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November 24, 1999

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street S.W. TW-A325
Washington, DC 20554

Re: State of South Dakota's comments with regard to the Further
Notice of proposed rulemaking released on September 3, 1999;
CC docket number 96-45; FCC 99-204

Dear Ms. Salas:

I am herewith enclosing, on behalf of the State of South Dakota,
its comments with regard to the September 3, 1999, Further Notice
of proposed rulemaking as referenced above.

Please give me a call if you have any questions or comments.

Sincerely,

John P. Guhin
Deputy Attorney General

JPG:nan
Enclosure
cc.enc.: Rolayne Wiest, Public Utilities Commission
By Federal Express

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Federal-State Joint Board on)
Universal Science:)
Promoting Deployment and)
Subscribership in Unserved)
and Underserved Areas,)
Including Tribal and Insular)
Areas)

CC Docket No. 96-45

COMMENTS OF THE
STATE OF SOUTH DAKOTA

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INTRODUCTION

The following are the comments of the State of South Dakota with regard to the "Further Notice of Proposed Rulemaking" (hereinafter Further Notice) released September 3, 1999. The comments focus on offering what we believe to be correct interpretations of the legal relationships between the states, tribes, and the United States with regard to telecommunications matters.

I

TRIBAL AUTHORITIES MAY NOT, CONSISTENT WITH FEDERAL STATUTE, BE CONSIDERED AS COMPARABLE TO STATE AUTHORITIES FOR THE PURPOSES OF REGULATING TELECOMMUNICATIONS SERVICES.

Paragraph 47 of the above-entitled notice raises the issue of whether tribal authorities should be considered "comparable to state authorities for the purposes of regulating telecommunications services" The answer is "no." Tribal authorities may not be considered as comparable to state authorities.

The authority of the Federal Communications Commission is entirely statutory. The Commission itself has no inherent

authority. Thus, any authority to treat a tribe as comparable to a state must flow from the text of statute. No statutory authority exists, however, to treat a tribe as a state for the purpose of regulating telecommunications services.

This is evident from the text of the relevant statutes. No part of any statute treats states and tribes the same. An analysis of the 1996 Act reveals numerous direct references to states as entities with the authority to regulate telecommunications. See, e.g., 47 U.S.C. § 251(d)(3); 47 U.S.C. § 251(f)(1)(B); 47 U.S.C. § 252(a), (b), (c), (d), (e); 47 U.S.C. § 253; 47 U.S.C. § 254(b)(5); 47 U.S.C. § 254(f); 47 U.S.C. 258; 47 U.S.C. § 259(b)(7); 47 U.S.C. § 261(b), (c).

The Further Notice at paragraph 33 relies heavily on "section 254" of the Act as justification for the changes contemplated by the Notice. Analysis of the text of "section 254," however, reveals no Congressional recognition of the power of tribes to displace states but, to the contrary, reveals a studied deference to state powers. See, e.g., 47 U.S.C. § 254(f):

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service.

(Emphasis added.) In contrast to the studied deference of the Act to the States, the 1996 Act neither vests authority nor recognizes authority in any tribe. This is further emphasized by the critical definitional section, 47 U.S.C. § 153(40), which defines the term "state" to include "the District of Columbia and the Territories and possessions." The Commission has properly

held that the term does not include an Indian tribe. See A.B. Fillins, 12 FCC Rcd 11755 (1997), ¶ 16-17 (hereinafter A.B. Fillins).

Nor is it possible to simply invoke various federal statutes which have fostered tribal self-government or economic development contrary to the implications of the Further Notice. See Further Notice, ¶ 37 and n.87. The Commission has twice squarely held that such federal statutes do not abrogate the purpose behind either federal rules or federal statutes. Thus, in the case entitled In re Application of Fort Mojave Indian Tribe, 6 FCC Rcd 6852 (1991), at ¶ 19, this Commission stated:

We recognize that federal statutes evidence a congressional goal of fostering tribal self-government and economic development (25 U.S.C. § 1, et seq.), but we believe that these policies does [sic] not by themselves, justify abrogation of the purpose behind Section 22.902(b) of the rules, which was promulgated pursuant to the Communications Act of 1934.

Moreover, just two years ago, the Commission held, in A.B. Fillins, supra, at ¶ 30, that:

While, as noted above, the Commission recognizes that federal statutes have fostered tribal self-government and economic development, these policies do not, by themselves, justify abrogation of the Communications Act or the rules adopted by the Commission pursuant to the Act.

These salutary principles correctly state the law and make it clear that a mere enunciation of general principles is simply not sufficient to negate the clear text of a statute.

In a somewhat similar context, the court of appeals in Backcountry Against Dumps v. EPA, 100 F.3d 147 (D.C. Cir. 1996), considered whether the Environmental Protection Agency could consider a tribe as a state for the enforcement of RICRA. The

court noted that RICRA included "tribes" within the definition of "municipalities" and not of states. Id. at 149. It further found

it significant that when Congress wants to treat Indian tribes as states, it does so in clear and precise language.

Id. at 150. It is clear that the courts will simply not uphold a federal agency's treatment of a tribe as a state without clear statutory authority and none exists here.

II

TRIBES LACK AUTHORITY OVER TELECOMMUNICATIONS MATTERS.

A. Tribes Lack Inherent Authority Over Telecommunications.

We discussed above the question of whether the FCC has the authority to treat tribes as states under the telecommunications statutes. It is our conclusion that the FCC has no such authority, regardless of the existence or nonexistence of any inherent tribal authority. In this section, we nonetheless discuss the question of the extent of any inherent tribal authority with regard to telecommunications. This discussion further reinforces the view that the tribes have no jurisdiction to control telecommunications in the federal law context or otherwise.

In this regard, we are guided by the Supreme Court's pronouncements in Rice v. Rehner, 463 U.S. 713 (1983). In that case, the Court considered whether the tribe had inherent authority over liquor. See id. at 724. That question turned upon the issue of whether there was a "tradition of sovereign immunity that favors the Indians in this respect," id. at 725,

i.e., liquor. The Court specifically found that there was no "single notion of tribal sovereignty" which controlled the outcome of the question. Id. Rather, the Supreme Court found it appropriate to look to the tradition of tribal sovereignty with regard to liquor-the particular matter at issue. Id.

The Court in Rice, 463 U.S. at 724, concluded that Congress had in fact "divested the Indians of any inherent power to regulate" in the liquor area. There were no congressional enactments which promoted the regulation of liquor by tribes. In fact, congressional enactments indicated there was no inherent tribal power. See id. at 722-723.

The same is true here. First, there is no complex of federal statutes which recognize tribal authority with regard to telecommunications. The earliest federal statutes allow the federal government, and not the tribes, to control the placement of rights-of-way with regard to telephones and telegraphs on reservations. See, e.g., 30 Stat. 990 (March 2, 1899); 31 Stat. 1058, 1083-84 (March 3, 1901). In fact, in the latter statute, Congress specifically reserved to "incorporated cities and towns" the "power to regulate the manner of construction" of the telephone and telegraph lines. 31 Stat. 1084.

Similarly, as we set forth above, neither the Communications Act of 1934 or the Telecommunications Act of 1996 even mention tribes but instead vest all power within the Federal Communications Commission itself and the states. There is, simply stated, no "backdrop" or "tradition" of tribal sovereignty

with regard to telecommunications and, in fact, the federal statutory system is the opposite. See Rice, 463 U.S. at 725.

This point was again affirmed when Congress in 1997 enacted 47 U.S.C. § 214(e)(6). In that instance, Congress provided that, when a carrier is not subject to the "jurisdiction of a State commission," the Federal Communications Commission could make an ETC designation. It is informative to contrast this with 47 U.S.C. § 214(e)(2), which provides that a "State commission" shall generally have the authority to "designate a common carrier." Tribes are not given that authority, and indeed are not even mentioned in the statute, even when it is found that a state lacks such jurisdiction.¹

Congress, therefore, in 47 U.S.C. § 214(e)(6) simply affirmed the long practice of denying tribal jurisdiction over telecommunications or it would have allowed the tribe the authority to itself designate a common carrier. See also A.B. Fillins, supra, at ¶ 32:

To allow Native Americans to exercise independent spectrum management authority and exempt them from the national cellular licensing scheme would clearly thwart the legislative intent underlying the Communications

¹ As our other comments indicate, we have serious doubts that a state ever lacks jurisdiction simply because an area is found to be "Indian country." We note, moreover, that the enactment discussed above does not declare that the states will, in fact, ever lack such jurisdiction, but merely provides for such a contingency. The only case squarely on point indicates that the states do have such jurisdiction over exchanges in "Indian country." See, *Cheyenne River Sioux Tribe Telephone Exchange v. PUC*, *supra*. (The strongest argument to exclude state jurisdiction would presumably arise in a situation in which a tribe operated a system exclusively for its members on a reservation and the state had disclaimed any interest in regulating. Even with such a case, and even if it would be found that the state lacks jurisdiction, the FCC lacks statutory authority to treat the tribe as a state.)

Act and the policies served by our cellular licensing rules.

We conclude, therefore, that tribes lack inherent jurisdiction over telecommunications matters.

B. Tribes Will Generally Lack Jurisdiction Over Telecommunications Within "Indian Country" Under the Alternative Montana Analysis.

We have demonstrated above that the congressional scheme provides no place for tribal regulation of telecommunications on or off "Indian country." Because this is the case, and because there is no backdrop of tribal sovereignty in the area, it follows that the tribes have no such jurisdiction.

Leaving aside these principles of law, however, we here submit that, on alternative grounds, tribes will almost never have jurisdiction over telecommunications in "Indian country."

1. The Concept of "Indian country" as Defined in Federal Statute Defines the Potential Maximum Extent of Tribal Jurisdiction.

Before discussing the extent of tribal authority under a Montana analysis, it is necessary to more closely define those cases in which a tribe may have authority of any sort. One of the most basic principles of federal Indian law is that tribal authority is confined to "Indian country" as defined by 18 U.S.C. § 1151. Therefore, to determine if there is even a question of whether a tribe has authority, it is necessary to determine whether the actions in question take place within "Indian country."

Federal law defines Indian country at 18 U.S.C. § 1151:

Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country,' as used in this chapter, means (a) all land within the limits of

any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

There are, therefore, three kinds of "Indian country": all land within any "Indian reservation," 18 U.S.C. § 1151(a); all "dependent Indian communities," 18 U.S.C. § 1151(b); and all "Indian allotments, the Indian titles to which have not been extinguished . . . ," 18 U.S.C. § 1151(c).

The Further Notice at ¶¶ 41-42 seeks discussion of the proper "jurisdictional" treatment of various situations. ^As noted, there is not even an arguable contention that a tribe will have jurisdiction unless the matter arises in "Indian country" as defined in 18 U.S.C. 1151. We will therefore first discuss below the concept of "Indian country" in some detail. We note further, however, that this is simply the first step. Once an area is classified as "Indian country," federal law as interpreted by the courts determines whether a tribe may have jurisdiction. Thus, after the discussion of the nature of "Indian country," we will turn to those principles of federal law.

a. Reservations.

All land within "reservations" is "Indian country." This includes allotted land, trust land acquired by virtue of the 1934 Indian Reorganization Act, fee land held by non-Indians, and any other lands.

It is necessary to take great care in determining whether an area is, in fact, a "reservation." For example, the United States Supreme Court in DeCoteau v. District County Court, 420 U.S. 425 (1975), declared that the Lake Traverse Reservation had been "terminated." The reservation, therefore, in law, has not existed for over a century. Nonetheless, the BIA turns out maps which purport to show a "Lake Traverse Reservation," and the BIA frequently refers to the area as the "Lake Traverse Reservation," although it is not in law a "reservation." See, e.g., Testimony of BIA reality officer Titus Marks, agreeing that it is not possible to tell, from looking at a BIA map, whether its purpose is to show actual reservation boundaries. Yankton Sioux Tribe v. Southern Missouri, Transcript, April 4, 1999, p. 367. See also DeCoteau, 420 U.S. at 443 n.27.

Similarly, the United States Census still refers to a Lake Traverse or Sisseton Reservation, even though the Supreme Court has pronounced that area to be terminated. See, e.g., 1990 Census of Population in Housing, Summary Population and Housing Characteristics, South Dakota, p. 175. In other words, it is not sufficient simply to refer to a federal document, or to the opinion of the federal bureaucrats who will often refer to a "reservation" even though none exists in law.

Moreover, in determining whether an area is a "reservation" and hence "Indian country," it is important to recall that some reservations have been diminished. Thus, for example, the Pine Ridge Reservation in South Dakota originally encompassed Shannon County, Bennett County, and south Jackson County but, by virtue

of a federal act, the courts have found that all of Bennett County was "sever[ed]" from the Pine Ridge Reservation. United States ex rel. Cook v. Parkinson, 525 F.2d 120, 122 (8th Cir. 1975). Similarly, in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, (1977) the Court ruled that the counties of Gregory, Mellette and Tripp's were removed from the Rosebud reservation. See also United States v. Stands, 105 F.3d 1565, 1571 (8th Cir. 1997).

b. Dependent Indian Communities.

"Dependent Indian communities" as defined by 18 U.S.C. § 1151(b) also constitute Indian country. In United States v. State of South Dakota, 665 F.2d 837 (8th Cir. 1981), the court of appeals found that a housing development within the city of Sisseton, South Dakota, and not on any reservation, constituted a "dependent Indian community" and, therefore, it was "Indian country." The Supreme Court in Alaska v. Native Village of Venetie, 522 U.S. 520, 527 (1997), held that the term "dependent Indian communities" referred to the

limited category of Indian lands that are neither reservations nor allotments, and that satisfied two requirements--first, they must have been set aside by the Federal Government for the use of Indians as Indian land; second, they must be under federal superintendence.

The nature of "dependent Indian communities" seems to be that they may be found at any place, but are more likely to be within former reservations.

c. Indian Allotments, the Indian Titles to Which Have Not Been Extinguished.

18 U.S.C. § 1151 also defines, as "Indian country," "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

An Indian "allotment" is land which was taken by an individual Indian at the time the allotment statutes were passed in the late 1800s or early 1900s. Moreover, that land must have been continuously in allotted status by that Indian, his Indian heirs, or the tribe itself. There are scattered "allotments" in many counties in South Dakota, including Bennett, Mellette, Tripp, Roberts, and Charles Mix Counties. These "allotments" are not "reservation" but are nonetheless "Indian country." Typically, an "allotment" might be 320 acres, but allotments will commonly be found in both smaller and larger blocks.

"Allotments," which have remained in allotted status, are "Indian country" under the plain definition of 18 U.S.C. § 1151(c). "Allotments" must, however, be distinguished from mere "trust land" which is not, simply by virtue of being in trust, "Indian country." The "Indian country" definition set out at 18 U.S.C. § 1151 does not refer to "trust" land in any of its subsections. Moreover, "trust" land is not an Indian "allotment." In Stands, 105 F.3d at 1571-72, the Eighth Circuit discussed the general topic at some length. The court pointed out that, after the Indian Reorganization Act was passed in 1934, the tribes frequently purchased land and the United States took

it into trust. This land is not, however, by virtue of being put into trust, "Indian country." See id. at 1572.²

We also note, for the sake of completeness, that the Tenth Circuit, United States v. Roberts, 185 F.3d 1125 (10th Cir. 1999), recently found that all "trust" land was in fact "Indian country." That decision is not effective within the boundaries of the Eighth Circuit, and we respectfully submit that it is wrong. The Indian Reorganization Act of 1934 does two things relevant here. First, it provides authority (albeit of suspect constitutionality) for the United States to take land into trust under 25 U.S.C. § 465. Second, it provides an independent process by which the Secretary of the Interior can declare that certain land does constitute a "reservation." 25 U.S.C. § 467. The effect of the Tenth Circuit's decision is simply to ignore the basic policy decision made by Congress in 1934 that a separate process exists to take land into trust under 25 U.S.C. § 465 and to declare or expand "reservation" boundaries under 25 U.S.C. § 467. Moreover, Roberts simply ignores the plain text of 18 U.S.C. § 1151, which defines "Indian country."

As an initial part of the answer to the question posed by the Further Notice at ¶ 42, then, we can say that all land within "reservations" constitutes "Indian country," and "dependent Indian communities" constitute "Indian country." "Allotted lands" which have never lost their allotted status remain "Indian

² It might become a "dependent Indian community," see supra, or it might also be, (in our view only in unique circumstances), a "de facto reservation." See generally Stands, 105 F.3d at 1572 n.3.

country"; mere acquired trust lands do not, for that reason, have "Indian country" status.

From this it should be clear that the "Tribal Designated Statistical Area" as referred to in Further Notice at ¶ 42 has no particular "Indian country" connotation and is simply irrelevant to this discussion. (South Dakota has no comment with regard to matters arising in Oklahoma or in Alaska except to call the FCC's attention to the Venetie case cited above.)

We will now discuss some more particular questions as raised by the FCC "Further Notice."

2. Case Authority Indicates That the States, and Not the Tribes, Have Jurisdiction Over Non-Indian Telecommunications Providers in "Indian country."

In South Dakota v. Bourland, 508 U.S. 679, 694 (1993) (quoting Montana v. United States, 450 U.S. 544, 695 (1981)), the Court found that the

"exercise of tribal power beyond what is necessary to protect tribal government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."

There has, of course, been no "express congressional delegation" of authority here. Bourland went on to identify two potential exceptions to this general rule. There are known as the "Montana exceptions." First, a tribe may have jurisdiction over nonmembers who enter "(consensual relations)" with a tribe. Bourland, 508 U.S. at 695 (quoting Montana v. United States, 450 U.S. at 565). Additionally, a tribe may retain inherent power to exercise civil authority over nonmembers when their conduct "(threatens or has some direct effect on the political integrity,

the economic security, or the health or welfare of the tribe.)" Bourland, 508 U.S. at 695 (quoting Montana, 450 U.S. at 566).

Neither of the Montana exceptions will commonly apply to telecommunications, as a pair of cases demonstrates. In Cheyenne River Sioux Tribe Telephone Authority v. Public Utilities Commission, 595 N.W.2d 604 (S.D. 1999), the South Dakota Supreme Court considered the question of whether the state Public Utilities Commission had jurisdiction over the sale of an on-reservation portion of the Timber Lake Exchange. The South Dakota Supreme Court held that the State did indeed have jurisdiction over that sale. Id. at 608. The Court rejected the argument that by regulating the sale of the exchange on the reservation that the PUC had infringed on the tribe's exercise of self-government. Id. at 608-609. The Court also rejected the theory that because the tribe had entered a consensual agreement with U.S. West, the tribe had jurisdiction over the sale.

The Court noted that federal law, and in particular 47 U.S.C. § 152(b), specifically vested the South Dakota PUC with authority and jurisdiction over intrastate facilities and that the state legislature had carefully exercised that authority. See Id. at 610. Given the congressional pronouncements, together with the proper exercise of state authority, the regulation of the sale could not infringe upon the tribe's right to self-government. The Court also rejected the thesis that federal law preempted regulation of the on-reservation sale, but found rather that federal law recognized state authority. Id. at 611.

A second case further upholds this thesis. In Devils Lake Sioux Indian Tribe v. North Dakota Public Service, 896 F.Supp. 955 (D.N.D. 1995), the district court considered whether the tribe or the state had authority to regulate electric services supplied to both Indians and non-Indians on various categories of land, including trust land, within the Devil's Lake Reservation. The court held that the state and not the tribe had such jurisdiction.³ The court clearly found that the requisites for finding jurisdiction to the tribe had not been met:

No showing has been made, and by inference at least, can be made, that the health, welfare, or safety of any Tribal Member is any way threatened under the present system.

896 F.Supp. at 961 (footnote omitted).

The court rejected the thesis that the tribes ought to have jurisdiction over the supply of electric power to tribal members because, theoretically, power might be shut off to a tribal member. Id.

To impose tribal jurisdiction on a non-Indian telecommunications supplier, it will obviously be necessary to show more than occasional defects in the way the service is supplied. Thus, for example, in South Dakota v. Bourland, 39 F.3d 868 (8th Cir. 1994), the court of appeals, on remand from the decision of the Supreme Court in South Dakota v. Bourland,

³ The court found that the tribe could select its own provider of electricity. See also In re Otter Tail Power Company, 116 F.3d 1207 (8th Cir. 1997). This is a far different matter, however, than exercising regulatory power over all reservation utility providers.

508 U.S. 679 (1993), found no basis to recognize tribal jurisdiction over non-Indians for a variety of reasons:

1. "Non-Indians 'may have harassed cattle grazing on the taken area or on tribal lands, failed to close pasture gates, or let down wires on fences.'" 39 F.3d at 870.
2. That "non-Indian deer hunting 'on the taken area and nonmember fee lands does reduce the amount of deer available to tribal members.'" Id.
3. That non-Indian hunters were alleged to have "driven and shot across the taken land, causing the Indian-owned cattle grazing there pursuant to one tribal rancher's lease agreement to become 'nervous,' and causing the cattle to move away from good grazing areas and water." 39 F.3d at 870 n.5.
4. That, it was alleged, "stray birdshot from non-Indian hunters has made the tribe's buffalo 'jump,' and has disturbed the herd grazing in or near the taking area." Id.

It is very unlikely that a tribe will ever be able to establish that it has jurisdiction over any portion of a non-Indian telecommunications provider on a reservation under the Montana health and welfare test, even assuming its applicability.

III

FEDERAL LAW DEMANDS THAT WIRELINE TELEPHONE CALLS BETWEEN INDIAN TRIBAL LANDS AND THE STATE IN WHICH TRIBAL LAND IS LOCATED MUST CONTINUE TO BE TREATED AS INTRASTATE CALLS SUBJECT TO STATE JURISDICTION.

The September 3, 1999, Notice at ¶ 44 suggests that comments be made with regard to whether wireline telephone calls between Indian tribal lands and the state in which tribal land is located should continue to be treated as intrastate, not interstate, calls. The answer is quite clear: the FCC lacks authority to declare an intrastate call to be an interstate call simply because it touches on "Indian country."

A. Federal Statute Precludes the Treatment of Intrastate Calls as Interstate Calls.

47 U.S.C. § 152(b) provides, with regard to certain exceptions not applicable here, that

nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with regard to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire

(Emphasis added). 47 U.S.C. § 153(22) in turn defines interstate communication as "(a) from any state . . . to any other state" And a "state," as A.B. Fillins, supra, has established, is one of the fifty states of the union and certain other entities, but not Tribes. It is clear that federal law purposely defers to the jurisdiction of states for "intrastate calls," and there is no latitude in federal law for the Federal Communications Commission to simply ignore that deference.

Moreover, Public Law 104-104, § 601, 110 Stat. 143 provides that the 1996 Act may not be "construed to modify, impair or supercede . . . State . . . law unless expressly provided."

Nothing in the 1996 Act "expressly" supercedes existing state law to regulate intrastate calls, and, thus, the act prohibits the FCC from taking jurisdiction of intrastate calls simply because they touch upon "Indian country."

B. Complexity of Implementing System.

Moreover, the proposal appears to have underestimated the difficulty and complexity with regard to creating a system in which calls between "Indian tribal lands" to non-Indian lands within a state would be treated as interstate calls.

First, we are not sure what is meant by the term "Indian tribal lands." If we assume that the term means "Indian country" as defined by 18 U.S.C. § 1151, and discussed above in Section II.B.1, the complexity of the situation is enormous. Thus, for example, there are seven reservations within the state of South Dakota. The proposal would mean that a call from any of these seven reservations to, for example, the state capitol would constitute an interstate call. Presumably, it would mean that a call between any two of the reservations would be an interstate call.

There is, as we pointed out above, also "Indian country" which is not found within any "Indian reservation" but instead is constituted as a "dependent Indian community." As defined by 18 U.S.C. § 1151(b), one of these dependent Indian communities is found within the city of Sisseton, South Dakota. The proposal would, apparently, mean that a person calling from one part of Sisseton to another part of Sisseton would have completed an "interstate call."

Moreover, there are, we estimate, hundreds of plots of "allotted" land which constitutes "Indian country" under 18 U.S.C. § 1151(c) in several South Dakota counties. Calls from any of these plots (some of which are quite small) would apparently be "interstate" under the proposal.

The courts have recognized the folly of breaking down communications networks into very small pieces involving few people. Thus, when considering whether to create one LATA or two LATA's within the entire state of South Dakota, Judge Greene in

United States v. Western Electric Co., 569 F.Supp. 990, 1046

(D.D.C. 1983), determined that the state should constitute only a single LATA. The court found:

In view of Rapid City's relatively small size, the court will grant the State's request to establish a single LATA in South Dakota. Such consolidation is likely to increase the viability of the Operating Company. Moreover, and this is especially important in a sparsely settled area such as this, a single LATA may be expected to enhance service in all parts of the State, both because of the centralization of direction that would flow from it and because the resulting increase in the viability of the Operating Company will render it less likely that substantial rate increases would be required to provide service to isolated ratepayers.

Id. (footnotes omitted).

Judge Greene's findings amply demonstrate the folly of a telecommunications proposal which demolishes the centralized regulation which now exists in South Dakota; such would decrease the viability of companies which now supply services and would likely increase rates to those in isolated areas. If this were true of a system which broke South Dakota into two systems, it is certainly true of a telecommunications system which changes South Dakota from one state regulator to a system in which there would be a state regulator, and nine tribal regulators regulating "reservations," off-reservation "dependent Indian communities," and off-reservation "allotted lands."

Moreover, we suggest that, because the proposal would have the effect of undermining Judge Greene's LATA order, the treatment of tribes as states is repugnant to the court's decree and thus not allowable for that reason.

IV

THE STATES HAVE GENUINE AND DEEP-SEATED INTERESTS IN REGULATING TELECOMMUNICATIONS WITHIN "INDIAN COUNTRY."

The Further Notice, at ¶ 46, requests comment on state interests in regulating telecommunications. The identification of these "particularized interests" apparently flows from the notion that White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980), is applicable to the question of whether the state may exercise its jurisdiction within "Indian country" and is applicable to the telecommunications issue.

We have suggested above that the tribes lack inherent jurisdiction over telecommunications and that this ends the question. Alternatively, we have suggested that tribes lack jurisdiction over at least non-Indian providers on reservations in view of the most recent precedent and in view of the Montana exceptions. These discussions are reflective of the deep particularized interests the states have continuing regulation of telecommunications. Nonetheless, some further identification of those interests is appropriate.

First, the states have a need to continue their regulations so as to guarantee reasonable rates, quality service, and continued vitality of local exchange carriers. The states have been the only historical regulators of intrastate communications on and off reservations.

Each of the states has set up sophisticated systems for regulation of telecommunications. Each has a duty to protect all of its citizens, Indians and non-Indians alike, from the occasionally predatory nature of telecommunications companies.

To accomplish these goals, it has been necessary to put in place sophisticated and expensive systems to make such analyses. The states are the only entities which are reasonably capable, from an economic and political point of view, for making these decisions.

It should be noted that if the states were deprived of this authority, the responsibility would fall upon reservation governments inhabited by very few persons. For example, the total 1990 population of the Crow Creek Reservation in South Dakota, Indian and non-Indian alike, was 1,756 and the total population of the Lower Brule Reservation in 1996 was 1,123. 1990 Census of Population and Housing, Summary Population and Housing Characteristics, South Dakota, p. 175. Even reservations with greater populations do not have a sufficient economic base to put in place a sophisticated system for the regulation of telecommunications. Thus, for example, the 1990 Census lists Pine Ridge as South Dakota's most populous reservation, and it is listed at 12,189 persons, Indian and non-Indian alike. Id. It is simply unreasonable to suggest that an appropriately sophisticated regulatory system can be built on an economic basis with that number of people.

Moreover, the states continue to have an interest in ensuring that any rate decisions are made with the full benefit of the democratic system. In each of the states, the regulators are ultimately responsible to the electorate--an electorate which includes all people of every race. Were telecommunications on reservations to be entrusted to tribes, on the other hand, only

tribal members would be allowed to vote in the tribal elections for the regulators. See *Cheyenne River Sioux Tribe v. South Dakota*, 595 N.W.2d at 612. The United States in the early part of this century made a concerted and successful effort to encourage hundreds of thousands of non-Indians to immigrate to Indian reservations. Those persons or their descendents now reside on reservations essentially at the invitation of the United States. It is unconscionable to deprive those persons of their right to vote in elections which will regulate their utilities. Thus, the states have a continuing interest in the democratic process, which must be protected.

V

FEDERAL LAW MAY PREEMPT TRIBAL LAW REGARDING COMMUNICATIONS.

The Further Notice at ¶ 46, asks whether federal law regarding telecommunications may preempt tribal authority over the regulation of telecommunications. The answer is clearly "yes." *A.B. Fillins, supra*, at ¶ 32, makes it clear that tribes are not exempted "from the national cellular licensing scheme." It likewise allows insight into the disarray which could be caused by allowing the nation's 200-plus Indian tribes a veto over federal telecommunications policy. Furthermore, tribes are not exempted from any part of the telecommunications law enacted by Congress. The Further Notice does not suggest any rationale by which federal law could be trumped by tribal law and none exists.

VI

THE FURTHER NOTICE REVEALS FURTHER MISAPPREHENSIONS
WHICH SHOULD BE ADDRESSED.

A. Reservations Exist Within States.

As the proposals discussed above reveal, we respectfully submit that the information conveyed to the Commission in its various hearings, see Further Notice, Appendices A, B, and C, has been incomplete with regard to the nature of states and the "Indian country" which are found within them. Some further general discussion of the nature of the problem is merited.

First, it is necessary to reiterate the obvious, i.e., that reservations exist within states. The existence of a "reservation" or "Indian country" does not displace the existence of a state. An Indian or non-Indian on the Cheyenne River Reservation in South Dakota, for example, remains in South Dakota.

Moreover, the Commission should be informed that all persons, tribal members and nonmembers, living on reservations have the right to vote in state elections, serve on state court juries, hold state public office, attend state schools. Strickland, ed., Felix S. Cohen's Handbook of Federal Indian Law (1982), pp. 645-46. All persons, Indian and non-Indian alike, on reservations are entitled to state social services. Id. In fact, a major part of the social service budget of many western states flows into reservations.

Moreover, states build and maintain a significant number of roads within reservations. The Commission should also be cognizant of the fact that on many reservations, non-Indians

outnumber Indians. As the Supreme Court stated in Duro v. Reina, 495 U.S. 676, 695 (1990),

The population of non-Indians on reservations generally is greater than the population of all Indians, both members and nonmembers

B. A More Complete Description of the Indian Civil Rights Act Is Merited.

We submit, further, that a more complete description of the nature of the Indian Civil Rights Act is appropriate. First, we note that the citation for the Act in the Further Notice is incorrect. See Further Notice, ¶ 40 n.90. The provisions of the Indian Civil Rights Act which provide for certain state jurisdiction are set out at 25 U.S.C. §§ 1321-1326.

Second, while it is correct to say that the Indian Civil Rights Act provides generally for the constitutional rights of Indians, that statement promises more than it delivers. In fact, the Indian Civil Rights Act is not, except for writs of habeas corpus, enforceable in federal court. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), an action was brought in federal court against a tribe claiming an equal protection violation. The Supreme Court held that the Indian Civil Rights Act did not authorize federal court actions for declaratory and injunctive relief against either a tribe or its officers. 436 U.S. at 72.

Accordingly, the federal courts are simply not open to entertain an allegation that a tribe has violated the civil rights either of one of its own members or of a nonmember. This, of course, contrasts vividly with the situation of the state in which any person, whether a citizen of the state or not, may claim in federal court that his constitutional rights have been

violated by the State under 42 U.S.C. § 1983. See generally Testimony of Lawrence Long, Chief Deputy Attorney General, State of South Dakota, Senate Hearing 104-694, pp. 88-129 (discussion of tribal sovereign immunity).

CONCLUSION

The foregoing reveals, we respectfully submit, that further study of the nature of "Indian country" is merited before any action is taken to disturb the regulation of telecommunications in "Indian country." Moreover, it also reveals that any changes must be made by Congress, and that the FCC lacks the authority to adjust jurisdictional arrangements because it has not been granted that power by Congress.

Dated this 24th day of November, 1999.

Respectfully submitted,

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