UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Sprint Communications Company L.P. and Sprint Communications, Inc., formerly known as Sprint Nextel Corporation, Plaintiffs, vs. Mary Wynne, in her official capacity as Chief Judge of the Oglala Sioux Tribal Court, the Oglala Sioux Tribe Utilities Commission; and Joe Red Cloud, Ivan Bettelyoun, David "Terry" Mills, Martina White Hawk and Arlene Catches the Enemy, in their official capacities as Commissioners of the Oglala Sioux Tribe Utilities Commission, Defendants.	Civil No. 4:15-CV-04051-KES **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Sprint Communications Company L.P. ("Sprint Communications") and its corporate parent Sprint Communications Inc. ("Sprint Inc.") brought this action to enjoin the Oglala Sioux Tribe Utilities Commission ("OSTUC") from proceeding in the Oglala Sioux Tribal Court to enforce an order of the OSTUC compelling Sprint Communications to register and be licensed by the OSTUC and to enforce a penalty on Sprint Communications for its failure to do so. That penalty accrues at $1,500 per day and now amounts to well over $100,000.

In January 2014, the OSTUC opened an administrative proceeding into the provision of utility services on the Pine Ridge Reservation. Besides Sprint Communications, the OSTUC's proceeding included AT&T and CenturyLink, plus two local telephone exchanges and several other local or regional businesses. In the course of that proceeding, the OSTUC declared itself to be the exclusive regulator of telecommunications services on the Pine Ridge Reservation with the power to regulate the providers of such interstate telecommunications services and to penalize providers who refuse to submit to OSTUC's unlawful regime.

Lurking in the background is a local exchange carrier ("LEC"), Native American Telecom-Pine Ridge LLC ("NAT-PR"). NAT-PR was formed by Gene DeJordy and Tom Reiman in 2009. NAT-PR is running a traffic pumping scheme on the Pine Ridge Reservation in conjunction with Free Conferencing Corporation. NAT-PR has invoiced Sprint Communications over $1 million for terminating access charges for calls made to Free Conferencing that Sprint Communications has refused to pay.

DeJordy and Reiman have also teamed with Free Conferencing to run another traffic pumping scheme on the Crow Creek Sioux Tribe Reservation. This Court is very familiar with this scheme, having enjoined the Crow Creek Sioux Tribal Court from proceeding with NAT-Crow Creek's efforts to enforce its invoices for similar access charges. *See Sprint Commc'ns Co. L.P. v. Native Am. Telecom, LLC*, No. Civ. 10-4110-KES, 2010 WL 4973319 (D.S.D. Dec. 1, 2010) ["*Sprint 2010 Order*"].

As this Court determined in 2010, only federal courts or the Federal Communications Commission ("FCC") can resolve questions of interstate telecommunications law:

> The FCA and the ICA were adopted for the purpose of bringing the telecommunications field under one federal regulatory scheme. It logically follows that Congress intended to have that regulatory scheme consistently interpreted in a federal forum.

Sprint 2010 Order at 10, WL 4973319 at *4. Consequently, Sprint Communications and Sprint Inc. do not have to first exhaust tribal court remedies. Instead, this Court can proceed now to address the merits of Sprint Communications and Sprint Inc.'s motion and grant the requested injunctive relief.

BACKGROUND

A. Sprint Inc. and Sprint Communications

Sprint Inc. is a Kansas corporation with its principal place of business in Overland Park, Kansas. Affidavit of Amy Clouser at ¶ 2. Sprint Inc. was formerly called Sprint Nextel Corporation. *Id.* Sprint Inc. is merely a holding company that does not directly provide telecommunications services, is not registered to do business in South Dakota and is not certificated by the FCC to provide interstate telecommunications services. *Id.* Instead, Sprint Inc. has subsidiaries like Sprint Communications that actually provide telecommunications services. Sprint Inc. is a party to this action only because the OSTUC sued it in tribal court under its former name, Sprint Nextel Corporation.

Sprint Communications is a Delaware limited partnership whose offices are also in Overland Park. *Id.* Sprint Communications is an interexchange carrier ("IXC") that is authorized by the FCC to provide interstate long distance telecommunications services. *Id.* Sprint Communications also has a certificate of authority from the South Dakota Public Utilities Commission ("SDPUC") to provide intrastate telecommunications services in South Dakota. *Id.*[1]

No Sprint entity, including Sprint Communications, has any employees on the Pine Ridge Reservation. Affidavit of Mark Felton at ¶ 2. Sprint Communications has no property of any kind within the Pine Ridge Reservation for providing telecommunication services. I*d.* at ¶¶ 3-4. Sprint Communications has no numbering resources on the Pine Ridge Reservation and thus, Sprint Communications does not offer local telecommunications services to persons residing within the Pine Ridge Reservation. *Id.* at ¶¶ 5-6. Sprint Communications also has no customers who have ported (transferred) a telephone number from any telephone numbers assigned to the Pine Ridge Reservation. *Id.* at ¶ 7.

Neither Sprint, Inc. nor Sprint Communications has consented to the jurisdiction of the Oglala Sioux Tribe, its tribal court or the OSTUC. Felton Aff. ¶ 9.

[1] In this brief, Plaintiffs will be referred to individually as Sprint Inc. or Sprint Communications. However, when the context requires, the term "Sprint" will be used to refer to both of these entities.

B. Sprint Communications' Role as an IXC

As an IXC, Sprint Communications offers long distance wireline services to its customers around the country. Long distance calls are those that are made from one Local Exchange Carrier ("LEC") to another. For example, in a typical situation, a long-distance call may be made from a Sprint Communications calling customer in Idaho to a called party, or "end user," in South Dakota. Sprint Communications generally owns the facilities over which the call travels between the LEC of the calling customer and the LEC of the called customer (or it enters arrangements with other carriers to route the calls over their facilities). *Id.* ¶ 3.

To deliver these calls, Sprint Communications (like other long distance carriers) purchases terminating access service from the called party's LEC under a tariff required to be published by the LEC that contains charges for terminating access (along with other offered services). *Id.* ¶ 7. Pursuant to the terms of that tariff, Sprint Communications and other long distance carriers pay for access service under the tariff whenever they route a call to the LEC that meets the tariff's definitions of "terminating access" service under the tariff and applicable law. *Id.* at ¶¶ 6-7. Because LECs have an effective monopoly over those using telephone numbers assigned to the LEC, the long distance carriers have no choice but to purchase the service defined in the tariff when the long distance calls are made from one of the LEC's assigned numbers. *Id.* at ¶ 7; *see generally Qwest Commc'ns Co. v. Aventure Commc'ns Tech. LLC*, No. Civ. 7-00078, 2015 WL 711154 at *3-4 (S.D. Iowa Feb. 17, 2015) (describing LEC access arrangements

and development of traffic pumping). In fact, the FCC has forbidden IXCs like Sprint Communications from blocking calls to any customer of a LEC. *See In re Establishing Just and Reasonable Rates for Local Exch. Carriers, Call Blocking by Carriers*, 22 FCC Rcd. 11629 (2007).

A distinctive feature of interstate telecommunications service is how long distance telecommunications traffic is routed. An individual making a long distance call has the freedom to designate the IXC to which the calling individual's LEC will route the traffic. *See* Clouser Aff. ¶ 5; 47 U.S.C. § 251(b)(3) § 258; 47 C.F.R. § 64.1120 (2014). The LEC that serves the called party designates where the LEC wants the long distance traffic routed. Clouser Aff. ¶ 5. Hence, while Sprint Communications may be the calling party's IXC, the called party's LEC designates where to route the long distance traffic for eventual delivery to the called party. *Id.* In other words, the calling customer of the LEC decides which IXC the calling customer's LEC should use, and the LEC of the called party selects the route the IXC uses to deliver a call.

The SDPUC has issued certificates of authority to Golden West Telephone Cooperative, Inc., Great Plains Communications Inc. and Mt. Rushmore Telephone Company to serve as LECs on the Pine Ridge Reservation. *Id.* at ¶ 18. Calls intended for a Golden West subscriber from Sprint Communications' out-of-state customers go to a switch owned by South Dakota Network ("SDN"). SDN carries those calls to a switch that Golden West has on the Pine Ridge Reservation. *See* Clouser Aff. at ¶ 18 and Ex. 3. Sprint Communications connects

to Great Plains at a Great Plains switch in Nebraska. *Id*. Sprint Communications connects to Mt. Rushmore Telephone at a CenturyLink switch in Rapid City. Sprint Communications has no involvement of any sort with intra-reservation calls, which are handled by either Golden West, Great Plains or Mt. Rushmore Telephone. *Id*. at ¶ 18. It is not known whether NAT-PR switches any intra-reservation calls. *Id*.

As noted, local exchange subscribers have the right to select which IXC handles their calls that go to parties outside the LEC's service area. In the case of Sprint Communications, there are only three such subscribers who are located on the Pine Ridge Reservation. One is a non-profit corporation formed under Washington state law, one a business organized as a South Dakota corporation, and one an individual with a Hispanic surname. Felton Aff. ¶ 8. None of these subscribers uses NAT-PR as its LEC. Id. ¶¶ 14-16.

C. Native American Telecom-Pine Ridge

Native American Telecom-Pine Ridge LLC ("NAT-PR") purports to be a LEC operating on the Pine Ridge Reservation. Records with the South Dakota Secretary of State indicate NAT-PR was formed in 2009 as a limited liability company under the laws of South Dakota by two non-Indians, Gene DeJordy and Tom Reiman. *See* Affidavit of Scott G. Knudson at Ex. 1. Sprint Communications has no customers who have chosen NAT-PR as their LEC. Clouser Aff. ¶ 14.

NAT-PR was formed by the same two individuals who formed the entity once called Native American Telecom that currently operates a traffic pumping

scheme on the Crow Creek Sioux Reservation. NAT-PR's business model is presumably the same. Under that model, NAT-PR has an arrangement with Free Conferencing Corporation, which is engaged in what the FCC has described as "access stimulation." Free Conferencing is a business partner or joint venture, not a "customer" of NAT-PR as that term is generally understood. Clouser Aff. ¶ 12. Free Conferencing offers what it describes as "free" conference calling services. *Id.* at ¶ 10. In the case of NAT-PR, Free Conferencing apparently has a piece of equipment called a conference bridge that is connected to NAT-PR's local telephone switch on the Pine Ridge Reservation. *Id.* at ¶ 10. People from anywhere served by the public telephone network can dial in to Free Conferencing's bridge. *Id.* ¶ 11. Free Conferencing's revenue comes from a revenue sharing arrangement with NAT-PR, where Free Conferencing and NAT-PR split the revenue obtained from terminating access fees charged to IXCs that deliver traffic to NAT-PR. Clouser Aff. ¶¶ 10, 12. *See generally Qwest Commc'ns Co. v. Aventure Commc'ns Tech.,* 2015 WL 711154, at *4 (detailing typical business relationship between traffic pumpers and LECs).

A salient feature of NAT-PR's interstate traffic is that NAT-PR directs how it wants its interstate traffic delivered. Clouser Aff. ¶ 9. NAT-PR instructs the Local Exchange Routing Guide ("LERG") with the routing information. *Id.* For example, when NAT-PR first began billing Sprint Communications, NAT-PR's instructions to the LERG were that interstate traffic would go to SDN, a third party outside the Pine Ridge Reservation unaffiliated with Sprint

Communications, for delivery to NAT-PR. *Id.* Today NAT-PR's LERG instructions direct interstate traffic to Inteloquent, another unrelated entity outside the Pine Ridge Reservation. *Id.* Hence, any interstate traffic Sprint Communications may have that ultimately is delivered to NAT-PR is routed at NAT-PR's instruction to a third party outside the Pine Ridge Reservation. *Id.* at ¶ 9 and Ex. 1.

Sprint Communications has researched the traffic that it carries to Inteloquent for eventual delivery to NAT-PR. Of traffic amounting to many millions of minutes of use monthly, 99.9 % goes to conference calling companies like Free Conferencing. *Id.* ¶ 13. Sprint Communications has thus far refused to pay for what it believes are unlawful charges. *Id.* ¶¶ 10, 16. If NAT-PR actually has local phone service on the Pine Ridge Reservation, Sprint Communications has nothing to do with that service. *Id.* ¶ 17.

D. The Tribal Entities

The Oglala Sioux Tribal Court is the tribal court of the Oglala Sioux Tribe and has its chambers in Pine Ridge, South Dakota. Mary Wynne is the Chief Judge of the Oglala Sioux Tribal Court.

The OSTUC purports to be authorized by the Oglala Sioux Tribal Council to regulate the activities of utilities within the exterior boundaries of the Pine Ridge Reservation. The OSTUC Commissioners currently are Joe Red Cloud, Ivan

Bettelyoun, David "Terry" Mills, and Arlene Catches the Enemy.[2] *See* Knudson Aff. Ex. 3 at 6.

E. The OSTUC Proceedings

In January 2014, the OSTUC, apparently on its own initiative, opened an inquiry into the provision of utility services on the Pine Ridge Reservation. *Inquiry into the rates, terms and conditions of service being provided by utilities on the Pine Ridge reservation,* Case No. U-1-2014. Knudson Aff. Ex. 2. The distribution list for the case included the following entities: AT&T; CenturyLink; Verizon; Golden West; Great Plains Communications; Fort Randall Telephone Company; SDN; Black Hills Electric Power Cooperative, Inc.; Nebraska Public Power District; Lacreek Electric Association, Inc.; and Lakota Plains Propane. Sprint was also on that distribution list. Not only is Joe Red Cloud the OSTUC's Chair, he was on the service list in U-1-2014 as being the manager of NAT PR. *See* Knudson Aff. Ex. 3 at 6 and 8. In its first order in U-1-2014, the OSTUC presented Sprint and other telecommunications service providers with a detailed demand for data concerning what business they provided on the Reservation. Sprint did not respond to the OSTUC's demand.

On July 16, 2014, the OSTUC followed up with an order in U-1-2014, where it asserted that it had regulatory jurisdiction over "all telecommunications

[2] The OSTUC is authorized to have five commissioners. Sprint Communications was informed that Martina White Hawk was the fifth commissioner, but when Sprint Communications prepared to serve Ms. White Hawk, it learned she had not yet been confirmed by the Tribal Council as a commissioner. The parties have agreed to dismiss Ms. White Hawk without prejudice.

providers engaged in providing service on the Pine Ridge reservation, regardless of whether a telecommunications provider has facilities physically located on the reservation or whether the telecommunications provider has entered into an agreement with the Tribe." Knudson Aff. Ex. 4 at 2-3. Indeed, the agency deemed itself to be the "exclusive" regulatory authority on the Pine Ridge Reservation. *Id.* at 2.[3] Then on September 9, 2014, the OSTUC issued what it called its "Final Order" in U-1-2014. Knudson Aff. Ex. 6. In this Final Order, the OSTUC imposed registration and annual reporting requirements on all telecommunications and other utility providers, including Sprint Communications. *Id.* at 2-3. The OSTUC also imposed a registration fee based on the number of customers a utility has on the reservation. *Id.* at 4. Subsequently, in U-1-2014, in an opinion dated October 23, 2014, entitled "Notice of Liability," the OSTUC established a fine of $1,000 per day for each day a utility failed to register with the OSTUC, effective retroactive to October 1, 2014, for every utility that failed to register by November 7, 2014. Knudson Aff. Ex. 7 at 2. In this order the OSTUC also required Sprint Communications to obtain a business license. *Id.* at 2 n.2.

Sprint has not participated in any way in U-1-2014. Felton Aff. ¶ 9. Sprint also has not registered with the OSTUC or obtained a business license. *Id.*

[3] The South Dakota Legislature and the SDPUC would disagree. *See* SDCL § 49-31-3 (vesting commission with "exclusive authority" to grant a certificate of authority and declaring that the provision of telecommunications service without a commission-issued certificate to be a misdemeanor).

Notwithstanding the OSTUC's lack of jurisdiction over either Sprint Inc. or Sprint Communications, the OSTUC has now sued Sprint Inc. in Oglala Sioux Tribal Court, seeking to enforce its registration requirements and to enforce its $1,000 per day penalty for failing to register.[4] Knudson Aff. Ex. 13. In another order in U-1-2014 dated February 19, 2015, the OSTUC added $500 per day for those entities, like Sprint Communications, that failed to provide an annual report. Knudson Aff. Ex. 8 at 2. In this latest order in U-1-2014, the OSTUC asserted that Sprint Inc. now owed $122,000 in penalties, along with seven other entities owing the same amount. *See id.* at 4. At no point in any of these OSTUC orders in U-1-2014 has Joe Red Cloud recused himself because of the conflict of interest presented by his position as Chair of the OSTUC and his position as Manager of NAT-PR.

The OSTUC expanded its regulatory initiative in September 2014, when it opened Case T-2-2014. In an order dated September 15, 2014, the OSTUC sought comments on the provision of "Lifeline" telecommunications services on the Reservation. Knudson Aff. Ex. 9 at 2. Then on January 6, 2015, the OSTUC proposed in T-2-2014 to adopt Lifeline rules based on what Texas has adopted. Knudson Aff. Ex. 10 at 10-22. In comments on that proposed rule, the South Dakota Telecommunications Association (SDTA) pointed out that Lifeline services are provided by Eligible Telecommunications Carriers (ETCs), and that only state commissions or the FCC can determine who is an ETC. Knudson Aff.

[4] The naming of Sprint Inc. as a defendant is plainly a misnomer.

Ex. 11. SDTA noted "there are no provisions in the federal law indicating that Tribal entities can legally adopt Tribal specific rules within the legal structure of the current federal Lifeline and Link Up programs." *Id.* at 3.

The OSTUC's regulatory ambitions also expanded into promoting the interest of local exchange carriers. In an order dated August 20, 2014, in U-1-2014, the OSTUC opened an inquiry into whether long distance carriers like Sprint Communications had discriminated "against tribally owned carriers." Knudson Aff. Ex. 5 at 1. The genesis of this inquiry was an email from Brandon Sazue purporting to act as Chair of the Crow Creek Tribe Utility Authority. In that letter, Sazue noted Sprint Communications' refusal to pay Native American Telecom-Crow Creek for terminating access charges. *Id.* at 7-12. This Court is well aware of that controversy. *See Sprint 2010 Order*.

It is plain that the OSTUC is merely a stalking horse for NAT-PR. In another OSTUC proceeding that the OSTUC also initiated on its own motion, Case T-3-2014, on September 24, 2014, the OSTUC issued a "Final Order" that described NAT-PR's tariffs as "consistent with the requirements adopted by the FCC on its 2011 *Intercarrier Compensation Order*." Knudson Aff. Ex. 12 at 5-6. The OSTUC also found NAT-PR to be in compliance "with all applicable tribal laws and federal requirements and is providing service consistent with the requirements of the *Intercarrier Compensation Order*." *Id.* at 6.

In the Final Order in T-3-2014, the OSTUC declared Sprint Communications' and other IXCs' failure to pay NAT-PR put at risk NAT-PR's

"continued ability to serve residents on the reservation" *id.* at 5, and was "unlawful." *Id.* at 7. The OSTUC indicated it would ask the FCC "in the interest of comity" to defer to the OSTUC and the tribal court to resolve the dispute between NAT-PR and the non-paying long distance carriers. *Id.* at 7-8.

SUMMARY OF ARGUMENT

The pathmarking case, *Montana v. United States*, 450 U.S. 544 (1981), establishes a presumption that Indian tribes cannot regulate the activities of non-Indians within a reservation, especially on non-Indian owned fee land, unless there is consent or the tribe needs to act to protect its very existence. Here, the OSTUC lacks regulatory jurisdiction over Sprint, first, because Sprint has no property or employees on the Pine Ridge Reservation. Moreover, any traffic that Sprint Communications handles that comes from or is routed into the Pine Ridge Reservation is delivered to or received from third parties outside the Pine Ridge Reservation.

The rule of comity that tribal courts should get the first cut at addressing their jurisdiction does not apply in this case. In *Strate v. A-1 Contractors*, 520 U.S. 438 (1987), the Court ruled that exhaustion was unnecessary when it was plain Congress had not granted tribal courts jurisdiction over a particular matter, because requiring a party to exhaust its tribal remedies would only cause delay. Congress has not provided tribal courts any jurisdiction over interstate telecommunications. Indeed, Congress has gone further and made the regulation

of interstate telecommunications exclusively a matter for the federal courts or the FCC.

Given that the OSTUC and the Oglala Sioux Tribal Court lack jurisdiction over Sprint, it has no choice but to seek an injunction to prevent the OSTUC from pursuing its tribal court complaint against Sprint, which seeks to impose an unlawful regulatory regime and substantive fines on Sprint. Here, as in the *Sprint 2010 Order*, each of the four *Dataphase* factors resolves in Sprint's favor.

ARGUMENT

I. Because Congress Has Afforded Exclusive Jurisdiction to the Federal Courts or the FCC Over Interstate Telecommunications, Sprint is Not Required to Defer to Tribal Court Jurisdiction

A. The Main Rule of *Montana* Precludes Tribal Court Jurisdiction Over Sprint

1. Tribes Presumptively Lack Jurisdiction Over Non-Indians on Fee Land Within a Reservation

The question whether this Court should defer first to the Oglala Sioux Tribal Court must be analyzed, first and foremost, from what the Court articulated as the governing rule in *Montana*. In that case, the Court addressed the authority of the Crow Indian Tribe to regulate hunting and fishing within the Crow Tribe's reservation on non-Indian owned fee land and the riverbed and river banks of the Big Horn River, which flowed through the reservation. Reviewing the history of the treaties and statutes creating what eventually became the Crow Tribe's reservation, the Court held that none of those treaties or

laws reserved to the tribe any power to regulate hunting or fishing on lands not owned by or held in trust for the tribe. 450 U.S. at 557-63.

The Court was unanimous in holding what is known as *Montana's* main rule: tribes have no civil authority to regulate the conduct of non-Indians within a reservation, especially on fee land owned by non-Indians.[5] *Id.* at 563-66. Much of the subsequent case law citing *Montana* addresses the two exceptions to the main rule of *Montana* – tribes can regulate only those non-Indians who affirmatively consent to tribal jurisdiction, or if the tribe must act to prevent imperilment to its political integrity, economic security, tribal health or welfare. *E.g., Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 327-30 (2008). But *Montana's* main rule remains: tribes presumptively cannot regulate non-Indians even on tribal lands within their reservations.[6] *Nevada v. Hicks*, 533 U.S. 353, 358-59 (2001)(quoting *Montana*); *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (tribe's inherent powers did not extend to criminal jurisdiction over non-Indians). A necessary corollary to *Montana's* main rule is that the non-Indian's conduct must be on a reservation.

[5] The Court split 6-3 on the question of title to the riverbed and banks of the Big Horn River, ruling that title to that land passed to the State of Montana under the Equal Footing Doctrine on its admission to the Union. 450 U.S. at 556-57.
[6] Concurring in *Hicks*, Justice O'Connor said: "Today, the Court finally resolves that *Montana* ... governs a tribe's civil jurisdiction over nonmembers regardless of land ownership." 533 U.S. at 387.

2. Sprint Has No Activities on the Pine Ridge Reservation

The key to any jurisdiction over a non-Indian is that the non-Indian activity must be on a reservation. As the Eighth Circuit explained in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998):

> The operative phrase is "on their reservations." Neither *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*.

133 F.3d at 1091 (emphasis in original); *see Christian Children's Fund Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (following *Hornell)*.

The OSTUC cannot proceed against Sprint in tribal court because Sprint Communications has no facilities, employees or activity on the Pine Ridge Reservation. Clouser Aff. ¶¶ 6, 19; Felton Aff. ¶¶ 2-7. It delivers all of the long distance traffic destined for parties on the Pine Ridge Reservation to SDN, Great Plains or Mt. Rushmore, or to Inteloquent to deliver to NAT-PR. Clouser Aff. ¶ 18. Any traffic leaving the reservation goes first to Golden West, then to SDN in Sioux Falls before reaching Sprint Communications' network. *Id.* ¶ 18 Ex. 3. Likewise, any traffic routed to Golden West is exchanged at Golden West's switch in Nebraska. *Id.* ¶ 18. These entities that exchange long distance traffic with Sprint Communications are not affiliated with Sprint in any way. Clouser Aff. ¶ 18.

Sprint Communications also has no NAT-PR customers who have picked Sprint Communication as their IXC. *Id.* ¶ 14-17. Sprint Communications has only three calling parties who use Sprint Communications as their IXC, two businesses formed under state law and one individual with a Hispanic surname. Felton Aff. at ¶ 8. As noted, any long distance calls these parties make are delivered from the Pine Ridge Reservation on their LEC's property. Clouser Aff. ¶ 18. Sprint Communications' use of the U.S. Postal Service to send these parties a bill does not put Sprint Communications on the Pine Ridge Reservation. The unilateral acts of these three parties who have elected Sprint Communications as their IXC do not confer tribal court jurisdiction over Sprint. *Cf. In re DeFender*, 435 N.W.2d 717, 720-21 (S.D. 1989) (mother's absence of contacts with the reservation placed her outside the tribal court's jurisdiction).

As noted earlier, Sprint Inc. is only a holding company incorporated under the laws of Kansas. Its principal place of business is in Overland Park, Kansas. Sprint Inc. is not certificated by either the FCC or the SDPUC to provide telecommunications services, whether inter- or intrastate. It is beyond cavil that Sprint Inc. is not on the Pine Ridge Reservation and no Oglala Sioux tribal entity has jurisdiction over Sprint Inc.

B. ***Strate*** **Eliminated the Presumption that the Tribal Court Exhaustion may be Ordinarily Required**

Subsequent to *Montana*, the Court issued two decisions on tribal court jurisdiction over civil matters involving non-Indians. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471

U.S. 845 (1985). Both decisions established a rule of comity that, while federal courts retain authority to determine whether a tribal court exceeded its jurisdiction, *id.*, at 852-53, a federal court should ordinarily defer ruling on tribal jurisdiction until "the Tribal Court has had a full opportunity to determine its own jurisdiction." *Id.* at 857.

The question of whether *National Farmers* and *Iowa Mutual* modified *Montana's* main rule to grant tribal courts general adjudicatory authority over non-Indians on a reservation was resolved in *Strate*. That case involved an action brought by a woman and her children for personal injury and loss of consortium from a traffic accident on a public highway on the Fort Berthold Reservation in North Dakota. The injured woman was not a tribal member, however, her children were. The personal injury claims were sued out in tribal court. The federal district court denied the defendants an injunction to stop the tribal court proceedings; the Eighth Circuit, applying *Montana*'s main rule, reversed.

In an unanimous decision authored by Justice Ginsburg, the Court affirmed the Eighth Circuit's holding. Addressing the exhaustion rule articulated in *National Farmers* and *Iowa Mutual,* the Court held that neither decision replaced *Montana's* main rule. 520 U.S. at 453. Further, the Court ruled it made no difference whether the tribe was exercising adjudicatory authority over the defendant driver in *Strate* versus regulatory authority over non-Indian hunters or fishers in *Montana*. *Id.* ("As to nonmembers, we hold, a tribe's adjudicatory

jurisdiction does not exceed its legislative jurisdiction."). Characterizing the rule as one only of comity, Justice Ginsberg wrote regarding exhaustion:

> When, as in this case, it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct. As in criminal proceedings, state or federal courts will be the only forums competent to adjudicate those disputes. Therefore, when tribal-court jurisdiction over an action such as this one is challenged in federal court, the otherwise applicable exhaustion requirement must give way, for it would serve no purpose other than delay. (Citations omitted.)

Id. at 459 n.14. Justice Ginsberg made clear – without an express grant, there is no tribal court jurisdiction and no need for tribal court exhaustion. The Court has subsequently described the exception to tribal court exhaustion articulated in *Strate* as broader than the three exceptions set out in *National Farmers* and *Iowa Mutual*. *Hicks*, 533 U.S. at 369.[7]

There is simply no tribal jurisdiction in this case – rather it is plain that there is only federal jurisdiction. *Reservation Tel. Coop. v. Henry*, 278 F. Supp.

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[7] The exhaustion rule is limited to the jurisdictional issue, as this colloquy from oral argument in *Nevada v. Hicks* indicates:

> [Mr. Anaya for Respondent]: It applied the rule of exhaustion that this Court laid down in *National Farmers Union*, as well as *Iowa Mutual v. LaPlante*.
>
> Question: [Court] Well, that case really just went to exhaustion on the jurisdictional issue.
>
> [Mr. Anaya]: Yes, they did, but it could be that the exhaustion could also apply to the merits,...
>
> Question [Court]: But it is correct, is it not, that we've never held that there must be exhaustion of anything other than the jurisdictional issues?
>
> [Mr. Anaya]: Yes, Your Honor, that is the case...

Transcript of Oral Argument at 38-39 (March 21, 2001) (available at 2001 WL 300601 (U.S.)).

2d 1015, 1020-21 (D.N.D. 2003) ("*Montana* and *Strate* support the proposition that instead of presuming that tribal power exists and searching for statutes or treaties to negate that presumption, the Supreme Court presumes that tribal power does not exist unless Congress has said otherwise."); *see Rolling Frito-Lay Sales LP v. Stover*, No. Civ. 11-1361, 2012 WL 252938 (D. Ariz. Jan. 26, 2012) (enjoining tribal court tort action over non-member because neither *Montana* exception applied); *Glacier Cnty. School Dist. No. 50 v. Galbreath*, 47 F. Supp. 2d 1167 (D. Mont. 1997) (enjoining tribal court proceedings against local school district).[8]

C. Jurisdiction Over Interstate Telecommunications is Exclusively Federal

Strate should resolve the question of tribal court exhaustion. There has been no grant of tribal court jurisdiction over IXCs like Sprint Communications. Without such a grant, Justice Ginsberg instructs that exhaustion falls away, for requiring tribal court exhaustion would only cause delay.

But the case against exhaustion is even stronger in the telecommunications field, for not only is there no grant, but Congress has determined that regulation

[8] Recent Eighth Circuit decisions on tribal court exhaustion are not to the contrary. In *Colombe v. Rosebud Sioux Tribe*, 747 F.3d 1020 (8th Cir. 2014), the controversy involved a casino management contract, a patently on-reservation matter. The appellate court held that the appellant had yet to exhaust his tribal court remedies and failed to show that exhaustion would be futile, one of the exceptions to exhaustion articulated in *National Farmers*. 747 F.3d at 1025. Another exhaustion case, *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877 (8th Cir. 2013) involved a contract dispute and collection action against a tribal member who contracted directly with a cable service provider and whose claim of abuse of process alleged harm on the reservation. *Dish* did not involve questions of federal telecommunications law.

of interstate telecommunications to be exclusively federal. Federal regulation of interstate telecommunications dates to 1910, when Congress deemed telephone companies to be common carriers to be regulated by the former Interstate Commerce Commission. *Oklahoma-Arkansas Tel. Co. v. Sw. Bell Tel. Co.*, 45 F.2d 995, 1000 (8th Cir. 1930); *see Essential Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 610 F.2d 1114, 1117 (3d Cir. 1979) (citing Mann-Elkins Act of 1910).

In 1934, Congress enacted the Federal Communications Act ("34 Act") to establish "a comprehensive scheme for the regulation of interstate communication." *Benanti v. United States*, 355 U.S. 96, 104 (1957). As one appellate court described the 34 Act:

> The Communications Act of 1934 creates a dual regulatory structure for interstate and intrastate wire communications. Interstate communications are totally entrusted to the FCC which is charged with providing "a rapid, efficient, Nation-wide, and world-wide wire ... communications service." 47 U.S.C. § 151 (1982). Purely intrastate communications, on the other hand, are to be regulated by the states. 47 U.S.C. § 152(b) (1982).

National Ass'n of Regulatory Util. Comm'rs v. F.C.C., 241 U.S. App. D.C. 175, 181, 746 F.2d 1492, 1498 (1984) (emphasis added). This bifurcated regulatory structure was purely federal-state. Nothing in the text of the 34 Act or its legislative history evidences any congressional intent to empower tribes to regulate any aspect of communications services, and certainly not interstate telecommunications services.

With the Telecommunications Act of 1996 ("96 Act"), Congress rewrote the 34 Act to address an increasingly competitive telecommunications market and

the emergence of both wireless and Internet services. But the 96 Act also continued federal law preeminence, explicitly preempting many areas where states could regulate. *E.g.*, § 251(d) (requiring state access and interconnection policies to be consistent with § 251); § 253(a) (preempting state prohibitions on new market entrants; § 253(d) (authorizing FCC to preempt state or local barriers to entry or other anti-competitive rules). As with the 34 Act, Congress did not grant tribes any express regulatory powers in the 96 Act.

The federal reach over telecommunications services is very broad. The FCC can regulate purely intrastate facilities and services that connect even one interstate call. *See Nat'l Ass'n of Regulatory Comm'rs*, 241 U.S. App. D.C. at 181, 746 F.2d at 1498. For example, in *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486 (2d Cir. 1968), a user of interstate telephone services sued its long distance carrier for negligence and breach of contract for providing erratic and defective service. *Id.* at 488. The appellate court reversed the district court's dismissal for lack of federal jurisdiction, holding that federal jurisdiction was exclusive over the dispute, and even if there was no express provision of the 34 Act applicable, the district court should apply federal common law. *Id.* at 490-91.

Similarly, the D.C. Circuit upheld the FCC's power to regulate intrastate Wide Area Telecommunications Services ("WATS"). *Nat'l Ass'n of Regulatory Util. Comm'rs*, 241 U.S. App. D.C. at 182, 746 F.2d at 1499. At issue in that case was a FCC order prohibiting state-imposed restrictions on the resale or sharing of interstate WATS services. The state regulatory association argued that the FCC

lacked the authority to regulate intrastate facilities and services. Rejecting that position, the appellate court stated "the very structure of the Communications Act [34 Act] and the relationship of its terms suggests that the physical location of telecommunications facilities is unimportant." *Id.* at 182-83, 741 F.2d at 1499. Rather, "Congress did not intend to allow inconsistent state regulations [to] frustrate [its] goal of developing a 'unified national communications service.'" *Id.,* 746 F.2d at 1499 (quoting *California v. F.C.C.,* 567 F.2d 84, 86 (D.C. Cir. 1977)).

In *Benanti*, at issue was the admissibility in federal court of wire-tapping evidence obtained by state officials without assistance of federal authorities. Section 605 of the 34 Act outlawed the warrantless wire-tapping of interstate communications, but was silent on whether that provision applied to states. The federal government pointed to various provisions of the 34 Act that provided states with some authority over interstate communications to argue that Section 605 on its face did not apply to state-obtained wire-tap evidence. 355 U.S. at 105. The Court disagreed:

> The very existence of these grants of authority to the States underscores the conclusion that had Congress intended to allow the States to make exceptions to Section 605, it would have said so.

Id. A similar conclusion applies to any assertion of tribal authority under the 34 or 96 Acts.

The OSTUC's regulatory initiative unequivocally intrudes on federal authority over interstate telecommunications. In U-1-2014, the OSTUC is boldly

asserting "exclusive" regulatory authority over telecommunications providers, regardless of whether the provider has facilities physically on the Pine Ridge Reservation. In this respect, the OSTUC is asserting the converse of *National Ass'n of Regulatory Comm'rs* – the reservation authority has power outside its borders. Nor is Case U-1-2014 merely a licensing and reporting requirement. The OSTUC seeks substantial monetary penalties. As the associated proceeding in T-2-2014 demonstrates, the OSTUC is attempting to expand into areas Congress has expressly provided only for state authority. As *Benanti* instructs, Congress could have expressly included tribes, but did not; consequently, there is no implied tribal power to do so.

The OSTUC has also opened Case T-3-2014 to look at allegedly discriminatory practices by Sprint and other IXCs against purportedly tribally owned LECs. In its September 24 final order in case T-3-2014, the OSTUC declared NAT-PR's interstate tariff to be in full compliance with the FCC's *Intercarrier Compensation Order*. Going further to construe federal law, the OSTUC declared Sprint Communications and other IXC's refusal to support NAT-PR's traffic pumping scheme a form of illegal self-help. But the FCC has expressly held that the refusal of an IXC like Sprint Communications' to pay is not an unlawful practice under 47 U.S.C. § 201(b) or § 203(c). *In re All Am. Tel. Co.*, 26 FCC Rcd. 723 ¶ 21 (2011). Congress has expressly provided federal authority to address allegations of unreasonable or discriminatory practices by

IXCs. 47 U.S.C. § 201-03. The FCC did so in *All Am. Tel.*, but now the OSTUC purports to override the FCC on this point of federal law.

In *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), the tribe operated a lottery that allowed people to participate by telephone even outside the reservation. After AT&T refused to provide the tribe with a toll-free service for its lottery, the tribe sued AT&T in tribal court, which ordered AT&T to provide that service. AT&T then sued in federal court, where the district court held the lottery illegal under federal law, but did not rule on whether the tribal court had jurisdiction over AT&T.

On appeal, the Ninth Circuit addressed the tribal court's jurisdiction and held that the 34 Act "establishe[d] 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." 295 F.3d at 905 (emphasis added); *see Sprint 2010 Order* at 9-10, 2010 WL 4973319, at *4 (D.S.D. Dec. 1, 2010); *Alltel Commc'ns v. Oglala Sioux Tribe*, No. Civ. 10-5011-JLV, 2010 WL 1999315, at *12 (D.S.D. May 18, 2010); *cf. Blue Legs v. United States Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) (no tribal court jurisdiction over RCRA claim). Congress has determined that federal law controls the regulation of intestate telecommunications, whether that preemption is explicit or because there can be no room for conflicting state regulations. *See Nat'l Ass'n of Regulatory Comm'rs*, 241 U.S. App. D.C. at 182; 746 F.2d at 1499 (federal authority "could be totally frustrated by contrary state regulation"); *see Hicks*, 533 U.S. at 385 (tribal court

jurisdiction presents "a risk of substantial disconformity in the interpretation of state and federal law") (J. Souter, concurring); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 486 (1999) (noting risk for conflicting or duplicative ruling if tribal court jurisdiction available).

D. Neither Exception to *Montana's* Main Rule Applies

1. Sprint Communications Has Not Consented to Tribal Jurisdiction

When articulating *Montana's* main rule, the Court created only two exceptions. Tribes may exercise jurisdiction over non-Indians on the reservation either by consent or, if necessary, to protect the tribes' health and welfare or political or economic integrity. The fact that Sprint Communications may have a single customer party who might possibly be a tribal member does not equate to a consensual relationship such that the OSTUC or Oglala Sioux Tribal Court can exercise jurisdiction over Sprint Communications. As an IXC, Sprint Communications has a common carrier obligation to accept the traffic delivered to it. *Oklahoma-Arkansas Tel. Co.,* 45 F.2d at 999. Moreover, under FCC regulations, it is the parties making the call that instruct which IXC to use to deliver their calls to the called parties. Consequently, providing telecommunications services on a reservation "as a matter of law does *not* create a 'consensual relationship' with the tribe or its members." *Reservation Tel. Coop.*, 278 F. Supp. 2d at 1023-24 (utility cooperative's provision of telecommunication services on reservation under a certificate of authority did not

meet first *Montana* exception). In another context involving an off-reservation utility, the North Dakota Supreme Court concluded:

> Because [a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself, . . . it is inaccurate to view a request for service by a potential electric customer from an electric supplier as forming a consensual relationship similar to that which occurs in other commercial contexts.

In re Application of Otter Tail Power Co., 451 N.W.2d 95, 105 (N.D. 1990) (internal quotations omitted).

The manner by which Sprint Communications provides long distance service also indicates the lack of consent by its part – actual or implied – to be regulated by the OSTUC. With NAT-PR, for example, any interstate traffic Sprint Communications carries that is eventually delivered to NAT-PR is routed at NAT-PR's direction to a third party carrier outside the Pine Ridge Reservation. Clouser Aff. ¶ 18. Similarly, Golden State, Great Plains and Mt. Rushmore, the LECs that serve Pine Ridge Reservation, receive traffic from or deliver traffic to Sprint Communications at locations outside the Pine Ridge Reservation. *Id.* Hence, whatever long distance traffic that Sprint Communications handles that terminates within or originates from the Pine Ridge Reservation, Sprint Communications exchanges with third parties *outside* the Pine Ridge Reservation. *Id.*

In addition to requiring a consensual relationship, the Court has also held that the proposed regulation must bear a nexus to any such relationship. "*Montana* limits tribal jurisdiction under the first exception to the regulation of

the activities of nonmembers" who have consented to be regulated. *Plains Commerce Bank,* 554 U.S. at 332 (internal quotations omitted); *see also Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) (holding that the tribal regulation must bear some nexus to the consensual relationship). "Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank*, 554 U.S. at 337. Whatever telecommunication services Sprint Communications has that come out of or terminate in the Pine Ridge Reservation do so under provisions of federal or South Dakota law. These services do not involve a direct, consensual relationship between Sprint Communications and anyone (including Free Conferencing) on the Pine Ridge Reservation. Similarly, because Sprint Communications has no physical presence or interconnection with NAT-PR on the Pine Ridge Reservation, there is no basis to hold that the tribal court has adjudicatory jurisdiction over Sprint Communications.

Nor does it matter if the Oglala Sioux Tribe in fact owns part of NAT-PR. In *Plains Commerce Bank*, the borrower was a South Dakota LLC owned by members of the Cheyenne River Sioux Tribe. The fact the lender in *Plains Commerce Bank* chose to do business with tribal members on a reservation did not confer adjudicatory jurisdiction over the lender. 554 U.S. at 330-31; *cf. Atkinson* 532 U.S. at 656 ("A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another – it is not 'in for a penny, in

for a Pound.'") (quotation omitted); *Plains Commerce Bank*, 554 U.S. at 338 (same).[9]

2. The Tribe's Inherent Jurisdiction Under *Montana's* Second Exception is Inapplicable

The second *Montana* exception recognizes that tribes also may retain inherent jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566. This second *Montana* exception is also narrowly applied. As the Court observed in *Atkinson*:

> *Montana's* second exception "can be misperceived." The exception is only triggered by *non-member conduct* that threatens the Indian tribe; it does not broadly permit the exercise of civil authority wherever it might be considered "necessary" to self-government. Thus, unless the drain of the non-member's conduct upon tribal services and resources is so severe that it actually 'imperils' the political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands.

532 U.S. at 657 n.12 (emphasis in original). The Tribe's inherent jurisdiction is not triggered in this case because Sprint Communications' conduct has not occurred within the Pine Ridge Reservation, nor has it directly affected the political integrity, economic security, health or welfare of the tribe. In addition,

[9] The fact that two of the wireline users on the Pine Ridge Reservation are business entities formed under state law should be dispositive of the fact they are not cloaked with tribal identity. *See American Property Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 502, 141 Cal. Rptr. 802, 810 (2012); *accord Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596, 604 (N.D. 1983).

Sprint Communications has no property on the Pine Ridge Reservation and does not in fact interconnect directly with NAT-PR.

Not only has it not committed any wrongful conduct on the Pine Ridge Reservation, Sprint Communications' conduct does not directly imperil the political integrity, economic security, health or welfare of the tribe. The business NAT-PR may attribute to Sprint Communications does not affect tribal members because calls delivered to Free Conferencing have no direct effect on the tribe. See Clouser Aff. ¶¶ 10, 13. Those calls are between callers using a service that is not intended to provide a service to tribal members. *See* Clouser Aff. ¶¶ 9-13.

The second *Montana* exception is designed to allow a tribe to do only "'what is necessary to protect tribal self-government or to control internal relations.'" *Strate*, 520 U.S. at 459 (quoting *Montana*). As noted above, "[t]he conduct must do more than injure the tribe, it 'must imperil the subsistence' of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566); *see* Felix S. Cohen, HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][C], at 231 n.220 (2005) (the "elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert *catastrophic* consequences.") (emphasis added). There is no basis in logic or common sense to find that Sprint Communications' failure to register with the OSTUC or to pay NAT-PR's invoices imperils the very existence of the tribe. Thus, tribal court jurisdiction cannot be asserted under *Montana's* second exception.

This conclusion is consistent with what courts and the FCC have concluded – the second *Montana* exception simply does not apply. In *Reservation Tel. Coop.*, the court held:

> The Defendants have wholly failed to establish that *Montana's* second exception applies and justifies the imposition of a possessory interest tax. The Cooperative's actions of providing telecommunication services, and the related sales and service of telephone equipment, do not endanger the tribe's political integrity, the economic security, or the health or welfare of the tribe.

278 F. Supp. 2d at 1024; *see also Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utils Comm'n*, 1999 SD 60, ¶¶ 22-23, 595 N.W.2d at 604 (SDPUC's exercise of authority over tribe's agreement to purchase on-reservation portion of telephone exchange did not infringe on exercise of tribal self-government).

The FCC likewise rejected that the second *Montana* exception applied to wireless services on the Pine Ridge Reservation:

> We are not persuaded that, in the circumstances of this case, tribal regulation of the relationship between non-tribal customers and Western Wireless is so crucial to Indian sovereignty interests that it meets the Supreme Court's exacting standard. Insofar as the State asserts authority to regulate Western Wireless' provision of service to non-tribal members, therefore, we believe it may do so.

In re: W. Wireless Corp. Petition for Designation as an Eligible Telecomm. Carrier for the Pine Ridge Reservation in South Dakota, 16 FCC Rcd. 18145, at ¶ 23 (2001).

II. SPRINT IS ENTITLED TO PRELIMINARY INJUNCTION AGAINST FURTHER TRIBAL COURT PROCEEDINGS

The Court may issue a preliminary injunction when it clearly appears from specific facts that immediate and irreparable injury will result to the moving party. Fed. R. Civ. P. 65(b).

In the Eighth Circuit, the well-known *Dataphase* factors determine whether to issue a preliminarily injunction:

> (1) the probability that the movant will succeed on the merits of its claim;
>
> (2) the threat of irreparable harm to the movant;
>
> (3) the balance between the harm to the movant if injunctive relief is denied and the injury that will result if such relief is granted; and
>
> (4) the public interest.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981); *Yankton Sioux Tribe v. Kempthorne,* 442 F. Supp. 2d 774 (D.S.D. 2006). No single factor in itself is dispositive – rather, all of the factors must be considered to determine whether, on balance, they weigh in favor of granting the injunction. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987). However, the Eighth Circuit has held that "[t]he two most critical factors for a district court to consider in determining whether to grant a preliminary injunction are (1) the probability that plaintiff will succeed on the merits and (2) whether the plaintiff will suffer irreparable harm if an injunction is not granted." *Chicago Stadium Corp. v. Scallen*, 530 F.2d 204, 206 (8th Cir. 1976). While both

of these factors weigh strongly in Sprint's favor, the remaining two factors tip in Sprint's favor as well.

A. Sprint is Likely to Succeed on the Merits

The "probability of success" on the merits factor does not require the party seeking relief to prove a greater than fifty percent likelihood that he will prevail, only that "the court ordinarily is not required at an early stage to draw the fine line between a mathematical probability and a substantial possibility of success." *Dataphase*, 640 F.2d at 113. "[T]he focus in determining probable success should not be to apply the probability language with mathematical precision." *Lenox Labs., Inc.*, 815 F.2d at 503. The case law is clear that parties seeking a preliminary injunction do not have to show a greater than fifty percent chance of success on the merits.

Sprint can readily demonstrate a better than even chance of prevailing. First, as noted above, a tribe presumptively has no civil regulatory or adjudicatory jurisdiction over non-Indians within its reservation. Here, neither Sprint Inc. nor Sprint Communications are on the Pine Ridge Reservation. Sprint Inc. is merely a holding company based in Overland Park, Kansas. Sprint Communications has no presence of any sort on the Pine Ridge Reservation, and all long distance traffic Sprint Communications may handle is delivered to or received from third parties outside the Pine Ridge Reservation. Under *Montana's* main rule, there is no tribal jurisdiction over Sprint, nor does either exception to *Montana's* main rule apply to Sprint.

Nor does this Court have to defer to the Oglala Sioux Tribal Court to address the jurisdictional question. *Strate* instructs that in the absence of a federal grant, exhaustion is unnecessary. Here, there is no federal grant of jurisdiction. But Congress has done even more to divest the tribal court of jurisdiction—the OSTUC is attempting to regulate interstate telecommunications, a subject which Congress has made exclusively a federal question.

B. Requiring Sprint to Exhaust the Tribal Court Proceedings Would Cause Sprint Irreparable Harm

While *Dataphase* is a four-factor test, a "threshold inquiry" is whether the plaintiff can show the possibility of irreparable harm in the absence of injunctive 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") (quotation omitted). Nevertheless, the moving party need only show the possibility of irreparable harm, not that the harm has occurred. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations … and, of course, it can be utilized even without a showing of past wrongs.")(citation omitted); *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472-73 (8th Cir. 1994) (preliminary injunction was justified based on a showing of a threat of irreparable harm); 11A Charles Wright, Alan Miller & Mary Kane, FEDERAL

PRACTICE AND PROCEDURE § 2948.1, at 155 (3d ed. 2013) ("the injury need not have been inflicted when application is made or be certain to occur").

The Eighth Circuit has held that a district court may presume irreparable harm from a finding of probable success on the merits. *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 505 (8th Cir. 1987) ("The court correctly noted that it could presume irreparable injury from a finding of probable success" on the merits); *see also Bio-Tech. Gen. Corp. v. Genentech, Inc.*, 80 F.3d 1553, 1558 (Fed. Cir. 1996)(patentee entitled to presumption of irreparable harm on clear showing of infringement and validity). As evidenced above, Sprint is likely to succeed on the merits. In this case, if the tribal court action continues, Sprint will be denied its "federal right to be free from tribal court interference." *MacArthur v. San Juan Cnty.*, 309 F.3d 1216, 1225 and n.7 (10th Cir. 2002). Further, the OSTUC order in U-1-2014 purports to regulate interstate telecommunication, which Congress has intended for federal regulatory jurisdiction to be exclusive. *See In re Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd. 1619 ¶ 6 (1992).

Sprint also faces the irreparable harm of a violation of its due process rights. This invasion of Sprint's rights is sufficient to warrant a preliminary injunction. "A plaintiff is required to make only a prima facie showing that there has been an invasion of its rights and that a preliminary injunction is essential to the assertion and preservation of those rights." *Livestock Mktg. Ass'n v. U.S. Dep't of Agric.*, 132 F. Supp. 2d 817, 824 (D.S.D. 2001).

The exercise of jurisdiction is rooted in due process. The Court has long recognized that a court improperly exercising jurisdiction over a party violates the Due Process Clause of the Fourteenth Amendment. *Pennoyer v. Neff*, 95 U.S. 714, 732 (1877). Admittedly, the Court has held that neither the Constitution nor the Bill of Rights necessarily applies on tribal lands within a reservation. *See Talton v. Mayes*, 163 U.S. 376 (1896). But because of that rule, it is important to recognize the need to limit "tribal authority over those who have not given the consent of the governed …." *Duro v. Reina*, 495 U.S. 676, 694 (1990). The OSTUC's hauling Sprint into the Oglala Sioux Tribal Court when that court lacks jurisdiction is a violation of Sprint's due process right:

> The ability of nonmembers to know where tribal jurisdiction begins and ends, it should be stressed, is a matter of real, practical consequence given '[t]he special nature of [Indian] tribunals,' *Duro v. Reina,* 495 U.S. 676, 693 (1990), which differ from traditional American courts in a number of significant respects.

Hicks, 533 U.S. at 383 (Souter, J., concurring); *see Plains Commerce Bank*, 554 U.S. at 537 (noting unique nature of tribal sovereignty and inapplicability of Bill of Rights to Indian tribes).

Additionally, in this case, the OSTUC seeks to have a court without jurisdiction in this case issue an order holding Sprint liable for over one hundred thousand dollars, and more going forward, funds that are Sprint's property. Sprint's property cannot "be taken away without that procedural due process required by the Fourteenth Amendment." *Bell v. Burson*, 402 U.S. 535, 539 (1971). The OSTUC is plainly acting on behalf of NAT-PR, despite the flagrant

conflict of interest – its chair is presented as NAT-PR's manager, and the tribe claims a financial interest in NAT-PR.

Loss of constitutional rights or freedom constitutes irreparable harm. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Walker v. Wegner*, 477 F. Supp. 648 (D.S.D. 1979), *aff'd*, 624 F.2d 60 (8th Cir. 1980). The irreparable harm Sprint faces, the loss of its constitutional rights, cannot be adequately redressed by other legal remedies. *See Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir. 1987). The irreparable harm to Sprint's due process rights thus warrants a preliminary injunction in this case.

C. The Balance of Harms Weighs in Sprint's Favor

The third *Dataphase* factor favors Sprint Communications as well. Sprint Communications will suffer presumptive irreparable harm by being compelled to respond to a complaint in a court which has no jurisdiction over it. *See Lenox Labs*, 815 F.2d at 505. The OSTUC, on the other hand, has no authority to preempt federal jurisdiction over interstate telecommunications and accordingly, will suffer no legitimate harm in being enjoined from further enforcement proceedings against Sprint Communications in tribal court.

D. The Public Interest is on Sprint's Side

Here, the public interest favors Sprint Communications. While there may be a federal policy to promote tribal self-government, that interest must yield to the explicit congressional determination that with respect to interstate telecommunication, jurisdiction is exclusively with the federal courts or the FCC.

Resolving the case in the federal courts will also serve to avoid unnecessary duplicative litigation and the needless delay the Court in *Strate* said would occur. *Strate*, 520 U.S. at 459 n.14; *see Sprint 2010 Order* at 17, 2010 WL 4973319, at *7.

CONCLUSION

The Court should grant Sprint injunctive relief halting the OSTUC's efforts to regulate and penalize Sprint. The OSTUC simply has no regulatory jurisdiction over Sprint; the Oglala Sioux Tribal Court likewise lacks adjudicatory jurisdiction over Sprint. As regulation of interstate communications is exclusively federal, Supreme Court precedent does away with any tribal court exhaustion requirement.

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