UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P., Plaintiff, vs. CROW CREEK SIOUX TRIBAL COURT, NATIVE AMERICAN TELECOM, LLC., and B. J. JONES, in his official capacity as special judge of Tribal Court; Defendants.	4:10-CV-04110-KES ORDER DENYING SPRINT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, Sprint Communications Company, L.P., moves for partial summary judgment on Counts I and II of defendant Native American Telecom, L.L.C's (NAT) first amended counterclaim. NAT opposes the motion. For the following reasons, the court denies Sprint's motion for partial summary judgment.

BACKGROUND

The facts viewed in the light most favorable to NAT, the nonmoving party, are as follows:

Sprint provides nationwide long-distance telephone services and is known under the telecommunications regulatory framework as an interexchange carrier (IXC). Sprint delivers long-distance calls to a local exchange carrier (LEC) for termination to end-users. Under the FCC's current

regulatory framework, Sprint pays the LEC a terminating access charge based on the LEC's interstate access tariff, which is filed with the FCC.

NAT is an LEC. NAT's interstate tariff number one, filed with the FCC, became effective on September 15, 2009. NAT's second interstate tariff became effective on November 30, 2010, and canceled and replaced NAT's tariff number one. NAT revised its tariff number two, and the revisions became effective on June 26, 2011. NAT's third interstate tariff was filed with the FCC in August 2011.

NAT also operates a free conference calling system (used for conference calling, chat-lines, and similar services) in connection with Free Conferencing Corporation, which is owned by WideVoice. NAT has a conference call bridge located on the Crow Creek Sioux Reservation in South Dakota. A party using NAT's services does not pay NAT for the conference call but rather is assessed normal charges by the party's telecommunications provider. NAT then bills the telecommunications provider an access fee as defined in its interstate tariff. NAT's access charges, which were billed to Sprint for conference calls, are at issue here.

After paying two of NAT's bills for charges connected to conference calls, Sprint ceased paying NAT's terminating access tariffs because Sprint believed that NAT was involved in a traffic-pumping scheme, otherwise known as access stimulation, to generate traffic from free conference calls and chat services. On August 16, 2010, Sprint filed suit against NAT alleging a breach of the Federal Communications Act (FCA) and a state-law unjust enrichment claim. Docket 1.

On March 8, 2011, NAT amended its answer and asserted counterclaims against Sprint alleging a breach of contract and a collection action pursuant to its tariffs, a breach of implied contract resulting from a violation of its tariffs, and a quantum meruit/unjust enrichment claim. NAT also sought declaratory relief. Docket 99.

On November 29, 2011, the FCC released its *Connect America Fund* final rule, which addresses access stimulation and traffic pumping. *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support*, 76 Fed. Reg. 73830 (Nov. 29, 2011). The FCC also created a transitional framework for VoIP intercarrier compensation. *Id.* at ¶ 19. On December 27, 2011, this court issued an order directing the parties to discuss what effect, in any, the FCC's *Connect America Fund* final rule had on the issues presented in this case. Docket 128. Then, on February 22, 2012, this court issued an order discussing the final rule and determined that it did not apply retroactively. Docket 141 at 9-11 ("Thus, the final rule is inapplicable to the time period before the final rule became effective."). As part of the same order, this court granted Sprint's then-pending motion to stay this proceeding and referred three issues to the FCC for resolution. *Id.* at 25. This court also directed the parties to issue periodic updates describing the status of the FCC proceeding. This court received these updates over the next two years, which showed that the status of the FCC referral remained unchanged since November 2012. *Compare* Docket 154 *with* Docket 163. Because of the limited

progress on the FCC referral, a telephonic status conference was held on July 23, 2014. *See* Docket 164.

The parties stated that they had been engaged in litigation before the South Dakota Public Utilities Commission (SDPUC). Docket 169 at 5. In that litigation, NAT was granted a certificate of authority by the SDPUC to provide certain telecommunications services in South Dakota. Based on the results of the SDPUC litigation and the lack of action by the FCC during the period of the stay, the parties discussed whether some of the disputes in this case remained viable. *Id.* at 8-10. The court proposed entering an order that lifted the stay, withdrew the issues that had been referred to the FCC, and established deadlines for the parties to amend the complaint, counterclaims, and to file any motions to dismiss. *Id.* at 12. The court also stated that it would rule on any motions to dismiss based on a statute of limitations defense and that a new referral of issues to the FCC could then be discussed. *Id.* With the parties in agreement, a formal order was issued that same day. *See* Docket 168.

Sprint did not amend its complaint. NAT amended its counterclaim on September 9, 2014, and added a number of allegations that arose during the period of the stay and FCC referral. Docket 172. A number of procedural motions have since been filed by the parties. Relevant to the present discussion is Sprint's motion for partial summary judgment on Counts I and II of NAT's amended counterclaim. Docket 176.

LEGAL STANDARD

Summary judgment on all or part of a claim is appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also In re Craig*, 144 F.3d 593, 595 (8th Cir. 1998). The moving party can meet its burden by presenting evidence that there is no dispute of material fact or that the nonmoving party has not presented evidence to support an element of its case on which it bears the ultimate burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has met this burden, "[t]he nonmoving party may not 'rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial.' " *Mosley v. City of Northwoods, Mo.*, 415 F.3d 908, 910 (8th Cir. 2005) (quoting *Krenik v. Cnty. Of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995)). "Further, 'the mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment. . . . Instead, the dispute must be outcome determinative under prevailing law.' " *Id.* (quoting *Get Away Club, Inc. v. Coleman*, 969 F.2d 664, 666 (8th Cir. 1992)). The facts, and inferences drawn from those facts, are "viewed in the light most favorable to the party opposing the motion" for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

DISCUSSION

Sprint seeks partial summary judgment on Counts I and II of NAT's amended counterclaim as to all calls delivered by Sprint to NAT on or after December 29, 2011. Sprint contends that NAT seeks to recover terminating access fees for what is known as "VoIP-PSTN" traffic. Sprint argues that the FCC's *Connect America Fund* final rule required NAT to file revisions to its interstate tariff that specified compensation obligations regarding VoIP-PSTN traffic. Sprint concludes that because NAT did not revise its interstate tariff, it cannot recover compensation for such traffic delivered on and after December 29, 2011, the effective date of the *Connect America Fund* final rule.

I. Can Sprint Move for Summary Judgment?

NAT briefly contends that Sprint cannot proceed with its summary judgment motion because Sprint did not amend its complaint to assert a new claim or defense related to its liability for the termination of VoIP-PSTN traffic. Sprint is seeking partial summary judgment, however, as a defendant on Counts I and II of NAT's amended counterclaim. "A defendant may move for summary judgment 'at any time[.]' " *Alholm v. Am. Steamship Co.*, 144 F.3d 1172, 1177 (8th Cir. 1998) (quoting Fed. R. Civ. P. 56(b)). Thus, Sprint was not required to first amend its complaint before seeking partial summary judgment on Counts I and II of NAT's amended counterclaim.

II. The Significance of VoIP-PSTN Traffic to the Present Dispute

Traditionally, telephone companies use what is known as circuit-switching technology in order to carry voice traffic over the Public Switched

Telephone Network (PSTN). *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n.*, 290 F. Supp. 2d 993, 995 (D. Minn. 2003) (hereinafter *Vonage Minnesota*). The PSTN is the conventional wireline telephone network available to the general public. *Id.* Voice traffic over the PSTN can be transmitted in Time Division Multiplexing (TDM) format in which "calls are digitized and broken up into segments" and then "sent in order, with segments from other telephone calls placed in between, then reassembled at the other end." *SightSound.Com Inc. v. N2K, Inc.*, 185 F. Supp. 2d 445, 459 (W.D. Pa. 2002).

By contrast, voice calls may also be carried over the Internet. *Vonage Holdings Corp. v. Neb. Pub. Serv. Comm'n.*, 564 F.3d 900, 902 (8th Cir. 2009) (hereinafter *Vonage Nebraska*). These are known as "Voice Over Internet Protocol," or "VoIP" communications. *Id.* In general, the term "VoIP" refers to "any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony." *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd. 4863 at ¶ 3 n.7 (Mar. 10, 2004) (hereinafter *IP-Enabled Services Notice*). Rather than using the traditional circuit-switching technology as used when calls are placed over the PSTN, VoIP calls "utilize[] 'packet switching,' a process of breaking down data into packets of digital bits and transmitting them over the Internet." *Vonage Minnesota*, 290 F. Supp. 2d at 995. "While sophisticated, [VoIP] is also more cost effective than traditional circuit switches." *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 574 (8th Cir. 2007).

So-called "VoIP-PSTN" traffic is a certain kind of VoIP traffic. *In the Matter of Connect America Fund*, Second Order on Reconsideration, 27 FCC Rcd. 4648 at ¶ 27 (Apr. 25, 2012) (hereinafter *CAF Second Order*). As part of its *Connect America Fund* proceedings, the FCC recognized that "[q]uestions regarding the appropriate intercarrier compensation framework for VoIP traffic have been raised in a number of previous rulemaking notices from varying perspectives and in varying levels of detail." *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶ 936 (Nov. 18, 2011) (hereinafter *CAF Notice*). And "the lack of clarity regarding the intercarrier compensation obligations for VoIP traffic has led to significant billing disputes and litigation." *Id.* at ¶ 937. Thus, the FCC felt "it appropriate to address the prospective intercarrier compensation obligations associated with VoIP-PSTN traffic." *Id.* at ¶ 939.[1]

In doing so, the FCC adopted a definition of "VoIP-PSTN traffic" as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." *Id.* at ¶ 940. The Commission added that it intended to "focus specifically on whether the exchange of traffic between a LEC and another carrier occurs in Time-Division Multiplexing (TDM) format (and not in IP format), without specifying the technology used to perform the functions subject to the

[1] FCC acknowledged its "prospective" regime did not "resolve the numerous existing industry disputes" regarding VoIP traffic. *CAF Notice*, 26 FCC Rcd, 17663 at ¶ 935.

associated intercarrier compensation charges." *Id.*[2] In other words, "all VoIP traffic will be subject to the same intercarrier compensation requirements, regardless of whether TDM or IP technology was used to originate or terminate the call." *CAF Second Order*, 27 FCC Rcd. 4648 at ¶ 39. "Pursuant to that definition, traffic that terminates in IP format is VoIP traffic regardless of whether it originates in IP or TDM format, so long as it otherwise meets the definition of VoIP traffic." *Id.* at ¶ 28 n. 69 (citing 47 C.F.R. § 51.913). And traffic is thus said to "terminate in IP format" when "it . . . 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). Finally, "Internet protocol-compatible customer premises equipment" means "end-user equipment that processes, receives, or transmits IP packets." *In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd. 10245, ¶ 24 n.77 (2005).

A. Focusing on the Service or the Provider?

The parties dispute the proper focus of the word "requires" in the regulation defining whether traffic is said to terminate in IP format. *See* 47 C.F.R. § 51.913(a)(3). NAT takes the position that the issue "is what NAT 'requires,' not what the customer actually uses." Docket 192 at 14 (emphasis omitted). NAT notes that it has a number of customers, including Free Conferencing, and none of them are required to use IP-compatible consumer

[2] The FCC explained its "reference to 'PSTN' refers to the exchange of traffic between carriers in (Time Division Multiplexing) TDM format." *CAF Notice*, 26 FCC Rcd. 17663 at ¶ 940 n.1891.

premises equipment to be a customer of NAT. Sprint counters that the question is whether "the service requires" the use of IP-compatible customer premises equipment. Docket 200 at 10.

The parties have not provided, and the court is not aware of, any authority specifically interpreting this regulatory language. When setting out its definition of VoIP-PSTN traffic, however, the FCC acknowledged that "[s]ome commenters question the scope of traffic that 'originates and/or terminates in IP format.' " *CAF Notice*, 26 FCC Rcd. 17663 at ¶ 940, n.1892 (quotation omitted). The FCC stated,

> Although our prospective VoIP-PSTN intercarrier compensation is *not circumscribed* by the definition of "interconnected VoIP service" . . . or the definition of "non-interconnected VoIP service" . . . nonetheless, informed by those definitions, *we believe it is appropriate to focus on traffic for services that require* "Internet protocol-compatible customer premises equipment."

Id. (citations omitted) (emphasis added). Both interconnected and non-interconnected VoIP services are services that require IP-compatible customer premises equipment. 47 C.F.R. § 9.3; 47 C.F.R. § 153(36)(A). Thus, the FCC acknowledged there are a number of potential services, including interconnected and non-interconnected VoIP, that require IP-compatible customer premises equipment. *In the Matter of Connect America Fund*, F.C.C. Declaratory Ruling, 2015 WL 628983 at *1 n.3 (Feb. 11, 2015). The Commission intended to focus on the traffic for those and similar services. Thus, the court concludes that the proper inquiry is whether traffic terminates

to an end-user customer of a service and whether that service (rather than the service provider) requires IP-compatible customer premises equipment. [3]

III. Does NAT Seek Recovery for VoIP-PSTN Traffic?

NAT does not dispute that it seeks compensation for the terminating access fees that were billed to Sprint pursuant to NAT's interstate tariffs, including its interstate tariff number three filed with the FCC in August 2011. NAT also does not dispute that it is still operating under its interstate tariff number three, and that only immaterial changes to the tariff have been made since August 2011. Furthermore, NAT does not dispute that it billed Sprint pursuant to NAT's tariff number three for telephone calls delivered by Sprint to NAT for termination to NAT's conferencing customer, Free Conferencing Corporation (Free Conferencing). And NAT does not dispute that calls delivered by Sprint to NAT's facilities were delivered over the traditional PSTN facilities.

A. The Call Flow Diagrams

In support of its position, Sprint relies on several so-called "call flow diagrams." These diagrams were originally produced by NAT in discovery

---

[3] Sprint contends that this question can be resolved by the FCC's *Cardinal Broadband* declaratory ruling. There, Cardinal attempted to argue that it was not an interconnected VoIP provider under the Commission's rules because it provided, in addition to an admittedly interconnected VoIP service, an analog telephone service that did not require IP-compatible customer premises equipment. *Cardinal Broadband*, 23 FCC Rcd. 12224 at ¶ 6 (Aug. 15, 2008). The FCC noted that the interconnected VoIP service and analog services were distinct. *Id.* at ¶ 11. Thus, "Cardinal's status as an interconnected VoIP service provider is unaffected by the fact that it also offers analog telephone services." *Id. Cardinal Broadband* would be applicable if, for example, NAT admitted the traffic it terminated was VoIP but argued that it should not be classified as such because NAT also terminated non-VoIP calls.

during the SDPUC proceeding. Facially, the diagrams contain a number of illustrations, and each diagram is accompanied by a "Scenario" that describes in technical terms what the illustration depicts. A legend follows each illustration containing two to three graphical explanations: A black arrow is paired with the phrase "TDM Voice Connection," a blue arrow with "Voice over IP Connection," and, on some of the diagrams, a red arrow appears alongside the phrase "Inter-Switch Component Control Link."[4]

When Sprint first moved for summary judgment, NAT originally argued that the documents had not been authenticated and they were not admissible. Then, pursuant to the magistrate judge's order, Sprint was allowed to conduct a Rule 30(b)(6) deposition of NAT regarding those diagrams. *See* Docket 208. Carey Roesel, NAT's designated witness, was deposed on February 15, 2015. This court granted Sprint's request to amend its statement of undisputed material facts in support of its summary judgment motion, which NAT responded to. *See* Docket 235. NAT no longer contests the authenticity or admissibility of the diagrams.

B. Deposition of Carey Roesel

Carey Roesel is an employee of Technologies Management Incorporated, a company based in Florida. He testified as NAT's representative. In preparation, Roesel stated that he spoke with several individuals about the call flow diagrams, including Keith Williams, who prepared them. Roesel stated that

[4] These color-based descriptions correlate with the color copies of the diagrams attached as an exhibit in Docket 180-6.

based on his understanding, the diagrams "were prepared to describe the manner in which calls were routed[.]" Docket 218-1 at 3.

Roesel was asked several times about the meaning of the legend that accompanies each of the diagrams. For example, counsel for Sprint asked,

> Q: Let me first ask you about the legend. There's a black line that says "TDM Voice Connection." And then below it there's a light blue colored line "Voiceover IP Connection." Do you see those?
>
> A: I do.
>
> Q: What do those mean?

Id. at 5. Roesel agreed that the black arrow represented "calls that are being carried from one place to another in TDM format[.]" *Id.* When asked about the blue arrow and whether portions of the calls were delivered in "IP format," however, Roesel qualified his response by stating that,

> A: Okay. The terminology is in the context of an engineering diagram. It describes -- the black does describe time-division multiplexing, and blue describes the specific technology used for that leg of the call.

Id.; *see also id.* (referring to the legend as containing "engineering terms that Keith [Williams] used to describe the technology that is used to carry the traffic."). Roesel was also directly asked about the formatting of calls, such as,

> Q: And within that trunk switch is [a] conversion of the call from TDM to IP, right?
>
> A: Yes.

Id. at 13.

Sprint contends that Roesel's references to internet protocol are sufficient to establish that traffic was, in fact, delivered in IP format as that

phrase is defined by the FCC. But whether a call terminates in IP format depends on whether "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). And the phrase "Internet protocol" itself refers to one of several "standard operating and transmission protocols that structure the [Internet's] operation." *In re DoubleClick Inc. Privacy Litig.*, 154 F. Supp. 2d. 497, 501 (S.D.N.Y. 2001). More specifically, it is the standardized language and set of rules that governs how the packets of data are sent from one location to another. *IP-Enabled Services Notice*, 19 FCC Rcd. 4864 at ¶ 8. Thus, Roesel's bare references to internet protocol do not automatically satisfy the more specific definition set forth in the regulation.[5]

i. Scenario #1

According to Roesel, the illustrations in Scenario #1 corresponded with the time period of September 2009 to October 2010. As shown in the diagram, calls destined for NAT would have first gone from Sprint to the South Dakota Network (SDN) tandem switch in Sioux Falls, South Dakota. Although Roesel was unsure, he stated it would be "a fair assumption" that those calls would be in TDM format at this time. *Id.* at 6. The purpose of the SDN tandem switch was to determine where the incoming call would go next and to send it on.

[5] Likewise, during the SDPUC proceeding, one of NAT's witnesses was asked if "[c]alls come into NAT's switch and then are switched and delivered in internet protocol to Free Conferencing's bridge; is that correct?" Docket 180-4 at 4. The witness responded "Basically," without further elaboration. *See id.* Such an answer, without more, is too conclusory to satisfy the regulatory definition of IP format.

From there the call would then traverse a "dedicated TDM transport facility" from the SDN switch to a WideVoice switch in Los Angeles, California. *Id.* Roesel agreed that the transport facility enabled calls to be delivered from one place to another in TDM format. The WideVoice switch would then identify calls that were specifically destined for Fort Thompson, South Dakota. Roesel was then asked,

> Q: And so at some point within [the WideVoice switch] we have a conversion of the call from TDM into internet protocol?
>
> A: Yes.

Id. at 7. The call would then be sent to a router in Los Angeles, which functions as "a basic way of identifying packets and routing the packets according to the specified destination." *Id.*

From the Los Angeles router, the call would be sent through what was labeled as the "ATT IP Network" to another router that was associated with SDN in Sioux Falls. That SDN router would then direct the call through the "SDN IP Network" to another router which, according to Roesel, was physically located in Fort Thompson. From the Fort Thompson router, which belonged to NAT, there were two possible destinations on the diagram. The router would determine where the call would go depending on the destination's telephone number. One of the destinations was depicted as a box labeled "NAT Voice Applications Services." Roesel stated that the router could send the call to the equipment located in that area. Roesel was then asked,

> Q: Okay. And within that ["NAT Voice Applications Services" box], that refers to, for this time period, conference bridges owned by a Free

Conferencing Corporation, is that correct?

A: Yes.

Id. at 8. According to Roesel, a "bridge" is "a device that allows multiple incoming calls that would be joined together or bridged in the device." *Id.* at 14. And when asked about what the bridge was connected to, Roesel testified,

Q: And it's connected to – in this case it's connected to a piece of NAT equipment which is how the calls get to it, right?

A: Yes.

Q: And is it connected to anything else?

. . .

A: I believe the only connection to that bridge would be by way of NAT's services, but again I can't think of any other connection there[.]

Id. Although Roesel testified that he did not know the specifics of the connection, he testified,

Q: Sure. It would be something that would allow a router to send packets onto a piece of equipment that could then receive and understand those packets?

A: That's right.

Q: And then the piece of equipment or pieces of equipment there within that ["NAT Voice Applications Services" box] would have the ability to then receive those packets and convert those packets into a voice so that callers can hear conversations?

A: I believe that's a reasonable description of what's happening when it comes to the exact technical nature and the use of the term "converting," yes. There are voice conversations that occur, and the information is coming by way of packets into the bridge.

Id. at 8. Roesel also stated that he "believe[d] the bridge is IP compatible, yes." *Id.* at 15.

The other destination depicted on the diagram was labeled "Wimax Base." This equipment would be connected to customers via wireless technology. Roesel stated those individuals would possess "equipment that enables the subscriber to talk on a normal telephone. So there's equipment that makes that conversion." *Id.* at 9.

ii. Scenario #2

Roesel testified that the illustration in Scenario #2 correlated with the time period of October 2010 through April 12, 2012. For this diagram, Roesel agreed that the first few steps were the same as illustrated by the previous diagram. Thus, calls again came from Sprint to the SDN tandem switch in Sioux Falls in TDM format and were sent to a WideVoice switch before being sent back to an SDN router. During this time period, however, the WideVoice switch had been relocated from Los Angeles to Sioux Falls. There was no longer a depiction of the call being sent from Los Angeles through the "ATT IP Network" before returning to the SDN router. When the call left the WideVoice switch, Roesel was asked,

> Q: So within [the box representing the WideVoice switch] we have conversion from TDM into IP?
>
> A: Yes.

Id. at 11.

Roesel agreed that "packets get sent" from the WideVoice switch to the SDN router, and that the call again would traverse the "SDN IP Network" before arriving at NAT's router. *Id.* And Roesel agreed that the portion of the first diagram that depicted a connection from the NAT router to the "NAT Voice Applications Services" box remained the same. When asked about who or what actually provides the so-called "voice applications," Roesel testified,

> A: I would say that NAT is providing a service to . . . Free Conferencing that they have defined as NAT Voice Application Services. So the services they are providing to the bridge is NAT Switch Applications.

Id. Roesel did not believe the Free Conferencing equipment at that location was any different than before and stated,

> Q: . . . the [NAT router] sends packets to the Free Conferencing equipment in [the "NAT Voice Applications Services" box]?
>
> A: Yes.
>
> Q: And those packets get delivered over some kind of physical facility that can accommodate packets?
>
> A: Correct.

Id. Roesel did not believe the diagram's illustration as to the Wimax destination had changed from before.

iii. Scenario #3

The final diagram involved the time period from April 12, 2012, forward. According to Roesel, this diagram was similar to the last, with the exception of an additional piece of equipment located on the Fort Thompson reservation designated as an "EO Switch." While Roesel expressed some uncertainty about

the precise function of the additional equipment, he agreed that "it didn't really change anything fundamentally" as to how calls from Sprint came in and were delivered to their destination. *Id.* at 13.

Like the other diagrams, Roesel agreed that this diagram depicted a call from Sprint to the SDN tandem switch in Sioux Falls in TDM format. Rather than proceed to a WideVoice switch as before, however, the call went to a box labeled "Trunk Switch," which was nonetheless placed in the same vicinity on the diagram as the other SDN facilities in Sioux Falls. From there, Roesel was asked,

> Q: And within that trunk switch is [a] conversion of the call from TDM to IP, right?
>
> A: Yes.

Id. Roesel agreed that the calls were sent as "packets" to the SDN router, and that those packets proceeded through a similar path as depicted in Scenario #2, although it now passed through the "EO Switch" before reaching a box labeled "Colocated Voice Application Services." *Id.* While the name of the voice applications box was different from the prior diagrams, Roesel was asked if that box "is again Free Conferencing -- conference bridge equipment," to which Roesel responded affirmatively. *Id.* Regarding the connection between the bridge equipment there and the "EO Switch" box, Roesel was asked,

> Q: Okay. We've still got packets going from the last piece of NAT equipment to the Free Conferencing equipment?
>
> A: Yes.
>
> . . .

Q: Yeah. The Free Conferencing equipment has to be able to receive and process those packets for there to be a call completed?

A: When the call is being delivered in packetized format, yes, the bridge needs to have the ability to process those packets.

Id. The portion of the diagram involving the Wimax base again appeared to be the same as was depicted before.

The record before the court demonstrates that, consistent with the times depicted in the diagrams, calls came in from Sprint and were exchanged in TDM format. Whether at one of the WideVoice switches or the trunk switch located in Sioux Falls, calls were converted from TDM format into packets of data. These packets were sent from either of those switches via routers to NAT's facilities. During each time period depicted in the diagrams, Roesel also testified that Free Conferencing's bridge equipment was located on Fort Thompson and connected to NAT's equipment. Although Roesel did not know the specifics, he stated that NAT provided switching services for its customer, Free Conferencing. The data packets would get routed and delivered to Free Conferencing by a facility or other piece of equipment that could receive and process the packets. According to Roesel, Free Conferencing's bridges were IP compatible. Moreover, Roesel stated that Free Conferencing's equipment would need to be able to receive and process data packets in order for a voice call to be completed. Thus, the switching service provided by NAT to Free Conferencing required IP-compatible customer premises equipment to complete the call. *See In the Matters of IP-Enabled Services E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd. 10245, ¶ 24 n.77 (2005) (defining IP-

compatible customer premises equipment). Consequently, the calls terminated in IP format. *See* 47 C.F.R. § 51.913(a)(3). Because the traffic was exchanged over PSTN facilities and terminated in IP format, the calls were VoIP-PSTN traffic. *CAF Notice*, 26 FCC Rcd. 17663, at ¶ 940.

IV. Would NAT Need to Refile its Interstate Tariff?

As part of its *CAF* decision, the FCC announced that under its "new intercarrier compensation regime, all traffic–including VoIP traffic–will be subject to a bill-and-keep framework."[6] *CAF Final Rule*, 76 Fed. Reg. 73830 at ¶ 62. Moving toward that goal, the Commission adopted a "transitional compensation framework" for VoIP traffic. *Id.* Within that framework, the FCC stated,

> (1) We bring all VoIP-PSTN traffic within the section 251(b)(5) [reciprocal compensation] framework;
> (2) Default intercarrier compensation rates for toll VoIP-PSTN traffic are equal to interstate access rates;[7]
> (3) Default intercarrier compensation rates for other VoIP-PSTN traffic are the otherwise-applicable reciprocal compensation rates; and
> (4) Carriers may tariff these default charges for toll VoIP-PSTN traffic in the absence of an agreement for different intercarrier compensation.

[6] A "bill-and-keep" system of compensation requires carriers to "look first to their subscribers to cover the costs of the network, then to explicit universal service support when necessary." *CAF Final Rule*, 76 Fed. Reg. 73830 at ¶ 18. This differs from the "model that dominated ICC regimes of the last century" where the calling party bears the entire cost of originating, transporting, and terminating a call. *Id.*

[7] "Toll" generally refers to traffic that is exchanged between different exchange areas. *CAF Notice*, 26 FCC Rcd. 17663 at ¶ 944 n.1902.

Id. (numerals added for clarity). As a means "of providing certainty regarding prospective intercarrier compensation obligations for VoIP-PSTN traffic," the Commission announced that "[c]arriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs, though remain free to negotiate interconnection agreements specifying alternative compensation for that traffic." *Id.* at ¶ 149. Because the Commission recognized the potential difficulty to distinguish VoIP-PSTN traffic from other traffic, it also "permit[ted] LECs to address this issue in their tariffs, much as they do with jurisdictional issues today." *Id.* at ¶ 63.

These changes were needed in part because "[b]oth state commissions and courts have been called upon to address disputes regarding intercarrier compensation for VoIP traffic in a range of contexts and with a range of outcomes." *CAF Notice*, 26 FCC Rcd. 17663 at ¶ 937. The Commission also described what it called "numerous informal disputes in this area," such as "terminating carriers [that] state[d] that they receive[d] no intercarrier compensation payments at all for traffic that is, or is alleged to be, VoIP traffic." *Id.* at ¶ 938. These rules were thus designed to "reduce disputes and provide greater certainty to the industry regarding intercarrier compensation revenue streams while also reflecting the Commission's move away from the pre-existing, flawed intercarrier compensation regimes that have applied to traditional telephone service." *Id.* at ¶ 946.

Sprint contends that the FCC sought to achieve those goals by giving LECs such as NAT three options regarding compensation for VoIP-PSTN traffic.

First, NAT could revise its interstate tariff to specifically address VoIP-PSTN traffic compensation obligations. Second, NAT could rely on negotiated interconnection agreements.[8] Or third, NAT could simply do nothing and thereby forgo compensation altogether. NAT acknowledges that it has a generic tariff that does not specifically address VoIP-PSTN traffic, and did not revise its tariff to do so after the *CAF Order* became effective. Sprint concludes that NAT has therefore, by default, elected not to receive compensation for VoIP-PSTN traffic.

The court is unaware of any authority addressing this issue. From the numerous orders and notices involved in the *CAF* proceedings, Sprint's primary support for its position comes from a single footnote in the November 18, 2011, *CAF Notice* that provides:

> CMRS providers currently are subject to detariffing, and nothing in our intercarrier compensation framework [for] VoIP-PSTN traffic disrupts that regulatory approach. (citing *In re Sprint PCS*, 17 FCC Rcd. 13192 (2002). . . . Under our permissive tariffing regime, providers likewise are free not to file federal and/or state tariffs for VoIP-PSTN traffic, and instead seek compensation solely through interconnection agreements (or, if they wish, to forgo such compensation).

CAF Notice, 26 FCC Rcd. 17663 at ¶ 961 n.1974. In contrast to this footnote, the FCC reiterated throughout the body of the same *CAF Notice* that it was establishing a set of default intercarrier compensation rates applicable to VoIP-

---

[8] Interconnection agreements are analogous to a contract between an LEC and another telecommunications carrier linking the two networks together for the mutual exchange of traffic. *See, e.g.*, *Destek Grp., Inc. v. State of New Hampshire Pub. Utils. Comm'n.*, 318 F.3d 32, 37 (1st Cir. 2003). No such agreement is present here.

PSTN traffic, and that carriers were permitted to include those default rates in their tariffs or address such traffic through negotiated agreements. *See, e.g.*, *id.* at ¶¶ 933, 934, 944, 960-61, 967. The FCC's *CAF Final Rule* contains similarly permissive language. *See, e.g.*, *CAF Final Rule*, 76 Fed. Reg. 73830 at ¶ 149 ("Carriers may tariff charges at rates equal to interstate access rates for toll VoIP-PSTN traffic in federal or state tariffs, though remain free to negotiate interconnection agreements specifying alternative compensation for that traffic."). And rather than an observation that the FCC was, for the first time, establishing a new obligation for carriers to pay for the exchange of VoIP traffic (which includes VoIP-PSTN traffic), the FCC was "adopt[ing] rules *clarifying the obligation* of VoIP traffic to pay intercarrier compensation charges during the transition to bill and keep." *CAF Notice*, 26 FCC Rcd. 17663 at ¶ 930.

Moreover, there is some ambiguity about the footnote's initial reference to "CMRS providers," which Sprint omitted, and the same footnote's later reference to the word "providers" appearing in isolation. While CMRS providers are subject to mandatory detariffing,[9] *In re Sprint PCS*, 17 FCC Rcd. 13192 at ¶ 8 (July 3, 2002), the FCC has also adopted specific rules regarding the role of tariffs in LEC-CMRS relationships. *See CAF Notice*, 26 FCC Rcd. 17663 at ¶ 964. It is unclear whether the footnote was intended to be read in that context or the context in which Sprint presents it. Even if the footnote's reference that providers may "if they wish, to forgo such compensation" did

[9] CMRS stands for "Commercial Mobile Radio Service." CMRS providers include cellular phone service providers, among others. *Alma Commc'ns Co. v. Missouri Pub. Servs. Comm'n.*, 490 F.3d 619, 621 n.5 (8th Cir. 2007).

apply to NAT, it does not follow that the FCC intended that choice to made presumptively. Likewise, if the Commission's intent was that carriers must revise their tariffs or risk forfeiting all compensation for VoIP-PSTN, it could have said so with greater clarity. *Cf. CAF Notice*, 26 FCC Rcd. 17663 at ¶ 667 ("LECs that meet the access stimulation trigger *are required to refile* their interstate switched access tariffs as outline above.") (emphasis added).

Thus, on one hand, allowing carriers to address what the FCC defined as VoIP-PSTN traffic through tariffs or other agreements during the transitional period would alleviate the Commission's concerns about providing certainty to the industry and reducing the number of disputes regarding VoIP-PSTN compensation. On the other hand, establishing a bright-line rule that simply forbid compensation for VoIP-PSTN traffic in the absence of a revised tariff or agreement that specifically addressed such traffic would also provide certainty, if not reduce litigation. In the absence of a clearer statement that the FCC intended the latter, the court concludes that NAT was permitted–but not required–to amend its interstate tariff defining VoIP-PSTN traffic and its attendant compensation obligations. Although NAT did not do so, that does not preclude it as a matter of law from recovering for the VoIP-PSTN traffic delivered by Sprint and terminated by NAT.

CONCLUSION

NAT seeks recovery under its interstate tariff number three for terminating access fees, including fees related to the termination of VoIP-PSTN traffic. Although the FCC permitted NAT to amend its interstate tariff to specify

how such traffic would be identified and the specific compensation obligations concerning VoIP-PSTN traffic, the Commission did not require NAT to do so. Accordingly, it is

ORDERED that Sprint's motion for partial summary judgment (Docket 176) is denied.

Dated April 27, 2015.

BY THE COURT:

/s/ *Karen E. Schreier*
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE