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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DISH Network Corporation, a Nevada corporation; DISH Network L.L.C., a Colorado limited liability company; and DISH Network Service L.L.C., a Colorado limited liability,

Plaintiff,

v.

Eric Tewa, Sr., in his official capacity as Chief Revenue Officer of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; Lamar Keevama, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally-recognized Indian tribe; and Merwin Kooyahoema, in his official capacity as Deputy Commissioner of the Hopi Tribe Office of Revenue Commission, an agency of a federally recognized Indian tribe,

Defendants.

CASE NO.: 3:12-cv-08077-JAT

MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

ORAL ARGUMENT REQUESTED

MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6)

COME NOW Defendants, Eric Tewa, Sr., Lamar Keevama, and Merwin Kooyahoema (hereinafter collectively, "Defendants"), by and through their attorneys of record, Maddox, Isaacson & Cisneros, LLP, and hereby submit this Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) (hereinafter "Motion").

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This Motion is based on the following Memorandum of Points and Authorities, all pleadings and papers on file herein, and on such oral argument and documentary evidence that may be presented at the oral hearing on this Motion.

Dated this 24th day of May, 2012.

MADDOX, ISAACSON & CISNEROS, LLP

By: Barbara M. McDonald

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MEMORANDUM OF POINTS AND AUTHORITIES

The Complaint by Dish is an improper attempt to avoid the privilege of doing business on the Hopi Reservation with members of the Hopi Tribe. Not only does Dish believe in the right to conduct business on Hopi land without observing Hopi law, but Dish also asserts that the Hopi Tribal Court cannot determine whether Dish is subject to that court's jurisdiction. These allegations are without merit and go against the long-standing observance of tribal sovereignty and jurisdiction over non-Indians who consensually enter reservation land to conduct business and whose conduct has "a direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States,* 450 U.S. 544, 566, 101 S. Ct. 1245, 1258 (1981).

To support the Complaint, Dish attempts to broaden the boundaries of federal preemption to infringe upon the rights of the Hopi Tribe to regulate its own economy. The Court should not throw aside the Hopi Tribe's mantle of tribal sovereignty so that Dish may escape its responsibility to pay a business licensing tax that Hopi law requires each and every reservation business to pay.

I. RELEVANT FACTS

The instant dispute began in 2009 when the Hopi Office of Revenue Commission (hereinafter, "Revenue Commission") informed Dish of the requirement to apply for and pay a business license fee and Dish refused, alleging, as in the Complaint, that the federal Communications Act pre-empted the Revenue

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Commission's right to such payment. Asserting that federal preemption did not apply, the Revenue Commission filed suit against Dish in the Hopi Tribal Court.

A. The Hopi Constitution Provides the Power to Charge License Fees and to Enforce Such Fees in the Hopi Tribal Court

The Hopi are a federally recognized tribe of Native American Indians occupying reservation lands in northeastern Arizona. The Indian Reorganization Act of 1934 endorsed the formation of a tribal form of Hopi government, including governance by the Hopi Tribal Council (hereinafter "Tribal Council"). In 1936, the Tribal Council adopted the Hopi Constitution. In relevant part, the Hopi Constitution specifies certain powers of the Tribal Council, including but not limited to the power "[t]o raise and take care of a tribal council fund . . . by charging persons doing business within the Reservation reasonable license fees, subject to the approval of the Secretary of the Interior."[1] Hopi Constitution, Article VI, Section 1 (e). In 1977, the Tribal Council established the Revenue Commission for the purpose of creating a body to enforce Ordinances 17 and 17A, which together regulate all business on tribal land, as permitted under the Hopi Constitution's provision of powers.

The ordinance here at issue is Ordinance 17A, the purpose of which is:

> to prescribe rules for the regulation and enforcement of Reservation businesses for the protection of Indian consumers and businesses with the view of attaining economic self-sufficiency for the Hopi Tribe. As practicable, it is the intent and purpose of this Ordinance to impose license fees for the privilege of doing business within the Reservation on the gross receipts of all non-tribal members engaged in the selling of tangible personal property at retail and wholesale and any services performed within the boundaries of the Reservation, including para-professional and professional and professional practices, as such terms are hereinafter construed, and to promote consistency and uniform treatment of all persons so assessed.

Ordinance 17A, Section 17.1.2. Ordinance 17A, Section 17.2.1 proclaims that, "No person may own or lease a reservation business without a license issued under the provisions of this Chapter." Ordinance 17A, Section 17.1.5(k) defines "Reservation Business" in relevant part as "any business that engages at a fixed location within the jurisdiction of the Reservation in the sale or purchase of goods or services . . .

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[1] The Supreme Court has determined that the Secretary of Interior need not review tribal taxation laws. *See Kerr-McGee Corp. v. Navajo Tribe of Indians,* 471 US 195, 198-201 105 S. Ct. 1900, 1902-1904 (1985).

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." Ordinance 17A, Section 17.3.1(a) requires each business license applicant to pay to the Revenue Commission an initial fee of two hundred dollars ($200.00) for each license issued before July 1 of that year. Ordinance 17A, Section 17.3.1(c) requires each licensed business to pay an annual fee between two hundred dollars ($200.00) to five hundred dollars ($500.00) to the Revenue Commission, depending on the business' gross revenues. Ordinance 17A, Sections 17.5.1 through 17.5.5 require all reservation businesses offering credit to comply with the provisions specified therein.

The Hopi Constitution further empowered the Tribal Council "to set up courts for the settlement of claims and disputes." Hopi Constitution, Article VI, Section 1(g). Thus the Hopi Constitution gives the Revenue Commission the power to enforce all ordinances through tribal court action, including Ordinance 17A.

B. Dish Service Entered Hopi Land to Provide Satellite TV Services

In 2009, the Revenue Commission informed Dish Service that pursuant to Ordinance 17A, Dish Service would need to apply for and obtain a business license and to pay an annual fee, in accordance with Ordinance 17A. The Revenue Commission deemed that Dish was a "Reservation Business" because Dish was engaging in business at a fixed location within the Hopi jurisdiction in the sale of services. Namely, Dish Service, on behalf of Dish Network LLC and Dish Network Corporation, was installing satellite dish receivers and decoder boxes at the homes of certain residents living on the Hopi Reservation. The activity was related to the sale of direct broadcast satellite (hereinafter "DBS") service to Hopi residents. The Revenue Commission determined that the installation was an engagement of business at a fixed location (the residences) within the jurisdiction of the Reservation.

Following Dish's refusal to comply with Ordinance 17A, the Revenue Commission filed a complaint in the Hopi Tribal Court on December 12, 2011, bringing claims of (1) Unlawful and Unfair Business Practice; (2) Unjust Enrichment; and (3) Declaratory and Injunctive Relief. On or about April 4, 2012, Dish filed a Motion to Dismiss. The Revenue Commission filed an Opposition on or about April 17, 2012, and concurrently filed a Motion to Amend Complaint. Dish filed a Reply in support of the

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Motion to Dismiss on or about April 28, 2012. Dish has not opposed the Motion to Amend Complaint, and the decisions on both Dish's Motion to Dismiss and the Revenue Commission's Motion to Amend Complaint are pending in the Hopi Tribal Court.

II. LEGAL STANDARD

Fed. R. Civ. P. 12 (b)(1) allows a party to bring a motion to dismiss for lack of subject-matter jurisdiction. "The Article III case or controversy requirement limits federal courts' subject matter jurisdiction by requiring, inter alia, . . . that claims be 'ripe' for adjudication." *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1121-22 (9th Cir. 2010) (citing *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315 (1984)). As such, defense on grounds of ripeness is properly raised in a Rule 12(b)(1) motion to dismiss. *Carjiano v. Occidental Petroleum Corporation*, 643 F.3d 1216, 1227 (9th Cir. 2011) (citing *Chandler*, 598 F.3d at 1122). The burden of proving the existence of subject matter jurisdiction belongs to the party asserting it. *Chandler*, 598 F.3d at 1122 (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S. Ct. 1673 (1994)). The doctrine of ripeness allows federal courts to "dispose of matters that are premature for review because the plaintiff's purported injury is too speculative and may never occur." *Id.* Whether a plaintiff must exhaust tribal court remedies is a question of ripeness. *See, eg., LaVallie v. Turtle Mountain Tribal Court*, 2006 U.S. Dist. LEXIS 87347 (D. N. Dakota, N.W. Div., Dec. 1, 2006, at *11) (finding that a habeus corpus petition was not ripe for review where the movant was simultaneously seeking review from a tribal court of appeals).

Fed. R. Civ. P. 12(b)(6) allows a party to bring a motion to dismiss for failure to state a claim for which relief may be granted. A complaint must include a "short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2). The statement must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007). The court must "accept all factual allegations in the complaint as true." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499 (2007). The court must also draw all reasonable inferences in plaintiff's favor. *Twombly*, 550 U.S. at 547. However, "[t]o survive a motion to

dismiss, a complaint must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). Though "not akin to a 'probability requirement,'" the plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* "Where a complaint pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.*

III. LEGAL ARGUMENT

The Court should dismiss the Complaint pursuant to Fed R. Civ. P. 12(b)(1), as the Complaint is unripe. The Court should further dismiss the Complaint pursuant to Fed R. Civ. P. 12(b)(6) because Dish has not stated a claim for which relief may be granted, as preemption under the Communications Act does not apply to Indian tribes.

A. The Complaint is Not Ripe for Adjudication under 28 USC § 1331, As Dish Has Not Exhausted Tribal Court Remedies, and Therefore Fed R. Civ. P. 12(b)(1) Demands Case Dismissal

Though a non-Indian may bring a federal claim under 28 USC § 1331 to challenge tribal court jurisdiction, such a plaintiff must first exhaust tribal court remedies. *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842, 846 (9th Cir. 2009); *Nat'l Farmers Union Insurance Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856, 105 S. Ct. 2447, 2454 (1985) (The question of whether a tribal court has the power to exercise subject matter jurisdiction over a non-Indian should be first answered in the tribal court itself.). "Relief may not be sought in federal court until appellate review of a pending matter in a tribal court is complete." *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 948 (9th Cir. 2008) (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17 107 S. Ct. 971, 976 (1987)). The question of whether a federal court is vested with authority to rule in a matter that remains unresolved before the tribal court is a threshold matter. *Lanphere v. Wright*, 2009 U.S. Dist. LEXIS 102756, at *5 (W.D. Washington, Oct. 29, 2009).

Accordingly, Dish may bring a claim in this Court to challenge tribal jurisdiction only after the Hopi Tribal Court has determined the question of federal subject matter jurisdiction. Because the question is pending before the Hopi Tribal Court, Dish's Complaint is not ripe for adjudication. As such, Dish

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cannot meet the threshold requirements for bringing claims against the Defendants at this time, and the Court should dismiss the Complaint.

The tribal exhaustion rule should not be lightly set aside, as important policy reasons stand behind the rule. Comity is one of these reasons:

> The tribal exhaustion rule is required for reasons of comity, rather than as a jurisdictional prerequisite. As such, exhaustion is analogous to the principle of abstention, under which resolution is favored in the non-federal forum, even where concurrent jurisdiction exists in both the state and federal courts.

LaPlante, 480 U.S. at 16, 107 S. Ct. at 976. Indeed, federal court restraint is "'especially appropriate'" where the matter involves "'[t]ribal governmental activity involving a project located within the borders of the reservation.'" *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 851 (8th Cir. 2003) (citing *U.S. v. Tsosie,* 92 F.3d 1037, 1041 (10th Cir. 1996)).

Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States,* 450 U.S. at 565-566, 101 S. Ct. at 1258 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 133, 152-153 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-389 (1976). The policy behind the tribal exhaustion rule derives from the commitment by Congress to support tribal self-government and self-determination. *Nat'l Farmers Union Insurance Cos.,* 471 U.S. at 856, 105 S. Ct. at 2454.

Practical reasons also argue for exhaustion. Tribal exhaustion serves the orderly administration of justice in the federal court, "by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id.* The federal court should thus "stay its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction and to rectify any errors it may have made." *Id.* at 856 - 57. As well, tribal exhaustion "will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* at 857. Therefore, "[a] federal court must give the tribal court a full opportunity to determine its own jurisdiction, which *includes exhausting opportunities for appellate review in tribal courts.*" *Boozer v. Wilder*, 381 F.3d

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931, 935 (9th Cir. 2004) (citing *LaPlante*, 480 U.S. at 16-17) (emphasis added). A district court "has *no discretion* to relieve a litigant from the duty to exhaust tribal remedies prior to proceeding in federal court." *Allstate Indemnity Co. v. Stump*, 191 F.3d 1071, 1073 (9th Cir.), *amended*, 197 F.3d 1031 (9th Cir. 1999) (emphasis added). Even where an alleged waiver of sovereign immunity has occurred, "the tribal court must have the first opportunity to address all issues within its jurisdiction." *Marceau v. Blackfeet Housing Authority*, 540 F.3d 916, 921 (9th Cir. 2008).

Comity, tribal sovereignty and practical issues demand that where Dish's conduct at issue is the engagement in business at fixed locations within the Hopi Reservation, the Tribal Court be allowed to determine first the question of subject matter jurisdiction. While acknowledging the doctrine of tribal exhaustion, Dish wrongly alleges that exhaustion is not applicable because the absence of tribal jurisdiction is clear (*see* Complaint at ¶ 12). Dish also wrongly alleges that whenever a dispute turns solely on federal law, exhaustion is inapplicable *(see id)*. Both these arguments have no merit and attempt to confound the long-standing rule of tribal court exhaustion.

1. The Exception to the Requirement of Tribal Exhaustion Does Not Apply

The Supreme Court "has crafted narrow exceptions to the exhaustion rule . . . ." *Atwood*, 513 F.3d at 948. The only exceptions occur

> 1) when an assertion of tribal court jurisdiction is "motivated by a desire to harass or is conducted in bad faith"; (2) when the tribal court action is "patently violative of express jurisdictional prohibitions"; (3) when "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction"; and (4) when it is "plain" that tribal court jurisdiction is lacking, so that the exhaustion requirement "would serve no purpose other than delay."

Elliott, 566 F.3d at 847 (quoting *Nevada v. Hicks*, 533 U.S. 353, 369, 121 S. Ct. 2304 (2001)).

In the instant case, contrary to Dish's allegation, the absence of tribal jurisdiction is not clear. Quite the opposite, the presence of tribal jurisdiction is clear under United States Supreme Court law, as explained below.

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a. This Case Is Not One Where "It is 'Plain' that Tribal Court Jurisdiction Is Lacking"

The exception to the rule of tribal court jurisdiction is not easily met, as the rule requires not a showing that tribal court jurisdiction clearly exists, but instead, a showing that tribal court jurisdiction "plainly" is lacking. Dish baldly alleges that tribal jurisdiction is absent under *Montana v. United, States (see* Complaint at ¶ 26), without citing the *Montana* rule or applying the facts to the law. Defendants will show how *Montana v. United States* supports case dismissal.

In *Montana,* the Court held that a tribe may regulate the activities of non-members who enter consensual relationships with the tribe or its members through methods including commercial dealing. 450 U.S. at 565-66, 101 S. Ct. at 1258. The Court held,

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66, 101 S. Ct. at1258 (1981) (internal citations omitted).

Here, the Hopi Tribe may regulate, through Ordinance 17A licensing fees, the activities of Dish, a nonmember of the Hopi Tribe, for entering into consensual relationships with the members of the Hopi Tribe, through the commercial dealing of satellite TV services. The Hopi Tribe may also retain inherent power to exercise civil authority over the conduct of Dish on land within the Hopi Reservation because Dish's conduct has a direct effect on the economic security of the Hopi Tribe. Namely, by withholding payment, Dish is depriving the Hopi Tribe of the security and benefits flowing from licensing fees.

Dish alleges that

> [n]either DISH Corporation nor DISH Service has any consensual agreement with the Hopi Tribe or its members and the consensual relationship between DISH [Network Service LLC] and certain individual residents of the Hopi Reservation with respect to the provision of DBS service would not support, under the principles of *Montana,* jurisdiction ver any of the DISH Plaintiffs with respect to matters not closely related to those consensual relationships.

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See Complaint at ¶ 26.

Dish has no problem admitting that "[s]ubscribers enter into a subscription agreement with DISH [Network Service LLC] *(see* Complaint at ¶ 15) and that "DISH [Network Service LLC] provides Direct Broadcast Satellite ('DBS') television service to a small number of persons who reside on the Tribe's reservation." *See id.* at ¶ 2. Dish also admits that "DISH Service provides installation service for DISH [Network Service LLC]. DISH Service enters the reservation to install the dish receiver and the decoder box on the subscriber's residence." *See id.* at ¶ 6. However, Dish's argument is that Dish Service, which is the party entering the Hopi Reservation and providing dish receivers and decoder boxes, itself does not have a "consensual" agreement to do so. *See id.* at ¶ 26. Dish's argument assumes that theories of agency do not apply, even with admitting that Dish Service acts "for" Dish Network LLC. Dish implies that Dish Services' conduct has nothing to do with the admittedly "consensual" relationship between Dish Network Service LLC and Hopi Tribal members. Of course, theories of agency do apply. Not only is principal Dish Network Service LLC liable for its agent Dish Service, but so too is Dish Corporation, which Defendants hereby assert also acts as a principal.

Even if Dish's conduct were not consensual, which is hard to imagine, Dish's conduct has a direct effect on the Hopi Tribe's economic security. The Revenue Commission has the responsibility of collecting fees and taxes for the benefit and welfare of Tribal members. Such fees and taxes have a direct effect on the Hopi Tribe's economic security. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 137 (1982) (The "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services."). Therefore, contrary to Dish's argument, the conduct by all the Dish Plaintiffs support the Tribal Court's jurisdiction under *Montana.* Under such circumstances, this Court cannot find "plain" that tribal court jurisdiction is lacking. Indeed, what is "plain" to see is that the Hopi Tribal Court has subject matter jurisdiction. Requiring Dish to exhaust tribal court remedies would serve the purposes of comity, adherence to principles of sovereign immunity, and efficiency, rather than purposes of delay.

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The exception to exhaustion of tribal remedies cited by Dish does not apply, and the Court must dismiss the Complaint.

2. Tribal Court Exhaustion is Appropriate Where a Federal Question Is at Issue

Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, Mont. does not stand for the proposition, as Dish alleges, that exhaustion is inapplicable where a dispute turns solely on a federal question of law *(see* Complaint at ¶ 12). In *Burlington,* the issue was whether two Indian tribes could impose an ad valorem tax on the value of a railroad that ran through tribal territory. 323 F.3d 767, 768 (9th Cir. 2003). As is the case here, the tribes filed suit in tribal court, and the railroad company brought a suit in federal court. *See id.* at 769. The tribal court then declined to schedule a trial until the federal courts determined the question of exhaustion of remedies. *Id.* No mention was made in *Burlington* regarding whether the issue of tribal court exhaustion was raised by motion of the parties, or by the tribal court, *sua sponte.*

In any event, the *Burlington* court decided not to decide the tribal exhaustion issue, as "[t]he record as it stands . . . provides inadequate information as to whether exhaustion of tribal court remedies would be futile." *Id.* at 775. The court vacated and remanded the lower court's grant of summary judgment to the railroad and held that the tribe should be permitted discovery to show whether the tribe did in fact have authority to regulate the railroad company's activities under *Montana v. United States. Id.* at 770. The *Burlington* court allowed the parties to conduct discovery to determine whether, under one of the *Montana* exceptions to the rule against tribal jurisdiction over non-Indians, the railroad's activities "so threaten[ed the tribe's] political integrity, economic security, health or welfare" as to give the tribe jurisdiction over the railroad. *See id.* Thus what the case shows is that just as tribal court exhaustion is not required where "it is "plain" that tribal court jurisdiction is lacking . . . .," exhaustion is not appropriate where tribal court jurisdiction may in fact exist. Said the court,

> Our law governing the scope of the second *Montana* exception, now two decades old, is still in its infancy. Its sound development is vital if there are to be harmonious and stable relations between tribes and non-Indian interlocutors. We conclude in the context of this litigation that a more complete record is necessary to the resolution of the

dispute at issue. The Tribes are entitled to some discovery, as framed by the district court, on the second *Montana* exception.

Id. at 775.

Here, Defendants have made a showing that both exceptions to *Montana* apply. Thus the Court must dismiss the Complaint.

B. The Communications Act of 1934 Does Not Preempt Tribal Law and thus Fed. R. Civ. P. 12(b)(6) Demands Case Dismissal

Even if the Court were to disagree with Defendants' assertion that Dish must exhaust tribal remedies, the Complaint should still be dismissed because Dish's preemption argument has no merit. Dish argues that sections 303(v) and 602 of the Communications Act, 47 U.S.C. ¶ 303(v), 47 U.S.C. § 152 note, divest the Revenue Commission of the power to tax Dish and that therefore, the Hopi Court lacks subject matter jurisdiction *(see* Complaint at ¶¶ 2, 19, 21-25). Dish is incorrect. Under the Communications Act, the Revenue Commission may carry out regulations requiring Dish to obtain a business license before entering into satellite television service agreements with Hopi tribal members. Therefore, even accepting all of Dish's factual allegations as true, and drawing all reasonable inferences in Dish's favor, the Complaint does not contain sufficient factual matter to state a claim that is plausible on its face.

1. The Communications Act Does Not Contain a Clear Divestiture of Sovereign Immunity

Observance of tribal sovereignty has been a longstanding attribute of federal law, and any diminishment of an Indian tribe's inherent rights should not be lightly considered. Federal law does not work as a divestiture of Indian taxing power. *Merrion,* 455 U.S. at 149, 102 S. Ct. at 908. "'The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." *Id.* at 137, 102 S. Ct. at 901 (quoting *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134 (1980)). *See also N.L.R.B. v. Pueblo of San Juan,* 276 F.3d 1186, 1194 (10th

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Cir. 2002) (In general, "divestiture [of tribal sovereignty] is disfavored as a matter of national policy and will only be found where Congress has manifested its *clear and unambiguous intent* to restrict tribal sovereign authority." (emphasis added)). In those cases where a federal statute is silent or ambiguous with respect to its application to Indian tribal governments,"silence [will] not work a divestiture of tribal power." *Pueblo of San Juan,* 276 F.3d at 1194.

Dish wrongly argues that section 303(v) and section 602 of the Communications Act apply to the Hopi because the Communications Act is allegedly a federal statute of general applicability *(see* Complaint at ¶ 23). The Court should know that though Dish cites *Donovan v. Coeur d'Alene Tribal Farm,* 751 F.2d 1113, 1116 (9th Cir. 1985), the proper starting point for the analysis is *FPC v. Tuscarora Indian Nation,* 362 U.S. 99, 116 80 S. Ct. 543 (1960), in which the Court stated, "[I]t is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The *Donovan* court acknowledged the *Tuscarora* statement as "dictum" but said *Tuscarora* has "guided" many decisions in the 9th Circuit. More recently however, a U.S. District Court in the Ninth Circuit has noted that the *Tuscarora* dictum has been eroded by the Supreme Court's decision in *Merrion. Morrison v. Viegas Enterprises,* 2011 U.S. Dist. LEXIS 81922, at *7-8 (S.D. Cal., July 26, 2011) (citing 455 U.S. 130, 102 S. Ct. 894 (1982)). *Merrion* recognized "the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *Merrion,* 455 U.S. at 137, 102 S. Ct. at 901. In *Merrion,* the question, as here, was whether a tribe had the authority to tax non-Indians. *See id.* at 133, 102 S. Ct. at 899. The Court held that the tribe did in fact have such authority.

The Tenth Circuit provides an additional reason why this Court should not follow the *Tuscarora* dictum:

> *Tuscarora* dealt solely with issues of ownership, not with questions pertaining to the tribe's sovereign authority to govern the land. Proprietary interests and sovereign interests are separate: One can own land without having the power to govern it by policy determinations as a sovereign, and a government may exercise sovereign authority over land it does not own. *Tuscarora* mentions no attempts by the tribe to govern the disputed land . . . . It was the tribe's possessory interest in the land, rather than its sovereign authority to govern activity on the land, that was at stake in *Tuscarora.*

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Pueblo of San Juan, 276 F.3d at 1198-99. Indeed *Tuscarora* involved the federal government's right to exercise eminent domain over Indian land and had nothing whatsoever to do with the right to tax, the subject at issue here. *See id.* at 1192 (A tribe's general authority as sovereign includes the power to tax.); *accord, Merrion*, 455 U.S. at 133, 102 S. Ct. at 899.

As an attribute of sovereignty, Indian tribal governments may regulate economic activity within the exterior boundaries of Indian reservations. *See Pueblo of San Juan*, 276 F.3d at 1193. Indian tribes may also exercise regulatory jurisdiction over non-member business activities conducted on tribal lands to the extent that the tribe can "assert a landowner's right to occupy and exclude." *Elliott*, 566 F.3d at 850. Indian tribal governments may assess or require a tax, license, permit, or fee on a non-Indian owned corporation if the corporation enters into a commercial dealing, contract, lease, or other "consensual relationship" with the Tribe *or its tribal members*. *Montana*, 450 U.S. at 565-66, 101 S. Ct. at 1258 (emphasis added). A tribe's power to tax

> is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to receive revenues for its essential services. The power does not derive solely from the Tribe's power to exclude non-Indians from tribal lands but from the Tribe's general authority, as sovereign, to control economic activities within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in such activities.

Merrion, 455 U.S. at 137, 102 S. Ct. t at 901.

Under the law provided by *Merrion*, the Revenue Commission has the sovereign right to tax the economic activity conducted by Dish. Therefore, under *Merrion*, a federal statute of general applicability does not extend to an Indian tribe. Here, Congress has not manifested in the Communications Act a clear and unambiguous intent to restrict tribal sovereign authority. The Hopi Tribe's taxation on Dish is an exercise of the tribal right to collect revenues from a company conducting business on tribal land. Contribution through taxes to the general cost of Hopi government is more than warranted, where Dish has availed itself of the privileges and benefits of carrying on business on the reservation. *See id.* ("Here, petitioners, who have availed themselves of the privilege of carrying on business on the reservation,

benefit from police protection and other governmental services, as well as from the advantages of a civilized society assured by tribal government. Under these circumstances, there is nothing exceptional in requiring petitioners to contribute through taxes to the general cost of such government."). Because the Communications Act does not preempt Hopi law, and the Hopi have the sovereign right to collect taxes from Dish, the Complaint must be dismissed.

1. The Communications Act Is Not "a General Statute Applying to All Persons"

Even assuming the Court would look to the *Tuscarora* dictum, Dish's arguments fail because the Communications Act is inapplicable to states and therefore cannot be said to be a statute of general applicability. In defining statutes of general applicability, the *Tuscarora* Court described as an example the Internal Revenue Act, as containing "language . . . [that] subjects the income of 'every individual' to tax." *Tuscarora,* 362 U.S. at 116, 80 S. Ct. at 598 (citing *Choteau v. Burnet*, 283 U.S. 691, 693, 696 (1931)). The *Tuscarora* Court further described its holding in another earlier case, that inheritance and estate taxes by a state were deemed to be of general applicability because the language of the statutes did not exempt "any" persons from their scope. *Id.* at 117, 80 S. Ct. at 597 (citing *Oklahoma Tax Comm'n v. United States,* 319 U.S. 598 (1943)).

By contrast, the amending Telecommunications Act provides, "Preservation of State Authority – This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State." 47 U.S.C. § 152 note. Unlike the *Tuscarora* examples, the Telecommunications Act is not applicable to "every individual" or indeed to any state and therefore cannot be considered to be so broad as to be considered general. *See id.* (describing the 1928 Revenue Act – an example of a "general statute" – as "very broad"). As such, the Communications Act is not a "general statute," and Dish has no grounds to bring claims for declaratory or injunctive relief.

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2. Legislative History and Other Means Indicate that the Communications Act Was Not Intended to Apply on Reservations

Dish cites *Donovan* for the proposition that a federal statute of general applicability applies to Indians unless one of three exceptions apply *(see* Complaint at ¶ 23). Even if the Court is willing to entertain the idea that the dictum of *Tuscarora* is still applicable and that the Communications Act is a "general" statute, the Complaint should still be dismissed because one of the three exceptions does in fact apply, namely, that "legislative history or some other means" establish that Congress intended the law not to apply on reservations. *See Donovan,* 751 F.2d at1116. The burden of showing Congressional intent to divest a tribe of its sovereign powers rests upon the party seeking such divestiture. *Pueblo of San Juan,* 276 F.3d at 1192. Any doubtful expressions of legislative intent must be resolved in favor of the tribe. *South Carolina v. Catawba Tribe of Indians,* 476 U.S. 498, 506, 106 S. Ct. 2039 (1986). This canon must also apply to statutes even where Indians are not mentioned. *Pueblo of San Juan*, 276 F. 3d at 1191-92.

As for legislative history, Congress has recognized that as sovereign nations, Native American tribes "undoubtedly possess the inherent right to resort to taxation to raise the necessary revenue for the accomplishment of [] vitally important objects." *Merrion,* 455 US at 144-55 (quoting S. Rep. No. 698, 45th Cong., 3d Sess., 1-2 (1879)). This specific statement about the Indian right to taxation satisfies the exemption test under *Donovan,* and the Complaint should be dismissed.

Not only legislative intent, but the clear language of section 602 of the Telecommunication Act indicates that Indian law is not preempted. In fact, where the language of a statute is plain and allows no more than one meaning, interpretation is unnecessary, "and the rules which are to aid doubtful meanings need no discussion." *Caminetti v. United States,* 242 U.S. 470, 485, 37 S. Ct. 192 (1917). The federal preemption clause of the Telecommunications Act is very specific about what entities are preempted. The law provides,

> (a) Preemption.--A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

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(b) Definitions.--For the purposes of this section–

. . . .

(3) *Local taxing jurisdiction.-- The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.*

(4) State.-- The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States.

(5) Tax or fee.-- The terms "tax" and "fee" mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

(c) *Preservation of State Authority.--This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.*

47 U.S.C. § 152 note (emphasis added).

Indian tribes are not subdivisions of state or federal governments. *Pueblo of San Juan*, 275 F. 3d at 1192. Being neither a municipality, city, county, township, parish, transportation district, nor assessment jurisdiction, Indians tribes are not local taxing jurisdictions. Instead, Indian tribes are "domestic, dependent *nations*." *Merrion*, 455 U.S. at 141, 102 S.Ct. at 903-04 (emphasis added). None of the general Congressional comments cited by Dish *(see* Complaint at ¶¶ 21 - 22) support the notion that Congress considered Indian nations to be "local taxing jurisdictions."

Where the Communications Act is so specific in exempting tax collecting by a municipality, city, county, township, parish, transportation district, and assessment jurisdiction – but not Indian nations, the plain meaning of the statute is that preemption does not apply to Indian nations or tribes such as the Hopi.

Other means are available to show that the Communications Act does not to apply on reservations. The Federal Communications Commission (hereinafter "FCC"), which is the executive

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branch of government enforcing the Communications Act, has recognized that tribes are nations, as opposed to local jurisdictions. The intent to allow taxation by Indian tribes of satellite businesses is clear from the FCC's formal affirmation and recognition of the principles of tribal sovereignty and the federal trust responsibility. In its "Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes," the FCC:

> recognizes the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions. As domestic dependant *nations,* Indian Tribes exercise inherent sovereign powers over their members and territory. The federal government has a federal trust relationship with Indian Tribes, and this historic trust relationship requires the federal government to adhere to certain fiduciary standards in its dealings with Indian Tribes. In this regard, the Commission recognizes that the federal government has a longstanding policy of promoting tribal self-sufficiency and economic development as embodied in various federal statutes.

16 FCC Rcd 4078, 4080 (2000) (emphasis added). The Commission further supports the authority of Indian tribal governments to "set their own communications priorities and goals for the welfare of their membership." *Id.* In adopting a government-to-government policy to guide its relations with Indian tribal governments, the FCC has agreed to follow and abide by the plain meaning of statutory law, legislative intent and the major principles underlying federal Indian law.

The executive branch's policy statements comport with the fact that Congress has simply not manifested "clear and unambiguous intent to restrict tribal sovereign authority." *Pueblo of San Juan,* 276 F.3d at 1194. Where "the legislative and executive branches have declared that federal Indian policy favors tribal self-government," the "Supreme Court has spoken clearly and emphatically" that such "policy reflects the fact that Indian tribes retain attributes of sovereignty over both their members and their territory, to the extent that sovereignty has not been withdrawn by federal statute or treaty." *Id.* at 1995.

Even if the Communications Act were ambiguous with regard to Indians, statutes must be construed liberally in favor of Indians, with any ambiguous provisions interpreted to their benefit. *Montana v. Blackfeet Tribe,* 471 U.S. 759, 766, 105 S. Ct. 2399 (1985). A liberal construction would be that if the FCC

does not have the power to prevent taxation by states, then the FCC has no power to prevent taxation by a sovereign nation, given the logic that a nation has greater sovereign powers than a state.

III. CONCLUSION

Dish should not be permitted to bring the instant Complaint before this Court because Dish has not exhausted remedies in the Hopi Tribal Court as the law demands. Moreover, even if this Court were to hear Dish's Complaint, the claims fail because the Communications Act does not preempt Hopi law. A "general statute" does not necessarily apply to Indian tribes, and even if the contrary were true, the Communications Act is not a "general statute." Further still, legislative history indicates that the Communications Act, even if deemed "general," was not intended to apply to Indian Tribes. The Hopi Tribe as sovereign may control economic activity within its own jurisdiction. For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint.

Dated this 24th day of May, 2012.

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