UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SPRINT COMMUNICATIONS COMPANY L.P.,

Plaintiff,

v.

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

Defendants.

Civil No. 10-4110-KES

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

Sprint is entitled to summary judgment on Native American Telecom LLC's ("NAT") claims to enforce its FCC Tariff No. 3 as to minutes delivered on and after December 29, 2011. NAT's attempts to create confusion have not created material disputes of fact. Moreover, NAT's argument that the regulatory treatment of every Internet protocol service offering depends on whether the carrier also offers an alternative non-IP service borders on the comical, and has previously been rejected by the FCC. The Court should grant Sprint's motion, thereby limiting the issues to be addressed by the FCC on any subsequent referral.

I. THERE ARE NO MATERIAL DISPUTES OF FACT

NAT spends 32 pages attempting, without success, to create the illusion of a material dispute of fact. The Court should find there are no disputes of fact that prevent it from entering judgment for Sprint as requested in its motion.

A. NAT Does Not Dispute the content of its Tariff No. 3.

Significantly, NAT does not dispute the identity and content of its Tariff No. 3. ECF No. 193, ¶¶ 2-4. It is undisputed, then, that NAT's FCC Tariff No. 3 does not address VoIP-PSTN traffic. Nor does NAT dispute that its invoices for the time period covered by Sprint's motion relied only on its FCC Tariff No. 3. *Id.* ¶ 5.

B. Virtually All Calls Were Terminated into Free Conferencing Corporation Bridges.

Sprint's Statement of Fact ("SOF") 6 and SOF 8 demonstrated that Free Conferencing Corporation was NAT's only conference call customer, and that all but an insignificant number of minutes (based on Sprint measurements) have been to Free Conferencing Corporation's numbers. ECF No. 177, at 2-3.

NAT purports to dispute those statements, but offers no evidence to rebut those facts. In responding to SOF 6, NAT admits that Free Conferencing Corporation "is the only conferencing company that is currently a NAT customer" (ECF No. 193 at 3), and provides no evidence

that there have ever been any other such customers. *Id.* In responding to SOF 8, NAT provides evidence that it has other customers receiving voice service, but does not document the number of minutes delivered to those customers in comparison to the number of minutes delivered to Free Conferencing Corporation. *Id.* at 4-5.[1] On the record before the Court, the calls in dispute went to Free Conferencing Corporation.

C. Calls into Free Conferencing Corporation Bridges Were Delivered in Internet Protocol.

Sprint used NAT's own documents and admissions to show that the calls delivered into Free Conferencing Corporation bridges were delivered in Internet protocol. ECF No. 177, at 3-5 (SOF 9). NAT disputes Sprint's SOF 9, but never denies the fact asserted, and provides no evidence contradicting Sprint's statement. Sprint's SOF 9 is true and should be accepted as such.

1. The call flow diagrams.

Sprint provided call flow diagrams and explained that the diagrams show the last leg of a call being delivered to Free Conferencing Corporation. ECF No. 177 at 3-5; ECF No. 180-5 (Call Flow Diagrams). NAT does not dispute that Sprint properly identified the link between NAT's equipment and Free Conferencing Corporation's equipment. ECF

[1] NAT's evidence that it offers non-voice services, and that it plans to expand its offerings, is not responsive to SOF 8, is irrelevant, and should be disregarded. ECF No. 193, at 4-5.

No. 193, Response to SOF 9(b). That link was described in the legend as a "Voice over IP Connection." ECF No. 180-5, Bates 000730. The document, which NAT agrees "speaks for itself," shows exactly what Sprint indicated in SOF 9.

2. NAT's challenge to authenticity.

Rather than provide an alternate explanation of the call flow diagrams, NAT challenges – of all things – the authenticity of the document it prepared and produced in discovery. NAT claims that because the document may not be what it purports to be, there is no admissible evidence that the final link involved Internet protocol. ECF No. 192, at 1. NAT's argument has many flaws.

First, Rule 56 allows a movant to establish facts by relying on materials in the record, including interrogatory responses. Fed. R. Civ. P. 56(c)(1)(A). At the summary judgment stage, the focus is not on whether the evidence has been submitted in an admissible form. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) ("We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."). Instead, the focus is on whether the material can be "presented in a form that would be admissible in evidence" at trial. Fed. R. Civ. P. 56(c)(2) (emphasis added). NAT does not argue that the call diagrams are incapable of being

authenticated. Indeed, since the document was produced by NAT in discovery, it would be relatively simple at trial for Sprint to call a NAT witness to testify that the document is what it purports to be. NAT's authenticity argument is irrelevant under the Rules of Civil Procedure.

Second, NAT's representation that the document has not been authenticated is demonstrably wrong. Contrary to NAT's claim that the document (which it provided in discovery) cannot be trusted, the document was, in fact, authenticated by NAT's president when he was deposed in 2013.

> Q. Can you turn to Tab 4. And I want to mark this NAT Exhibit 4.
> (NAT Exhibit No. 4 was marked for identification by the shorthand reporter and is attached hereto.)
> BY MR. SCHENKENBERG:
> Q. I just -- this was something that Scott sent around to us that has a number of scenarios.
> …
> Q. Anyway, so what you have in Tab 4 and what's been marked, these are the -- to your knowledge, this is the information that was provided by your network folks to kind of lay out technical call scenarios?
> A. Is this the entire document that was sent to you?
> Q. I believe it is, yes.
> A. Okay.
> Q. And if it is not, I certainly don't mind making sure the record clear and complete.
> A. Okay.
> Q. This is information you believe to be true and accurate based on what you have gotten from your technical team?
> A. That's right.

Nov. 14 Schenkenberg Aff. (ECF No. 198) Ex. A, at 154-55 and Depo. Ex. 4 (same diagrams).[2]

If this is not enough, NAT then made Mr. Holoubek's entire deposition transcript, including the call flow diagrams, an exhibit in the South Dakota PUC case, and it was received into evidence. ECF No. 180-4, at 448. Then, when Sprint offered the color version of the document into the record, NAT did not object. *Id.* at 448-449 (Wald, stating "I don't have any problem" admitting the color version of the call flow diagrams, which were already in the record attached to the Holoubek deposition transcript).

To sum up, NAT produced the document in discovery; NAT's president authenticated it and verified its accuracy; NAT caused the document to be entered into evidence; and NAT did not object when Sprint offered the color version. NAT's authenticity argument is not only wrong, it is indefensible.

[2] Mr. Holoubek's testimony that this information was provided by NAT's "technical team" contradicts Mr. Wald statement that the diagrams were "not prepared by NAT." ECF No. 191-1, ¶ 8. Because it is implausible that Mr. Wald actually has personal knowledge of that fact, the Court should disregard Mr. Wald's statement. The documents were prepared by, and produced by, NAT.

3. NAT witnesses confirmed the that calls were delivered in Internet protocol and had no problem understanding the diagrams.

The call flow diagrams are not the only evidence that calls were delivered to Free Conferencing Corporation in Internet protocol. Mr. DeJordy admitted this fact in the South Dakota PUC Proceeding:

Q. And so today are you familiar with how Free Conferencing receives service from NAT?
A. Yes.
Q. Calls come into NAT's switch and then are switched and delivered in internet protocol to Free Conferencing's bridge; is that correct?
A. Basically.

ECF No. 180-4, at 161-62. Mr. Dejordy's testimony is admissible evidence that supports SOF 9. (Note also that NAT's lawyers did not object to the question, and Mr. DeJordy had no difficulty understanding what was asked.) While Mr. DeJordy submitted an affidavit that accompanied NAT's response, he did not contradict SOF 9, nor did he retract his sworn testimony before the South Dakota PUC. ECF No. 192-1.

Similarly, although NAT's consultant, Mr. Roesel, did not prepare the call flow diagrams, he agreed that the call flow diagrams identified an Internet protocol connection between NAT and Free Conferencing Corporation. ECF No. 180-4, at 449-50. This is important because it disproves NAT's argument that the diagrams are confusing or

incomplete. As the transcript shows, Mr. Roesel had no difficulty understanding the diagrams, and readily admitted that the diagrams were contrary to his prior understanding. *Id.*

4. NAT has not denied that calls were delivered to Free Conferencing Corporation in Internet protocol.

The Court should place great weight on the fact that neither NAT nor any witness claims that the calls were delivered into NAT in a protocol other than Internet protocol. NAT challenges admissibility, claims confusion, but never reaches that key fact. For example, when faced with the blue line in the Call Flow Document that is labeled (by NAT) as a "Voice over IP Connection" connecting its equipment to conference bridges, NAT crafted a limited denial, denying "that the Call Flow Documents show the *format* of the traffic that terminates into the 'customer premises equipment' of NAT customers generally." ECF No. 193, at 11, 13 (second emphasis added). In other words, NAT denied that the diagrams show the format of all calls to all of its customers, but does not deny (because it cannot honestly do so) that the blue arrow is an Internet protocol connection between NAT's equipment to Free Conferencing Corporation's equipment.

The affidavit of Mr. Tcipnajotov also misses the target. He carefully avoids speaking to the protocol used to deliver calls into Free Conferencing Corporation's bridge(s). *See* ECF 192-2 (only addressing

whether NAT required calls to be delivered in Internet protocol). Instead, he talks about the (irrelevant) fact that some bridges can accept calls in both IP and TDM formats (*id.* ¶ 2), and that NAT does not require Free Conferencing Corporation's bridges to be Internet protocol compatible. *Id.* ¶ 3. Thus, Mr. Tcipnajotov's affidavit does not create a material dispute of fact.

The Court should find there is no reasonable dispute of fact as to whether calls were delivered to Free Conferencing Corporation's bridges in Internet protocol.

II. ARGUMENT

A. Calls Into Free Conferencing Corporation were VoIP-PSTN Calls.

The FCC defined "VoIP-PSTN traffic" as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." *CAF Order*,[3] ¶ 940. The FCC's rules provide that "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). Here, the service NAT has provided to Free Conferencing Corporation is the delivery of calls, in Internet

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

protocol, over a "Voice over IP Connection." ECF No. 180-6, Bates 000730. To receive that service, and to complete those calls, Free Conferencing Corporation must use Internet protocol-compatible customer premises equipment. Because the service requires the use of Internet protocol-compatible customer premises equipment, the calls qualify as VoIP-PSTN traffic.

NAT argues that Rule 51.910(a)(3) has nothing to do with "what the customer actually uses." ECF No. 192, at 16. Instead, NAT argues, traffic terminates in Internet protocol format only if the carrier offers nothing but Internet protocol service, thereby requiring the customer to use Internet protocol-compatible equipment. *Id.* In other words, because Free Conferencing Corporation could choose to take a different service not reliant on Internet protocol, NAT claims that even Internet protocol calls do not qualify as VoIP-PSTN traffic.

NAT's reading should be rejected because it does not give effect to the plain language of the rule. Compare the following:

> **Section 51.913(a)(3)**: 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.
>
> **NAT's rewrite**: Telecommunications traffic originates and/or terminates in IP format if **the carrier** ~~it originates from and/or terminates to an end-user customer of a service that~~ requires **the customer to use only** Internet protocol-compatible customer premises equipment.

The words chosen by the FCC focus on what the service requires (i.e., necessitates), while NAT's reading has the carrier imposing a requirement. However, it makes no sense to make "carrier" the subject action verb like "requires," when the word "carrier" is neither in, or suggested by, the Rule's plain language.[4]

This argument has been made before. In 2008, the FCC began an enforcement proceeding against Cardinal Broadband which, the FCC alleged, had not provided compliant E911 access for its interconnected VoIP service. *In The Matter Of Cardinal Broadband LLC*, Notice of Apparent Liability for Forfeiture & Order, 23 FCC Rcd. 12224 (2008).[5] An "interconnected VoIP service" was defined as a service that

> (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet Protocol-compatible customer premises equipment; and (4) permits users generally to receive calls that originate on the public switched telephone network ("PSTN") and to terminate calls to the PSTN.

Id. at ¶ 2 n.2 (citing 47 C.F.R. § 9.3) (emphasis added). The FCC later relied on this definition when it drafted its new Rule 51.913(a)(3). *CAF Order*, ¶ 940 n.1892 ("Although our prospective VoIP-PSTN intercarrier

[4] Consider, for example, a notation on a lunch menu: "If you order an item that requires the use of the oven, allot an extra 20 minutes to receive your food." Under NAT's construction, it could order the meatloaf without a delay because the restaurant did not "require" it to order the meatloaf. This is absurd.

[5] E911 service allows for location accuracy.

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.'").

One argument Cardinal Broadband made to the FCC's Enforcement Bureau was that it did not "require" customers to use Internet protocol compatible equipment because it also offered analog telephone service "at all the locations at which it provides interconnected VoIP service." *Cardinal Broadband*, 23 FCC Rcd. 12224, ¶ 6. The FCC's Enforcement Bureau easily rejected this poor reading of the definition:

> Finally, we reject Cardinal's argument that it is not an interconnected VoIP service provider because it also sells Qwest analog telephone service that does not "require a broadband connection from the user's location" or "require internet protocol-compatible customer premises equipment." Conventional analog telephone service and interconnected VoIP service are distinct services. Cardinal's status as an interconnected VoIP service provider is unaffected by the fact that it also offers conventional analog telephone service.

Id. ¶ 11 (emphasis added) (footnotes omitted).[6]

[6] Though not discussed in the *Cardinal Broadband* order, consider the broader impact, from a regulatory standpoint, of categorizing carriers based on what services are offered to the customer base, not on the services actually provided. NAT's argument, if accepted, would not only limit the availability of E911 service (as shown by *Cardinal Broadband*), but it would also create a loophole with respect to obligations to pay much needed regulatory assessments on revenues from Internet protocol

Based on the plain language of the Rule, and guided by FCC analysis in *Cardinal Broadband*, the Court should hold that NAT delivers VoIP-PSTN traffic to Free Conferencing Corporation within the meaning of Rule 51.913(a)(3) because that service requires the use of Internet protocol-compatible equipment by Free Conferencing Corporation.

B. NAT's Failure to Include IP Language in its Tariff is Fatal to Its Tariff Claim.

Sprint moves for partial summary judgment on NAT's Counts One and Two – both of which seek to enforce NAT's federal tariffs – because NAT failed to include language in its tariff requiring compensation to be paid on VoIP-PSTN traffic. ECF No. 178, at 3-6. NAT responds by arguing that it did not need to include such language in its tariff, and was simply entitled to payment for that traffic because the FCC's rules extend a compensation obligation to VoIP-PSTN traffic. ECF No. 192, at 17-18. But that is not what the FCC said. Instead, the FCC brought these charges within its "permissive tariffing regime," which makes tariffs optional. *CAF Order*, ¶ 961 n.1974. And, if carriers do not file tariffs, they instead must "seek compensation solely through interconnection

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enabled services. *See In the Matter of Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 34 (2006) ("We therefore find that extending [universal service find] contribution obligations to providers of interconnected VoIP services is necessary at this time in order to respond to these growing pressures on the stability and sustainability of the Fund.").

agreements (or, if they wish, to forgo such compensation)." *Id.* As Sprint pointed out, NAT's failure to amend its tariff when given the right to do so was a choice to forgo compensation. ECF No. 178, at 5-6.

NAT makes no attempt to rebut the FCC's statement in ¶ 961 of the *CAF Order.* Instead, it argues that the FCC's rules, of their own accord, create a payment right. ECF No. 192, at 19. This argument is wrong,[7] but completely off point on this motion. NAT's Counts One and Two rely solely on its Tariff No. 3 for the periods that are the subject of this motion. NAT admitted this when it chose not to dispute Sprint's SOF 5:

> **Sprint's SOF 5**. Relying on its FCC Tariff No. 3, NAT billed Sprint terminating access charges for telephone calls delivered by Sprint to NAT for termination "to NAT's conferencing customer, Free Conferencing Corporation." ECF No. 172, ¶¶ 45, 46.
>
> **NAT's Response**:
> NAT does not dispute this statement to the extent it refers to bills covered by the August 2011 tariff. Terminating access charges for calls covered by NAT's earlier tariffs were billed pursuant to that tariff.

ECF No. 193, at 2. Thus, NAT did not issue bills under the authority of 47 C.F.R. § 51.913(a)(3), nor do Counts One and Two seek to enforce that Rule. Instead, those counts rely solely on Tariff No. 3, and Tariff No. 3 neither defines, nor imposes compensation obligations on, the newly

[7] *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 52-55 (2007) (no private right of action to enforce rule; private right of action results from violation of statute, or from FCC order making some action a violation of a statute).

defined category of VoIP-PSTN traffic. Even if NAT were correct that it had an independent cause of action for failure to pay compensation mandated by an FCC Rule, its Counts One and Two do not assert any such claim.

Sprint's motion should be granted.

C. NAT's Reliance on The Filed Rate Doctrine is Misplaced.

Next, NAT argues that filed rate doctrine precludes Sprint from disputing NAT's bills. NAT's argument appears to be twofold: (1) NAT is entitled to judgment simply because it has a tariff, regardless of the language of the tariff or the facts; and (2) Sprint cannot retroactively attack NAT's rates for VoIP-PSTN traffic.

1. The filed rate doctrine is not a defense to Sprint's motion.

The Court should disregard NAT's argument that the filed rate doctrine prevents Sprint from disputing NAT's bills. The question Sprint has raised on its motion is not, as NAT argues, whether Tariff No. 3 "is defective" (ECF No. 192, at 21). Instead, the question is whether the tariff applies as to the calls in dispute. Judge Kornmann has recognized the difference:

> Where, as here, it is alleged that the charges as set out in Northern Valley's tariffs do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat AT & T's claims and defenses.

Northern Valley Communications, LLC v. AT & T Corp., 659 F. Supp. 2d 1056, 1061 (D.S.D. 2009) (denying LEC judgment on the pleadings against an IXC). So, NAT is correct that its tariff is the exclusive source of NAT's rights, but, as recognized in *Northern Valley*, if the tariff does not give NAT the rights it seeks to enforce, Sprint's dispute will be valid.

2. Sprint's motion does not attack NAT's rates.

NAT's argument that Sprint cannot challenge NAT's "rates for VoIP-PSTN call traffic" comes out of left field, for two reasons. First, NAT's Tariff No. 3 has no rates for VoIP-PSTN call traffic, which is the point of Sprint's motion. Second, Sprint's motion did not challenge NAT's rate levels, only the application of the tariff to the calls into Free Conferencing. ECF No. 178, at 4-6. NAT's argument is off point.

D. NAT's Claim for Compensation Under *Farmers II* Does Not Arise Under Its Counts One and Two.

NAT continues to throw arguments at the wall on page 22 of its memorandum. There it argues that, under footnote 96 of the FCC's *Farmers II* decision, it would be entitled to some compensation even if its tariff gives it no right to compensation. ECF No. 192, at 22. Sprint disagrees with the premise, but recognizes it is an issue the Court has consistently kept open and referred to the FCC. As such, Sprint did not move for judgment on NAT's Count Three, which asserted a claim for Quantum Meruit/Unjust Enrichment.

Neither NAT's Count One nor its Count Two can reasonably be construed as seeking compensation outside the tariff regime per footnote 96. Count One alleges that "Sprint has failed to pay the access charges that Sprint owes under the tariffs." ECF No. 172, ¶ 63. Count Two alleges that "NAT has supplied services and submitted invoices to Sprint pursuant to NAT's filed tariffs for services provided, which constitutes (sic) an implied contract." *Id.* ¶ 67.

Whether NAT is entitled to compensation under *Farmers II* is a question outside the scope of Counts One and Two, to be decided another day. This argument should be rejected.

E. NAT Misunderstands the Rules of Civil Procedure.

Finally, NAT argues that Sprint cannot make its VoIP-PSTN argument as to Tariff No. 3 because Sprint did not amend its Complaint to add defenses to claims that had not yet been asserted by NAT. Sprint addressed this issue in its reply in support of its motion to dismiss. ECF No. 196. NAT cites no cases suggesting that Sprint would be precluded from defending NAT's amended counterclaim. To the contrary, the case cited by NAT involved plaintiffs whose complaint was dismissed, and who waived their right to amend a third time by not seeking leave from the district court. *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 665 (8th Cir. 2012). Nothing in that decision suggests that Sprint should be

denied the right to right an answer and assert affirmative defenses, something the rules give every litigant the right to do.

Nor is there any import to NAT's assertion that "claims arising from the same transaction or occurrence must be brought together or are waived." ECF No. 192, at 24. NAT's point is unclear, and the case NAT cites in support of this proposition contains neither the clause "transaction or occurrence," nor the word "waived." *Id.* at 24 (citing *Gomez*, 676 F.3d at 665). Presumably, NAT intended to invoke Fed. R. Civ. P. 13(a)(1)(A), which designates a counterclaim as compulsory if it arises out of the same transaction or occurrence as the opposing party's claim. But it makes no sense to suggest that Sprint failed to assert compulsory counterclaims when it filed its complaint (not counterclaim) in 2010. Nor could any claim Sprint might wish to assert associated with Tariff No. 3 have been compulsory when the pleadings were filed in 2010 and 2011. *Arch Mineral Corp. v. Lujan*, 911 F.2d 408, 412-13 (10th Cir. 1990) (claims that have not matured when complaint is filed are not compulsory counterclaims). NAT's argument is far off the rails of logic.

The Court should reject NAT's argument that Sprint is somehow procedurally barred from defending NAT's claims under Tariff No. 3.

III. CONCLUSION

NAT's Counts One and Two rely on NAT's FCC Tariff No. 3 for periods after the effective date of the *CAF Order*'s new compensation regime for VoIP-PSTN traffic. NAT chose not to amend its tariff, and thereby agreed to forgo compensation. Because NAT's tariff does not apply to the traffic delivered into Free Conferencing Corporation after December 29, 2011, Sprint's motion should be granted.

Dated: November 21, 2014.

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