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 MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION.

Defendant Native American Telecom, LLC ("NAT") hereby submits this memorandum in support of its motion for summary judgment ("Motion") on (1) all claims asserted by Plaintiff Sprint Communications Company L.P. ("Sprint") and (2) NAT's counterclaims to collect amounts due for interstate terminating access charges billed to Sprint since 2010.

In its 2010 Complaint, which is Sprint's only pleading in this case, Sprint asserted only two grounds to justify its refusal to pay charges billed by NAT. It alleged that NAT is engaged in unlawful "traffic pumping" and that NAT is a "sham" entity. On November 18, 2011, the Federal Communications Commission ("FCC") issued an order in the Connect America Fund proceeding (the "CAF Order") expressly rejecting Sprint's theory that the practice at issue was unlawful. Then, in 2014, the South Dakota Public Utilities Commission ("PUC") issued an order, including formal findings of facts, in a contested proceeding expressly rejecting Sprint's

claim that Sprint is a "sham." Thus the only two grounds Sprint has relied on to justify its failure to pay NAT either have no merit under the law or have already been adjudicated against Sprint in a contested proceeding.

Further, in July 2014, the Court gave the parties leave to amend their claims. Sprint chose not to amend and thus left "traffic pumping" and its allegation that NAT is a "sham" as its only defenses to payment. Sprint also has taken the position that no discovery in this case is necessary.[1] Sprint has thus chosen to justify its non-payment solely on the legal theories asserted in 2010, which are now clearly ripe for summary judgment.

Finally, Sprint has filed a motion for summary judgment on a legal theory not asserted in its pleadings. That legal theory, which concerns a tortured construction of the CAF Order regarding voice over Internet protocol ("VoIP") traffic, also has no merit and does prevent the entry of summary judgment for NAT.

II. UNDISPUTED MATERIAL FACTS.

A. NAT's History.

NAT was formed to provide local phone and broadband services to the members of the Crow Creek Sioux Tribe, who for a variety of reasons cannot get service from traditional carriers like Sprint. NAT's Statement of Undisputed Material Facts ("NAT Facts"), filed contemporaneously herewith, ¶ 1. In October 2008, the Crow Creek Sioux Tribal Utility Authority granted to NAT a certificate of authority for the provision of telecommunications service on Crow Creek. *Id.*, ¶ 2.

In September 2009, NAT filed its first interstate tariff with the FCC and first access services tariff with the Tribal Utility Authority ("2009 Tariffs"). *Id.*, ¶ 3. In August 2011, NAT filed an amended tariff voluntarily reducing its rates so they became equivalent to the price cap

[1] *See* Docket 207.

LEC with the lowest interstate switched access rates in South Dakota ("Tariff No. 3"). *Id.*, ¶ 4. Tariff No. 1, Tariff No. 2, and Tariff No. 3 set all charges at the ***interstate rate.*** *Id.*, ¶ 5.

Pursuant to its tariffs, NAT has submitted invoices to Sprint for access charges associated with the access services provided to Sprint. *Id.*, ¶ 6. Beginning in March 2010, Sprint ceased paying for the access services it takes from NAT. *Id.* Sprint continues to take access services from NAT, while withholding payment for the services NAT provides. *Id.*

B. Sprint's Original Claims.

In August 2010, Sprint initiated this action. In its Complaint, Sprint identified two grounds to justify its refusal to pay NAT's charges. According to the 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 NAT exists merely to benefit free conferencing companies. *Id.*, ¶ 10. Finally, Sprint's Complaint alleged that according to the FCC, NAT's business model is "likely unlawful and [the FCC] is still exploring ways to prohibit them going forward."[2] *Id.*, ¶ 29.

Sprint's original Complaint references only NAT's 2009 tariffs that had been filed as of the date of its 2010 Complaint. However, the 2010 Complaint also sought prospective relief concerning future conduct. It seeks permanent injunctive relief enjoining "NAT from assessing charges on Sprint pursuant to their unlawful scheme." *Id.*, ¶ 45. It also seeks a declaratory

[2] This reference was apparently to the work of the FCC that eventually led to the CAF Order, which in November 2011 found that NAT's business model was *not* unlawful.

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*.

C. The CAF Order And Subsequent The Federal Regulations.

On November 18, 2011, the FCC issued the CAF Order. NAT Facts, ¶ 7. Among other things, the CAF Order rejected the basic premise of Sprint's 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. NAT Facts, ¶ 8. In this regard, the FCC clarified the definition of VoIP-PSTN traffic, reiterated its position that this traffic is indeed compensable, and directed that beginning in July 2012 all CLEC terminating access charges including, but not limited to, intrastate traffic, interstate traffic and VoIP-PSTN traffic would be compensable only at the interstate rate (except in rare circumstances where the intrastate rate might be lower). *Id*.

Specifically, the CAF Order defines VoIP-PSTN traffic as "traffic exchanged over PSTN facilities that originates and/or terminates in IP format." 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 this section of

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.

Those regulations then provide, as earlier stated in the CAF Order, that PSTN-VoIP traffic shall be compensated only at the relevant interstate rate, 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).

The CAF Order stated specifically that 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. NAT Facts, ¶ 9, CAF Order, ¶ 691. 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. NAT Facts, ¶ 9.

D. The PUC Findings In 2014.

In October 2011, 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"). *Id.*, ¶ 11. Sprint

intervened in the PUC Proceeding for the purpose of contesting NAT's application. *Id.*, ¶ 12. Sprint contended, among other things, that NAT was a "sham" enterprise. *Id.* Sprint also submitted pre-filed written testimony of Randy Farrar, who Sprint identified as its expert and representative, that NAT is a "sham." *Id.* The allegations are, for all intents and purposes, identical to the allegations in Sprint's 2010 Complaint. Docket 1, ¶¶ 2, 10, 21, 32.

At the 2014 contested evidentiary hearing on NAT's application, Farrar testified both as Sprint's official representative and as an expert[3] that NAT was complying with all applicable laws and regulations, including the CAF Order, 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.

NAT Facts, ¶ 13.

On May 13, 2014, the PUC voted to approve NAT's application and, in its subsequent order dated June 12, 2014 ("PUC Order"), made formal Findings of Fact and Conclusions of Law. *Id.*, ¶ 14. 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.* 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

[3] Sprint emphasized for the PUC that its long-term employee was not just an expert, but also its representative who spoke for the company. NAT Facts, ¶ 13, Hearing Transcript, pp. 476:13-477:14, 24-25.

> 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., ¶ 14.

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*., ¶ 15.

E. NAT's Counterclaim To Collect Terminating Access Fees.

In response to the Complaint, NAT filed a Counterclaim to collect the outstanding charges due from Sprint, which were then approximately $600,000. Docket 99, ¶ 30. The Counterclaim asserted that the charges were continuing to accrue daily as Sprint continued to withhold amounts due. *Id.* In September 2014, after the Court gave the parties leave to update their pleadings, NAT filed an Amended Counterclaim that continued to assert the claims for terminating access charges due. Docket 171, ¶ 30.

Since March 2010, Sprint has continued to deliver traffic to NAT for which Sprint has paid absolutely *nothing.* NAT Facts, ¶ 18. As of December 31, 2014, Sprint owes NAT $1,577,654.81, plus interest and fees under the applicable tariffs, of which $386,268.06 is for the period through August 11, 2011 (the effective date of the 2009 Tariffs) and $1,191,386.75 is for the charges due under the Tariff No. 3. *Id.*

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment is appropriate where a moving party demonstrates the absence of a genuine issue of material fact through the pleadings, depositions, affidavits or other evidence and is entitled to a judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party satisfied this burden, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

Sprint is a plaintiff here that has asserted only two grounds in its 2010 Complaint to excuse its refusal to pay NAT. In addition, it advanced an additional defense in its motion for summary judgment. Sprint has repeatedly taken the position that it does not need discovery to pursue its case. *See, e.g.*, Docket 207, 210. It has also declined the Court's invitation to add additional grounds to support its original claims. In these circumstances, as discussed below, there are no material facts in dispute as to the claims and issues Sprint has put in contention between the parties, and NAT is entitled to judgment as a matter of law.

II. IT IS UNDISPUTED THAT NAT IS NOT ENGAGING IN UNLAWFUL CONDUCT.

Sprint alleges in its Complaint that NAT is engaged in an "unlawful scheme" and thus not permitted to charge terminating access fees to IXCs for traffic involved in that scheme. However, as a matter of law, the FCC rejected Sprint's contentions and Sprint's claims are now

moot. Even Sprint's own representative testified under oath that there is nothing unlawful about NAT's business and that NAT was acting in compliance with the CAF Order. Furthermore, the South Dakota PUC, in a nearly three-year contested proceeding by Sprint, determined that NAT was not an unlawful company. Thus, NAT is entitled to summary judgment.

The CAF Order specifically addresses what Sprint's Complaint refers to as "traffic pumping." The FCC refused to make revenue sharing unlawful and instead addressed concerns about high 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." CAF Order, ¶ 679. The FCC noted that some parties, like Sprint, wanted all revenue sharing declared unlawful, but rejected their proposals. CAF Order, ¶ 672, Note 1112.

In light of those and other policy considerations, the FCC concluded that "the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition." CAF Order, ¶ 690. At the time the CAF Order was issued, NAT had already filed a new interstate tariff that complied with that requirement. 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. [4]

The PUC recognized the FCC's decision on the new access stimulation rules as articulated in the CAF Order. In the PUC Order, the PUC thus found as follows concerning Sprint's traffic pumping allegations:

[4] "We require a competitive LEC to file a revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. **A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing**." CAF Order, ¶ 691 (emphasis added).

> 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**.

Id, ¶ 29 (emphasis added).

With the issuance of the CAF Order, and certainly the PUC Order, Sprint should have begun to meet its obligations to pay terminating access fees, but it still refused to pay NAT anything. Sprint also made the considered decision not to amend its original Complaint or to withdraw its now wholly debunked contentions that it was excused from paying terminating access fees because NAT is engaged in "traffic pumping." *See* Fed. R. Civ. P. 11(b) (violation of Rule 11 by continuing to advocate that there are factual contentions and that claims are warranted when they are not).[5] Enough is enough. In light of the express provisions of the CAF Order, NAT is entitled to summary judgment on Sprint's claim that NAT is engaged in "unlawful" "traffic pumping."

III. IT HAS BEEN ADJUDICATED THAT NAT IS NOT A SHAM.

As pretext to avoid paying charges legally due to NAT, Sprint also alleges that "NAT purports to operate local exchange carrier operation on the Reservation but in reality exists only to engage in traffic pumping." Complaint, ¶ 2. Further, Sprint alleges that NAT's "claim that it provides competitive local exchange services to the Reservation is a sham." *Id.*, ¶ 10. Sprint has

[5] Sprint's conduct in this matter is difficult to fathom until one understands that Sprint has been engaged in a company-wide effort to avoid paying intercarrier compensation as part of a cost cutting program. In 2011, a United States District Court found that Sprint willfully violated its obligations to pay access charges to 19 separate carriers throughout the United States in order to deal with its internal financial problems. Sprint was so committed to its cost cutting plan that it proffered false testimony to justify its scheme. *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.")*

already litigated that claim and lost. It is barred for litigating the claim again here.

The PUC Order adjudicated the issue presented by Sprint on whether NAT is a "sham" and found against Sprint. It finds expressly: "**The Commission has found that NAT is not a sham entity.**" Cite. In the Eighth Circuit, issue preclusion or collateral estoppel has five elements: the party sought to be precluded in the second suit must have been a party, or in privity with a party, to the original lawsuit; (2) the issue sought to be precluded must be the same as the issue involved in the prior action; (3) the issue sought to be precluded must have been actually litigated in the prior action; (4) the issue sought to be precluded must have been determined by a valid and final judgment; and (5) the determination in the prior action must have been essential to the prior judgment. *Anderson v. Genuine Parts Co., Inc.*, 128 F.3d 1267, 1273 (8th Cir.1997). All of the elements of collateral estoppel are present here on an undisputed record.

Sprint, the same party with the same counsel of record in the instant case, was a party in the PUC Proceeding. Sprint advanced arguments and took positions on *issues* in the PUC Proceeding that are identical to those that Sprint advances in this action as grounds to avoid paying NAT for terminating access, including that NAT was engaged in a traffic pumping scheme and is a sham. Sprint had a full and fair opportunity to litigate those issues. It conducted extensive discovery on them and participated in a contested evidentiary hearing during which it submitted written and oral expert testimony, cross-examined NAT witnesses, and submitted exhaustive post-hearing briefs. The PUC rejected Sprint's position, and that determination is final and no longer appealable. NAT is thus entitled to summary judgment on Sprint's claims that it is entitled to withhold access fees because NAT is a "sham."

IV. SPRINT OWES NAT FOR ALL TERMINATING ACCESS CHARGES BILLED UNDER ITS TARIFF NO. 3

In its motion for summary judgment, Sprint asserts a position never raised it its pleadings. Specifically, it contends that it does not have to pay charges billed after the CAF Order because NAT did not amend its tariff to add special provisions for traffic it claims is terminated by NAT in VoIP or "Internet protocol format." Although given leave by the Court to update its claims and add additional reasons why it should not have to pay NAT, Sprint made a considered decision not to amend its original complaint. That original Complaint put in issue both its past charges and future charges, as it sought declaratory and injunctive relief as to future charges. Docket 1, ¶45. 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.").

The Eighth Circuit has also made clear that a plaintiff should not be allowed to stand on one legal theory in one part of its case and then switch legal theories after the first theory is tested. *Morrison Enters., L.L.C. v. Dravo Corp.*, 638 F.3d 594, 610 (2010); *Briehl v. General Motors Corp.*, 172 F.3d, 623, 629 (1999); *Humphreys v. Roche Biomedical Laboratories*, 990 F.2d 1078, 1082 (1993). Sprint has thus waived any right it may have had to argue that NAT should have amended Tariff No. 3 after the CAF Order.

Moreover, as discussed below, Sprint's position is simply wrong as a matter of law and barred by the Filed Rate Doctrine in any event.

A. NAT's Tariffs In this Matter Only Assess An *Interstate* Access Rate.

All of NAT's tariffs have only ever assessed an interstate access rate. The FCC regulations implementing the CAF Order, which became effective in July 2012, provide that

VoIP-PSTN calls "***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).

Sprint has proffered its new defense that it should not have to pay NAT's Tariff No. 3 because NAT did not revise its tariff. However, it is clear that NAT's Tariff No. 3 complies with the FCC's regulation. The only rate in Tariff No. 3 is its interstate rate, and that rate is at the rate of lowest price cap LEC in the state. The CAF Order provides:

> A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing.

CAF Order, ¶ 691.

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. *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"). Thus, the so-called legal requirement that Sprint imagines 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 became effective, NAT filed Tariff No. 3. *See* NAT Facts, ¶. Tariff No. 3 is a generic tariff; i.e., it does not explicitly articulate rates for Toll VoIP-PSTN or PSTN-PSTN. *Id*. Instead, Tariff No. 3 established the same new CAF Order compliant rates for all "access services." 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 was already compliant.

The CAF Order stated expressly that 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, and NAT is entitled to judgment as a matter of law. NAT is thus entitled to a judgment that Sprint is required to pay NAT all terminating access charges billed under Tariff No. 3.

B. There Is No Disputed Fact As To Whether NAT Originates Or Terminates Calls In IP Format Under The FCC's Regulations.

Even though NAT was charging Sprint the proper (interstate) rate under the federal regulations, NAT's call traffic is not VoIP-PSTN traffic as that term is defined by FCC regulations and thus the provision of the CAF Order to which Sprint refers would not apply in any event. The regulation defines what qualifies as "telecommunications traffic that originates and/or terminates in IP format," 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. The legal issue, thus, is what NAT's "***service requires,***" not what the customer actually uses.

It is undisputed that, as defined by the regulations, NAT's service does not "***require***" customer premises equipment in "IP format." NAT Facts, ¶ 16. 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 have a service that is *required* to use internet-protocol compatible

equipment in order to be a customer of NAT. *Id.* The residential customers and tribal offices, for example, use regular, PSTN handsets that can be plugged into any phone connection and used with any traditional phone service. *Id.*

Second, Free Conferencing is a high volume end user customer of NAT. *Id.*, ¶ 17. Even in the category of conferencing company end user customers, NAT's service 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.* It is undisputed that the "service" that NAT provides, even to Free Conferencing, does not "*require*" internet-protocol compatible customer premises equipment. *Id.*

These facts are not disputed. In the context of summary judgment, NAT has submitted evidence that NAT's service does not "*require*" **"**Internet protocol-compatible customer premises equipment." Sprint has no evidence to dispute NAT's evidence and has taken the position that no discovery is needed in this matter.[6] A party is entitled to summary judgment when he can demonstrate to the Court that the opposing party does not have any evidence to dispute a material fact.[7] *See* Fed. R. Civ. P. 56(e)(2); *Coe v. N. Pipe Products, Inc.*, 589 F. Supp. 2d 1055, 1074 (N.D. Iowa 2008).

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[6] On December 18, 2014, NAT filed a Cross Motion Of Native American Telecom, LLC For An Order Directing Sprint To Complete Rule 26(f) Process And For Scheduling Order. Docket 201. Sprint opposed the motion, contending discovery is not necessary in this matter, which it claims should be the subject of a primary jurisdiction referral. See Docket 207. The Court (Duffy, J.), in response to Sprint's position that discovery is not required, denied NAT's motion. Docket 208. Also, there is no discovery permitted in the FCC proceeding that Sprint has urged upon the Court. *See* 47 C.F.R. 1.729. Sprint is now barred by the doctrine of judicial estoppel from contending that it needs discovery in this matter. *See Hossaini v. W. Missouri Med. Ctr.*, 140 F.3d 1140, 1142 (8th Cir. 1998) ("The doctrine of judicial estoppel prohibits a party from taking inconsistent positions in the same or related litigation.")

[7] Sprint's challenge to NAT's Tariff No. 3 is also barred by the Filed Rate Doctrine. As the FCC made clear in *Farmers I*, even when a LEC has rates that are not just and reasonable, a long distance carrier is prohibited from challenging past charges, and the FCC has the authority only to "find under section 208 that a rate will be unlawful in the future." *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Company*, 22 FCC Rcd.

CONCLUSION

For the foregoing reasons, NAT's motion should be allowed, and the Court should enter summary judgment in favor of NAT (1) dismissing all of Sprint's claims against NAT and (2) awarding judgment on NAT's claims under Counts One and Four of its Amended Counterclaim that Sprint owes it all terminating access fees billed to Sprint by NAT, plus interest and attorneys' fees due under NAT's tariffs.

February 25, 2015

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17973, ¶20 (F.C.C), 22 F.C.C.R 17973, 2007 WL 2872754, ¶ 20 (2007). The Doctrine also prevents a court from awarding any form of relief that would have the effect of imposing rates other than those reflected in a duly-filed tariff. *Great Lakes Communication Corporation v. AT&T Corporation*, 2014 WL 2866474 (N.D. Iowa, June 24, 2014). Under the Doctrine, Sprint may only petition the FCC to review the rates in a LEC's tariff on a *prospective* basis; it is barred from contesting the rates retroactively. *Id*. at 16.

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 February 25, 2015.

/s/ Scott R. Swier

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