Federal Communications Commission
Washington, D.C.

February 2, 2000

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Greene, Myer, & McElroy, P.C.
c/o Alice Walker
Counsel for Cheyenne River Sioux Tribe Telephone Authority
1007 Pearl Street, No. 220
Boulder, Colorado 80302

Re: Acceptance of Comments As Timely Filed in (Docket No. 96-45)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(I), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

for William F. Caton
Magalie Roman Salas
Secretary

GREENE, MEYER & McELROY
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January 20, 2000

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street S. W., TW-A-325
Washington, D.C. 20554

VIA OVERNIGHT COURIER

Re: In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas
CC Docket No. 96-45

Dear Ms. Salas:

Enclosed please find the original and one of the Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority and the Motion to Accept Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority as Timely Filed, and Notice of Errata.

Please date stamp the copies and return them to us in the enclosed self-addressed stamped envelope.

Thank you for your attention to this matter.

Sincerely,

Alice E. Walker

Alice E. Walker

AEW/dav

Enc.: Original & 1: As stated; SASE

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1007 PEARL STREET, SUITE 220 BOULDER, COLORADO 80302 303-442-2021 FAX 303-444-3490
A Professional Corporation

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas	)	**CC Docket No. 96-45**

MOTION TO ACCEPT REPLY COMMENTS OF THE CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY AS TIMELY FILED AND NOTICE OF ERRATA

The Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") respectfully files this motion to accept its Reply Comments, electronically filed in this matter on January 20, 2000, as timely filed on January 19, 2000. A paper version of the Reply Comments is attached hereto for filing.

The Telephone Authority attempted to file its Reply Comments electronically repeatedly between the hours of 4:30 p.m. and 9:30 p.m., mountain standard time, on January 19, 2000. However, the Commission's Electronic Filing System was not functioning and would not allow the Telephone Authority to file its document. Accordingly, the Telephone Authority was unable to file its Reply Comments on January 19, 2000 in this matter.

The Telephone Authority also hereby notifies the Commission of an errata in the Reply Comments electronically filed on January 20, 2000. Those comments were inadvertently entitled "Reply Comments of the Walker River Paiute Tribe." As shown on the paper version of the Reply Comments attached hereto, the proper title is "Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority." A correct version was also filed electronically on January 20,

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2000. Please file the correct version in the Commission's records.

Dated: January 20, 2000

Respectfully submitted,

Alice E. Walker
Scott B. McElroy
GREENE, MEYER & MCELROY, P.C.
1007 Pearl Street, No. 220
Boulder, Colorado 80302
(303) 442-2021

Attorneys for Cheyenne River Sioux Tribe Telephone Authority

By: Alice E. Walker

CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Motion to Accept Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority as Timely Filed, and Notice of Errata in the U.S. Mail, first-class postage prepaid thereon, on this 20th day of January, 2000, addressed to the following:

Chairman William Kennard
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Commissioner Harold Furchtgott-Roth
Federal Communications Commission
1919 M Street, N.W., Room 802
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Commissioner Gloria Tristani
Federal Communications Commission
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Commissioner Michael Powell
Federal Communications Commission
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Nancy Ann Ursale

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas	)))))	**CC Docket No. 96-45**

REPLY COMMENTS OF THE
CHEYENNE RIVER SIOUX TRIBE TELEPHONE AUTHORITY

I. INTRODUCTION

The Cheyenne River Sioux Tribe Telephone Authority ("Telephone Authority") files these comments in response to the Further Notice of Proposed Rulemaking (rel. Sept. 3, 1999) ("Further Notice") issued by the Commission in the above-captioned proceedings. The Further Notice raises a variety of issues regarding the implementation of the Communications Act (codified in scattered sections of 47 U.S.C.) in Indian country. The Telephone Authority's experience in operating exchanges in South Dakota both on and off the Cheyenne River Indian Reservation demonstrates the benefits from tribal participation in the provision of telecommunications services in Indian country. However, the Telephone Authority's unsuccessful attempt to purchase additional telephone exchanges from U S West demonstrates the adverse effect that may result from the assertion of state control over the provision of such services in Indian country. In short, the need for clear guidance from the Commission regarding the Act's implementation in Indian country is overwhelming. Consistent with its trust responsibility to protect tribal interests and to consult with Indian tribes on a government-to-government basis, the Commission should carefully consider the impact its rulemaking proceeding may have on the

ability of tribes to determine what is in their best interests and the interests of their members, and to govern themselves. The record of the Telephone Authority demonstrates the wisdom of a course of action in which substantial authority over the regulation of the provision of services in Indian country is vested in the affected Indian tribe.

II. THE TELEPHONE AUTHORITY'S EXPERIENCE DEMONSTRATES THE ADVANTAGES OF TRIBAL PARTICIPATION IN THE PROVISION OF TELECOMMUNICATIONS SERVICES IN INDIAN COUNTRY.

A. TRIBES CAN BEST DETERMINE WHO SHOULD PROVIDE SERVICE WITHIN RESERVATION BOUNDARIES.

1. Government-to-Government Consultation.

On prior occasions, the Telephone Authority has explained its view that the Commission should consult on a government-to-government basis with Indian tribes in order to ascertain their individual needs vis-a-vis telecommunications services. *See Comments of the Cheyenne River Sioux Tribe Telephone Authority, Smith Bagley, Inc. Petition for Designation as an Eligible Telecommunications Carrier Under 47 U.S.C. § 216(e)(6), FCC 97-419* at 3-4 (July 27, 1999); *Comments of the Cheyenne River Sioux Tribe Telephone Authority, In the Matter of Western Wireless Corp. Petition for Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to Crow Reservation, Montana* at 1-3 (Oct. 28, 1999). Such government-to-government consultation stems from the United States' obligation as trustee to protect the rights of Indian tribes to govern themselves and their reservation homelands, as well as to protect tribal trust assets. *E.g. Comments of the Tuscarora Indian Nation of New York* at 3-5 (Dec. 17, 1999).

Because the needs of each tribe differ, and only the tribe's governing body can determine what those needs are, the Commission should not attempt to make blanket regulatory changes as a one-size-fits-all fix to the problem of low telecommunications services penetration rates in Indian country. For example, as described below, Part 2, *infra*, the Telephone Authority's experience is unique and what may be helpful for the Cheyenne River Sioux Tribe given the Telephone Authority's well-established operation may not be helpful for tribes that have not developed their own telephone companies. The Commission can better accomplish its goals of improving telecommunications services in Indian country by consulting on a government-to-government basis with individual tribes, and identifying specific steps it can take to benefit each tribe.

2. The Telephone Authority's Experience.

The Cheyenne River Sioux Tribe ("Tribe") established the Telephone Authority in 1958 for purposes of providing telephone service within the Cheyenne River Indian Reservation ("Reservation"), pursuant to the Tribe's Ordinance 24. As such, the Telephone Authority is the oldest tribal telecommunications company in the United States. All the directors who serve on the Telephone Authority's Board of Directors are members of the Tribe who live on the Reservation. The directors, therefore, have a direct interest in the type and quality of telecommunications services provided on the Reservation.

Since 1974, the Telephone Authority has served nearly the entire Reservation, spanning a distance of 110 miles.[1] The Telephone Authority presently owns and operates the

[1]As the Commission is aware, the Telephone Authority wishes to purchase the Timber Lake telephone exchange, one-half of which lies within the Reservation. The Timber Lake exchange is the only area that the Telephone Authority does not serve on the Reservation. *See*

Eagle Butte, Dupree, South Dupree, Isabel[2] and La Plant telephone exchanges. Since 1974, the five exchanges have formed one calling area, eliminating the long distance charges that existed prior to the Telephone Authority's ownership and operation. *See* Further Notice ¶ 14 (seeking comment on local toll service). Indeed, presently it is long distance to the community of Timber Lake, located on the Reservation, because Timber Lake is within the one exchange on the Reservation that the Telephone Authority does not own. It is the Telephone Authority's intent to bring Timber Lake into the local calling area if and when it purchases the Timber Lake exchange from U S West.

The Telephone Authority is constantly upgrading its plants, facilities and equipment. The Reservation is served by over 250 miles of fiber-optic cable, digital switches and digital carriers. The Telephone Authority provides high quality telephone service to more than 3,000 access lines with fiber-optic long distance service, computerized billing service, mobile telephone system, equal access conversion, free fire bar service, and 100 percent one-party service in buried cable. The Telephone Authority recently invested $1 million for switching upgrades for year 2000 compliance. As a member of the Reservation community, the Telephone Authority has strong incentives to ensure that all telephone customers on the Reservation receive state-of-the-art service. This contrasts with the plants currently operated by U S West in the Timber Lake, Morristown and McIntosh exchanges which U S West wants to sell. Unlike the Telephone Authority, U S West has no incentive to upgrade its facilities, because it is not a member of the

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Part III(B), *infra*.

[2]A small portion of the Isabel exchange extends outside of the Cheyenne River Indian Reservation, onto the Standing Rock Indian Reservation.

Reservation community and has no stake in the overall well-being of the economy. Moreover, U S West has made the business decision to concentrate its services in urban areas and to sell its operations in rural areas like the Reservation. Consumers living within the Reservation clearly benefit from the ongoing service that the Telephone Authority provides them.

The Telephone Authority also is an Internet service provider for the Reservation, operating as the corporate entity, Lakota Technologies, Inc. *See* Further Notice ¶ 14 (seeking comment on availability of Internet service). The Telephone Authority charges a flat rate of $17.95 per month for unlimited Internet access, whereas the Internet service provider in Timber Lake charges $34.00 per month and requires subscribers to commit to one year of service. The Telephone Authority requires no such commitment. In addition to bringing all of the Reservation exchanges into a local calling area, the Telephone Authority also makes Internet access affordable and available to Reservation residents. As the Commission has often noted, affordable Internet access is a standard utility that must be available to everyone in the country. The Telephone Authority makes that utility available to all households and businesses lying within the five exchanges it owns and operates.

The important lesson from the Telephone Authority's experience is that providers with direct and meaningful ties to Indian reservation communities can best decide what those communities need and want. A carrier with no ties to the reservation community, such as U S West, has no means, much less desire, to ascertain the community's needs. Only the Indian tribal government with jurisdiction over the Indian reservation at issue can determine what is in the best interests of the reservation residents. Thus, the Commission's suggestion to force carriers to provide services to reservations, Further Notice ¶¶ 93-96, 115, without consulting with the

affected tribal government is by itself impractical and quixotic as a means to ensure the best service to Indian communities. For the same reason, it does not make sense to establish a nationwide tribal service area, Further Notice ¶ 64, since the needs of each Indian community differ greatly. Consultation between Indian tribes and the Commission is a critical component of their trust relationship, and is fundamental to ascertaining the kinds of services needed for a particular reservation government. The Telephone Authority's success in meeting the specific needs of the exchanges it serves is an example the Commission should follow in identifying carriers to serve reservation telephone exchanges.

III. THE COMMISSION MUST CAREFULLY EXAMINE THE QUESTION OF JURISDICTION TO IMPLEMENT THE COMMUNICATIONS ACT IN INDIAN COUNTRY

A. RESERVATION TELECOMMUNICATIONS SERVICE SHOULD BE SUBJECT TO TRIBAL JURISDICTION UNDER THE MONTANA EXCEPTIONS TO STATE JURISDICTION.

The Commission has asked for comment on,

> the extent of state and tribal regulation of telecommunications provided on tribal lands and by tribally-owned or operated carriers. In particular, we seek comment on the appropriate jurisdictional authority in the following situations: (1) tribally-owned or operated carriers providing service within the reservation (a) to tribal members, (b) to non-tribal members, and (c) to non-tribal members living on non-native fee lands (within the reservation); (2) non-tribally owned or operated carriers offering service both inside and outside of the reservation; and (3) tribally-owned or operated carriers offering service outside of the reservation.

Further Notice ¶ 41. In particular, the Commission is interested in "whether the state commission has jurisdiction over telecommunications in the situations described above [in ¶ 41], the legal authority for such jurisdiction . . . and the extent to which the particular state commission

exercises that jurisdiction." Id. ¶ 43. The issue is complicated by the checkerboard land ownership on many reservations in which trust land is interspersed with fee land frequently owned by non-Indians.

The territory of the Cheyenne River Sioux Tribe includes all lands within the exterior boundaries of the Cheyenne River Indian Reservation as set forth in the Act of March 2, 1889, 25 Stat. 888, as well as lands held in trust for the Tribe and its members outside those boundaries. Constitution of the Cheyenne River Sioux Tribe, art. I (Tribe's territorial jurisdiction). In fact, the United States Supreme Court held in South Dakota v. Bourland, 508 U.S. 679 (1993), that the southern and eastern boundaries remain as set forth in Section 4 of the Act of March 2, 1889, 25 Stat. 888. Bourland is on all fours with an earlier Supreme Court case, Solem v. Bartlett, 465 U.S. 463 (1984). Solem affirms the northern and western boundaries of the Cheyenne River Indian Reservation as set forth in Section 4 of the Act of March 2, 1889, 25 Stat. 888. Thus, all four Reservation boundaries have been upheld in two separate Supreme Court cases. *Cf.* Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir.), *cert. denied*, 512 U.S. 1236 (1994). Those boundaries define the extent of the Tribe's regulatory jurisdiction. 18 U.S.C. § 1151.

Clearly, the physical character of telephone exchanges does not permit segmented jurisdiction over a company providing similar services to different types of land. Moreover, 25 U.S.C. § 319 provides the Secretary of the Interior jurisdiction over all "right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation . . . ." It is virtually impossible to provide services on a reservation without obtaining such a right of way. The Telephone Authority submits that the dominant interests in such

situations are those of the affected tribe. Certainly, the history of the Telephone Authority demonstrates that the assertion of state authority to address these complex matters will not improve the provision of services in Indian country.

1. Telecommunications Services Within Indian Reservations.

The Commission has recognized the critical importance of telecommunications services to political activities, health, safety, and economic security in Indian country:

> The absence of telecommunications service in a home puts its occupants at a tremendous disadvantage in today's society. Parents cannot be reached when urgent situations arise at school. Job seekers cannot offer prospective employers a quick and convenient means of communication. People in immediate need of emergency services cannot contact police departments, fire departments, or medical providers. In short, telephone service provides a vital link between individuals and society as a whole.

Further Notice ¶ 2. Indian tribes have regulatory jurisdiction over those who affect these critical aspects of sovereignty:

> Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes . . . tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments.

25 U.S.C. § 3601(3), (5). *See* Constitution of the Cheyenne River Sioux Tribe, art. I (Tribe's jurisdiction extends to reservation lands and trust allotments outside reservation), art. IV, § 1, cl. k (separation of powers in tribal government); By-Laws of the Cheyenne River Sioux Tribe, art. V (tribal courts "have jurisdiction over claims and disputes arising on the reservation."); Cheyenne River Sioux Tribe, Law and Order Code §§ 1-4-1, 1-4-2, 1-4-3(2)(B), 1-4-7(1). *See also* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144 (1982). There is no question, then, that

Indian tribes are sovereign governments with regulatory jurisdiction over their territory and those who choose to enter their reservations to provide telecommunications services.

With respect to tribal trust lands within Indian reservations, tribes have jurisdiction to regulate the provision of telecommunications services to such lands, whether by carriers owned and operated by the tribes, or by non-Indian entities. Montana v. United States, 450 U.S. 544, 557 (1981). With respect to non-trust lands located within the exterior boundaries of an Indian reservation, the tribe also has jurisdiction to regulate all telecommunications services providers who serve tribal members. *See* Bourland, 508 U.S. at 695 (affirming Montana test for tribal regulatory jurisdiction over non-Indians within reservation boundaries). Moreover, South Dakota has admitted that it has no jurisdiction over the Telephone Authority's on-Reservation telecommunications services. *Brief of Appellee* at 20, 31-38, Cheyenne River Sioux Tribe Tel. Auth. v. Public Util. Comm'n of S.D., Nos. 20062, 20464 (S.D. Aug. 20, 1998).[3] As the Telephone Authority's experience shows, *see* Part II(A)(2), *supra*, the exercise of state jurisdiction does nothing to further the provision of quality telecommunications services in Indian country. The Montana analysis controls the jurisdictional outcome. Indian tribes are the sovereign governments with regulatory jurisdiction over their reservation lands, which includes all lands within the reservation boundaries. 18 U.S.C. § 1151.

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[3]However, the South Dakota Public Utilities Commission has asserted jurisdiction within Reservation boundaries to designate the Telephone Authority as an ETC for the Reservation. *Findings of Fact, Conclusions of Law, Order and Notice of Entry of Order*, In the Matter of the Filing by the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier, No. TC97-184 (S.D. Pub. Util. Comm'n Dec. 18, 1997). The Telephone Authority has argued that the South Dakota Commission does not have such jurisdiction. *In the Matter of Petition of the Cheyenne River Sioux Tribe Telephone Authority for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, FCC 97-419*, ADD/USB File No. 98-21 (Jan. 6, 1998).

Leaving aside the jurisdictional question of who should regulate the provision of telecommunications services in Indian country, it is clear that the Secretary of the Interior has exclusive authority to grant rights of way for telephone lines on Indian reservations. *See* 25 U.S.C. § 319. In exercising that authority, the Secretary is obliged to assess the quality of service that will be provided by the carrier. In making that determination, he must carefully consider the views of the affected tribe. Many Indian tribes have regulatory codes in place that require utilities providers to obtain a tribal license to operate within reservation boundaries. *See, e.g.*, *Memorandum Opinion and Order*, In the Matter of U S WEST Communications and Gila River Telecommunications, Inc. Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary, of the Commission's Rules, AAD 91-2, 7 FCC Rcd 2161 (1992); *Comments of the Tuscarora Indian Nation of New York* at 5 (Dec. 17, 1999). *See* Further Notice ¶ 47. In addition, most tribes, like the Cheyenne River Sioux Tribe, have general jurisdiction to regulate commercial activities on their reservations. Law and Order Code § 1-4-3 (tribal courts have personal jurisdiction over those who enter the Cheyenne River Indian Reservation), § 1-4-4 (tribal courts have jurisdiction to determine rights to property located within boundaries of Reservation), § 1-4-5 (tribal courts have subject matter jurisdiction over all civil causes of action and criminal causes of action involving tribal members). The Secretary must implement his authority under 25 U.S.C. § 319 in a manner consistent with such tribal regulatory codes and in the best interests of the tribes. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in party, dissenting in part), *modified on reh'g*, 782 F.2d 855 (10th Cir.), *modified*, 793 F.2d 1171 (10th Cir.) (adopting concurring/dissenting

opinion of Seymour, J.), *cert. denied sub nom.* Southern Union Co. v. Jicarilla Apache Tribe, 479 U.S. 970 (1986).

The provision of telecommunications services by a tribally-owned and operated carrier within reservation boundaries is unquestionably under tribal jurisdiction, and federal law has spoken to the issue. Therefore, there is no need to establish a new test to determine whether the Commission or the states have jurisdiction to designate ETCs within Indian reservations. Further Notice ¶ 82. Where the states do not have jurisdiction, as in the case of tribally-owned and operated carriers providing service within the boundaries of their reservations, the Commission must designate ETCs as Congress has directed under 47 U.S.C. § 214(e)(6).

2. Telecommunications Services by Tribal Carriers Outside Indian Reservations.

Tribally-owned and operated carriers providing service outside of reservation boundaries are subject to a different regulatory scheme. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973) (citations omitted). *Accord* Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 118 S.Ct. 1700, 1703 (1998) ("a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country." (citing Mescalero Apache Tribe v. Jones, 411 U.S. at 148-49; Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962))). Supreme Court precedent thus establishes that state utilities commissions retain regulatory authority over the off-reservation activities of tribally-owned and operated carriers.

The Supreme Court has held that tribally-owned and operated businesses continue to possess tribal sovereign immunity for activities occurring outside of Indian reservations. See Kiowa Tribe of Okla., 118 S.Ct. at 1704-05.[4] However, the Supreme Court has also held that state commissions would have adequate alternatives to ensure that they can satisfy their legitimate regulatory concerns regarding tribal carriers that provide service outside of reservation boundaries. In Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991), the Court held that the State of Oklahoma could tax the sale of cigarettes to non-Indians by a tribally owned convenience store and that the tribe could be required to assist in the collection of such taxes. Oklahoma complained that without a waiver of sovereign immunity it had "a right without any remedy." Id. at 514. The Court was not persuaded: "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives." Id. The Court mentioned the possibility of officer suits, actions against the wholesalers or "agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax." Id.

The general rule is, then, that state commissions regulate the activities of tribally-owned carriers that expand their business outside of reservation boundaries, and sovereign immunity does not have to bar the state from enforcing its regulations against such carriers, albeit within the constraints of Kiowa Tribe of Okla. In keeping with the pro-competitive spirit of the Communications Act, as well as federal law supporting tribal self-determination and economic

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[4]Sovereign immunity is a fundamental aspect of tribal government. Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890-91 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Sovereign immunity extends to tribal entities authorized by tribal governments, such as the Telephone Authority.

development, the Commission should encourage tribally owned and operated telecommunications services providers to expand their businesses as they see fit, whether within or without reservation boundaries. *See* Part B, *infra*. Tribal telecommunications companies should be able to provide their services on their reservations as well as to the communities surrounding them.

B. THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION AND COURTS HAVE PREVENTED THE TELEPHONE AUTHORITY FROM PROVIDING SERVICE IN INDIAN COUNTRY.

The Commission has asked for comment "on regulations or actions at the state level that may impact deployment and subscribership in unserved and underserved areas." Further Notice ¶ 30 (footnote omitted). *See also* id. ¶ 45 (seeking comment "on the extent to which the state's exercise of jurisdiction over telecommunications on tribal lands and over tribal carriers that serve areas both inside and outside Indian sovereign territory is warranted."). The experience of the Telephone Authority in attempting to purchase three rural South Dakota exchanges located on the Cheyenne River and Standing Rock Indian Reservations shows the pitfalls that can arise when states seek to exercise jurisdiction over the provision of telecommunications services in Indian country. The end result was to frustrate the self-governing powers of the Cheyenne River Sioux Tribe while precluding the improvements in telecommunications services in Indian country that would have occurred if the Telephone Authority had been allowed to purchase the three exchanges.

In early 1994, U S West decided to sell 67 of its rural exchanges in South Dakota. Up until that time, all 67 exchanges were apparently routinely regulated under the scheme contemplated by the Communications Act of 1934 in which substantial regulatory authority rested with the South Dakota Public Utilities Commission ("SDPUC"). A consortium of buyers,

including the Telephone Authority, bid on the 67 exchanges. The Telephone Authority successfully bid on the Morristown, Nisland, and Timber Lake exchanges and on December 7, 1994, the Telephone Authority and U S West entered into an agreement for the sale of those exchanges. On December 20, 1994, U S West and the consortium of buyers filed an application with the SDPUC seeking approval of the sale and an order to the effect that U S West's gain from the sale would not be treated as operating income for future rate making requests. Subsequently, the agreement between U S West and the Telephone Authority was amended to include the McIntosh exchange instead of the Nisland exchange and the application to the SDPUC was amended accordingly. The Timber Lake exchange is located on the Cheyenne River Indian Reservation and the Standing Rock Indian Reservation. The McIntosh and Morristown exchanges are within the Standing Rock Indian Reservation. All three exchanges serve non-Indians as well as tribal members.

On March 30, 1995 -- well after the initial application was filed with the SDPUC -- South Dakota enacted a new law with an emergency provision making it immediately effective. The state statute specifically required SDPUC approval of the sale of telephone exchanges and established standards for the approval of such sales. S.D. CODIFIED LAWS § 49-31-59. After conducting hearings through out the state, the SDPUC denied the sale of the three Indian country exchanges to the Telephone Authority. The SDPUC approved the sale of all but one of the other 67 exchanges.[5]

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[5]Because state law does not permit a municipality to operate an exchange outside of its boundaries, the SDPUC denied the sale of the Alcester exchange to the Beresford Municipal Telephone Company.

The South Dakota courts upheld the decisions of the SDPUC refusing permission to US West to sell the three Indian country exchanges to the Telephone Authority. Initially, the Circuit Court rebuked the SDPUC for its finding that, "[a]s [the Telephone Authority] has declined to waive its sovereign immunity, the [SDPUC] similarly declines to give up its jurisdiction." *Decision and Order Regarding Sale of the Timber Lake Exchange* at 6, In the Matter of the Sale of Certain Telephone Exchanges by U S WEST Communications, Inc. to Certain Telecommunications Companies in South Dakota, No. TC94-122 (S.D. Pub. Util. Comm'n July 31, 1995) (finding of fact 23). *See Memorandum Decision* at 30, Cheyenne River Sioux Tribe Tel. Auth. v. Public Util. Comm'n of S.D., Civ. No. 95-288 (S.D. Cir.Ct. for 6th Cir. Feb. 21, 1997). The court directed the SDPUC to make findings on each of the factors for approval listed in the state statute. However, on remand, the SDPUC again refused to approve the sales and that result was upheld by the Circuit Court and the South Dakota Supreme Court.

What is striking about South Dakota's refusal to approve the sales of the three Indian country exchanges is the SDPUC's outright hostility to the Telephone Authority and the counterproductive effort by the State of South Dakota to maintain state authority over the exchanges. Throughout the long process, the Telephone Authority's ability to provide service at a level at least equal to that furnished by US West was never questioned. Implicitly if not explicitly, it was widely recognized that if the sales were approved, service would be substantially improved on account of the differences between a distant corporate owner no longer interested in the difficulties associated with rural exchanges and ownership by a local entity vitally concerned over the economic development of the area. Certainly, the Telephone Authority has demonstrated its ability to provide quality service at a reasonable price in the adjacent exchanges which it

currently operates. Its ability and willingness to provide similar service in the exchanges which it wished to purchase was never in doubt. Indeed, faced with nearly identical circumstances in terms of prior experience for the purchasers of the other 63 sales, the SDPUC approved those sales. The only differentiating factors were the fact that the Telephone Authority is an entity established by the Cheyenne River Sioux Tribe and that the exchanges are located in Indian country.

Putting aside the legal arguments, the sole policy question driving South Dakota's opposition to the sale of the Indian country exchanges to the Telephone Authority was its desire to ensure that state regulatory authority was not curtailed on the affected reservations. That issue is one that has caused great and bitter conflict between the State and Indian tribes for decades. The state policy of resistance to tribal jurisdiction manifested itself in two areas. First, considerable confusion existed over the tax consequences of the sale of all 67 exchanges because the smaller companies purchasing the exchanges would be subject to different taxes than US West had been. Ultimately -- with the exception of the Indian country exchanges -- that issue was resolved. The tax consequences of the sale of the Indian country exchanges were not significantly different except for the sovereign immunity of the Tribe which extends to the Telephone Authority as a tribal entity. That issue could not be worked out among the parties and the SDPUC seized on the lack of agreement (which it acknowledged it lacked authority to execute under state law) as one reason to deny the sales. Second, the SDPUC found that while it had jurisdiction over the sale of the exchanges, it would lack jurisdiction to regulate the operation of the Indian country exchanges after the sale and, therefore, that the sales should not be approved since the exchanges would no longer be subject to state regulation.

To date, the Telephone Authority has not been able resolve its differences with the SDPUC either through the courts or negotiations and has been unable to complete the purchase of the three Indian country exchanges. The result has not served anyone well. US West is forced to operate three rural exchanges contrary to its wishes and the long term plans for the company. The Telephone Authority is unable to expand its service area and customer base. Most importantly, customers of the three exchanges located in Indian country are denied the advantages of improved service that would have occurred if the Telephone Authority had purchased the exchanges.

IV. SUPPORT OF TRIBAL SELF-DETERMINATION AND SELF-GOVERNANCE THROUGH THE PROVISION OF TELEPHONE SERVICES.

The Commission has asked whether it "has the authority to and whether we should try to attract carriers by agreeing to designate only one carrier to serve the unserved, tribal land or permitting only one carrier to receive federal universal service support for serving the area." Further Notice ¶ 107. *See also* id. ¶ 109. Because of the high cost of starting up the provision of telecommunications services, especially in Indian country which tends to be rural, it makes economic sense to designate only one ETC to begin the provision of telecommunications services to a previously unserved tribal area where it is clear that a multiple ETCs would not be in the public interest. Only one ETC would have access to universal service support funds, and would find greater economic incentive to commence operations in previously unserved areas. There is no need for regulatory change in this regard, as the Communications Act already requires an examination of the public interest to determine whether multiple ETCs are beneficial. *See* 47 U.S.C. § 214(e)(2).

Multiple ETCs for a single, previously unserved area may have the effect of prohibiting any of the ETCs from realizing profits from serving that area since they must all share the same universal service support fund, and cannot, as a result, realize a profit from providing service on those lands. *See* Further Notice ¶ 106. It makes economic sense to allow a single ETC a period of protection during which time only it has access to the universal service support funds for that service area. Even so, the pro-competitive spirit of the Communications Act favors more than one ETC where the public interest favors them. Id. ¶ 108. Thus, the better approach to the market disincentive of having to share universal service support funds with other ETCs is to increase the universal service support fund pie. Id. ¶ 67 (seeking comment on whether to "lift the cap on the high-cost fund to allow for growth in the size of the fund . . . ."). The Telephone Authority agrees that when multiple ETCs serve the same area, they should be entitled to the same amount of universal service support funds as would be available to a single ETC for the same area.

V. CONCLUSION.

The Commission should continue its efforts to consult directly with Indian tribes in order to ascertain the telecommunications needs of individual tribal communities. As the Telephone Authority's experience demonstrates, diverse issues affect Indian tribes and blanket regulations cannot hope to address the breadth of such diversity. The Commission should develop a policy that provides guidance for engaging in government-to-government consultations with Indian tribes so that telecommunications services are appropriately tailored to each specific tribal community. Only through such consultation can the Commission learn from Indian tribes themselves what is in their best interests and the interests of their members.

Alternatively, in order to buttress the authority of tribal governments over the provision of telecommunications services in Indian country, the Commission should seek to amend the Communications Act to provide for the treatment of Indian tribes as states in implementation of the Act. *See, e.g.*, 33 U.S.C. § 1377 (e).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Reply Comments of the Cheyenne River Sioux Tribe Telephone Authority in the U.S. Mail, first-class postage prepaid thereon, on this 20th day of January, 2000, addressed to the following:

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