

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA**

<p>AT&T CORP.,</p> <p>Plaintiff,</p> <p>vs.</p> <p>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,</p> <p>Defendants.</p>	<p>Civil Action No. 14-4150</p> <p>BRIEF IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS COMPLAINT</p>
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Defendants Oglala Sioux Tribe Utility Commission (“OSTUC” or “Commission”), and Joe Red Cloud, Ivan Bettelyoun, David “Terry” Mills, and Arlene Catches The Enemy, in their official capacities as Commissioners, submit this brief in support of their motion to dismiss the Complaint filed by Plaintiff AT&T Corp. (“AT&T”).

PRELIMINARY STATEMENT

AT&T seeks declaratory relief regarding the Commission’s exercise of regulatory authority and jurisdiction over AT&T with respect to interstate “access charges” imposed on AT&T by Native American Telecom – Pine Ridge (“NAT-PR”) under its federal tariff.

The OSTUC was established through the adoption of the Oglala Sioux Tribe Utilities Code by Ordinance of the Oglala Sioux Tribal Council of the Oglala Sioux Tribe, Ordinance No. 09-11 dated February 24, 2009. Pursuant to this authority, the OSTUC has implemented rules and regulations to govern the provision of telecommunications services to residents and consumers located on the Pine Ridge Indian Reservation (“PRIR”) by utilities. The OSTUC has

adopted certain Orders after notice and comment periods and open meetings held the first Tuesday of each month (*see* minutes and agendas of OSTUC meetings, and various Orders issued by the Commission at www.ostuc.net).

The Commission's authority and jurisdiction over Utilities on the PRIR is based upon applicable Tribal Laws, including the Tribal Utilities Code, and Tribal Council Ordinance No. 09-11.

The Oglala Sioux Tribe "formally delegates exclusive and essential government functions and authority for the appropriate and independent regulation of utilities on the Pine Ridge Indian reservation" to the Tribe Utility Commission. Section 3102 of the Oglala Sioux Tribe Utilities Code.

It is the purpose and intent of the Tribal Council that "the operations of the Commission be conducted independently and on behalf of the Tribe for the sole benefit and interests of the Tribe, its members, and the residents of the Reservation." Section 3-102(3) of the Oglala Sioux Tribe Utilities Code.

The Commission therefore exercises a certain amount of regulatory authority over Utility providers operating on or rendering services to residents and consumers on the PRIR.

In its Final Order dated September 24, 2014 in Case No. T-3-2014 (attached as Exhibit A to AT&T's Complaint), the Commission affirmed its jurisdiction over all "telecommunications companies engaged in the furnishing of telecommunications services, including cable, telegraph, or telephone companies engaged in the transmission of images, data, messages, conversations by voice or electronic means, whether by land based or wireless technologies."

The entire thrust of AT&T's complaint is the claim that the OSTUC may not exercise jurisdiction and authority to hear and determine issues, claims and disputes related to NAT-PR's imposition of interstate access charges under its federal tariff. AT&T even goes so far as to unfairly and deliberately misrepresent the Commission's Final Order dated September 24, 2014 (Exhibit A to AT&T's complaint). In paragraph 8 of its complaint, AT&T recasts the Commission's ruling and falsely asserts that the Commission ruled that NAT-PR was "providing service in accordance with its **[federal]** tariffs." (Emphasis added). No such ruling appears in the Commission's Final Order. The bracketed term was conveniently, yet deliberately, inserted by AT&T in its Complaint. AT&T misreads the Commission's Final Order dated September 24, 2014.

Defendants hereby represent and affirm that the Commission does not seek to exercise its jurisdiction and authority to hear and determine claims concerning NAT – PR¹ and its dispute with AT&T over interstate access charges imposed on AT&T under NAT-PR's federal tariff.

AT&T has filed an informal complaint against NAT-PR with the Federal Communications Commission (FCC). The informal complaint specifically addresses AT&T's claim that the OSTUC may not exercise jurisdiction and authority over AT&T concerning interstate access charges imposed by NAT-PR under its federal tariff.

ARGUMENT AND AUTHORITIES

For the reasons which follow, this Court cannot consider the same claims, issues and disputes put forth in AT&T's informal complaint filed with the Federal Communications Commission (FCC)

¹ The Oglala Sioux Tribe is the majority owner in NAT-PR.

de novo, and cannot reach a conclusion inconsistent with the FCC's ultimate determination of the issues and claims presented in AT&T's informal complaint.

The principles of collateral estoppel and claim preclusion have long been applied to deny parties the right to re-litigate tariff issues before a court, after an expert agency has addressed the matter. *Jack Faucett Assoc., Inc. v. Am. Tel. & Tel.*, 566 F. Supp 296 (D.D.C. 1983) (precluding AT&T from re-litigating 11 issues litigated in an underlying antitrust case); *Springfield Television Corp. v. F.C.C.*, 609 F.2d 1014, 1019 (1st Cir. 1979) (allowing offensive collateral estoppel absent showing of "cogent and compelling" new evidence).

Out of considerations of fairness and judicial efficiency, this Court should use its discretion to prevent AT&T from re-litigating before this Court claims, issues and disputes which it has already submitted to the FCC.

Section 207 of the Communications Act compels dismissal of AT&T's complaint. Section 207, 47 U.S.C. § 207, provides:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of damages for which such common carrier may be liable . . . in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies. (Emphasis added.)

Courts have recognized this language to be clear on its face – the same charges may not be brought before a federal court and the FCC – and the filing of a formal or informal complaint is considered an election of the administrative forum, and deprives a federal court of subject matter jurisdiction over the same claims. *Stiles v. GTE Southwest, Inc.*, 128 F.3d 904, 907 (5th Cir. 1997). The proper response to claims precluded by a § 207 election is for a court to dismiss the claims without

prejudice, so that, if they have merit, they can be brought before the other forum. *E.g., Premiere Network Svcs. v. SBC Communications, Inc.*, 440 F.3d 683, 692 (5th Cir. 2006).

Courts have taken a broad view as to what actions trigger an election under § 207:

[T]he district court, relying on a ground not raised in the motion, dismissed *sua sponte* Digitel's complaint for lack of subject matter jurisdiction. The court held that an enraged letter sent by a Digitel executive to the Federal Communications Commission ("FCC") was an "informal complaint" to the FCC, and thereby constituted a binding election by Digitel to pursue its remedies before the agency and not in federal court. We affirm.

Digital, Inc. v. MCI Worldcom, Inc., 239 F.3d 187, 188-89 (2d Cir. 2001); see also *Mexiport, Inc. v. Frontier Comms. Svcs., Inc.*, 253 F.3d 573, 575 (11th Cir. 2001) (Section 207 "does not distinguish between informal and formal complaints, and we will not read such a distinction into it. Because Mexiport filed a complaint with the FCC, it is precluded from also bringing an action in federal district court. There is no subject matter jurisdiction.").

AT&T's filing of an informal complaint regarding NAT-PR's imposition of interstate access charges under its federal tariff falls well within the scope of actions that trigger an election under *Digital* and *Mexiport*. Under § 207 of the Communications Act, AT&T has selected the FCC as the forum for resolving this dispute over interstate access charges imposed by NAT-PR under its federal tariff. As a result, this Court lacks subject matter jurisdiction to hear and determine these claims; AT&T's complaint must be dismissed without prejudice.

CONCLUSION

For the reasons stated, AT&T's complaint should be dismissed without prejudice. The Court is without subject matter jurisdiction to hear and determine the claims and issues put forth by AT&T in its complaint.

Dated this 31st day of October, 2014.

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