UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

NATIVE AMERICAN TELECOM, LLC; B.J. JONES in his official capacity as Special Judge of Tribal Court; and CROW CREEK SIOUX TRIBAL COURT,

Defendants.

Civil No. 10-4110-KES

SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON A PORTION OF NAT'S COUNTS ONE AND TWO

Sprint Communications Company L.P. moves for summary judgment on Native American Telecom LLC's ("NAT") claims to enforce its FCC Tariff No. 3 as to minutes delivered on and after December 29, 2011. Effective that day, there was a change of law by which carriers such as NAT were allowed to recover access charges for calls terminated in Internet Protocol ("IP") format by amending their tariffs to establish applicable rates, terms, and conditions for terminating such calls.[1] NAT, however, never amended its tariff. Because NAT failed to follow the regulatory directives necessary to collect compensation for calls

[1] The FCC also allowed non-tariffed compensation under formal interconnection agreements, but NAT has not pleaded the existence of a formal interconnection agreement.

terminated in IP, Sprint is entitled to summary judgment on NAT's interstate tariff claims (Counterclaim Counts One and Two) for calls delivered after December 29, 2011.

I. STANDARD

As the Court is well aware, summary judgment is appropriate where a moving party demonstrates (1) the absence of a genuine issue of material fact through the pleadings, depositions, affidavits, or other evidence and (2) entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party satisfies this burden, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). A court may enter summary judgment on either entire claims, or a "part" of any claim. Fed. R. Civ. P. 56(a).

II. NAT'S CLAIMS UNDER ITS FCC TARIFF NO. 3 FOR PERIODS ON AND AFTER DECEMBER 29, 2011 MUST FAIL

The undisputed material facts on this motion are set forth within Sprint's Statement of Undisputed Facts, and are not repeated here.

A. NAT's Claim for Damages

NAT's Counts One and Two in its Amended Counterclaim seek to enforce its interstate tariffs. ECF No. 172 at 17-18. This includes its FCC Tariff No. 3, which was filed with the FCC in August of 2011 and remains on file. Sprint's Statement of Undisputed Facts ¶¶ 2-4. NAT

alleges that Sprint delivered calls destined to NAT, and is liable to pay the terminating switched access charges set forth in its FCC Tariff No. 3. ECF No. 172, ¶¶ 63-64, 67-68.

B. The *CAF Order*'s Prospective Regime Applies to the VoIP-PSTN Traffic at Issue in This Case

On November 18, 2011, the FCC issued the *CAF Order*,[2] wherein the FCC comprehensively reformed intercarrier compensation. The FCC recognized that, under current practice, there were "significant billing disputes and litigation" over whether and how VoIP calls were to be compensated. *CAF Order*, ¶ 937.

While it did not resolve the backward-looking disputes, the FCC established a "prospective intercarrier compensation regime" for what it called "'VoIP-PSTN' traffic." *CAF Order*, ¶ 940 (emphasis added). The FCC did so, in part, to "reduce disputes and provide greater certainty" going forward. *CAF Order*, ¶ 946. The effective date of the *CAF Order* was December 29, 2011. 76 Fed. Reg. 73830 (Nov. 29, 2011).

The FCC defined "VoIP-PSTN traffic" as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." *CAF*

[2] *In the Matter of Connect Am. Fund*, 26 FCC Rcd. 17663 (2011), Report & Order & Further Notice of Proposed Rulemaking, *review denied*, *Direct Commc'ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015 (10th Cir. 2014).

Order, ¶ 940.[3] Stated another way, VoIP-PSTN calls are calls that are delivered through traditional means, but are in IP format on either end, or both ends, of a call.

Here, the undisputed facts show that the calls for which NAT bills Sprint are exchanged over traditional PSTN facilities and terminate to Free Conferencing Corporation in IP. Sprint Statement of Facts ¶¶ 8-10. The "traditional PSTN facilities" are those that connect Sprint with the intermediary carrier, and the calls "terminate" to Free Conferencing Corporation in IP on the VoIP links shown in the diagrams that NAT provided in discovery.[4] Thus, the FCC's two part test is met.

C. The FCC Required Tariff Revisions to Take Advantage of This Prospective Regime

The FCC implemented this prospective change via the tariff process. In order to obtain the compensation allowed by the *CAF Order*, LECs were directed to file tariff revisions establishing obligations for carriers to pay for VoIP-PSTN traffic. *CAF Order*, ¶ 944. The FCC stated:

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[3] "PSTN" stands for "Public Switched Telephone Network," which is made up of the traditional telecommunications facilities that allow customers of one carrier to make calls to customers of other carriers. *CAF Order*, ¶¶ 15, 63.

[4] While Sprint believes the facts are undisputed on this point, NAT refused to answer the question in response to a simple request for admission served on August 11, 2014. Schenkenberg Aff. Ex. H. The parties met and conferred, without success, on NAT's objection, and Sprint intends to file a motion to compel. Schenkenberg Aff. ¶ 9.

> We therefore permit LECs to file tariffs that provide that, in the absence of an interconnection agreement, toll VoIP-PSTN traffic will be subject to charges not more than originating and terminating interstate access rates. This prospective regime thus facilitates the benefits that can arise from negotiated arrangements without sacrificing the revenue predictability traditionally associated with tariffing regimes. For interstate toll VoIP-PSTN traffic, the relevant language will be included in a tariff filed with the Commission, and for intrastate toll VoIP-PSTN traffic, the rates may be included in a state tariff. In this regard, we note that the terms of an applicable tariff would govern the process for disputing charges.

CAF Order, ¶ 961 (emphasis added).

The FCC gave LECs three options, creating what might be called an "either/or/or" scenario. Either LECs can impose charges by tariffs to obtain compensation, or "Under [the FCC's] permissive tariffing regime, providers likewise are free not to file federal and/or state tariffs for VoIP-PSTN traffic, and instead to seek compensation solely through interconnection agreements (or, if they wish, to forgo such compensation)." *CAF Order*, ¶ 961 n.1974 (emphasis added). Thus, the three options are: (1) rely on revised tariffs that are specific to VoIP-PSTN traffic; or (2) rely on interconnection agreements; or (3) forego compensation.

Despite being given the chance to tariff charges for VoIP-PSTN calls, NAT chose not to amend its tariff to include any terms imposing compensation obligations on VoIP-PSTN calls. Sprint's Statement of

Undisputed Facts ¶ 4. As a result, NAT cannot recover for calls after December 29, 2011, and has chosen to "forego compensation" on those calls from Sprint."[5]

In short, NAT has failed to follow the rule that provided it with a path to obtain compensation on calls terminated in IP.[6] NAT's FCC Tariff No. 3 does not contain the necessary terms, and NAT's attempt to collect on a tariff that does not impose compensation obligations on VoIP-PSTN calls must fail.

III. CONCLUSION

Sprint respectfully requests that the Court grant Sprint's motion for summary judgment on NAT's Counterclaim Counts One and Two as to all calls delivered by Sprint to NAT on or after December 29, 2011.

[5] NAT's Counterclaim Counts One and Two seek to enforce tariffs, not an Interconnection Agreement, so the exception that allows compensation in accordance with a formal interconnection agreement is not relevant.

[6] An example of such language is attached as Exhibit G to the Schenkenberg Affidavit. That language was filed with the New York Commission by Carey Roesel, who has provided testimony as NAT's regulatory consultant. Schenkenberg Aff. ¶ 10 and Ex. I.

Dated: October 1, 2014

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