

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH DAKOTA  
SOUTHERN DIVISION

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SPRINT COMMUNICATIONS  
COMPANY L.P.,

Civil No. 10-4110-KES

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,

**SPRINT'S MEMORANDUM IN  
SUPPORT OF MOTION TO  
DETERMINE REASONABLE  
ATTORNEYS' FEES**

Defendants.

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Sprint Communications Company L.P. ("Sprint") submits this memorandum in support of its Motion to Determine Reasonable Attorneys' Fees to be awarded to Sprint.

**I. SPRINT IS ENTITLED TO FEES**

In its February 16, 2016 Memorandum Opinion and Order (Docket 281), the Court awarded Sprint monetary relief on its Count 1. The Court then held that, under 47 U.S.C. § 206, "[b]ecause the court has concluded that Sprint is entitled to recover damages on Count 1 of its complaint, Sprint is also entitled to an award of its reasonable attorneys' fees." Docket 281 at 10. The Court deferred a determination on the amount of reasonable fees until after the trial then scheduled for April of

2016. *Id.* On August 4, 2016, the Court issued its Memorandum Opinion and Order, ordering that judgment be entered for Sprint and against Native American Telecom, LLC (“NAT”) on the remaining claims. Docket 324. Judgment was entered that same day. Docket 325.

## **II. SPRINT’S REQUESTED FEES ARE REASONABLE**

In accordance with LR 54.1(c), Sprint’s motion is accompanied by affidavits setting out the time reasonably spent in the litigation, as well as factual matters pertinent to the motion.

The total amount of attorneys’ fees requested by Sprint, \$690,617.25, is reasonable and consistent with the guidelines for determining the amount of attorneys’ fees articulated by this Court and the Eighth Circuit:

When Congress has authorized an award of attorneys’ fees, the court should “determine ‘the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.’” *Simpson v. Merchants & Planters Bank*, 441 F.3d 572, 580 (8th Cir.2006) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The resulting product is called the “lodestar,” which is presumed to be the reasonable fee to which counsel is entitled. *McDonald v. Armontrout*, 860 F.2d 1456, 1458 (8th Cir.1988). The court should consider the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir.1974), to set the reasonable number of hours and reasonable hourly rate components of the fee award formula. *Id.* at 1459. These factors are:

(1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary

fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorney; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Pennsylvania v. Delaware Valley*, 478 U.S. 546, 562 (1986) (citing *Johnson*, 488 F.2d at 717–19); *see also Hensley*, 461 U.S. at 430 n. 3 (setting out *Johnson* factors).

*Albers v. Tri-State Implement, Inc.*, No. CR. 06–4242–KES, 2010 WL 960010, at \*22 (D.S.D. Mar. 12, 2010).

**A. Sprint seeks to recover for an appropriate number of hours**

To determine the lodestar amount, the Court must first determine the number of compensable hours—i.e. hours reasonably spent—from time records.

1. Hours spent vindicating Sprint’s right not to pay NAT’s illegal charges

NAT first threatened Sprint with litigation in April of 2010. *See* Trial Ex. 136. Between that time and the entry of final judgment, Briggs and Morgan, P.A. (“Briggs and Morgan,” or “Briggs”) billed Sprint for 2,032.9 hours in this litigation, 2,054 hours in South Dakota Public Utility Commission (“SDPUC”) cases TC10-026<sup>1</sup> and TC11-087,<sup>2</sup> and 130 hours in furtherance of the Court’s order referring certain issues to the

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<sup>1</sup> This is the case number for Sprint’s complaint filed at the SDPUC alleging that NAT was engaged in unlawful traffic pumping.

<sup>2</sup> This is the case number of NAT’s certification proceeding.

Federal Communications Commission (“FCC”). Schenkenberg Aff. ¶ 11, 14. Sprint’s South Dakota counsel, Tobin Law, billed Sprint for work on this case and in three other cases involving NAT. Tobin Aff. ¶ 2.<sup>3</sup>

Given the length of the litigation, the complexity of the case, the number of claims, and NAT’s aggressiveness, it is no surprise that the number of hours spent by Sprint’s counsel was significant.

2. Sprint has exercised billing judgment in submitting this request

Sprint’s motion requests that it be compensated for 2,056.85 hours associated with this lawsuit. Sprint requests compensation for 1,883.5 of the 2,044 hours billed by Briggs, and 173.35 hours billed by Tobin Law. Schenkenberg Aff. ¶¶ 12-13; Tobin Aff. ¶¶ 8-9. Sprint does not seek to be compensated for work done in the other NAT proceedings, or in furtherance of the ordered FCC referral.

Sprint’s request reflects the exercise of “billing judgment” as required by federal law. *Hensley*, 461 U.S. at 437. First, as is demonstrated by the Knudson, Schenkenberg, and Tobin Affidavits, and the bills issued to Sprint in this matter,<sup>4</sup> Sprint’s attorneys minimized the number of lawyers working on the file, used associates, paralegals,

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<sup>3</sup> Sprint is not seeking recovery of hours billed by its former counsel Stan Whiting, who passed away in January of 2013.

<sup>4</sup> Briggs’ bills are Exhibit A to the Schenkenberg Affidavit. Exhibit B to the Schenkenberg Affidavit lists the time entries for which Sprint seeks compensation. The Tobin Law bills are Exhibit A to the Tobin Affidavit.

support staff, and local counsel appropriately, did not bill for travel time, and did not bill for more than one timekeeper when multiple timekeepers were involved in an internal conference or client call, thereby minimizing fees. Knudson Aff. ¶¶ 7, 10; Schenkenberg Aff. ¶¶ 7, 10. In addition, Briggs' records reflect that more than \$20,000 of time was written off before being billed, either in exercise of billing judgment, or in accordance with the engagement agreement between Sprint and Briggs. Knudson Aff. ¶ 10; Schenkenberg Aff. ¶ 11.

Second, Sprint is seeking recovery for hours spent only by the key Briggs and Morgan timekeepers on the file: shareholders Scott Knudson and Phil Schenkenberg, associates Brooke Swenson and Claire Joseph, and non-administrative work done by paralegal Beth Wold. Knudson Aff. ¶ 7; Schenkenberg Aff. ¶ 7. Time spent by others who performed research projects, did cite checks, or made other contributions to the case, is not a part of this request. See Schenkenberg Aff. Ex. A.

Third, Sprint does not seek an award of fees billed to Sprint for work done in the SDPUC cases or in furtherance of the referral to the FCC. The work in SDPUC case TC11-087 contributed greatly to this case, as the discovery and testimony formed the basis for the Court's summary judgment ruling (Docket 250) and was a substantial part of the trial record. See, e.g., Docket 303 (joint transcript designations); Trial

Exhibits 106-107 (key discovery responses provided by NAT in TC11-087); Schenkenberg Aff. ¶ 15. The fact that a significant amount of work was done in the SDPUC case, and did not need to be done under this Court's supervision, further demonstrates billing judgment associated with this motion.<sup>5</sup>

Therefore, the Court should award Sprint compensation for 2,056.85 hours reasonably spent in this case, as reflected on Exhibit A to Sprint's motion.

**B. The rates billed to Sprint were reasonable**

The rates charged by Sprint's counsel were reasonable, and should be compensated fully. Generally speaking, a fee applicant must show that its requested rates are aligned with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation. *Mock*, 296 F. Supp. 2d at 1063-64 (citing *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11 (1984)).

1. Briggs' rates were reasonable

In this case, most hours were billed by Briggs, which is located in Minneapolis. Many courts recognize circumstances in which it is

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<sup>5</sup> It would be reasonable for Sprint to request some portion of the fees incurred in that case and on the FCC referral. *See Mock v. South Dakota Bd. of Regents*, 296 F. Supp. 2d 1061, 1064-65 (D.S.D. 2003) (allowing fees incurred for work in connection with administrative proceedings where necessary and useful in court proceeding).

appropriate to use an out-of-district lawyer's "home" rates as the starting point for calculating the prevailing community rates. For example, the court in *Mathur v. Board of Trustees of Southern Illinois University*, reversed a district court's use of southern Illinois rates, finding that Chicago rates should have applied because local lawyers either lacked depth of experience in the subject area, or were conflicted out. 317 F.3d 738, 743-44 (7th Cir. 2003). Likewise, in *Chrapliwy v. Uniroyal, Inc.*, out-of-district rates were used when the lead lawyers had a special level of expertise, and the opposing party also relied on out-of-district counsel. 670 F.2d 760, 768-69 and n.18 (7th Cir. 1982). *See also McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 382-83 (5th Cir. 2011) (remanding case and directing court to use out-of-district rates as a starting point).

In this case, the Briggs lawyers brought a high level of expertise in areas of Indian law, telecommunications law, and traffic pumping. Traffic pumping represented hundreds of millions of dollars of potential exposure to Sprint, and if NAT had succeeded in using a tribal court as a way to create additional leverage, that could have imposed tremendous new liabilities on Sprint. Lawson Aff. ¶¶ 4-6. In addition, as explained by Sprint's in-house counsel, Bret Lawson, it would have been difficult, if not impossible to find comparable South Dakota counsel to serve as lead counsel on this case. Lawson Aff. ¶¶ 7-9. Notably, Sprint's regular

South Dakota counsel (Gunderson, Palmer, Nelson & Ashmore, LLP) and other counsel it used in traffic pumping cases (Davenport, Evans, Hurwitz & Smith) were conflicted out. Lawson Aff. ¶¶ 7-9. Similarly, other law firms that regularly handle telecommunications cases in South Dakota would have been conflicted out as well. Lawson Aff. ¶ 9. And Mr. Tobin is a solo practitioner without the resources and support needed to serve as lead counsel in this case.

NAT is in no position to dispute that it was appropriate for Sprint to look to experienced out-of-district counsel given the complexity, novelty, and technical issues in this case. NAT itself called on Partridge & Snow, an expensive and skilled east coast firm, and brought two Partridge and Snow lawyers (Wald and Coppola) to trial. *See generally McClain*, 649 F.3d at 388 (Dennis, J., concurring) (“[W]hen the defendant has hired expensive, out of town counsel, the plaintiffs seem justified in saying that the nature of the case required the skills of out of town specialists.”); *see also Domtar, Inc. v. Niagra Fire Ins. Co.*, 563 N.W.2d 724, 741 (Minn. 1997) (national experience bears on reasonableness of hourly fee).

In this unusual case, the relevant legal community should be extended to include the nearby District of Minnesota, where Sprint found experienced and skilled Minneapolis counsel to serve as lead counsel.

The affidavit of Ann Rainhart, who is the executive director for Briggs and who held a similar role with another Minneapolis law firm, establishes that the rates charged to Sprint between 2010-2016 were at or below reasonable rate levels for comparable work in the Minneapolis area. Rainhart Aff. ¶¶ 6-9. Accordingly, the Court should allow Sprint to recover the Minneapolis rates charged by Briggs timekeepers.

2. Tom Tobin's rates were reasonable

Mr. Tobin, a solo practitioner in Winner, based on a conservative review of his invoices, billed Sprint for at least 173.35 hours during the course of this case, at a reasonable rate of \$275 per hour. Tobin Aff. ¶¶ 5, 8-9.

**C. The Johnson factors mitigate in favor of awarding Sprint its requested fees**

As noted above, the lodestar amount may be adjusted after evaluation of the *Johnson* factors. Sprint does not seek an enhancement based on those factors. However, application of those factors weighs in favor of finding that Sprint requests a reasonable fee.

Four factors are particularly important.

1. The novelty and difficulty of the question

NAT was the first traffic pumper that attempted to use tribal court to enforce illegal federal access tariffs. Lawson Aff. ¶ 4. If this gambit had been successful, it could have led to a mass migration of traffic

pumpers to tribal lands, and the potential for tremendous liability to Sprint and other carriers. *Id.* ¶ 4. This created significant jurisdictional and tribal sovereignty issues of first impression in the area of traffic pumping. Knudson Aff. ¶ 2. The skill and expertise exercised by Sprint's lawyers, who obtained a first-of-its kind injunction on a tribal court proceeding to enforce a federal tariff, had value far beyond the bounds of this case.

Beyond that issue, this case had numerous complex and technical issues involving tariff interpretation, the network engineering of NAT's VoIP network, whether NAT provided a VoIP service, and how calls were delivered from NAT's facilities through the Free Conferencing equipment.

This factor weighs in favor of full recovery.

2. The skill requisite to perform the legal service properly

For the reasons noted above, to fully (and successfully) represent Sprint in this case, Sprint's lawyers had to have a depth of understanding of federal and state telecommunications regulation, Indian law, and telecommunications technology, plus the litigation skills to utilize motion practice and trial to prevail on claims. This factor weighs in favor of full recovery.

3. The amount involved and the results obtained

The amount in dispute in this case was substantial. Mr. DeJordy provided affidavit testimony that, as of the end of 2014, Sprint owed NAT \$1,577,654 in access charges. Docket 211-1 at ¶ 17. Had NAT prevailed, it would have sought to collect a late payment of 1.5% per month. *See, e.g.*, Docket 221-3, Original Page 28, § 3.1.2.6. Those principle charges, plus late fees, plus the \$463,000 demanded in NAT's post trial brief for 2012-2015, bring the total amount in dispute to over \$3 million.<sup>6</sup>

Sprint's lawyers obtained excellent results, and thus Sprint is entitled to a fully compensable fee. In 2010, after a contested evidentiary hearing, the Court granted Sprint's request that the tribal court action be enjoined, and ordered that liability under federal tariffs must be litigated in Federal Court. Docket 62. In 2015, the Court found that NAT had billed Sprint in violation of the Communications Act for periods covered by Tariff No. 1 and Tariff No. 2. Docket No. 250. Sprint prevailed on alternative grounds—the tariffs were void and unenforceable, and Free Conferencing was not a legitimate end user under *Farmers/Sancom*. *Id.* And, after NAT abandoned all remaining claims other than its claim

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<sup>6</sup> Sprint's money judgment is for approximately \$30,000. But it is the degree of success, not the size of the judgment, that drives the size of a fee award. *See Albers*, No. CR. 06-4242-KES, 2010 WL 960010, at \*21.

under Tariff No. 3,<sup>7</sup> Sprint obtained an order denying NAT's claim for payment of bills under Tariff No. 3.

In addition to fierce battles in court, Sprint has had to fight a public relations battle waged by NAT, in which NAT has argued in court and to regulators that Sprint was disputing NAT's bills for illegitimate reasons. This adds further weight to the significance of the orders obtained that vindicated Sprint's disputes.

That Sprint was able to obtain fees only on its Count 1, or that Sprint did not win every motion in the case, should not limit Sprint's award. "It is generally true that status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fares on each motion along the way." *Jenkins by Jenkins v. State of Mo.*, 127 F.3d 709, 714 (8th Cir. 1997). The most critical factor in determining the reasonableness of a fee award is the degree of success obtained. *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 772 (8th Cir. 2000). "If the plaintiff has won excellent results, he is entitled to a fully compensatory fee award, which will normally include time spent on related matters on which he did not win." *Jenkins*, 127 F.3d at 716 (citations omitted).

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<sup>7</sup> See Transcript of Status Conference held 4/15/15.

All of the claims litigated in this case were related to NAT's ongoing violations of the Communications Act, which Congress has dictated justify damages plus a fee award. When a party was successful on the claim at the heart of the case, a fee award should be fully compensable. *Id.* at 773-74. Here, Sprint obtained damages under Tariff No. 1, and law of the case establishes that the claims arising out of Tariff 2 and Tariff 3 are related to Tariff 1. NAT successfully made this argument when it amended its pleading in 2015. Docket 190 at 13; *id.* at 15 (amended counterclaim arises out of the same transactions and occurrences as the earlier pleadings); see Docket 234 at 9-12 (Court agreeing with NAT and denying motion to dismiss on statute of limitations grounds).

Therefore, the degree of success in the case as a whole mitigates in favor of the recovery requested.

4. The experience, reputation, and ability of the attorney

As noted above, Sprint attorneys had depth of experience in complex telecommunications and Indian law issues, and litigated all claims to a successful resolution. This factor weighs in favor of awarding Sprint its requested fees.

## **CONCLUSION**

For the above reasons, the Court should award Sprint fees as set forth on Exhibit A to Sprint's motion.

Dated: August 29, 2016

By s/Tom D. Tobin

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