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'S MEMORANDUM IN OPPOSITION TO NATIVE AMERICAN TELECOM'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Sprint Communications Company L.P. ("Sprint") submits this memorandum in opposition to Native American Telecom LLC's ("NAT") Motion for Partial Summary Judgment (ECF No. 211). For the reasons set forth below, Sprint opposes NAT's motion for partial summary judgment, and cross-moves on those points.

Ignoring the rules of procedure and practice, NAT moved for summary judgment on six claims and counterclaims without (1) identifying the claims or counterclaims, (2) listing the elements, (3) identifying the documents and facts that allegedly dispose of the claims or counterclaims, (4) or establishing the basis for NAT's claimed

damages. NAT's Motion should be denied for its procedural deficiencies alone.

What is more, NAT's counterclaims fail on the merits during most of the disputed periods. Notably, NAT's Tariffs Nos. 1 and 2 were unenforceable and NAT lacked authority to bill under the Federal Communications Commission's ("FCC") access rules for competitive local exchange carriers ("CLECs") before NAT received CLEC status in June of 2014.

Even if NAT's claims do not fail as a matter of law, there are disputed facts as to whether NAT engaged in unjust and unreasonable practices and whether NAT provided service in compliance with its tariffs and federal law. Those disputed facts preclude the entry of summary judgment in NAT's favor.

I. NAT FAILED TO MEET ITS BURDEN AS A MOVANT

A. Standard for a movant

As the movant, NAT bears the significant burden of establishing that it is entitled to summary judgment: "[t]he moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law." *Ctr. For Family Med. v. United States*, 456 F. Supp. 2d 1115, 1116 (D.S.D. 2006).

To satisfy this burden, "[t]he moving party must inform the court of the basis for its motion and also identify the portion of the record that shows that there is no genuine issue in dispute." *Mendoza v. Addar, Inc.*, No. CIV. 10-4077-KES, 2012 WL 1665425, at *1 (D.S.D. May 11, 2012) (citing *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)).

The moving party must satisfy its burden before the nonmoving party is required to establish issues of fact. *See Robinson v. Monaghan*, 864 F.2d 622, 624 (8th Cir. 1989). In addition, "[w]here the moving party fails to satisfy its burden to show initially the absence of a genuine issue concerning any material fact, summary judgment must be denied even if no opposing evidentiary matter is presented." *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986).

B. Tariffs are contracts, and NAT has not established that the tariffs impose compensation on the calls in dispute

Tariffs are a form of contract. *See, e.g.*, ECF No. 172 (NAT's Crossclaim Count One is described as a "Breach of Contract/Collection Action Pursuant to Federal Tariffs"). To prevail on a claim that money is due under a tariff, a plaintiff "must demonstrate (1) that [it] operated under a federally filed tariff and (2) that [it] provided services to the customer pursuant to that tariff." *Alliance Commc'ns Co-op., Inc. v. Global Crossing Telecomms., Inc.*, Nos. Civ. 06-4221-KES, 06-3023-KES, 2007 WL 1964271, at *3 (D.S.D. July 2, 2007). The Ninth Circuit has

detailed a movant's obligation to negate specific elements of a claim in order to prevail on a motion for summary judgment on an opposing party's claims:

> A moving party without the ultimate burden of persuasion at trial-usually, but not always, a defendant has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2727 (3d ed.1998). In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990). In order to carry its ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact. *See id.*
>
> If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial.

Nissan Fire & Marine Ins. Co., v. Fritz Cos., Inc., 210 F.3d 1099, 1102-03 (9th Cir. 2000).

Here, NAT fails to "produce evidence negating an essential element" of Sprint's claims and fails to produce evidence proving essential elements of its counterclaim counts. Notably, NAT neither cites nor discusses a single term of any of its tariffs under which NAT is allegedly entitled to payment. For example, under NAT's Tariff No. 1, Switched

Access Service "is available to Customers for their use in routing or receiving traffic and/or in furnishing their services to End Users." Sprint's Response to NAT's Statement of Undisputed Material Facts and Sprint's Statement of Undisputed Material Facts ("Sprint Facts"), filed contemporaneously herewith at ¶ 36; March 19, 2015 Affidavit of Philip R. Schenkenberg ("Schenkenberg Aff."), filed contemporaneously herewith, Ex. 1 at original p. 65 (emphasis added). NAT has made no record to support a finding that Sprint was a "Customer" as that term is defined in the tariff, or that the calls in dispute were delivered to "End Users" as defined in the tariff. Sprint Facts ¶ 38. *See also*, Schenkenberg Aff., Ex. 1 at original pp. 9-10 (definitions of "customer" and "end user") & Ex. 2 at first revised p. 9 (revised definition of "customer"). Even more, NAT has failed to identify the number of calls in dispute or the rate elements that correlate with services that NAT claims to have provided. Accordingly, NAT has failed to demonstrate how it provided switched access service pursuant to Tariff No. 1 and its motion should be denied.

Similarly, Tariff No. 2 states that "[s]witched Access Service provides for the use of switching and/or transport facilities or service to enable a Buyer to utilize the Company's Network to access Calls or to deliver Calls." Sprint Facts ¶ 43; Schenkenberg Aff. Ex. 4 at original p.

37 (emphasis added). Under that tariff, a "Buyer" is defined as a an interexchange carrier that utilizes "Access Service to complete a Call to or from End Users." Sprint Facts ¶ 44; Schenkenberg Aff. Ex. 4 at original p. 7. NAT has failed to show that Sprint qualifies as a "Buyer" under Tariff No. 2 or that calls in dispute were delivered to "End Users." In addition, NAT has not identified the specific minutes, rates, or rate elements in dispute. NAT has neither shown that it operated under Tariff No. 2 nor that it provided any services under that tariff that entitle NAT to payment.

Likewise, NAT's Tariff No. 3 defines "Switched Access Service" as a service "available to customers for their use in furnishing their services to end users, provides a two-point electrical communications path between a customer's premises and an end user's premises." Sprint Facts ¶ 46; Schenkenberg Aff. Ex. 5 at § 3.1.1 (emphasis added). NAT has not demonstrated that, pursuant to Tariff No. 3, Sprint is a "customer," there are "end users," or that calls were delivered to a "premises."[1] Again, NAT fails to identify specific minutes, rates, and rate

[1] Instead, the testimony available to the Court suggests that Free Conferencing had no *premises* at all and, instead, kept its equipment in NAT's premises. ECF No. 218-1 at 51:5-10 (NAT's 30(b)(6) witness testifying that Free Conferencing has a conferencing bridge co-located with NAT's equipment).

elements in dispute. As such, NAT has failed to establish that it is entitled to the payment at issue under Tariff No. 3.

NAT's failure to demonstrate that it operated under a tariff and provided access services under that tariff is fatal to its motion. "Section 203(c) of the Act requires a carrier to provide communications services in strict accordance with the terms and conditions of its tariff." *Qwest Commc'ns Co. v. Sancom, Inc.*, Mem. Op. & Order, 28 FCC Rcd. 1982, ¶ 16 (2013) ("*Qwest v. Sancom*"); *see, e.g.*, *GE Elec. Co. v. S&S Sales Co.*, No. 1:11-CV-00837, 2011 WL 4369045, at *2 (N.D. Ohio Sept. 19, 2011) ("Courts routinely grant motions to dismiss where complaints fail to identify a contractual provision that allegedly was breached"). Because NAT did not identify nor explain the tariffs/contracts and how they applied, and because NAT failed to demonstrate its performance or Sprint's lack thereof, NAT has failed to demonstrate that it is entitled to damages under a theory of breach of contract and Sprint has no obligation to respond further to this motion. NAT's motion should be denied.

II. NAT IS NOT ENTITLED TO BE PAID ACCESS CHARGES UNDER ITS TARIFF NO. 1 (SEPT. 15, 2009 – NOV. 30, 2010)

NAT's Tariff No. 1 was filed in September of 2009, and then was amended on October 20, 2009, to be effective October 22, 2009. Sprint Facts ¶ 34; Schenkenberg Aff. ¶¶ 2-4 & Ex. 1 at original title page & Ex.

2 at first revised title page. NAT's motion implicates Tariff No. 1 because (1) Tariff No. 1 governs Sprint's refund claim (Sprint's Count One); and (2) NAT seeks to enforce Tariff No. 1 within its Counterclaim Counts One and Four. NAT's attempt to enforce Tariff No. 1 must be denied for four reasons.

A. NAT's Tariff No. 1 is unlawful and unenforceable

NAT's Tariff No. 1 is void and unenforceable because it purports to allow access charges for calls not made to an "end user" as defined by federal rule. Northern Valley Communications, LLC's ("Northern Valley") Tariff F.C.C. No. 3 was rendered void and unenforceable by the FCC in 2011 for this same reason. *Qwest Commc'ns Co. LLC v. N. Valley Commc'ns*, LLC, Mem. Op. & Order, 26 FCC Rcd. 8332, 8332 (2011) ("*Qwest v. Northern Valley*"). The same result is warranted here.

1. *Qwest v. Northern Valley*

FCC rule 47 C.F.R. § 61.26 establishes standards and limitations for CLECs that wish to collect switched access charges. Under the rule, the term "CLEC" is defined as "a local exchange carrier [("LEC")] that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of 'incumbent local exchange carrier' [("ILEC")]…." 47 C.F.R. § 61.26(1)

(2014) (emphasis added). The term "end user," then, is key to the access charge regime.

In *Qwest v. Northern Valley*, Northern Valley, a CLEC, filed a tariff that required interexchange carriers to pay access charges on calls to "end users," and defined the term "end user" by stating that "'[a]n End User need not purchase any service provided by [Northern Valley].'" *Id.* ¶ 7 (alteration in original). The FCC held that Northern Valley's tariff was unlawful and that Northern Valley had violated the Communications Act because, under federal law, an "end user" must be a paying customer. *Id.* ¶ 10. Thus, "a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service for a fee." *Id.* ¶ 17 (emphasis added).

Northern Valley argued that the tariff language was not determinative on liability because the individual or entity receiving the call *might*, in fact, take service for a fee. *Id.* ¶ 13. The FCC rejected that argument, holding that it did not matter whether charges were *actually* assessed to the alleged "end user" because, for the proper construction of tariffs, "neither the intent of the framers nor the practice of the carrier controls." *Id.* In other words, a tariff that, by its terms, allows for the possibility of an unlawful result, is void.

The FCC's decision was affirmed on appeal. *Northern Valley Commc'ns, LLC v. F.C.C.*, 717 F.3d 1017, 1019 (D.C. Cir. 2013) ("Therefore, we uphold the FCC's decision that CLECs may not rely on tariffs to charge long-distance carriers for access to CLECs' non-paying customers.").

2. *NAT's Tariff No. 1 is unlawful under Qwest v. Northern Valley and subsequent federal caselaw*

NAT's Tariff No. 1 suffers from the same problem that disqualified the Northern Valley Tariff. Under NAT's Tariff No. 1, an interchange carrier is deemed to be a customer if it utilizes NAT's access services "to reach End Users." Sprint Facts ¶ 37; Schenkenberg Aff. Ex. 2 at first revised p. 9. Tariff No. 1's convoluted definition of "End User" includes the statement "[t]he End User may be, but need not be, the customer of an Interexchange Carrier and may or may not be a customer of the Company." Sprint Facts ¶ 38; Schenkenberg Aff. Ex. 1 at original p. 10. But if an entity is not a "customer" of the Company, then the entity receiving the calls is not "responsible for the payment of charges." *See* Sprint Facts ¶ 38; Schenkenberg Aff. Ex. 1 at original p. 9 (definition of "Customer"). And, if the entity need not be responsible for charges to be an "End User," then the tariff runs afoul of the FCC's *Northern Valley* decision.

A federal district court in California has since reiterated that an interstate access tariff with NAT's defect cannot be used to impose compensation obligations on an interexchange carrier. *N. Cnty. Commc'ns Corp. v. Verizon Select Servs., Inc.*, No. 08cv1518 AJB (WMC), 2012 WL 10907044, at *6 (Sept. 28, 2012) ("*NCC v. Verizon*"). When that court found tariff language that "remove[d] the requirement … that an end user must be [the CLEC's] paying customer," the court awarded the long distance carrier (like Sprint in this case) judgment on the pleadings on the CLEC's (like NAT purports to be) tariff enforcement claim. *Id.* at *5-6. *See also AT&T Corp. v. All Am. Tel. Co.*, Mem. Op. & Order, 28 FCC Rcd. 3477, ¶ 37 (2013) ("*2013 All American Order*") ("Accordingly, until a CLEC files valid interstate tariffs under Section 203 of the Act or enters into contracts with [interexchange carriers] for the access services it intends to provide, it lacks authority to bill for those services.") (footnote omitted).

The same result is warranted here. NAT lacked a lawful tariff for time periods between September 15, 2009 through November 30, 2010. The Court should thus deny NAT's motion for summary judgment.

B. NAT was not authorized to provide local exchange services to Free Conferencing

Moreover, even if NAT's Tariff No. 1 was lawful, NAT could not enforce that tariff because NAT was not operating as a "LEC" with respect

to calls delivered to Free Conferencing and, thus, federal rules would have prohibited NAT from providing local exchange services to Free Conferencing.

1. *NAT was not a CLEC until 2014*

In its amended counterclaim, NAT alleges that it operated as a CLEC with respect to calls delivered starting in 2009. *See, e.g.*, ECF No. 172 ¶¶ 9, 13-15 (discussing CLEC access charge rules), & 24. However, NAT was not awarded a certificate of authority to provide CLEC service in South Dakota by the South Dakota Public Utilities Commission ("SDPUC"), the only entity with the authority to issue NAT such a certificate, until June 12, 2014. ECF No. 211-5 at 18. NAT tries to evade the fact that it lacked a CLEC certificate before June of 2014. But this fact was not lost on the SDPUC, which specifically noted that NAT had operated in South Dakota "prior to receiving a certificate of authority from the Commission." *Id.* at 11. While the SDPUC did not make "NAT's operation without a certificate of authority" a barrier to certification prospectively, the SDPUC also did not cure the deficiency retroactively. *Id.* Thus, NAT did not have the authority to operate as a CLEC before June of 2014.

In addition, the SDPUC found that it has regulatory authority over all telecommunications services provided by NAT on the Reservation, and

sole regulatory authority over the calls delivered to a non-tribal member like Free Conferencing. *Id.* at 16. That means that NAT's tribal certificate did not authorize it to provide service as a CLEC to anyone, and certainly not to Free Conferencing (the recipient of all or virtually all calls in dispute). As a result, though the SDPUC gave NAT a "pass" in the prospective application process for having provided service without authorization between 2009 and June 12, 2014, the SDPUC's decision makes clear that NAT operated without the necessary authority during that time.

2. *The FCC's CLEC access charge rules apply only to CLECs*

The SDPUC's jurisdictional decision bars NAT from collecting access charges for calls delivered to Free Conferencing before June 12, 2014. To file and enforce an access tariff, an entity like NAT must be a "CLEC," which, under the rules, is defined as "a local exchange carrier [(LEC)] …" 47 C.F.R. § 61.26. NAT admits this fact by pleading that its authority to charge access emanates from the FCC's CLEC access charge rules. ECF No. 172, ¶ 14. Equally important, NAT's Tariff No. 1 applied only to the extent that NAT operated as a LEC. That tariff defines "Company" as "NATIVE AMERICA TELECOM, LLC, the issuer of this tariff, a competitive local exchange carrier [(CLEC)]." Sprint Facts ¶ 35; Schenkenberg Aff. Ex. 1 at original p. 9. Additionally, under that tariff,

an "End User" is defined as an entity that "subscribes to or otherwise uses … services provided by a local exchange carrier." Sprint Facts ¶ 38; Schenkenberg Aff. Ex. 1 at original p. 10.

Prior to June 12, 2014, NAT was not operating as a CLEC when it delivered calls to Free Conferencing. As such, NAT lacked the authority to tariff interstate access services for calls to Free Conferencing and NAT did not meet the terms of the tariff that it filed. NAT's motion for summary judgment on its Tariff No. 1 must be denied.

C. NAT did not charge Free Conferencing for services while Tariff No. 1 governed

NAT's claims to enforce Tariff No. 1 also fail because, during that time, Free Conferencing was not obligated to pay under its agreement with NAT, nor did it pay, for the services that it received from NAT. Sprint Facts ¶¶ 39-41, 49; Schenkenberg Aff. Ex. 7 at ¶ 22 & Ex. 9 & Ex. 8. As stated by the FCC, the "access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service *for a fee*." *Qwest v. N. Valley*, ¶ 7 (emphasis in original).

It is undisputed that the service agreement between NAT and Free Conferencing in effect starting in 2009 required NAT to provide service to Free Conferencing without charge: "NAT-CC shall provide all telecommunications services utilized by FCC in connection with this

Agreement **without charge**." Sprint Facts ¶ 49; Schenkenberg Aff. Ex. 7 at ¶ 22 (emphasis added). Moreover, NAT's Profit and Loss Statement (Income Statement) for 2009 reflects no income from end users and NAT's 2010 statement shows only "CABS" income, which is carrier access billing amounts received from interexchange carriers. Sprint Facts ¶ 49 Schenkenberg Aff. Ex. 9. According to the General Ledger detail provided by NAT, the first End-User Fee Income from Free Conferencing did not occur until September 30, 2011. Sprint Facts ¶¶ 40-41, 49; Schenkenberg Aff. Ex. 8 at 000283. Based on the undisputed evidence, NAT was not paid money by Free Conferencing, nor was NAT due money from Free Conferencing, in 2009 or 2010.

Thus, while Tariff No. 1 was in effect, Free Conferencing, a purported end user, did not obtain service from NAT "for a fee" as is required for a CLEC to collect access charges. NAT's claims seeking to enforce Tariff No. 1 as to calls to Free Conferencing therefore fail and NAT's motion should be denied.

D. There are material facts sufficient to prove that NAT engaged in unjust and unreasonable conduct in violation of Section 201

If NAT's motion as to claims under its Tariff No. 1 is not denied for the reasons set forth above, then there is a disputed fact as to whether NAT served a legitimate "end user" of local exchange service under the

fact-intensive analysis that the FCC established in the "*Farmers II*" line of cases.

The Court is familiar with the key cases in which the FCC decided that (1) traffic pumpers and traffic pumping operations were in violation of federal law and (2) calls to chat lines and/or conference call companies were not compensable at access charges. In short, in *Farmers II*,[2] the FCC evaluated tariff language in light of the facts regarding the delivery of calls, the relationships between the LEC and the calling companies, and the payments between the LEC and the calling companies, and the FCC decided that the LEC "was not entitled to charge Qwest switched access charges under the terms of Farmers' tariff" and that the LEC violated federal law by so doing. *Id.* ¶ 10.[3] In *Qwest v. Sancom*,[4] the FCC evaluated Sancom's relationship with Free Conferencing and determined that "Sancom's interstate switched access charges are unlawful because, with regard to the traffic at issue, Sancom did not have 'end users' that were billed or paid for service, as required by the

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[2] *Qwest Commc'n Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009).

[3] *See also Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Final Order, No. FCU-07-2, 2009 WL 3052208 (Iowa Utils. Bd. Sept. 21, 2009) ("IUB Order").

[4] *Qwest Commc'ns Co. v. Sancom, Inc.*, Order, 28 FCC Rcd. 1982 (2013).

Tariff." *Id.* ¶ 1. In the *2013 All American Order*, the FCC evaluated a traffic pumping venture in Utah, found that the LECs did not operate as bona fide CLECs, and found that the CLECs thus unlawfully charged for access services that they did not provide. 28 FCC Rcd. 1982, ¶¶ 25, 34.

Sprint has produced facts that establish the basis on which the Court (or the FCC on referral) could find that NAT violated federal law, and that NAT's switching and delivery of calls to Free Conferencing did not qualify as access charge calls under NAT's tariff and FCC precedent. Those facts are:

- Free Conferencing did not pay for service for a substantial portion of the dispute period. Nor did NAT's 2009 and 2010 income statements reflect that it was owed any money by Free Conferencing. Sprint Facts ¶¶ 39-41, 49; Schenkenberg Aff. Exs. 7-9. This fact helps prove that access charges were not due. *Farmers II* ¶ 12.

- NAT has always shared a substantial portion of its revenues with Free Conferencing. Sprint Facts ¶ 49; Schenkenberg Aff. Ex. 7 at ¶¶ 7, 9, & 22; *id.* at p. 9. This fact helps prove that access charges were not due. *IUB Order*, pp. 32-34 (parties who share profits are business partners).

- NAT was not in business to provide competitive local service as a common carrier, but was instead in business to generate high volumes of inbound calls. Sprint Facts ¶ 28; Schenkenberg Aff. Exs. 7 at ¶ 7 & Ex. 11 at 211. This fact helps prove that access charges were not due. *See 2013 All Am. Order*, ¶ 25 ("Defendants had no intention at any point in time to operate as bona fide CLECs or provide local exchange service to the public at large."); *id.* ("Defendants' entire business plan was to generate access traffic exclusively to a handful of CSPs.").

- NAT provided a promise of exclusivity to Free Conferencing, inconsistent with common carrier obligations. Sprint Facts ¶ 29; Schenkenberg Aff. Ex. 7 at ¶ 7 & Ex. 11 at 251-52 (Holoubek testifying that NAT has only one paying customer, even after more than four years of operations). This fact helps prove that access charges were not due. *See Sancom*, ¶¶ 23, 25 (through an exclusive agreement with Free Conferencing, "Sancom was not acting as a common carrier indiscriminately serving End Users as defined in the Tariff."); *Farmers II,* ¶ 14 (exclusivity clause is antithetical to common carrier operations).

- NAT operated without authorization from the state regulatory authority. ECF No. 211-5 at 11. This fact helps prove that access charges were not due. *2013 All Am. Order*, ¶19 (failure to comply with state commission standards for providing local exchange service).

- The arrangement between NAT and Free Conferencing was driven by litigation, and bills and contracts were backdated for litigation purposes. Sprint Facts ¶ 31; Schenkenberg Aff. Ex. 11 at 257-59 & 341. This fact helps prove that access charges were not due. *Farmers II*, ¶ 20 (high-volume calling companies and pumpers signed contract amendments as part of a litigation strategy); *Id.* ¶ 16 (LEC did not issue bills until dictated by litigation concerns); *IUB Order*, p. 27 (practice of backdating is an attempt to hide deficiencies of prior arrangements).

- NAT did not comply with its local Tribal Tariff in the provision of services to Free Conferencing. Sprint Facts ¶ 32; Schenkenberg Aff. Ex. 6. For example, NAT's Tribal Tariff has a $35 per Primary Rate Interface ("PRI") charge for local service. Sprint Facts ¶ 32; Schenkenberg Aff. Ex. 6 at § 5.1 & Ex. 11 at 400. But, Free Conferencing never paid NAT this fee. Sprint Facts ¶ 32; Schenkenberg Aff. Ex. 11 at 402. This fact helps prove that access charges were not due. *Sancom*, ¶ 24 (arrangements appear to have been purposefully structured to avoid a traditional tariffed offering); *id.* ¶ 19 (absence of genuine billing relationship); *2013 All Am. Order*, ¶ 38 (practices show calling company was not receiving

services described in tariffs); *Farmers II*, ¶ 15 (LEC did not intend this to be a traditional local service offering).

- NAT and Free Conferencing have operated as business partners, and not in an arm's-length commercial arrangement. Sprint Facts ¶ 33; Schenkenberg Aff. Ex. 11 at 369, 269-70, 360. This fact helps prove that access charges were not due. *Farmers II*, ¶ 10 (stark difference between true customer relationships, which involve individuals who subscribe to local exchange service and pay a local exchange carrier for that service, compared to relationships that involve money and other benefits flowing out of the LEC to the so-called customers); *Sancom*, ¶ 21 ("Sancom viewed the Free Calling Companies more as business partners than local exchange customers."); *IUB Order*, pp. 32-34 (parties who share profits are business partners); *2013 All Am. Order*, ¶ 25 (All American and e-Pinnacle perpetuated their scam in conjunction with jointly operated, co-owned entities).

Accordingly, there is a material dispute of fact for all time periods as to whether calls through NAT to Free Conferencing were compensable, and whether NAT operated in violation of the law by billing Sprint. This disputed fact precludes summary judgment on NAT's claims for time periods covered by NAT's Tariff No. 1.

III. NAT IS NOT ENTITLED TO BE PAID ACCESS CHARGES UNDER ITS TARIFF NO. 2 (NOV. 30, 2010 – AUG. 23, 2011)

NAT's motion to enforce its interstate tariffs includes NAT's Tariff No. 2, which is implicated within NAT's Counterclaim Counts One and Four. NAT filed Tariff No. 2 on November 15, 2010, to be effective on November 30, 2010. Sprint Facts ¶ 42; Schenkenberg Aff. ¶ 5 & Ex. 4 at original title page. That tariff was amended effective June 26, 2011 (Sprint Facts ¶ 42; Schenkenberg Aff. ¶ 5; Ex. 3), and then replaced and

superseded by Tariff No. 3 on August 23, 2011. Sprint Facts ¶ 46; Schenkenberg Aff. ¶ 7 & Ex. 5 at original p. 1. NAT's motion for summary judgment on its Tariff No. 2 must be denied for four reasons.

A. NAT's Tariff No. 2 is unlawful and unenforceable between Nov. 30, 2010 and June 26, 2011

Like Tariff No. 1, NAT's Tariff No. 2 runs afoul of *Qwest v. Northern Valley* and, as such, is void and unenforceable. Under NAT's Tariff No. 2, an interexchange carrier is a "Buyer" when it uses NAT's access service to complete a call to "End Users." Sprint Facts ¶ 43; Schenkenberg Aff. Ex. 4 at original p. 7. The tariff's definition of "End User" ends with "[a]n End User need not purchase any service provided by the Company." Sprint Facts ¶ 44; Schenkenberg Aff. Ex. 4 at original p. 8. This is the identical language that the FCC deemed unlawful and rejected. *Qwest v. N. Valley*, ¶ 4. Moreover, Tariff No. 2 defines "Customer of an Interstate or Foreign Telecommunications Service" to be one who receives calls "without regard to whether and how much payment is tendered to either the Company or the Buyer." Sprint Facts ¶ 44; Schenkenberg Aff. Ex. 4 at original p. 7. As discussed, above, *supra*, at pp. 8-11, such language runs afoul of *Qwest v. Northern Valley* and *NCC v. Verizon*.

NAT's Tariff No. 2 cannot be distinguished from the faulty Northern Valley tariff. For the reasons stated by the FCC in *Qwest v. Northern Valley*, and by the court in *NCC v. Verizon* (*supra* pp. 8-11), this Court

should rule that NAT's Tariff No. 2 was void and unenforceable between November 30, 2010 and June 26, 2011.

B. NAT was not authorized to provide local exchange services to Free Conferencing

As shown above, *supra*, at pp. 11-14, NAT had no certificate of authority from the SDPUC to provide competitive local exchange service in South Dakota while its Tariff No. 2 was purportedly in effect. As also established above, *supra*, at pp. 13-14, FCC rules allow only CLECs to tariff and charge interstate switched access.

Consistent with the rules, NAT's Tariff No. 2 applied only to the extent that NAT operated as a LEC. The tariff defines "Company" as "Native America Telecom, LLC, the issuer of this tariff, a competitive local exchange carrier [(CLEC)]" Sprint Facts ¶ 45; Schenkenberg Aff. Ex. 4 at original p. 7. *See also* Schenkenberg Aff. Ex. 4 at original p. 49 (defining "End User Access Service" as a service provided to end users who obtain local exchange service from NAT). Because NAT was not a LEC when it provided service to Free Conferencing, NAT's Tariff No. 2 did not, and could not, impose access charge liability on calls from Sprint, through NAT, to Free Conferencing.

C. NAT did not charge Free Conferencing for services while Tariff No. 2 was in effect

NAT's claims to enforce Tariff No. 2 also fail because, during that time, Free Conferencing did not pay for the services that it received from NAT. The argument made *supra* pp. 14-15, with respect to Tariff No. 1, applies equally here. The first payment that Free Conferencing made to NAT was in September of 2011, after Tariff No. 2 was replaced by Tariff No. 3. Sprint Facts ¶¶ 41, 49; Schenkenberg Aff. Ex. 8 at 000283, Ex. 9, & Ex. 7, ¶ 22.

Thus, while Tariff No. 2 was in effect, Free Conferencing did not obtain service from NAT "for a fee" as is required for a CLEC to collect access charges. NAT's claims seeking to enforce Tariff No. 2 as to calls to Free Conferencing fail.

D. There are material facts sufficient to prove that NAT engaged in unjust and unreasonable conduct in violation of Section 201

If NAT's motion as to claims under its Tariff No. 2 is not denied for the reasons set forth above, then there is a fact issue as to whether NAT served as a legitimate "end user" of local exchange service under the fact-intensive analysis established by the FCC in the *Farmers II* line of cases. This argument is made above, *supra*, at pp. 15-19 and is not repeated here.

IV. NAT IS NOT ENTITLED TO BE PAID ACCESS CHARGES UNDER ITS TARIFF NO. 3 (AUG. 24, 2011 – PRESENT)

NAT's motion to enforce its interstate tariffs includes NAT's Tariff No. 3, which is implicated within NAT's Counterclaim Counts One and Four. NAT filed Tariff No. 3 on August 8, 2011, to be effective August 23, 2011. Sprint Facts ¶ 46; Schenkenberg Aff. Ex. 5 at original p. 1. NAT's motion for judgment on its Tariff No. 3 must be denied for four reasons.

A. Bills issued under NAT's Tariff No. 3 that came due before September 10, 2012 are barred by the two-year statute of limitations

Sprint made this argument on its pending Motion to Dismiss, ECF No. 181, and its briefing filed in support of that motion, and does not repeat those arguments herein.

B. NAT was not authorized to provide local exchange services to Free Conferencing before June 12, 2014

As demonstrated above, *supra*, at pp. 11-14, NAT had no certificate of authority from the SDPUC to provide competitive local exchange service in South Dakota while its Tariff No. 3 was purportedly in effect before June 12, 2014. As argued above, FCC rules allow only CLECs to tariff and charge interstate switched access.

Consistent with the rules, NAT's Tariff No. 3 applied only to the extent that NAT operated as a LEC. For example, under NAT's Tariff No. 3, the term "Access Minutes" includes an understanding that only some usage is chargeable: "that usage of exchange facilities in interstate or

foreign service for the purpose of calculating chargeable usage." Sprint Facts ¶ 47; Schenkenberg Aff. Ex. 5 at original p. 6. Likewise, the tariff provides that "End User Access Service provides for the use of Company common lines by end users who obtain local exchange service from the Company under its general and/or local exchange tariffs." Sprint Facts ¶ 48; Schenkenberg Aff. Ex. 5 at original p. 89 (emphasis added). Because NAT was not operating as a LEC, it could not charge interstate switched access under the federal rules, FCC precedent, and its own tariff.

C. NAT's Tariff No. 3 does not impose compensation on IP terminated calls in compliance with the CAF Order, for time periods after December 29, 2011

Sprint made this argument on its pending Motion for Partial Summary Judgment, ECF No. 176, and Sprint's briefing filed in support of that motion, and does not repeat those arguments herein.

D. There are material facts sufficient to prove that NAT engaged in unjust and unreasonable conduct in violation of Section 201

If NAT's motion as to claims under its Tariff No. 3 is not denied for the reasons set forth above, then there is a fact issue regarding whether NAT served as a legitimate "end user" of local exchange service under the fact-intensive analysis that the FCC established in the *Farmers II* line of

cases. This argument was made above, *supra*, at pp. 15-19 and is not repeated here.

One additional point merits discussion with respect to time periods following the *CAF Order*. NAT is under the mistaken impression that, following the *CAF Order*, there is no way for Sprint to challenge whether NAT actually provided access service in compliance with the law, and no way for Sprint to argue that NAT's business practices and billings violate the Communications Act. *See* ECF No. 213 at 8-10. NAT is incorrect.

First, following the *CAF Order*, the FCC issued a clarification order specifically noting that, prior to the new rules, the FCC had "adopted several orders resolving complaints concerning access stimulation under preexisting rules and compliance with the Communications Act." *In the Matter of Connect Am. Fund*, Clarification Order, 27 FCC Rcd. 605 ¶ 25 (2012). The FCC clarified that the new rulemaking "complements these previous decisions, and nothing in the [new rules order] should be construed as overturning or superseding [those] previous [FCC] decisions." *Id.* NAT's argument flies in the face of this ruling.

The FCC also rejected this very argument when it ruled on a request for reconsideration in the *All American* case. *AT&T Corp. v. All Am. Tel. Co.*, Order on Reconsideration, 29 FCC Rcd. 6393 (2014). There, the traffic pumpers argued that "carriers who act unjustly and

unreasonably in violation of the Act and Commission rules may do so with impunity as long as they benchmark their access rates to the competing incumbent local exchange carrier." *Id.* ¶ 16. The FCC disagreed, finding the *CAF Order* to be "completely at odds" with such an argument. *Id.* ¶ 17. This rationale was recognized and applied by the Iowa district court: "[f]urthermore, as previously stated, the new rules set forth in the Connect America Order do not immunize LECs from their ongoing duties to provide tariffed services without discrimination among customers." ECF 217-1 at 112.

As stated by the District of Iowa, "the new rules set forth in the Connect America Order do not immunize LECs from their ongoing duties to provide tariffed services." ECF No. 217-1 at 113. Because there is a dispute of fact as to whether NAT met this obligation, its motion must be denied.

V. CONCLUSION

NAT's motion for summary judgment on Sprint's Count One should be denied because NAT has not proven a right to collect, nor can it collect, under its FCC Tariff No. 1.[5]

[5] As Sprint has previously conceded, its request for declaratory relief within this count was mooted when Tariff No. 1 was superseded.

NAT's motion for summary judgment on Sprint's Count Two (Unjust Enrichment) should be denied because NAT did not brief this issue. See Local Rule 7.1(B) (requiring a written brief "[w]ith every motion raising a question of law" which must contain "the specific points of law with the authorities in support thereof on which the movant relies").

NAT's motion for summary judgment on Sprint's Count Three (Declaratory and Injunctive Relief as to Tribal Court) should be denied because that Count is not directed to NAT, and Sprint already obtained relief on that Count. *See* ECF No. 62 at p. 17.

NAT's motion for summary judgment on its Counterclaim Count One and Count Four should be denied because NAT has not proven a right to collect, nor can it collect, under its FCC Tariffs 1, 2, and 3.

Respectfully submitted,

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