UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

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.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff AT&T Corp. ("AT&T") hereby submits this response in opposition to the motion to dismiss filed by Defendants Oglala Sioux Tribe Utility Commission (the "Tribe Utility Commission" or "OSTUC") and the Commissioners of the Tribe Utility Commission, Joe Red Cloud, Ivan Bettelyoun, David "Terry" Mills, and Arlene Catches The Enemy, in their official capacities.

Defendants' motion to dismiss should be denied. As alleged in AT&T's complaint, Defendants have purported to exercise regulatory authority and jurisdiction over AT&T generally and over a pending dispute between Native American Telecom-Pine Ridge ("NAT-PR") and AT&T concerning NAT-PR's demand that AT&T pay certain "access charges." AT&T seeks two declarations (and a permanent injunction) stating that: (a) Defendants lack jurisdiction over AT&T and (b) Defendants lack jurisdiction over claims concerning NAT-PR's dispute with AT&T over its charges under its federal tariff. Complaint ¶¶ 10, 28, Prayer. It is

well-settled that 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).

Defendants attempt to recast the issues in this case as the same as those brought by AT&T in an informal complaint with the FCC, and therefore, they argue, this Court is without subject matter jurisdiction. Defendants are wrong. Regardless, Defendants improperly attempt to limit their Order and ignore that AT&T also seeks a declaration that Defendants cannot assert jurisdiction over AT&T generally.

This Court's Subject Matter Jurisdiction is Proper.

Subject matter jurisdiction is proper in this case for at least three reasons. First, contrary to Defendants' suggestion (at 3), AT&T's informal complaint to the FCC does *not* ask the FCC to adjudicate whether the Tribe Utility Commission can exercise jurisdiction over AT&T and its dispute with NAT-PR (*see* FCC Informal Complaint attached as Exhibit A). Indeed, Defendants are not even parties to the FCC proceeding. Instead, AT&T filed the informal complaint against NAT-PR (and "Native American Telecom, LLC," a related entity operating on a different reservation) asking the FCC to address the underlying access charge dispute between AT&T and NAT-PR, and to determine whether the access charges assessed by NAT-PR purportedly under its federal tariff are lawful and proper. Moreover, AT&T filed the informal complaint on August 21, 2014, more than a month *before* the Tribe Utility Commission issued its September 24, 2014 Order purporting to rule on NAT-PR's dispute with AT&T. In short, AT&T's informal complaint does not request that the FCC address whether Defendants' lack jurisdiction over AT&T. Rather, that is a matter for this Court, as the existence or nonexistence of tribal

jurisdiction "itself presents a federal question within the scope of 28 U.S.C. § 1331." *Bruce H. Lien Co. v. Three Affiliated Tribes*, 93 F.3d 1412, 1422 (8th Cir. 1996).

Second, even if the issue of Defendants' jurisdiction over AT&T was before the FCC (which it is not), Defendants' reliance on the "principles of collateral estoppel and claim preclusion" is misplaced. *See* Def. Brief at 4. Those principles come into play after a matter has been subject to final adjudication, and are not triggered by the mere filing of an informal complaint. *See, e.g.*, *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 n.5 (res judicata and collateral estoppel require a "valid final adjudication" or "valid final judgment" of a claim or issue).

Third, even if the issue of Defendants' jurisdiction over AT&T was before the FCC (which it is not), Defendants' reliance on the doctrine of election of remedies under 47 U.S.C. § 207 also is misplaced. *See* Def. Brief at 4-5. That statute provides a right of action before the FCC or a federal district court for "[a]ny person claiming to be damaged by any common carrier," and as Defendants note, courts have held that an election of forum under this statute is binding. However, AT&T's claims against Defendants here are not and cannot be subject to 47 U.S.C. § 207, because neither the Tribe Utility Commission nor its Commissioners are "common carriers." Even assuming *arguendo* that AT&T's claims against NAT-PR are subject to 47 U.S.C. § 207, AT&T's complaint here does not ask this Court to resolve the issue presented by AT&T's informal complaint against NAT-PR, namely, whether the federal access charges imposed by NAT-PR are lawful. Indeed, NAT-PR is not a party to this proceeding, and nowhere in its complaint did AT&T request that the Court address the merits of AT&T's claims against NAT-PR. Instead, AT&T's complaint before this Court raises an entirely separate issue – whether the Defendants have jurisdiction over AT&T generally and over the dispute between

NAT-PR's and AT&T. Again, the jurisdiction question is not an action under 47 U.S.C. § 207 (which addresses only claims against a "common carrier"), nor is it a matter that AT&T has asked the FCC to address.

Defendants' Order Improperly Exercises Jurisdiction.

Defendants assert (at 3) that the Tribe Utility Commission "does not seek to exercise its jurisdiction and authority to hear and determine claims concerning NAT-PR and its dispute with AT&T over interstate access charges imposed on AT&T under NAT-PR's federal tariff." Although such a concession is welcome, Defendants' assertion cannot be squared with the Tribe Utility Commission's actions. In its September 24, 2014 Order (Exhibit A to the complaint), the Commission found that NAT-PR had filed both an "intrastate access tariff with the [OSTUC]" and an "interstate access tariff on file with the FCC," and it concluded that NAT-PR is "providing service in accordance with its tariffs in effect with this Commission *and the FCC*." Exhibit A at 3-4, 6-7 (emphasis added). The Tribe Utility Commission specifically noted the FCC's *Intercarrier Compensation Order*, imposing certain requirements upon federal tariffs, and found that NAT-PR had complied with the FCC's order. *Id.* at 5, 6. It concluded that the its responsibility is "to ensure that Utilities operating on this reservation are in compliance with tribal *and federal* requirements." *Id.* at 7 (emphasis added). It found that the "payment issue is putting at risk NAT-PR's continued ability to serve residents of the reservation based upon other service providers on the Pine Ridge reservation refusing to pay NAT-PR's tariffed rates," noting that NAT-PR "has filed tariffs governing the traffic in dispute with the FCC and the [OSTUC]." *Id.* at 5, n.12. And it ordered that its decision be sent to the FCC "requesting . . . that the FCC not act on pending matters involving [AT&T] until such time as the act of discrimination or payment dispute is resolved with carriers serving the sovereign Nation of the Oglala Sioux

Tribe." *Id.* at 7. In short, the Tribe Utility Commission made no distinction in its order between NAT-PR's intrastate and federal interstate tariffs, but plainly purported to address both.

Defendants Ignore AT&T's Request for a Declaration and Injunctive Relief.

Even if Defendants could re-cast their Order to address only NAT-PR's intrastate tariff, and not its federal tariff, that would change nothing. AT&T's complaint broadly asserts that the Commission has *no* jurisdiction over AT&T generally, and AT&T seeks a declaration to that effect, along with an injunction to prevent Defendants from purporting to exercise jurisdiction over AT&T, including issuing or seeking any order regarding forfeitures and penalties against AT&T. *See, e.g.*, Complaint ¶¶ 10, 28, Prayer. That is, AT&T's federal claim here is not limited to Defendants' attempt to exercise jurisdiction over charges imposed by NAT-PR under its federal tariff, but extends to Defendants' attempt to exercise jurisdiction over AT&T in any way.

Conclusion

For the reasons stated above, the Court should deny Defendants' motion to dismiss.

Dated: November 21, 2014

Respectfully submitted,

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