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

SPRINT COMMUNICATIONS COMPANY L.P, Plaintiff, vs. NATIVE AMERICAN TELECOM, LLC; B.J. JONES, in his official capacity as Special Judge of Tribal Court; and CROW CREEK SIOUX TRIBAL COURT, Defendants.	Case No. 10-4110-KES

NATIVE AMERICAN TELECOM, LLC'S OPPOSITION TO SPRINT'S MOTION FOR SUMMARY JUDGMENT ON "ADDITIONAL PORTIONS" OF NAT'S COUNTS ONE AND FOUR

Defendant Native American Telecom, LLC ("NAT") hereby opposes Plaintiff Sprint Communications Company L.P.'s ("Sprint's") Motion For Summary Judgment On "Additional Portions" Of NAT's Counts One And Four (Docket 223) ("Cross-Motion").[1]

[1] Sprint filed and briefed this motion as a cross motion in response to NAT's Motion For Partial Summary Judgment (Docket 211). Sprint's opposition to NAT's motion addresses many of the same issues raised in its Cross-Motion. In connection with both NAT's Motion and Sprint's Cross-Motion, Sprint filed one document under Local Rule 56.1 entitled "Sprint's Response To Nat's Statement Of Undisputed Material Facts And Sprint's Statement Of Undisputed Material Facts" (Docket 220) ("Sprint Statement of Facts"), which included additional "undisputed facts" that Sprint contends support its cross-motion for summary judgment.

In connection with this opposition, NAT thus also refers the Court to (1) the documents filed in connection with NAT's motion for Partial Summary Judgment, especially the Reply Memorandum In Support Of Cross-Motion For Partial Summary Judgment (Docket 239) ("NAT's Summary Judgment Reply"), which addresses the arguments made by Sprint in connection with this Cross-Motion; and (2) NAT's Response To Motion For Summary Judgment, Cross-Motion For Partial Summary Judgment, Filed By Native American Telecom, LLC (Docket 240)("NAT Statement Of Facts"), which also responds to Sprint's statement of "material facts" filed in connection with the Cross-Motion.

The Cross-Motion suffers from the same flaws as Sprint's claims that led NAT to seek partial summary judgment. The only claims Sprint has pled in this action have been debunked by the Federal Communications Commission ("FCC") in its Connect America Fund order ("CAF Order") or rejected by the South Dakota Public Utilities Commission ("PUC") in a contested proceeding that binds Sprint. Having failed to take advantage of the opportunity given by the Court to amend its Complaint, Sprint has made a strategic decision to move forward solely on the two purported justifications it originally advanced for its refusal to pay NAT. Sprint may not now assert additional grounds to justify its nonpayment to defeat summary judgment on its claims. Sprint waived other justifications for its refusal to pay NAT. These justifications arise from the same transaction and occurrences that are the subject of the claims Sprint actually pled but are now waived because Sprint chose not to plead them.

Also, as discussed in NAT's Summary Judgment Reply, for theories Sprint is now advancing to justify its refusal to pay NAT – and Sprint continues to invent new excuses as old excuses get repudiated – Sprint has either not been able to cite legal authority or present admissible evidence to support its position. What it cites as "facts" in its statement of "undisputed facts" are frequently mere allegations or tortured constructions of testimony or documents that no reasonable fact finder could conclude based on the evidence it cites. At a minimum, as discussed below, the "facts" it cites are disputed and, as a result, Sprint is not entitled to summary judgment on the issues identified in its Cross-Motion.

ARGUMENT

I THE ARGUMENTS RAISED BY SPRINT ARE UNTIMELY, PROCEDURALLY IMPROPER, AND HAVE BEEN WAIVED.

As discussed in NAT's own motion, it is black letter law that 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 (8th Cir. 2010); *Briehl v. General Motors Corp.*, 172 F.3d, 623, 629 (8th Cir. 1999); *Humphreys v. Roche Biomedical Laboratories*, 990 F.2d 1078, 1082 (8th Cir. 1993).

Having failed to take advantage of the opportunity given by the Court to amend its Complaint, Sprint has made a strategic decision to move forward solely on the two purported justifications it originally advanced for its refusal to pay NAT. Sprint may not now assert additional grounds to justify its nonpayment.[2]

II. THERE ARE, AT A MINIMUM, DISPUTED ISSUES OF FACT AS TO SPRINT'S LIABILITY FOR THE TERMINATING ACCESS CHARGES BILLED UNDER ITS CURRENT TARIFF (TARIFF NO. 3).

In NAT's Summary Judgment Reply, NAT discussed why there are no disputed issues of fact as to Sprint's liability to NAT for charges billed under Tariff No. 3, which was filed with the FCC in August 2011. In the CAF Order, the FCC decided to regulate "access stimulation" by controlling rates and specifically rejected Sprint's requests that access stimulation be banned. It is undisputed that NAT has always complied with the CAF Order's new regulatory program. NAT Statement of Facts, pp 7-8, ¶ 13. The CAF Order and the PUC's ruling on NAT's CLEC application ("PUC Order") establish as matters of law that Sprint is not entitled to relief on claims it asserted in its Complaint. Further, as discussed above, it has waived any other claims arising from the same transactions or occurrences alleged in its Complaint.

[2] For a more detailed discussed of this issue and Sprint's waiver of the arguments it is now trying to advance, *see* NAT's Summary Judgment Reply, pp. 4-7 (Docket 339).

Now Sprint has in its Cross-Motion advanced new theories to justify its refusal to pay bills sent under Tariff No. 3. Even assuming arguendo that Sprint is permitted to advance them, there are at minimum disputed issues of fact that preclude summary judgment on these new theories.

A. There Is No Evidence Supporting Sprint's Allegations That NAT Comes Within The Scope Of The *All American* Decision And Much Evidence To Dispute The Allegation.

Sprint contends that the "new rules in the Connect America Order do not immunize LECs from their ongoing duties." Sprint Opposition, p. 26. In one extreme situation, the FCC did indeed find that a company purporting to provide interstate access service was a sham. *AT&T Corp. v. All Am. Tel. Co.*, 299 FCC Rcd. 6393 (June 10, 2014) ("*All American*"). Sprint contends that NAT falls within the facts of *All American.* Sprint's arguments in this regard are not based on any admissible evidence, as *All American* concerned a situation wholly unlike NAT. Not only is NAT a real enterprise but Sprint has already made these same arguments and they have been rejected in an adjudicatory proceeding. Moreover, it is clear that there is an extensive record of admissible evidence that precludes summary judgment for Sprint based on the *All American* case.

In *All American*, the FCC found that the defendants were sham entities created to capture revenues that could not otherwise be obtained by lawful tariffs. 28 FCC Rcd. 2477 at 3488. The defendants were formed and certificated by state commissions to be competitive local exchange services, but rather than serving and competing to serve a range of customers in a local area, they provided services only in Nevada and Utah to either a single chat line/conferencing service ("CSPs") or to a few such services. *Id.* Despite becoming CLECs, they never marketed their service to anyone other than their one or few CSPs. The defendants involved had no intentions of functioning as *bona fide* LECs. *Id.* They did not own or lease switching equipment typically

used to provide competitive LEC services to the public. They also located their equipment pursuant to a fraudulent effort to maximize the amount of transport mileage so they could charge for traffic in direct contravention of applicable rules. *Id.* By the time of the FCC's decision, Utah had revoked All American's ability to operate, characterizing All American as a "mere shell company." The Utah PSC had by then found that All American lacked the technical, financial, and managerial resources to serve customers.[3] *Id.* The defendants authorizations from the FCC had also already been "discontinued," and they had not complied with FCC's discontinuation of service rules either. The FCC concluded that the defendants were not *bone fide* CLECs and were a "sham." *Id.* at 3488.

Here, NAT has submitted two affidavits from Gene DeJordy, the founder of NAT and a member of its board, which establish NAT has over 150 residential, tribal, and commercial customers besides Free Conferencing, (docket 211-1, ¶ 4), and that NAT has physical offices, telecommunications equipment and towers on the Crow Creek reservation in addition to an internet library and technology center (docket 192-1, ¶¶ 9-14.)

In addition, Sprint itself has submitted an affidavit of its own representative establishing that Sprint's records show all calls at issue in this case:

> Sprint's internal records show that … calls delivered by Sprint to NAT were delivered by Sprint over the traditional public switched telephone network ("PSTN") facilities of the intermediary carrier South Dakota Network. Since April 2014, the calls delivered by Sprint to NAT have been delivered by Sprint over the traditional PSTN.

Fourth Affidavit of Amy S. Clouser, ¶ 3, docket 179. Thus, there is no dispute that real calls from real Sprint customers were delivered by Sprint and terminated by NAT during the period of

[3] In the PUC Order, the PUC found in a contested proceeding in which Sprint was the participant that NAT had the technical, financial, and managerial resources to operate a CLEC. PUC Order, pp. 8-12.

Tariff No. 3. Further, on October 1, 2014, Sprint itself filed a motion for summary judgment in which it advanced as an **undisputed fact** the following:

> 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."

Sprint Statement of Undisputed Facts, Docket 177, ¶ 5. Specifically in connection with NAT's Tariff No. 3, Sprint itself submits as an undisputed fact that NAT billed Sprint for ***switched access charges.*** In *Farmers I*, the FCC ruled that calls into conference bridges actually "terminate" at the bridges located on the premises of local exchange carrier. *Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co.*, 22 FCC Rcd. 17973, 17985 (2007), 2007 WL 2872754 (F.C.C.). Thus, unlike in *All American*, the calls at issue here are all terminated on the Crow Creek reservation at the location covered by NAT's tariff, where it has always been authorized to operate by the Crow Creek Tribal Utility Authority.

Finally, there is the PUC proceeding. In that proceeding, Sprint's own representative and expert testified in connection with NAT's "access stimulation practices" and the applicable FCC Commission orders that "I know what NAT's doing- what Free Conferencing is doing is legal, but it just doesn't sound right." *See* Affidavit of Stephen Wald, Ex. G, Testimony of Randy Farrar, 546:4-5.[4]

More importantly, on May 13, 2014, the PUC voted to approve NAT's application and, in its subsequent PUC Order, made formal Findings of Fact and Conclusions of Law. *Id.*, ¶ 14. In particular, the PUC expressly rejected Sprint's contention that NAT was a "sham" and that

[4] Sprint attempts to explain away its representative's testimony by arguing in its opposition papers that the statement concerning lawful activity related only to the tariff rates. However, if the Court reads the entire testimony of Mr. Farrar, it is apparent that he was referring to all business activity post CAF Order. *See* Farrar Testimony, pp. 538:12-542:23. In other parts of his testimony, Sprint's representative and expert testified that Free Conferencing was acting lawfully. PUC Hearing Transcript, p. 546.

"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 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. Therefore, all arguments that NAT is a "sham entity" have been finally and fully adjudicated against Sprint, which already lost that argument.

In short, there is an extensive record of admissible evidence establishing NAT's compliance with the applicable federal regulations and taking the situation outside the scenario in *All American.*

B. There Is, At A Minimum, A Genuine Issue To Be Tried As To Whether NAT Was A Certified Local Exchange Carrier With Respect To Calls Delivered to Free Conferencing.

Sprint also contends that NAT was not entitled to bill Sprint for *interstate* service under its federal tariffs because it did not until 2014 have a certificate of authority from the PUC to provide *intrastate* service. Sprint cites no case, statute, or FCC ruling to support its position, and there is none. Even the SDPUC said that NAT did not violate its rules because it was operating

on the Crow Creek Reservation under the authority of the Tribe.

But Sprint is looking for a pretense to avoid its obligations and is now contending that the PUC "*found that it has regulatory authority over all telecommunications service provided by NAT on the Reservation delivered to a non-tribal member like Free Conferencing…. 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*…." Sprint Memorandum, pp. 12-13, Docket 219. The PUC said nothing of the sort. As a matter of law, NAT has authority under the order of the Crow Creek Tribal Utility Authority and its federal tariffs to provide interstate service and do business as a local phone company, and, as a matter of law the Crow Creek Tribal Utility Authority may claim jurisdiction over companies who agree to the jurisdiction of the Tribe, which it is undisputed that Free Conferencing Corporation clearly agreed to tribal jurisdiction[5]

Again, Sprint has in its Cross-Motion advanced this new theory that has been waived by its considered decision not to assert this claim or defense even though it arises from the same transaction or occurrence as it original claim. Assuming arguendo that Sprint is permitted to raise this new theory, there are genuine issues of fact to be tried that preclude summary judgment based on this new claim and defense.

Sprint contends that NAT was not a "certified local exchange carrier with respect to calls delivered to Free Conferencing." *See* Sprint Cross-Motion, Docket 223, p. 1. First, that statement is not even supported by the evidence Sprint cites. *See* NAT Statement of Facts (Docket 240), Response Nos. 22, 23, pp. 12- 20.

Second, the FCC's regulations define the term "CLEC" as any local exchange carrier that provides interstate-exchange access services and does not fall into the definition of an "ILEC." 47 C.F.R. § 61.26. Specifically, the regulations provide the following definition:

[5] For a more detailed discussion of this issue, *see* NAT Summary Judgment Reply, pp. 11-17, Docket 339.

> CLEC shall mean a local exchange carrier 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" in 47 U.S.C. 251(h).

47 C.F.R. § 61.26(a)(1). Nothing in the definition of a "CLEC" requires authority from a state. NAT is indisputably a "CLEC" under the definition, as it has since 2009 been a local exchange carrier, provided some or all of the interstate exchange access services used to send traffic to or from an end user, and has not fallen within the definition of "incumbent local exchange carrier." (An ILEC is one of the original "Baby Bells" dating from 1996 or a successor. 47 U.S.C. 251(h).)

Sprint alleges that the PUC found that NAT needed the authority of the PUC in order to operate. The PUC found no such thing. In the PUC proceeding, Sprint contended that NAT was acting unlawfully for the brief period that NAT was treating the calls from the reservation to the other parts of South Dakota as interstate calls. The PUC Order rejected Sprint's argument that connecting those calls was a ground to deny NAT's application. The PUC Order stated this:

> Regarding the operation of NAT prior to receiving a certificate of authority from the Commission, the Commission notes that this application involved jurisdictional issues regarding the scope of the Commission's jurisdiction over NAT's provisioning of services on the Crow Creek reservation. Prior to filing this application, NAT sought, and received, authority to operate from the Crow Creek Tribal Utility Authority. [citing hearing exhibits] **Under these unique circumstances, the Commission finds that NAT's operation without a certificate of authority does not bar it from receiving a certificate of authority**.

PUC Order, Docket 211-5 ¶ 46 (emphasis added). The PUC thus did not find that NAT needed a certificate of authority issued by the PUC to operate. The PUC simply rejected Sprint's contention that the uncertainly about whether NAT needed state CLEC authority for reservation to off-reservation calls was grounds to deny NAT's application. The PUC was likely paying deference to NAT's position that calls placed from a sovereign nation, the reservation, to other

locations within the state of South Dakota can logically and legally be considered interstate calls. In any event, the PUC did not take Sprint's position that NAT was acting unlawfully. Such deference is consistent with the FCC's policy, as discussed further below, that utmost respect should be paid to the sovereignty of a Native American tribe and tribal government.[6]

Most important, NAT clearly had CLEC authority from the Crow Creek Tribal Utility Authority. Tribal governments "derive their powers of government from their inherent sovereignty and not by delegation from the federal government." *Mexican v. Circle Bear*, 370 N.W.2d 737, 740 (S.D.1985) (*citing United States v. Wheeler*, 435 U.S. 313, (1978)). "Indian tribes exist as sovereign entities with powers of self-government." *Id*. at 740-41 (citations omitted).

It has been the consistent policy of the United States to respect tribal self-government. By Executive Order No. 13175, President Clinton directed, "With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal government the maximum administrative discretion possible." Consultation and Coordination with Indian Tribal Governments, 65 Federal Register 218 (November 9, 2000)(attached to NAT's Summary Judgment Reply as "Exhibit A"). That mandate has continued through the administrations of Presidents Bush and Obama. *See* Presidential Memoranda attached to NAT's Summary Judgment Reply as "Exhibit B."

In 2008, pursuant to its inherent sovereignty, the Crow Creek Tribal Utility Authority entered an "*Order Granting Approval To Provide Telecommunications Service*" (the "Tribal CLEC Order"). The Tribal CLEC Order provided:

> Under the Constitution and By Laws of the Crow Creek Sioux Tribe, the Tribal Council is empowered and authorized to enact resolutions and ordinances governing the management of all economic and educational affairs and

[6] For a more detailed discussion of this issue, *see* NAT Statement of Facts, Docket 240, pp. 14-17.

enterprises of the Tribe….

> Native Telecom proposes to: (i) provide basic telephone and advanced broadband services, which are "utility services" essential to the health and welfare of the tribe; and (ii) provide these services in "all areas of the Crow Creek Sioux Reservation." Furthermore, Native Telecom proposes to provide basic telephone service, consistent with the federal universal service requirements of 47 U.S.C. § 214(e) and the rules of the Federal Communications Commission ("FCC"). In addition, Native Telecom commits to work with the Crow Creek Sioux Tribe to identify and pursue economic development opportunities and make basic telephone and advanced broadband services readily available and affordable to residents of the reservation.
>
> The Crow Creek Utility Authority concludes that Native Telecom's proposal to provide basic telephone and advanced broadband services on the reservation is consistent with the "Crow Creek Indian Reservation Telecommunications Plan To Further Business, Economic, Social, and Educational Development" on the reservation. Based upon Native Telecom's proposal and commitments, Native Telecom is hereby granted authority to provide telecommunications services on the Crow Creek Reservation subject to the jurisdiction of the laws of the Crow Creek Sioux Tribe.

PUC Order at 15-16, ¶ 3. In the Tribal CLEC Order, the Crow Creek Tribal Utility Authority also described the nature of what it was doing: "This approval is akin to competitive local exchange carrier (CLEC) approval provided to carriers outside of reservations." PUC Order at 15-16, ¶ 3.

There is thus much evidence that NAT had all necessary authority to operate as it has.

Further, to the extent Sprint has contended that the Tribe does not have jurisdiction over Free Conferencing Corporation ("Free Conferencing") – it has really offered no evidence to support that contention –NAT has submitted evidence demonstrating that Free Conferencing agreed to tribal jurisdiction.

An Indian reservation is considered a sovereign nation, and thus some have concluded that traffic between a reservation and residents in a state outside the reservation is *interstate* traffic that does not require state authorization. Wald Aff., Ex. A, PUC Hearing at 303:14-305:5, 436:5-437:8. The PUC made certain conclusions of law regarding its jurisdiction over conduct

on the Crow Creek Reservation in the PUC Order. The PUC noted there was some uncertainty regarding jurisdiction because NAT is a limited liability company formed under tribal law, is majority owned by the Tribe, and requested a service area on the Crow Creek Reservation. The PUC first recognized the foundational principal that the Tribe had sovereignty over its members, stating the following in the PUC Order:

> The Commission points out that this case involves a telecommunications company that is a limited liability company formed under the Crow Creek Sioux Tribe in which the tribe is the majority owner. *See* Finding of Fact 26. The requested service area is on the reservation. *See* Finding of Fact 54. The United States Supreme Court has found that Indian tribes possess "'attributes of sovereignty over both their members and their territory...." *Montana v. United States*, 450 U.S. 544, 563, (1981), citing *United States v Wheeler*, 435 U.S. 313, 323 (1978).

PUC Order at 15-16, ¶ 3. The PUC then found, consistent with well-established law, that Native American tribes also have jurisdiction over non-members on their reservation who consent to the tribe's jurisdiction, writing as follows:

> NAT's service is not limited to tribal members, as it also provides service to Free Conferencing. *See* Finding of Fact 32. In Montana, the court found that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Montana, 450 U.S. at 564. Regarding jurisdiction over nonmembers, the Court generally found that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. The Court then found that there were two exceptions to this general rule. **The first is that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements**." Id. The second exception is that "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

Id. (emphasis added). The PUC concluded that it had jurisdiction to grant NAT's application, which related to *intrastate* service, but that it did not have jurisdiction over tribal member on the reservation:

> The Commission finds it has the necessary jurisdiction to grant a certificate of authority to NAT pursuant to SDCL chapter 49-31 and 47 U.S.C. § 152(b). However, the Commission finds that it **does not have** primary regulatory authority over the provision of service by NAT to members on the reservation as NAT is a telecommunications company operating on the Crow Creek Reservation as a limited liability company formed under the Crow Creek Sioux Tribe.

PUC Order at 16, ¶ 4 (emphasis added). The PUC then simply made clear that it was not making any finding as to whether any non-member consented to tribal jurisdiction. The PUC Order stated:

> Since this is an application for a certificate of authority, the Commission makes no findings on whether any specific nonmember that receives service from NAT has consented to jurisdiction as set forth in the first *Montana* exception. Regarding the second *Montana* exception, the Commission finds there has been no showing that the requirements of this exception have been met.

PUC Order at 16, ¶ 4. The PUC thus did not, as Sprint contends, find that it has "sole regulatory authority over the calls delivered to a non-tribal member like Free Conferencing." In fact, it said the opposite.

As for Free Conferencing, however, the evidence was undisputed that Free Conferencing consented to the authority of the Tribe. Wald Aff., Ex. A, PUC Hearing Tr. at 162:5-19 (Q: And NAT takes the position that Free Conference has consented to the Tribe's jurisdiction; right? A: It doesn't really take that position. Free Conferencing did.) There is thus indisputable evidence of consent to jurisdiction by Free Conferencing to the Tribe's jurisdiction, making this new theory by Sprint not susceptible to summary judgment.

III. THERE ARE, AT A MINIMUM, GENUINE ISSUES TO BE TRIED AS TO SPRINT'S NEW THEORIES PURPORTING TO JUSTIFY ITS REFUSAL TO PAY BILLS UNDER NAT'S TARIFFS NOS. 1 AND 2.

For the first time in five years of litigation, Sprint is now advancing new claims regarding tariffs that were in place at the time it initiated this action in 2010. As discussed in NAT's Summary Judgment Reply, the claims and defenses Sprint now asserts are related to Tariff Nos.

1 and 2 indisputably involve the same transactions and occurrences as the claims asserted in Sprint's Complaint. Sprint chose not to plead them when it commenced this action or when the Court granted it leave to amend, and they are now waived.

Even if Sprint could, five years into this case, advance the its new claims and defenses related to Tariffs 1 and 2, there are "undisputed facts" identified by Sprint to support its Cross-Motion that are either wholly unsupported by the evidence it cites or disputed by admissible evidence presented by NAT.

A. There Are Disputed Facts As To Whether Sprint Has Preserved Its Right To Contest NAT's Charges Under Tariffs Nos. 1 and 2.

Another one of Sprint's new claims is that NAT's Tariffs Nos. 1and 2 have improper definitions of "End User" and thus are void on their face. On the legal issues Sprint raises, NAT refers the Court to its Summary Judgment Reply. *See* Docket 239, pp. 17-22. Sprint ignores the Filed Rate Doctrine and its codification in 47 U.S. C. § 204(a)(3), which provides that tariffs filed on 15-days' notice are "deemed lawful." It is also misreading the FCC authority it cites to support its theory, as that authority only directed the CLEC to file a revised tariff and did not hold that the tariff at issue was void. *See Northern Valley Communications*, 26 F.C.C. Rcd. 8332, 8341 (2011)("Northern Valley")("[W]e conclude that the Tariff violates section 201(b) of the Act, and must be revised.")

In addition, Qwest has never preserved this claim or defense by properly raising these issues under the dispute provision of the tariffs.[7] NAT's Tariff No. 2 includes specific requirements for disputing bills that Sprint is required to follow to dispute the invoices issued by

[7] It is Sprint's obligation to plead and prove that it complied with the notice and dispute provisions under NAT's tariff and Sprint has not done so. And thus, NAT has not filed a new statement of facts in response to Sprint's Cross Motion with this filing adding this disputed fact issue so as to not unduly complicate the voluminous record the Court has before it. In any event, whether the dispute provisions apply to Sprint and whether Sprint has indeed complied with those provisions are questions of fact that prohibit the entry of summary judgment in favor of Sprint. *See Great Lakes Communication Corp. v. AT&T Corp.*, 2015 WL 897976, No. 13-CV-4117-DEO, *10 (March 3, 2015).

NAT for the tariffed services Sprint has received. First, Sprint was required to submit a "written notice of good faith dispute" "for each and every individual bill that Buyer wishes to dispute," including "sufficient documentation to investigate the bill being disputed." Tariff No. 2 ¶ 3.1.7.1(a) (Docket 67-3, pp. 32-33). Second, Sprint was also required to pay "in full" any disputed charges "prior to or at the time of submitting a good faith dispute." *Id.*, ¶ 3.1.7.1(b).

Sprint has acknowledged that its formal notices objecting to NAT's bills have identified only "traffic stimulation activities and artificial mileage inflation," and have included this paragraph in the attached documentation:

> Sprint objects to the nature of certain traffic for which Cabs Agents/Native American Telecom is billing access charges and Sprint disputes the terminating charges in full. It is Sprint's position that traffic volumes associated with, but not limited to; artificially stimulated usage, chat lines, free conferencing, and revenue sharing are not subject to access charges. If you have any questions please call Julie Walker at 913-762-6442 or email at julie.a.walker@sprint.com.

Amended Complaint (Docket 171); ¶¶ 34, 59; Sprint's Answer To Amended Complaint (Docket 238), ¶¶ 32, 53; *see also* Exhibit B to Amended Complaint. Sprint admits that it first provided only a limited dispute notice to NAT in February, 2010, *see* Sprint's Answer to Amended Counterclaim, Docket 238, ¶ 5; however, it fails to present any evidence that it followed the dispute provisions by providing sufficient documentation to investigate the reasons Sprint disputes the bills.

A customer's failure to comply with notice-and-dispute provisions in a tariff is to "admit the accuracy of the entire contents of the bills at issue and be foreclosed from any opportunity to challenge the accuracy of those bills." *Powers Law Offices, PC v. Cable & Wireless USA, Inc.*, 326 F. Supp. 2d 190,193 (D. Mass. 2004); *see also MCI Telecomms. Corp. v. Best Tel. Co., Inc.*, 898 F. Supp. 874-75 (S.D. Fla. 1994) ("If the customer does not give the required notice of the basis of its dispute, the invoice is deemed to be correct and binding on the customer.")

At best, there is an issue of fact as to whether Sprint's dispute notices comply with the dispute provisions of the tariff that are to be strictly construed and deemed lawful. Thus, summary judgment should be denied.

B. NAT Has Presented Admissible Evidence Demonstrating There Are Genuine Issues To Be Tried As To Whether Free Conferencing Is An End User Customer Who Received Access Services Under Tariffs Nos. 1 and 2.

For the first time in five years of litigation, Sprint contends that isolated phrases in Tariff Nos. 1 and 2 are defenses to its liability. Sprint cites, for example, as "undisputed facts" terms of NAT's tariffs taken out of context or in limited context, like the definition of the word "Company," a phrase from a section on "Access Service," and even a term from NAT's "Tribal Tariff" not at issue in this case. Sprint cites these terms to imply that NAT has failed to prove some required element of its counterclaim but without referring to any testimony, other admissible evidence, or legal authority to support its position. As discussed below, Sprint's position has no merit.

The term "Company" is defined as "NATIVE AMERICA TELECOM, LLC, the issuer of this tariff, a competitive local exchange carrier." Sprint cites this definition to imply that NAT must be a "competitive local exchange carrier" in order to bill for switched access fees under its federal tariffs. NAT Statement of Facts, Docket 240, ¶ 35. But nowhere do these *interstate* tariffs require that NAT obtain CLEC authority from a state agency that by its nature has jurisdiction over *intrastate* traffic. Sprint cites no authority to support its position.

As discussed above, the FCC's regulations define the term "CLEC" as any local exchange carrier that provides interstate-exchange access services and does not fall into the definition of an "ILEC." 47 C.F.R. § 61.26(a)(1). It is not disputed that NAT is a local exchange carrier, that it provides some or all of the interstate exchange access services used to send traffic to or from an end user, and that it is does not fall within the definition of "incumbent

local exchange carrier."

Sprint also cites as "undisputed facts" various other phrases in the tariffs to suggest to the Court that there might be some obscure technical flaw in NAT's claim. *See* NAT's Statement of Facts, Docket 240, ¶¶ 34-48. Through these references, Sprint is attempting to imply that Free Conferencing does not receive "access service" for which NAT is entitled to bill Sprint switched access fees.

Sprint quotes those phrases to give a distorted view of the tariff and suggest NAT must meet some technical threshold to prove its claim. It does not. The tariff actually provides a broad and general description of "Switched Access Service" after the words Sprint quotes out of context. It describes the "Switched Access Service" NAT provides as follows:

> Switched Access Service consists of local transport and the appropriate end office switching and functions to enable a Customer to utilize the Company's network to accept Calls originated by End User or to deliver Calls for termination to End Users.

Docket 221-1, at 5 of 5, § 6.1. This generic description is included in tariffs just so an entity like Sprint cannot invent pretexts for avoiding payment. The broad language in the tariff does not permit any reasonable dispute that Free Conferencing was a customer of such a service or that the calls of Sprint's customers to Free Conferencing conferences were delivered under such a service.[8]

Further, since the onset of the case, Sprint has admitted that the calls at issue have indeed been delivered to NAT during the periods in question. *See* Third Aff. of Amy S. Clouser, Docket 76, ¶ 2. Further, Sprint has also admitted that its own internal records show that the calls at issue were delivered from Sprint to NAT. *See* Fourth Aff. of Amy S. Clouser, Docket 179,

[8] For a more detailed discussion of the phrases from the tariffs Sprint takes out of context, *see* NAT's Statement of Facts, docket 240, ¶¶ 34-48.

¶ 3. Indeed, Sprint has even cited as an ***undisputed fact*** that "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.'" Sprint Commcn's Co. L.P.'s Statement of Undisputed Facts in Support of Mot. for Summ. J. on a Portion of NAT's Counts One and Two, Docket No. 177, ¶ 5. At a minimum, there is evidence supporting Free Conferencing's position that precludes summary judgment.

Finally, Sprint has gone so far astray from the actual claims and defenses in the case that it even cites as an "undisputed fact" what it describes as NAT's "Tribal Tariff." Statement of Facts, ¶ 32, p. 42. That "Tribal Tariff" is for local service and has nothing to do with the claims in this case, the tariffs at issue in the case, or the bills sent under those tariffs. *See* Docket 221-6 (page 7 of 62) ("Tribal tariff" covers "service offerings, rates, terms and conditions applicable to the furnishing of *intrastate* end-user local exchange communications services by Native American Telecom, LLC to Customers within the state of South Dakota.") In fact, in its own Answer to NAT's Amended Counterclaim, Sprint itself even recently stated that it "*denies that NAT's* ***Tribal tariff*** *and South Dakota Public Utilities Commission tariff are relevant to NAT's counterclaims*." Docket 238, ¶ 11.

C. At A Minimum, There Is A Genuine Issue To Be Tried As Whether Free Conferencing Has Been An End User Under Tariff Nos. 1 And 2.

Finally, Sprint claims that NAT is unable to enforce the provisions of Tariffs Nos. 1 and 2 because NAT did not bill Free Conferencing for services until 2011. While NAT does not dispute that there was a delay in billing Free Conferencing after the FCC's *Farmers II* decision clarified the rules, NAT has submitted admissible evidence that it was working to properly bill Free Conferencing as soon as those rules were clarified.

In *Farmers II*, the FCC found that the conferencing companies were not end users because Farmers "never intended to treat the conference calling companies as customers of any of *Farmers'* tariffed services." *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, 24 FCC Rcd 1480, ¶ 16 (F.C.C. 2009). Here, that is not the case, because Free Conferencing from the outset always wanted to comply with the rules and was working to properly bill Free Conferencing as soon as those rules were clear.[9]

After the issuance by the FCC of the *Farmers II* decision, both NAT and Free Conferencing knew and agreed that it was necessary for NAT to bill Free Conferencing for the tariff services Free Conferencing received from NAT. PUC Hearing Tr. at 258-59. They were aware of *Farmers II*, they aspired to comply with the decision, and they did not want to give long distance carriers a reason not to pay. *Id.* at 258, 264. NAT knew it had to move from "netting" to a model in which it had to account for charges on a month-by-month basis, and NAT and Free Conferencing did just that. *Id.* at 269. NAT thus hired Technologies Management, Inc. ("TMINC"), a nationally known telecommunications consultant, to evaluate the technical issues related to how to bill Free Conferencing for universal service, line, and other charges. *Id.* at 264-270.

NAT sent its first bill to Free Conferencing for end-user fees in 2011. It did not send a bill to Free Conferencing before 2011 because TMINC was addressing uncertainty regarding its proper treatment. The uncertainty arose because Free Conferencing's requirement for access lines fluctuates dramatically by day of the week and time of day, and consequently it was not clear how NAT should properly account for and charge Free Conferencing for its use of access

[9] Free Conferencing was actually instrumental to the *Farmers II* decision because it refused to participate in the backdating of a Farmers contract, and it was its disclosure during discovery in an unrelated case that allowed Qwest to seek reconsideration of *Farmers I*. *See Sancom v. Qwes*t, Case No. 07-4147-KES (D.S.D.), Trial Tr. at 1180:17-1183:22.). Any suggestion that NAT or Free Conferencing did not intend to comply with the requirement announce in *Farmers II* is inconsistent with the record.

lines. This issue was further complicated, and resolution delayed, because TMINC sought guidance from the Universal Service Administrative Company ("USAC"), the federal agency charged with collecting and distributing telecommunications fees and subsidies, because the "end user" fees charged to Free Conferencing would serve as the basis for calculating universal service fees ("USF") taxes, and because of a question regarding the proper treatment of the imputed value of the services that NAT subsidized on behalf of the Native American users of the services on the reservation.

Free Conferencing was, however, on notice that bills for services were forthcoming shortly after the *Farmers II* decision. Once NAT's consultants reached a conclusion on the technical issues, Free Conferencing paid all of the accrued charges and began paying for all services from NAT on an ongoing basis. Free Conferencing has continued to make payments to NAT each and every month since 2011.

There has been extensive testimony about TMINC's work in this area and the calculation of appropriate charges for NAT to bill Free Conferencing. PUC Hearing Tr. at 266-268; 397-401:15, 403:19-403: 408:24-409:10. In fact, NAT even pre-paid some of the USAC charges and received a $10,000 credit back from USAC when universal service fees were re-calculated by TMINC. *Id.* at 268.

Despite extensive discovery during the two proceedings before the PUC, Sprint has identified no evidence to dispute the evidence that NAT intended to determine the proper way to bill Free Conferencing and that there was an immediate agreement post *Farmers II* that Free Conferencing would be billed.

Sprint has charged that NAT and Free Conferencing "backdated" their "service agreement" and the bills to Free Conferencing. That charge is unsupported by the evidence and

certainly disputed. As part of creating an account receivable for each of the months for which obligations were due, NAT created invoices through its accounting system for each account receivable, and those invoices were put in a file. PUC Hearing Tr. at 401-409. The invoices were not represented to anyone as having been sent from NAT to Free Conferencing in the ordinary course of business. *Id*. They were not filed with a court or agency, and they were never intended to be presented to anyone as evidence that bills were sent at the time the services were provided. *Id*. Then, Sprint and other intervenors in NAT's PUC proceeding served discovery requests for everything and anything related to NAT's business operations, and the discovery responses provided by NAT included the invoices. *Id*. The invoices were never presented as if they were sent during the periods covered by invoices. *Id*. NAT never offered the invoices to support any legal position or misrepresented any fact to anyone, and in fact the contrary is true. *Id*.

As soon as the Interim President of NAT was deposed, he disclosed that NAT engaged TMINC to evaluate certain technical telecommunications issues regarding the billing of Free Conferencing and that Free Conferencing made a lump sum payment to NAT in 2011. Wald Aff., Ex. E., Deposition of Jeff Holoubek, November 25, 2013, pp. 117-28. NAT's Interim President did not know about the existence of the invoices nor how the invoices came to be created, but said he would find out. At the CLEC hearing he reported that the accounting system generated the invoices when the NAT accountant entered the monthly charges into the system, after TMINC had provided its suggestions regarding the proper accounting for the services NAT provided to Free Conferencing. Ex. A., PUC Hearing Tr., 270. The invoices were put in a file. When the discovery request was made by Sprint, NAT produced everything, including the file with the invoices. *Id.*

By using the word "backdated," Sprint attempts to slander NAT and Free Conferencing by implying they acted in a manner similar to those certain parties involved in *Farmers I* who submitted false information in an FCC proceeding. Neither NAT nor Free Conferencing were parties in *Farmers I.* As the Court is aware from the *Sancom* matter, Free Conferencing declined to sign an addendum to its contract when requested by one of the *Farmers I* parties. In other litigation, Free Conferencing later produced email regarding its refusal to sign, which triggered Qwest's request for reconsideration by the FCC of *Farmers I.* Sprint's allegation of "backdating" is thus especially inappropriate when directed to Free Conferencing. *See Sancom v. Qwes*t, Case No. 07-4147-KES (D.S.D.), Trial Tr. at 1180:17-1183:22.).

As to Sprint's allegation that the amendment to the NAT/Free Conferencing "Service Agreement" was "backdated, almost from the outset it was clear to the parties that terms of the Service Agreement had to be amended to address regulatory and business requirements of the parties to the Agreement. Wald Aff., Ex. A, PUC Hearing Tr., at 265-268; 397-401. As a result, because of practical business and regulatory issues, Free Conferencing and NAT agreed that various provisions of the original Service Agreement would be amended or not enforced. *Id*.

In November 2009, the FCC released *Farmers II*, which provided clarity in a variety of areas concerning the relationship between CLECs and end users like Free Conferencing. With the release of *Farmers II*, NAT and Free Conferencing understood that Paragraph 7 of the Service Agreement, which under certain circumstances gave Free Conferencing the exclusive right to locate and install equipment at NAT's office for the purpose of provided audio conferencing services, required reconsideration. Among other things, *Farmers II* said that exclusivity was not consistent with the concept of end users receiving tariffed service. From that point forward, both NAT and Free Conferencing understood that Free Conferencing had no right

to exclusivity. *See* Wald Aff., Ex. A., PUC Hearing Tr., 257:4-259:24, 272:17-275:7.

Paragraph 7 Provision never prevented NAT from expanding its business services. As NAT's Interim President testified during the PUC hearing, NAT received numerous expressions of interest from companies wanting to do business with NAT. However, NAT decided it was not in a position to expand its business relationships until it "got its litigation stuff worked out." Wald Aff., Ex. A, PUC Hearing Tr. at 292:21-296:15. NAT expected that the litigation would end after the FCC issued the CAF Order that rejected Sprint and other long distance carriers' pressure to make unlawful the business model of free calling companies. *See* DeJordy Aff., Docket 192-1, ¶ 22. However, Sprint has continued litigating disputes, which continues to impair NAT's ability to expand residential services on the Crow Creek reservation and expand services to more non-residential customers. *Id.*

Also, under the original Service Agreement, the formula for Free Conferencing's marketing fee increased from 75% to 95% in relation to traffic volume. However, as the parties' circumstances changed – litigation costs rose, NAT reduced its rates, and Free Conferencing volunteered to increase traffic volume – Free Conferencing also agreed to receive payment based on the lowest formula of 75% regardless of volume, and in fact has never received more than 75% of the revenues. Wald Aff., Ex. A, PUC Hearing Tr. at 292:21-296:15.

The NAT board decided that it was not practical or necessary to formally amend the written Service Agreement every time there was an adjustment to the arrangement between NAT and Free Conferencing. Any written amendment of the Service Agreement required the Crow Creek Sioux Tribe to incur the expense of its own legal counsel. During the periods when NAT's counsel and telecommunications consultants considered how to address *Farmer II* and evaluated other changes in the regulatory framework that might affect NAT, NAT's board, after

consulting with the Tribe, decided that the Tribe was not in a financial position to document in writing every needed change to the Service Agreement. *Id*., at 258. The Tribe simply did not have the resources to pay counsel, and a writing was deemed by the board not to be necessary given that the parties were dealing fairly and openly with each other. *Id*. at 259. In addition, each and every part of the Agreement that was either not adhered to or modified was in favor of the Crow Creek Sioux Tribe and so there was not a concern that the Tribe would be somehow mislead to their detriment.

The issuance of the CAF Order by the FCC in November 2011 resolved most of the major uncertainties relating to NAT's business. NAT and Free Conferencing decided it was an appropriate time to reduce to writing the modifications the Service Agreement they had agreed to over the years. Wald Aff., Ex. A., PUC Hearing Tr., 272-273. The Tribe was still concerned about the cost of having a lawyer review an amended contract, so the parties took the unusual step of using as the amended contract a redlined version of the Service Agreement showing the changes from the original. *See* Wald Aff., Ex. G, Service Agreement. That amended agreement is signed on behalf of NAT by each of the three owners of NAT. *Id*.

Next to their signatures is a date in ***2012***, reflecting that no one was trying to mislead anyone as to when the document was signed. *Id*. The document shows all of the redlined changes that the parties intended. *Id*. The date on the first page off the document, 2009, was not changed because the parties had agreed to the changes well before they had changed the writing. Free Conferencing had not, for example, ever taken a marketing fee based on a formula greater than 75% even though it had such a right in 2009. *Id*. All of the parties were open about what they were doing and the document itself is fully transparent as to what it is and when it was signed. All of these issues were fully vetted by the SDPUC and Sprint is well aware that the

actions of all parties involved have been considered to be reasonable under the circumstances.

CONCLUSION

For the foregoing reasons, NAT request that the Court allow its motion for partial summary judgment.

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SWIER LAW FIRM, PROF. LLC

/s/ Scott R. Swier

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

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

Attorneys for Native American Telecom, LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 23, 2015.

/s/ Scott R. Swier

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