UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

vs.

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

Defendants.

Case No. 10-4110-KES

NATIVE AMERICAN TELECOM, LLC'S OPPOSITION TO SPRINT'S MOTION FOR SUMMARY JUDGMENT RELATED TO NAT'S COUNTS ONE AND TWO

Defendant Native American Telecom, LLC ("NAT") opposes Sprint Communications Company, L.P.'s ("Sprint") Motion For Summary Judgment On A Portion Of NAT's Counts One and Two ("Motion"). Sprint stands alone among national carriers with an extreme history of inventing pretexts for its refusals to pay intercarrier compensation. The current motion, which advances a new justification not alleged in its pleadings, adds to that history.

First, Sprint's Motion should be denied simply because Sprint has failed to introduce any admissible evidence on the facts purporting to support its motion. The motion is founded entirely on an unauthenticated document about which Sprint has conducted no substantive discovery. The document itself uses terms that are not defined, that are susceptible to a variety of meanings, and that do not address the applicable regulations on terminating access charges for voice over Internet protocol ("VoIP") traffic. Sprint has essentially acknowledged that it has no admissible evidence to support its Motion, but filed the Motion anyway.

Second, the Motion wholly misstates the law related to intercarrier compensation for VoIP traffic. There is no legal requirement that NAT file a new tariff to collect access fees. Regulations promulgated by the Federal Communications Commission ("FCC") in 2012 establish as law the rate at which LECs can charge for VoIP-PSTN traffic. Instead of citing the applicable regulations, Sprint attempts to obscure the law with misleading references to the FCC's order in the Connect American Fund proceeding (the "CAF Order"). Sprint was an active participant in that proceeding, so it should fully understand the nature of the VoIP issues, CAF Order, and regulations discussed below. Sprint's own comments in the CAF proceeding show that Sprint's Motion is founded on an intentional misstatement of what the CAF Order says and was intended to do. By mischaracterizing the law as it does, Sprint demonstrates that its conduct in this action is just another example of advancing pretexts to control costs and to avoid its legal obligation to pay intercarrier compensation.

Third, to the extent Sprint has facts the Court could find admissible, those facts are much disputed. The applicable FCC regulations define traffic as "IP format" if "it originates from and/or terminates to an end-user customer of a service that *requires* Internet protocol-compatible customer premises equipment." NAT has submitted evidence that NAT does not "require" IP compatible customer premises equipment.

Fourth, the Filed Rate Doctrine precludes Sprint from challenging the rates in NAT's lawfully filed Tariff No. 3. Sprint seeks summary judgment on NAT's breach of contract claims from December 29, 2011 to the present; however any effort by Sprint to have the Court declare NAT's rates are unreasonable can only be made by petitioning the FCC on a prospective basis. Thus, Sprint is not entitled to the relief sought in its Motion.

Fifth, even if Sprint's argument had any merit, under *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.,* 24 FCC Rcd 14801 (F.C.C. 2009) ("*Farmers II*")[1], NAT is entitled to collect from Sprint the difference between any unlawful rate and a just and reasonable rate. Since the rate in NAT's tariff was both a lawful rate and a just and reasonable rate[2], NAT is entitled to collect the tariffed rate from Sprint in any event.

Finally, the claim for which Sprint now seeks summary judgment is not properly before the Court. The Court gave Sprint and the other parties leave to amend their pleadings to address issues that arose because of the CAF Order, proceedings before the South Dakota Public Utility Commission ("PUC"), and other events since the case was commenced in 2010. For whatever strategic reasons it deemed appropriate, Sprint declined to amend its complaint. The claim that it advances in the Motion, which purportedly relates to a provision in the 2011 CAF Order, is thus not properly before the Court.[3]

I. THE FACTS.[4]

A. The Initiation Of This Action.

Since 2009, NAT has provided interstate access services under its tariffs which are validly filed and consistent with Section 203 of the Federal Communications Act ("Act"), 47 U.S.C. § 203. NAT's Statement of Material Facts As to Which There Exists Genuine Material Issues To Be Tried ("NAT Facts"), filed contemporaneously herewith, ¶ 7. NAT's tariffs have been in full force and effect during the time that it has been providing access services to Sprint.

---

[1] Any comparison to the *Farmer's II* case is pretense. Here, there is no issue affecting the validity of the NAT's tariff.

[2] As a matter of fact the rate charged is exactly the same as what would otherwise be required (the interstate rate) if NAT were required to refile its tariff.

[3] The claim also is not the subject of any dispute that is the subject of either Sprint's Complaint or NAT's Amended Counterclaim. *See* Docket 1 and 172.

[4] For a more complete recount of the facts, NAT refers the Court to NAT's Statement Of Material Facts As To Which There Exists A Genuine Material Issue To Be Tried, filed contemporaneously herewith.

Id. Pursuant to its tariffs, NAT has submitted invoices to Sprint for access charges associated with the access services provided to Sprint. Sprint continues to take access services from NAT, while withholding payment for the services NAT provides. *Id*., ¶¶ 14-15. NAT's tariffed access rates have been and are now fully compliant with the FCC's regulations governing CLEC access charges. *Id*., ¶ 28.

Beginning in March 2010, Sprint ceased paying for the access services it takes from NAT. In August 2010, Sprint initiated this action. As stated in its Complaint, Sprint commenced this action "to bring to an end NAT's efforts to establish traffic pumping operations on the Crow Creek Sioux Reservation in South Dakota in violation of federal and state law." Docket 1, Complaint, ¶ 1. Sprint also alleged that "NAT purports to operate local exchange carrier operation on the Reservation but in reality exists only to engage in traffic pumping." *Id*., ¶ 2. Further, Sprint alleged that NAT's "claim that it provides competitive local exchange services to the Reservation is a sham" and that "Sprint refuses to acknowledge the SD PUC's jurisdiction over NAT," *Id., ¶¶* 10, 11. Finally, Sprint's Complaint alleged that "the FCC has found such traffic-pumping scheme to be likely unlawful and is still exploring ways to prohibit them going forward." *Id*., ¶ 29.

Although Sprint's original Complaint references NAT's 2009 tariffs that had been filed as of the date of its Complaint, the Complaint seeks permanent injunctive relief enjoining "NAT from assessing charges on Sprint pursuant to their unlawful scheme." *Id*., ¶ 45. The Complaint also seeks a declaratory judgment establishing that NAT has no right to charge or collect access charges based on routing long distance calls from Sprint to entities that provide conference calls or other entities that Sprint considers to qualify as "access stimulators." *Id*. The Complaint thus

seeks prospective relief through an injunction and a current declaration regarding Sprint's rights as of the today.

B. Sprint's History Of Inventing Pretexts To Escape Its Legal Obligations.

This is not the first case in which Sprint has refused to pay access charges for VoIP-PSTN traffic based on pretext. *See* NAT Fact, ¶¶ 30-33. In March 2011, the United States District Court for the Eastern District of Virginia issued an opinion after a bench trial in the case *Central Telephone Co. of Virginia v. Sprint Communications of Virginia*, 759 F. Supp. 2d 789 (2011) ("*Central Telephone*"). *Id.*, ¶ 30. In *Central Telephone*, the Court found that in the summer of 2009, Sprint embarked on company-wide cost cutting efforts. *Central Telephone,* 759 F. Supp. 2d at 792, 797. As that time, Sprint launched a coordinated effort to contest access charges on VoIP traffic with other carriers across the telecommunications industry. *Id*. Sprint did this despite previously announcing it developed a policy to pay for all VoIP-PSTN traffic. *See id.,* 793-94.

In *Central Telephone,* the Court also found that Sprint invented pretexts for breaching contracts with 19 other carriers.[5] *Id*., at 792. The Court also found that, for the first time in its history, Sprint started disputing access charges due to AT&T, Verizon, Qwest and other carriers. *Id*. About the same time Sprint was making up stories in *Central Telephone* to advance its corporate cost cutting scheme, Sprint was in this case also claiming that there should be no compensation for any VoIP traffic because VoIP is an "information service." Docket 21, Sprint's Brief in Support of Motion for Preliminary Injunction at 24-25.[6])

---

[5] The Court essentially found that Sprint witnesses, including an in-house lawyer, were lying at trial. *Central Telephone Co. of Virginia v. Sprint Communications of Virginia*, 759 F. Supp. 2d 789, 807 (2011) *(*"Simply put, on the record as a whole, [in-house counsel's] testimony is not credible….. Sadly, the testimony of other Sprint witnesses is no more trustworthy.")

[6] The FCC rejected the argument in the CAF order. Ironically, Sprint took that position after its own Director of Policy testified that it was the policy of Sprint to pay for VoIP traffic. *See Central Telephone*, at 794.

C. The PUC Proceeding.

In 2010, NAT filed an application for a certificate to obtain, to the extent necessary, authority to provide intrastate interexchange access services that originate or terminate on the Crow Creek Sioux Reservation ("PUC Proceeding"). NAT Facts, ¶ 16. In October 2011, Sprint intervened in the PUC Proceeding for the purpose of contesting NAT's application. *Id.*, ¶ 26. Sprint advanced the same arguments in the PUC Proceeding as it does in its Complaint here to avoid paying NAT for terminating access, including that NAT was engaged in a "traffic pumping scheme," is a "sham," and was engaged in artificial mileage inflation. *Id.*

In February 2014, the PUC conducted a contested evidentiary hearing on NAT's application for a certificate of authority. At the hearing, a long-term Sprint employee testifying as Sprint's representative and as an expert stated unequivocally that NAT was complying with all applicable laws and regulations. He testified as follows:

Q: So in this situation here Native American Telecom has their tariff that's consistent with the new triggers, is it not?

A. Yes. And that's one part of this eight-year transition.

Q. Right.

A. And I've never argued -- no one's ever said that you are not consistent with the rules. But we're in a transition. Things are not going to be correct, right, just, reasonable, until at the end of that transition period.

Q. Okay. So you agree that NAT is consistent with the rules as articulated by the Federal Communications FCC?

A. As -- yes. As far as where we are in the transition period, yes. NAT is -- NAT is consistent. That doesn't mean they're -- that doesn't mean they're not a traffic pumper. It means they're a traffic pumper meeting the rules.

Q. Okay. So and those rules reflect the public policy of the United States?

A. Yes.

Q. And so they're lawfully operating the business in compliance with the public policy of the United States with respect to interstate traffic; right?

A. Yes.

Q. And so they're lawfully operating the business in compliance with the public

policy of the United States with respect to interstate traffic; right?

A. Yes.

Q. And the other LECs in the state that are accepting the same kind of traffic that NAT is accepting on interstate traffic pursuant to the authorization of this FCC and have the lowest rates in the state, charge similar rates than NAT for interstate traffic under the authorization of this FCC, they are also complying with the public policy of the United States?

A. Yes. Yes. As, again, referring back to this transition period, yes. They are complying with the transition that the FCC has put in place. They are consistent, yes.

Q. And with respect to the intrastate traffic that's been authorized by the Public Utilities FCC, there are state tariffs that also are at the same lowest rate in the state, are in compliance with the public policy of the State of South Dakota.

A. I would presume so, yes.

Q. And, obviously, this public policy as implemented by the Public Utilities FCC?

A. Yes.

Id., ¶ 28.

Also at the hearing, Sprint offered into evidence a number of call flow diagrams produced by NAT during discovery, which are the same documents attached as "Exhibit E" to the Affidavit of Philip Schenkenberg (the "Call Flow Documents"). NAT's Response to Sprint's Statement of "Undisputed" Facts ("NAT Response"), filed contemporaneously herewith, ¶ 9a. Witnesses for NAT were available to be questioned on the documents, but Sprint chose not to question them.[7] *Id*. Instead, in its Motion Sprint merely speculates as to what the Call Flow Documents are and mean without reference to testimony or other evidence of any kind. *Id*.

On May 13, 2014, the PUC voted to approve NAT's application and, in its subsequent

[7] In its "Statement of Undisputed Facts," Sprint claims that "NAT's consultant agreed that 'Free Conferencing's bridge is an IP-based bridge." Sprint Statement, ¶9(f), However, at the PUC hearing, NAT's consultant simply stated that he had no involvement in preparing the Call Flow Documents and had never seen them before. Affidavit of Stephen Wald In Opposition To Sprint's Motion for Partial Summary Judgment ("Wald Aff."), filed contemporaneously herewith, Exh. B, pp. 450. He then confirmed what were on the documents. *Id.* However, he had previously testified that it was his understanding that Free Conferencing did not have a "VoIP bridge," although he made clear that he did not want to speak authoritatively on that. *Id.* at 446.

order dated June 12, 2014 ("PUC Order"), made formal Findings of Fact and Conclusions of Law rejecting the reasons Sprint advanced for denying NAT's application (PUC Findings"). NAT Facts, ¶ 27. In particular, the PUC found that NAT was not a "sham" and that "Sprint did not dispute that NAT is complying with the transition and access stimulation rules." *Id.*, ¶ 28. The PUC went on to find against Sprint as follows:

> The Commission finds that it is in the public interest to grant NAT a certificate of authority. The Commission finds that, under the specific facts of this case, NAT's involvement in access stimulation does not warrant denial of its application for a certificate of authority. The Commission notes that the FCC declined to ban revenue-sharing arrangements and promulgated rules to limit adverse effects of access stimulation through its mandated reductions in access rates charged by those companies engaged in access stimulation and mandated reductions in access rates through the FCC's intercarrier compensation reform. As required by the FCC's Transformation Order, NAT's access rates have been reduced. The Commission has found that NAT is not a sham entity. The Commission further notes that NAT has plans for further expansion of telecommunications services that do not include access stimulation.

Id., ¶ 29.

The PUC Order is final and binding on Sprint, Sprint did not appeal the Order, and the time for appealing the PUC Order has expired. *Id.*, ¶ 27.

D. The CAF Order, The Federal Regulations, and NAT's 2011 Tariff.

On November 18, 2011, the FCC issued an order in connection with the Connect America Fund proceeding (the "CAF Order"). NAT Facts, ¶ 22. Among other things, as the PUC later found, too, the CAF Order rejected the basic premise of Sprint's 2010 Complaint, which asserted that "traffic pumping" is a "violation of federal and state law." *Id*. The CAF Order also rejected the position of various carriers, including Sprint, who had "urged us to declare revenue sharing to be a violation" of the Communication Act. *Id*. Instead, it addressed concerns about switched access rates by creating a "definition" which if met requires a

competitive LEC to "benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state." *Id*., CAF Order, ¶ 679.

Another primary goal of the CAF Order was to reform the entire system of intercarrier compensation. On April 1, 2011, Sprint had urged the FCC to "clarify that VoIP traffic exchanged with PSTN (or TDM) networks is not a telecommunications service, and thus is not subject to access charges. Rather, VoIP traffic should be subject immediately to a bill-and-keep regime." NAT Facts, ¶ 25; Wald Aff., Ex. G, Comments of Sprint Nextel Corporation, April 1, 2011, p. 2. In this regard, the FCC rejected Sprint's position here, too, stating:

> In this Order, we ***explicitly supersede the traditional access charge regime*** and, subject to the transition mechanism we outline below, regulate terminating access traffic in accordance with the section 251(b)(5) framework. Consistent with our approach to comprehensive reform generally and the desire for a more unified approach, we find it appropriate to bring ***all traffic*** within the section 251(b)(5) regime at this time, and commenters generally agree.

NAT Facts, ¶ 26, CAF Order, ¶ 764 (emphasis added). By bringing "all traffic within the section 251(b)(5)," the FCC decided to clarify the compensation regime for VoIP-PSTN calls as well.

The FCC was well aware that there was concern in the industry about the regulation of non-traditional providers of phone services over the internet, such as Vonage, Skype and cable TV providers like Time Warner, as opposed to traditional telecommunications carriers. NAT Facts, ¶ 27. Therefore, the FCC decided to reclassify ***all traffic***, including that of the non-traditional phone services. The CAF Order proclaims:

> [T]he FCC has authority to bring ***all*** traffic within the section of 251(b)(5) framework for the purposes of intercarrier compensation, including traffic that otherwise could be encompassed by the interstate and intrastate access charge regimes, and we exercise that authority now for all VoIP-PSTN traffic.

Id., CAF Order, ¶ 943. In choosing to bring VoIP-PSTN calls with all other call traffic in the realm of 251(b)(5), it was forced to define VoIP-PSTN traffic. NAT Facts, ¶ 28. The CAF

Order defines VoIP-PSTN traffic as "traffic exchanged over PSTN facilities that originates and/or terminated in IP format." *See id*., CAF Order ¶ 940. In defining VoIP-PSTN traffic, the FCC stated that it believed "it is appropriate to focus on traffic for services that ***require 'Internet protocol-compatible premises equipment***.'" *Id*., ¶ 940, n. 1982 (citations omitted) (emphasis added).

The authoritative federal regulations implementing the CAF Order became effective on July 13, 2012, and codify the definition of VoIP-PSTN traffic as "Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an ***end-user customer of a service that requires Internet protocol-compatible customer premises equipment***." 47 C.F.R. § 51.913 (a)(1)(c); *see also* NAT Response, ¶ 9a; CAF Order, n. 1892.

By including VoIP-PSTN traffic in its reform of intercarrier compensation, the FCC was able to set a rate for the traffic, in spite of the opposition from Sprint and others. That Sprint now contends the CAF Order imposed a new requirement on LECs is especially ironic given Sprint's own comments in the Connect America Fund proceeding. Sprint's comments make clear that Sprint understood then, as it understands now, that the VoIP issue before the FCC in the section it cites was to clarify the ***rate,*** not whether LECs could charge at all. *See* Wald Aff., Ex. G., Sprint Comments, p. 3. For Sprint now to contend otherwise is consistent with the unfortunate conduct identified by the District Court in *Central Telephone.*

The CAF Order, and later the federal regulations, announced the rates at which LECs may charge for VoIP-PSTN traffic. The regulation now sets forth the legal requirements imposed on carriers with respect to the payment of "Terminating Access Reciprocal Compensation," as follows:

> Terminating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time

> Division Multiplexing **(TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate terminating access charges specified by this subpart**. **Interstate originating Access Reciprocal Compensation subject to this subpart exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format shall be subject to a rate equal to the relevant interstate** originating access charges specified by this subpart.

47 C.F.R. 51.913(a)(1)(emphasis added). In short, any traffic that originates or terminates in "IP format" ***shall be subject*** to the "***relevant interstate"*** rate.

Aware of the concern about high switched access rates, in August 2011, three months before the FCC issued the CAF Order, NAT filed an amended tariff voluntarily reducing its rates so they became equivalent to the price cap LEC with the lowest interstate switched access rates in South Dakota. NAT Facts, ¶ 21. That tariff is Tariff No. 3.[8] NAT Response, ¶ 3. NAT's Tariff No. 3 is a generic tariff. *See* Ex. A, Affidavit of Philip Schenkenberg, Docket Item, 180. It sets forth the charges for all traffic, not explicitly delineating charges for Toll VoIP-PSTN or PSTN-PSTN. *Id*. With the filing of Tariff No. 3, NAT's interstate rate for terminating calls was competitive with rates across the United States, including rates in urban areas. NAT Facts, ¶ 21. Thus, after the CAF Order became effective on December 29, 2011, NAT did not file a new or amended tariff, because NAT's rates were already compliant with the CAF Order and federal regulations, including the required rates for VoIP-PSTN calls. *Id*.[9]

E. The Court Grants Leave To Amend.

On July 23, 2014, the Court gave the parties leave to amend their pleadings so they could update their original pleadings given all of the events since 2010. Docket Item, 168. The Court's

---

[8] NAT's rate is actually lower than that of the lowest price capped carrier in the state. Also, NAT lowered its intrastate rate at the same time. NAT's intrastate rate has always mirrored its interstate rate, even though the rules at the time would have allowed NAT to charge a higher rate for intrastate traffic.

[9] Competitive LECs like NAT whose rates were already at or below the rate to which they would have to benchmark in the refiled tariff were not required to make a revised tariff filing. CAF Order, ¶ 691.

leave gave Sprint an opportunity to assert additional grounds for its failures to pay NAT, as well as to delete from its Complaint the grounds that are no longer valid because of the CAF Order and the findings of the PUC. *Id*. Sprint did not amend and thus made a considered decision to assert, for the entire period at issue (2010-the present) only two basic grounds for non-payment: (1) that NAT is engaged in an "unlawful scheme of "traffic pumping" and "access stimulation;" and (2) that NAT is a "sham." Sprint's Motion thus raises a ground for non-payment not pled as a claim or defense in connection with this case.

ARGUMENT

I. Standard of Review.

The standard for summary judgment is well settled. In determining whether summary judgment should issue, the Court must view the facts and inferences from the facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Woods v. DaimlerChrysler Corp.,* 409 F.3d 984, 990 (8th Cir.2005); *Littrell v. City of Kansas City, Mo.,* 459 F.3d 918, 921 (8th Cir .2006). The moving party has the burden to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Enterprise Bank v. Magna Bank,* 92 F.3d 743, 747 (8th Cir.1996).

Sprint is not entitled to summary judgment on NAT's breach of contract claims because: (1) it fails present any admissible evidence that its calls through NAT to Free Conferencing are in IP format; (2) NAT disputes that its services require IP CPE, a material fact at issue in this case; (3) it misrepresents the law applicable to VoIP traffic; (4) even if Sprint's factual and legal arguments were correct, NAT is entitled to recover for its service under *Farmers II*; (5) Sprint is

precluded from contesting past charges under the Filed Rate Doctrine; and 5) Sprint waived the right to assert any claims about NAT's alleged VoIP-PSTN traffic[10].

II. NAT'S Services Do Not "Require Internet Protocol Compatible Customer Premises Equipment."

Sprint's Motion declares that "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's Memorandum of Law, p. 4. Sprint misstates the facts, as well as the law. The phrase "have been terminated in Internet Protocol" is especially misleading when used without regard to the FCC's regulations applicable to "Terminating Access Reciprocal Compensation." Under the regulations, the legal issue is not whether calls "have been terminated in Internet Protocol," as Sprint suggests, but whether NAT "***requires Internet protocol-compatible customer premises equipment.***" Moreover, the Call Flow Documents submitted by Sprint contain no admissible evidence and, to the extent they do, the facts are much disputed.

1. Sprint Misstates The Law.

Sprint does not even identify the legal definition of what it refers to as "VoIP-PSTN traffic." The reason is simple: the actual definition in the regulations, when applied to NAT, makes clear that Sprint's position has no merit, especially in the context of summary judgment.

Under the applicable regulations, "Terminating Access Reciprocal Compensation … exchanged between a local exchange carrier and another telecommunications carrier in Time Division Multiplexing (TDM) format that originates and/or terminates in IP format ***shall be subject to a rate*** equal to the relevant interstate terminating access charges specified by this

[10] Even if Sprint's claim regarding VoIP-PSTN traffic was allowed and if everything Sprint is claiming about VoIP-PSTN traffic was true, the inference would be that NAT was obligated to charge the interstate rate for this traffic. *See* NAT Facts, ¶ 21. That said, NAT has always charged the interstate rate for this traffic anyway. Sprint's entire argument on this subject is a "red herring".

subpart." 47 C.F.R. 51.913(a)(1)(emphasis added). The regulation then defines when "telecommunications traffic originates and/or terminates in IP format." 47 C. F. R. 51.913(1)(a)(3). Specifically, it provides as follows:

> Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment.

47 C. F. R. 51.913(a)(3)(emphasis added). This is consistent with the definition used by the FCC in the CAF Order. *See* CAF Order, n. 1892.[11] The legal issue, thus, is what NAT "***requires,***" not what the customer actually uses.

2. The Call Flow Documents Are Not Admissible Or Authenticated, and They Do Not Show Whether Or Not NAT Provides Services That Require Internet Protocol-Compatible Customer Premises Equipment.

Sprint primarily relies on the Call Flow Documents to support its contention that Sprint's calls "terminate to Free Conferencing in IP." *See* Memo of law p. 4; Affidavit of Schenkenberg, Ex. E. However, there is no admissible evidence regarding what the diagrams say or mean. Sprint has never taken the opportunity to further inquire about the documents, which include a narrative and various graphic representations without identifying the author or the purpose for which they were drawn. *See* NAT Response, ¶ 9a.

Sprint has provided no evidence as to why the Call Flow Documents were created, or by whom. During the PUC Proceeding, Sprint introduced the Call Flow Documents as a formal exhibit at the hearing on NAT's CLEC application. *Id*. Witnesses brought to the hearing by

[11] Footnote 1892 provides in relevant part: "Although our prospective VoIP-PSTN intercarrier compensation is not circumscribed by the definition of 'interconnected VoIP service' in section 3(25) of the Act (referencing 9.3 of the FCC's rules) or the definition of 'non-interconnected VoIP service' in section 3(36) of the Act, nonetheless, informed by those definitions, we believe it is appropriate to focus on traffic for services that requires 'Internet protocol compatible customer premises equipment.'"

NAT were available to be questioned on NAT's network, but Sprint chose not to question any of them.[12] *Id*.

In this case, there was limited discovery in connection with a motion for a preliminary injunction, but there has been no discovery since then but for the service by Sprint of a single request for admission.[13] NAT Response, ¶ 9a. The Call Flow Documents have not been authenticated, and there has as yet been no discovery as to the nature of the documents, who prepared them, when they were prepared, or what they were intended to convey. *Id*. None of the terms used on the documents have been explained, and no testimony by anyone, let alone by anyone with personal knowledge, has been offered to explain any of the terms used in the Call Flow Diagrams. *Id*. The documents themselves do not use any term that is common to the FCC regulations that govern payments for "Terminating Access Reciprocal Compensation." *Id*. They do not, for example, specify what is the "customer premises equipment" or whether or not NAT provides "services that require internet protocol-compatible customer premises equipment," which is the legal standard under the applicable regulations. *Id*. The Call Flow Documents thus provide no basis for the Court on summary judgment to conclude as a matter of law that Sprint has no liability to NAT.

3. There Are Various Disputed Facts As To Whether Not NAT Provides Services That Require Internet Protocol-Compatible Customer Premises Equipment.

[12] NAT brought to the PUC hearing an employee of an entity other than NAT who could answer any technical questions about its traffic flow that the PUC might have had. He was the author of the Call Flow Documents.

[13] On February 25, 2011, the parties filed an Interim Joint Rule 26(f) Report. Docket Item 88. Pursuant to that Report, depending on the Court's ruling on NAT's preliminary injunction motion, the parties were to reconvene their Rule 26(f) meeting to set out the parameters of any additional discovery and report those to the Court. Sprint did not comply with that process in connection with its admission request. When Sprint raised the issue of an admission request, NAT asked that if discovery was to restart then the parties should discuss an overall discovery plan. Sprint served its request without discussing an overall discovery plan or even a plan to address discovery on NAT's network or issues raised by Sprint's contention that traffic to NAT "have been terminated in Internet Protocol."

On the legal standard under the applicable regulations, there are indeed various disputed issues of fact.

First, under the regulations, the issue is what NAT "***requires,***" not what the customer actually uses. *Id*. NAT has many customers besides Free Conferencing Corporation, including residential members of the Crow Creek Tribe, Crow Creek Holdings, LLC, Lone Star Crow Creek Hotel, and tribal government offices. *Id*. None of those establishments are *required* to use internet-protocol compatible equipment in order to be a customer of NAT. *Id.* The residential customers use regular, PSTN handsets that can be plugged into any phone connection and used with any traditional phone service.

Second, Free Conferencing is a high volume end user customer of NAT. Even in the category of conferencing company end user customers, NAT does not "*require*" it to have internet-protocol compatible equipment in order to be a customer of NAT. *Id*. Conferencing companies can operate with bridges, such as hardware based bridges, that use either traditional "Time Division Multiplexing" ("TDM") input or input in IP format. *Id*. Any of these bridges could be used to receive NAT's high traffic service. *Id*. NAT thus has no need to, and does not, "*require"* that conferencing companies or any other high volume end user customer use ***"internet protocol-compatible customer premises equipment."***[14]*Id.*

Third, Free Conferencing is not even represented on the diagrams in the Call Flow Documents. *Id*. Sprint claims that the box on the diagrams labeled "NAT Voice Applications Services" represents Free Conferencing equipment, namely the Free Conferencing bridge that is an "IP bridge." *Id*. In so stating, Sprint cites to testimony of NAT's consultant from the PUC hearing. Sprint's citation is a gross distortion of the testimony. At the hearing cited, NAT's

[14] It is Sprint's contention that NAT should have filed a revision to its tariff in order to reduce its intrastate rate to match the appropriate interstate rate for this traffic. Sprint fails to inform this Court that NAT's intrastate rate was already the same as its interstate rate, and has always been the same as its interstate rate.

consultant simply stated that he had no involvement in preparing the Call Flow Documents and had never seen them before. NAT Response, ¶ 9f. However, he had previously testified that it was his understanding that Free Conferencing did not have a "VoIP bridge," although he made clear that he did not want to speak authoritatively on that. *Id*. Therefore, there is not a single piece of admissible evidence to establish that Sprint's calls to NAT that terminated to Free Conferencing are VoIP-PSTN calls, and the proposition is much disputed.

III. NAT's Tariff No. 3 Is In Compliance With Federal Regulations.

Even if NAT calls were in "IP format" – *i.e.* met the definition in the regulations as "originates from and/or terminates to an end-user customer of a service that ***requires Internet protocol-compatible customer premises equipment***" – Sprint is obligated for all existing charges under the terms of its Tariff No. 3. Sprint contends that the CAF Order required NAT to file a new tariff expressly acknowledging charges for VoIP-PSTN traffic. Sprint ignores the applicable regulations and thus is simply misstating the law.

With the issuance of the CAF Order, the FCC reformed its regulation of intercarrier compensation by bringing "***all traffic*** within the section 251(b)(5) regime" for uniformity. *See* CAF Order, ¶ 764 (emphasis added). In so doing, the FCC decided to clarify the compensation regime for VoIP-PSTN calls as well. The FCC's intent in the CAF Order was to resolve disputes as to the rates LECs could charge carriers for VoIP-PSTN calls, not to decide for the first time whether carriers could charge terminating access rates for these calls. The FCC explained that the intent of its treatment of VoIP-PSTN traffic was to "reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams." *Id*., ¶ 946. In its section on "*Authority To Address VoIP-PSTN Traffic Under Section 251(b)(5),*" the FCC asserted the legal authority to regulate "the transport and termination of all telecommunications

exchanged with LECs." CAF Order, ¶954. It did so after stating that "we exercise that authority now for all VoIP-PSTN traffic." *See* CAF Order, ¶ 943.

Sprint contends that before the CAF Order a LEC was not permitted to charge carriers access fees for VoIP-PSTN calls. Sprint also incorrectly claims that "LECs were directed to file tariff revisions establishing obligations for carrier to pay for VoIP-PSTN traffic." Sprint's contentions are simply wrong, and Sprint knows it. With the CAF Order, the FCC simply resolved the debate over the *rate* at which VoIP-PSTN traffic could be charged.

In support of its position, Sprint cites paragraph 944 of the CAF Order. However, neither paragraph 944 nor any other paragraph of the CAF Order sets forward a strict requirement to file a revised tariff or else waive all compensation for VoIP-PSTN traffic. In reality, Paragraph 944 concerns only the rates for VoIP-PSTN traffic and states the following:

> We adopt transitional rules specifying, prospectively, the default compensation for VoIP- PSTN traffic:
>
> - Default charges for "toll" VoIP-PSTN traffic will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure;
> - Default charges for other VoIP-PSTN traffic will be the otherwise-applicable reciprocal compensation rates; and
> - LECs are permitted to tariff these default charges for toll VoIP-PSTN traffic in relevant federal and state tariffs in the absence of an agreement for different intercarrier compensation.

CAF Order, ¶ 944. The FCC explained its reasoning in adopting a new compensation framework for VoIP-PSTN traffic, stating that "the record is clear that many providers did not pay the same intercarrier compensation rates for VoIP traffic that would have applied to traditional telephone service traffic." CAF Order, ¶ 948. This language makes clear that the FCC's intent was to establish fairness in compensation for VoIP-PSTN traffic, not to declare that it was adopting a process by which LECs could for the first time charge carriers for VoIP traffic.

For that reason, Paragraph 948 contains no mandate instructing all LECs to file new tariffs immediately, "or else", as Sprint alleges. The FCC simply stated that it "permit[s] LECs to include language in their tariffs to address the identification of VoIP-PSTN traffic" so that the proper rate could be charged. *Id.*, ¶ 950. However, in the case of NAT, this revision was neither required, as Sprint would like to say, nor necessary because NAT has always charged the interstate rate for ALL traffic, as is reflected in NAT's tariffs.

In 2012, if there was any uncertainly on this point in the CAF Order, that uncertainty was resolved with the promulgation by the FCC of its regulation on the issue. First, the FCC acknowledged that with the CAF Order it determined that interstate access rates would apply to VoIP-PSTN traffic, not whether the traffic could be charged at all. *See* FCC 12-47 ¶ 30 ("For all interstate toll VoIP traffic, interstate access rates continue to apply consistent with the default rates adopted in the *USF/ICC Transformation Order"*.) Then, in July 2012, the FCC issued the formal regulation, 47 C. F. R. § 51.913, which provides that VoIP-PSTN calls[15] "***shall be subject*** to a rate equal to the relevant interstate originating access charges specified by this subpart." 47 C. F. R. § 51.913(a)(3). The regulations do *not* require LECs to file new tariffs in order to charge VoIP-PSTN traffic at that rate. Rather, it provides:

> [A] local exchange carrier ***shall be entitled*** to assess and collect the full Access Reciprocal Compensation charges prescribed by this subpart that are set forth in a local exchange carrier's interstate or intrastate tariff for the access service defined in § 51.903 [i.e, VoIP-PSTN traffic].

47 C. F. R. § 51.913 (b) (emphasis added). The absence of any requirement in the federal regulations for LECs to file new or revised tariffs is not an oversight. When new filings or tariff amendments are required, the FCC knows how to do require them, and does in other contexts.

[15] Again, VoIP-PSTN calls are defined by the regulation as "Telecommunications traffic originates and/or terminates in IP format if it originates from and/or terminates to an end-user customer of a service that requires Internet protocol-compatible customer premises equipment." 47 C.F. R. § 51.913(a)(3).

See e.g., 47 C. F. R. § 51.907(b)(1) ("Each Price Cap Carrier shall file tariffs"); 47 C. F. R. 51.909(b)(1) ("Each Rate of Return Carrier shall file intrastate access tariff provisions"); 47 C. F. R. 51.911(b) ("Competitive LEC that has tariffs on file with state regulatory authorities shall file intrastate access tariff provisions"); 47 C. F. R. § 61.26(2) ("A CLEC engaging in access stimulation…shall file revised interstate switched access tariffs"). Thus, the so-called legal requirement that Sprint claims NAT is failing to follow simply does not exist.

In NAT's case, in August 2011, months before the CAF Order was issued and became effective and almost a year before the applicable regulations were passed, NAT filed Tariff No. 3. *See* NAT Facts, ¶ 21. Tariff No. 3 is a generic tariff; i.e., it does explicitly articulate rates for Toll VoIP-PSTN or PSTN-PSTN. *Id*. Instead, Tariff No. 3 established new rates for all "access services." *See* Schenkenberg Aff., Ex. A. Thus, when the CAF Order became effective in moving ***all*** terminating access traffic to the section 251(b)(5) framework, not just VoIP-PSTN, NAT's FCC Tariff No. 3 *became* it's section 251(b)(5) traffic tariff on December 29, 2011, by default.

Tariff No. 3 is in full compliance with the federal regulations. NAT's interstate rates for terminating calls are competitive with rates across the United States, including rates in urban areas. There was no requirement or need for NAT to file any revisions as the rate for VoIP-PSTN traffic was what the regulations required. In addition, competitive LECs like NAT whose rates were already at or below the rate to which they would have to benchmark in the refiled tariff were not required to make a revised tariff filing after the CAF Order. CAF Order, ¶ 691. Thus, Sprint's claims about NAT's failures to meet its legal obligations to charge for VoIP-PSTN traffic simply have no legal merit.

IV. The Filed Rate Doctrine Precludes Sprint From Disputing NAT's Past Bills.

NAT's filed rates are consistent with the FCC's mandate in the CAF Order and the regulations adopted in July, 2012. Sprint claims that NAT's tariff is defective because it does not directly articulate a rate for VoIP-PSTN traffic. However, Sprint's challenge to the NAT's tariff is barred by the filed rate doctrine. "Under [the filed rate] doctrine, once a carrier's tariff is approved by the FCC, the terms of the federal tariff are considered to be 'the law' and to therefore 'conclusively and exclusively enumerate the rights and liabilities' as between the carrier and the customer. Iowa Network Servs., Inc., v. Qwest Corp., 466 F.3d 1091, 1097 (8th Cir. 2006) (quoting Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000); Firstcom, Inc., v. Qwest Corp., 555 F.3d 669, 680 (8th Cir. 2009)("Under the filed tariff doctrine, courts may not award relief that would have the effect of imposing any rate other than that reflected in the filed tariff") (citation omitted).

"The filed rate doctrine is motivated by two 'companion principles' (1) preventing carriers from engaging in price discrimination as between ratepayers (the 'nondiscrimination strand') and (2) preserving the exclusive role of federal agencies in approving rates for telecommunications services that are 'reasonable' by keeping courts out of the rate-making process (the 'nonjusticiability strand'), a function that the federal regulatory agencies are more competent to perform." Northern Valley Commc'ns, LLC v. AT&T Corp., 659 F. Supp. 2d 1056, 1060 (D.S.D. 2009) (quoting Marcus v. AT&T Corp., 138. F.3d 46, 58(2d Cir. 1998)). Because Sprint is challenging the rates in NAT's tariff No. 3 for all call traffic from December 29, 2011 to the present, its claim is barred by the filed tariff doctrine. Thus, if Sprint wishes to attack NAT's rates for VoIP-PSTN call traffic, it should file a petition for rulemaking and may only do so concerning any future charges. Accordingly, its motion for partial summary judgment on call traffic for December 2011- present must be denied.

V. NAT Is Entitled To Recover On Its Breach Of Contract Claims.

Sprint still would not be entitled to summary judgment even if there were admissible facts to support its Motion and Sprint had not so misstated the law. The FCC, the Court in the instant action, and another Court in this District have all found that a LEC is not precluded from recovering access charges from a carrier even if there is a technical issue with tariff compliance.

In 2009, the FCC issued its decision in *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.,* 24 FCC Rcd 14801 (F.C.C. 2009) ("*Farmers II*"). In Footnote 96 on page 12 of *Farmers II* ("*Farmers II* Note 96"), the FCC made clear that LECs may be compensated for their services to IXCs even if they are precluded from billing under their tariffs. In *Farmers II,* the FCC found that certain conferencing companies were not "end users" under the tariff at issue in that matter. The FCC specifically noted, however, that its ruling did not preclude the local exchange carrier from seeking compensation from the carrier:

> This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g.*, *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or FCC decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp*., Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claim for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

Farmers II Note 96.

In 2012, two United States District Judges in this District cited the *Farmers II* Note 96 as still binding legal authority. In *Northern Valley Comm's., LLC v. Qwest Comm's. Co., L.P.*, 2012 U.S. Dist. LEXIS 40081 (D.S.D. Mar. 23, 2012), (Schreier, J), this Court was asked to stay the case and refer certain issues to the FCC. The Court addressed the *Farmers II* Note 96 holdings specifically in its decision and wrote:

> **The FCC, however, declined to rule that Farmers was "precluded from receiving any compensation at all for the services it has provided to Qwest." *Id.* at 14812 n.96** (citation omitted). **The FCC declined Farmers' petition for reconsideration and rejected challenges to its authority to issue *Farmers II.*** *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 25 FCC Rcd. 3422 (2010), 2010 WL 972315 (*Farmers III*).

Id. at 10-11 (emphasis added). The Court went on to write:

> Assuming, without deciding, that Qwest's interpretation is correct and the conference calling companies do not subscribe to services in Northern Valley's interstate access tariff number three because they purchase local, not interstate services, **the FCC has repeatedly reasoned that a CLEC or a LEC may be entitled to recover some payment for these services**. ***See, e.g., Farmers II*, 24 FCC Rcd. at 14812 n.96** .

Id. at 27 (citations omitted) (emphasis added). Just a month earlier, in this very case, on February 22, 2012, the Court reached the same result. On a motion to refer certain issues to the FCC, the Court cited the *Farmers II* Note 96, reaffirming that the FCC "declined to rule that Farmers was 'precluded from receiving any compensation at all for the services it has provided to Qwest.'" *Id.* at 9.

Also, in *Northern Valley Communs., L.L.C. v. Qwest Communs. Corp.*, 2012 U.S. Dist. LEXIS 89563 (D.S.D. June 19, 2012), Judge Kornmann wrote:

> The only consistent theme connecting *Farmers II* and the Rulemaking appears to be that LECs should receive some form of compensation for access stimulation-related services. *See Farmers II*, 24 FCC Rcd. at 14812 n.96

Id. at 19-20.

Under *Farmers II* Note 96 and the latest authority in this District, even if there was some reason NAT could not bill under its tariff, NAT would still be entitled to "some form of compensation" for the services Sprint received. Moreover, since the rate in NAT's tariff was both a lawful rate and a just and reasonable rate, NAT is entitled to collect the tariffed rate from Sprint in any event.

VI. Sprint Has Failed To Or Is Precluded From Pursuing The Arguments Asserted in the Motion.

In August 2010, Sprint initiated this action. Its Complaint seeks an injunction against NAT from assessing access charges against Sprint and declaratory relief that NAT is not entitled to charge Sprint access charges. Docket Item, 1. Sprint, in its Complaint, alleges only two grounds for its position: (1) that NAT is engaged in an "unlawful scheme of "traffic pumping" and "access stimulation;" and (2) that NAT is a "sham." In documents submitted to NAT pursuant to the dispute provisions in NAT's tariff, Sprint disputed NAT's charges only on those two grounds and, more recently, on the sole grounds of "traffic stimulation activities or artificial mileage inflation."

This Court gave Sprint and NAT leave to amend their claims to address the factual and legal developments since 2010, especially the CAF Order and the PUC Order. Docket 168. Sprint declined to do so. Under the law, claims arising from the same transaction or occurrence must be brought together or are waived. *See Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 664-65 (8th Cir. 2012) (affirming dismissal where plaintiffs made a "strategic decision not to amend the complaint" and "chose to stand on their complaint, confident their allegations were sufficient."). Sprint asserted claims for injunctive and declaratory relief that it has declined to withdraw; it is thus continues to press claims against NAT related to NAT's most recent bills under its current tariffs, and the contention in its Motion related to "VoIP traffic" thus arise from

the same transactions and occurrences as do, at least, the claims for declaratory and injunctive relief in Sprint's 2010 Complaint.

Sprint, though, has chosen not to amend its complaint to assert a claim that it is not liable for NAT bills because NAT calls are "in VoIP." It should not now be permitted to seek summary judgment on an entirely new claim or defense, especially one that it failed to properly plead when given an opportunity by the Court just a month before.

October 31, 2014

SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

Scott R. Swier
202 N. Main Street
P.O. Box 256
Avon, South Dakota 57315
Telephone: (605) 286-3218
Facsimile: (605) 286-3219
scott@swierlaw.com

Stephen Wald
Partridge Snow & Hahn LLP
30 Federal Street
Boston, Massachusetts 02110
Telephone: (617) 292-7900
Facsimile: (617) 292-7910
swald@psh.com

Attorneys for Native American Telecom, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on October 31, 2014.

/s/ Scott R. Swier