AT&T.

**Count 1:**  
**Declaratory and Injunctive Relief**

21. AT&T incorporates the preceding paragraphs by reference as though fully set forth herein.

22. The Commission has issued Final Order T-3-2014 declaring that it has jurisdiction and authority over AT&T and its federal access charge dispute with NAT. On its own motion, the Commission ruled that NAT had established lawful federal tariffs, that NAT "is operating in compliance with all applicable tribal laws and federal requirements," that NAT was "providing service in accordance with its [federal] tariffs," and that it is unlawful for AT&T to withhold payment for the interstate access charges billed by NAT. The Commission found that the alleged violations are "subject to forfeitures and penalties to be separately established by this Commission."

23. AT&T's transmission of long distance calls destined to NAT occurs entirely outside the Pine Ridge Reservation and does not constitute voluntarily doing business within the Pine Ridge Reservation.

24. Interexchange carriers like AT&T are prohibited from blocking calls to competitive local exchange carriers like NAT purports to be, and thus are not free to choose whether to carry long distance calls destined to a particular competitive local exchange carrier's end-users. *Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Red. 11629 (2007).

25. AT&T has not consented to the exercise of jurisdiction by the Tribe over AT&T or AT&T's dispute with NAT regarding NAT's interstate access charge bills.

26. Jurisdiction to enforce NAT's federal tariff rests exclusively with the federal courts or the FCC.

27. Neither the Tribe nor the Commission has jurisdiction to enforce NAT's federal tariff.

28. AT&T is entitled to a declaration that Defendants lack jurisdiction over both AT&T and over claims concerning NAT's dispute with AT&T over NAT's charges under its federal tariff. AT&T also is entitled to a permanent injunction enjoining Defendants from purporting to exercise jurisdiction over AT&T in its dispute with NAT, including issuing or seeking any order regarding forfeitures and penalties against AT&T.

**Prayer for Relief**

WHEREFORE, AT&T respectfully requests that this Court enter judgment in AT&T's favor and against Defendants and award AT&T the following relief:

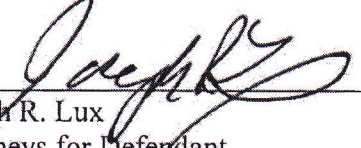


- a) A declaratory judgment, pursuant to 28 U.S.C. § 2201, stating that Defendants lack jurisdiction over AT&T;
- b) A declaratory judgment, pursuant to 28 U.S.C. § 2201, stating that Defendants lack jurisdiction over claims concerning NAT's dispute with AT&T over NAT's charges under its federal tariff;
- c) A permanent injunction against Defendants, pursuant to 28 U.S.C. § 2202, prohibiting Defendants from attempting to exercise jurisdiction over AT&T and enjoining Defendants from purporting to exercise jurisdiction over AT&T in its dispute with NAT, including issuing or seeking any order regarding forfeitures and penalties against AT&T; and
- d) Such further relief as the Court may deem just and proper.

Dated: September 30, 2014

Respectfully submitted,

**COSTELLO, PORTER, HILL  
HESITERKAMP, BUSHNELL &  
CARPENTER, LLP**

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