BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED COMPLAINT OF SOUTH DAKOTA NETWORK, LLC, AGAINST SPRINT COMMUNICATIONS COMPANY, LP	)	DOCKET NUMBER TC09-098 REPLY MEMORANDUM IN SUPPORT OF AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT

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COMES NOW, South Dakota Network, LLC (SDN), by and through its undersigned attorneys, and for its Reply Memorandum in Support of its Amended Motion For Partial Summary Judgment on Count Two (2) of its Amended Complaint, states and alleges as follows:

I. Procedural History

On September 1, 2010, SDN filed a Summary Judgment Motion on Count 1 and Count 2 of its Amended Complaint. Due to the pending issuance of an Order by the FCC to address outstanding intercarrier compensation issues, including pumped or stimulated traffic, SDN held Count 1 of its September 1, 2010, Motion for Summary Judgment in abeyance and filed an Amended Motion for Partial Summary Judgment on Count 2 of its Amended Complaint, Statement of Undisputed Facts, and Affidavit of Mark Shlanta on September 23, 2011. SDN's Count 1 will be addressed either by a later summary judgment Motion or at a hearing on the merits. On November 7, 2011, Sprint filed an Opposition to SDN's Motion for Summary Judgment. On November 10, 2011, Sprint filed an Affidavit of Regina Roach. Sprint did not file a response to SDN's Statement of

Undisputed Facts as contemplated in SDCL § 15-6-56(c)(2) thus the material facts are deemed admitted. Accordingly, the issue before this Commission is limited to whether SDN has shown entitlement to judgment on the merits as a matter of law. Kling v. Stern, 2007 SD 51, 733 NW2d 615. The Affidavit of Mark Shlanta, Chief Executive Officer of SDN, filed on September 23, 2011, as well as the pleadings on file herein, confirm there is no genuine issue of fact and that summary judgment on Count Two of the Amended Complaint filed by SDN should be granted.

II. Response to Sprint's Facts

For the purposes of this Summary Judgment motion, there is no factual dispute. The parties agree that Sprint has not paid any bill or sent any money to SDN since it first notified SDN of its intent to dispute billing for April 2009 CEA services. Sprint's dispute notice also attempted to dispute past invoices, i.e. from June 2007 through April 2009, which had been timely paid by Sprint without protest. Sprint has refused to pay not only the disputed portion of the invoices, related to alleged "pumped traffic", but also the undisputed portion of the current invoices, related to "unpumped traffic." Instead of paying the undisputed portion of each invoice, Sprint has employed a wholly Sprint-created "accounting mechanism" whereby Sprint applies the undisputed portion of the current invoices as a "credit" to retroactively "disputed" potions of past paid invoices. Sprint has not made any payments to SDN since April of 2009, although it continues to receive SDN's CEA services each month. Sprint's brief identifies an internal accounting mechanism, now called an "AP debit balance" for the first time, that it used to begin to extinguish amounts it believes it has overpaid. Although SDN disagrees with the legality of the so-called accounting procedure, SDN agrees that Sprint has followed the exact

procedure as outlined in the fact portion of its brief. SDN submits this procedure is an illegal self-help remedy not authorized by either SDN's intrastate South Dakota Access Tariff ("Access Tariff") or South Dakota law.

In the fact portion of its brief, Sprint further points out that SDN is a conduit through which Sprint delivers traffic to the LECs it believes are engaged in traffic pumping or access stimulation. This is true only because Sprint ordered appropriate access facilities from the Access Tariff and sent the traffic to SDN for termination to the LECs[1]. SDN has no control or input regarding the traffic sent by Sprint. SDN expects Sprint to send only that traffic that is appropriate for the access facilities Sprint ordered. Sprint is the party that continues to send traffic that it claims is "unlawful;" i.e. not appropriate for the tariffed service Sprint ordered and therefore in violation of SDN's Access Tariff, to SDN for delivery to these LECs without any intent to pay for such traffic. Sprint further indicates that SDN has issued a monthly bill for the total amount of traffic (both the undisputed portion and the disputed portion) without breaking out which traffic is associated with traffic pumping and which traffic is not. This is also true, but again only because SDN issues an invoice for all of the traffic sent by Sprint via the Feature Group D (FGD) facilities Sprint ordered without any indication by Sprint what part of that traffic Sprint considers to be "unlawful." It is only after the traffic is delivered by SDN as requested by Sprint that Sprint makes any effort to identify traffic it believes to be unlawful and that it wishes to dispute.

The fact that Sprint's books reflect a self-serving Accounts Payable due from SDN based on its issuance of a retroactive, untimely dispute notice, and request for

[1] A diagram that depicts a generic view of the transmission path and the rates that apply for switched access service can be found in SDN's tariff. Access Tariff 5.6.1(D)(1)(pg. 72)(See Exhibit A attached hereto).

refund several years after payment of such invoices by Sprint, is of little consequence to this dispute. It does not constitute a legal basis to deny SDN's Motion. SDN's Access Tariff, not Sprint's uniquely created accounting procedures, controls this dispute.

III. Argument

SDN is requesting the Commission to: 1) grant summary judgment on Count Two of its Amended Complaint; 2) require Sprint to make immediate payment to SDN of "undisputed" portions of the invoices since April of 2009, plus late charges permitted by SDN's tariff, and interest; and 3) order Sprint to pay the "undisputed" portion of the invoices on a go forward basis.

A. Sprint's "accounting mechanism" is an unacceptable and novel accounting procedure.

Sprint has attempted to characterize its self-help "accounting mechanism" as an AP Debit Balance. The fundamental flaw of Sprint's argument is that it assumes just because it issued a retroactive dispute notice, which included invoices over two years old, that Sprint is entitled to that money and has the right to offset this balance against liability for future services. In essence, Sprint seeks to employ a pre-judgment garnishment of funds from SDN. It has made an assumption that the disputed traffic is in fact "unlawful" as it alleged in its Counterclaim, and it is entitled to a judgment therefore. The problem with this assumption is there has been no ruling or determination from this Commission or any other legal forum that the traffic at issue here is "unlawful" or that Sprint is entitled to these funds.

The South Dakota Federal District Court clearly indicated decades ago that prejudgment garnishments are in violation of due process and unconstitutional. Stuckers

v. Thoms, 374 F.Supp 178 (D.S.D. 1974). No person shall be deprived of any significant property interest without being afforded the opportunity for a meaningful hearing before such deprivation occurs. Id at 181. Sprint is not entitled to these funds and is not entitled to deprive SDN of its property interest in these funds. To unilaterally determine it is entitled to these funds violates the law and the Access Tariff.

Sprint likens its "accounting mechanism" to paying a charge twice on your credit card bill. The next month you have a credit on your bill so you do not have to issue a check until your credit is used up. The difference in this example and the instant facts is both the credit card company and the customer agree there is an overpayment. SDN asserts it has lawfully charged Sprint pursuant to its tariff and does not agree Sprint is entitled to a credit.

B. SDN's Access Tariff does not allow Sprint's self-help accounting mechanism.

The parties agree that the summary judgment motion is a question to be resolved by SDN's tariff.[2] SDN's tariff provides, "In the event of a dispute concerning the bill, SDN may require the customer to pay a sum of money equal to the amount of the undisputed portion of the bill." (Access Tariff, Section 2.4.1(B)(2))[3] (emphasis added). Sprint alleges that the self-help credit methodology it created adheres to this provision of the tariff. Sprint indicates because "pay" or "payment" is not defined it should be construed according to its plain and ordinary meaning and cites the Merriam-Webster Dictionary. This argument must fail. Conventional principals of contract interpretation

[2] Pursuant to the filed rate doctrine, the tariffs have the effect of law. (See SDN's Memorandum in Support of Amended Motion for Partial Summary Judgment filed September 23, 2011, pg. 6, et seq.) The doctrine is also confirmed in South Dakota Law SDCL 49-13-12 and SDCL 49-31-19.

[3] The portion of the tariff quoted by Sprint in its brief does not appear to quote the exact language of the Access Tariff. The dispute provisions can be found at 2.4.1(B) of the Access Tariff on file with the Commission. (See Exhibit B attached hereto).

require agreements to be construed in their entirety giving contextual meaning to each term. Bunkers v. Jacobsen, 2002 SD 135, ¶ 15, 653 NW2d at 738.

First of all, SDN's tariff clearly indicates that a payment not received by the payment date, as set forth in 2.4.1(b)(2), in immediately available funds, will be subject to a penalty. Access Tariff 2.4.1(B)(1) (emphasis added). "Immediately Available Funds" is further defined in SDN's tariff as "a corporate or personal check drawn on a bank account and funds which are available for use by the receiving party on the same day on which they are received and include U.S. Federal Reserve bank wire transfers, U.S. Federal Reserve notes (paper cash), U.S. coins, U.S. Postal Money Orders and New York Certificates of Deposit". (Access Tariff at 2.6) A credit is not an immediately available fund to SDN under the pertinent definition in the tariff and in fact SDN has not received any funds from Sprint since Sprint issued its dispute notice. SDN has continued to provide services for traffic without receiving payment.

Second, the argument must fail even under Webster's definition of "pay" because again there is only a "dispute" between SDN and Sprint, there is not a predetermined "indebtedness" owing by SDN. A credit by Sprint is not "accepted as a medium of exchange." Further SDN does not agree there is a "debt or obligation" required to be discharged by SDN. No proper legal authority has determined that Sprint is entitled to judgment for these past balances. When the terms of a negotiated agreement are clear and unambiguous, and the agreement actually addresses the subjects that it is expected to cover, there is no need to go beyond the four corners of the contract. Wessington Springs Educ. Ass'n v. Wessington Springs School Dist. No. 36-2, 467 N.W.2d 101 (S.D,1991).

Accordingly, it is the dispute notice provisions in SDN's tariff that controls and the definitions therein.

Sprint indicates in its brief that because SDN can point to no provision in its tariff taking away a right to retroactive claims it must allow it. Again this is contrary to contract interpretation and specifically the maxim *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. Rush v. U.S. Bancorp Equipment Finance, Inc., 2007 SD 119, ¶ 10, 742 NW2d 266 (citing Accounts Mgmt., Inc. v. Litchfield, 1998 SD 24, ¶ 9, 576 N.W.2d 233, 236). Also Sprint cannot effectively amend any tariff by the unilateral creation of an internal accounting practice and the questionable issuance of a retroactive "credit." South Dakota statute sets out specifically how a tariff is created and amended, which most importantly requires Commission approval and is effective prospectively, not retroactively. SDCL §§ 49-31-12, et seq. and § 49-31-19.[4] Once a telecommunications carrier's tariff is approved, the terms of the tariff are considered to be the law and to therefore conclusively and exclusively enumerate the rights and liabilities as between the parties. Iowa Network Service, Inc. v. Qwest, 466 F.3d 1091, 1097 (C.A.8. Iowa 2006).

C. South Dakota law confirms recoupment and set off is not applicable.

Sprint cited no legal authority that provides support for its self-help accounting methodology. Although not in support of whether the Motion for Summary Judgment should be denied, Sprint did, however, provide a Minnesota federal case, between

[4] The FCC has advised that any action taken by it would not resolve alleged access stimulation activity prior to the effectiveness of any final order. *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) ¶ 661, FN 10 28.

MIEAC, the CEA provider in Minnesota, and Sprint wherein Sprint requested that a similar case involving access stimulation be stayed and referred to the FCC under the primary jurisdiction doctrine. Minnesota Independent Equal Access Corporation v. Sprint, 2011 WL 3610434 ("MIEAC"). In that case, MIEAC was apparently requesting immediate payment for calls Sprint and MIEAC agreed were covered by MIEAC's tariff. The Court determined that it could not rule on the Summary Judgment Motion without ruling on the merits of the dispute and specifically Sprint's affirmative defense of setoff and recoupment.

Sprint has conceded that SDN can obtain a preliminary money judgment if that result is compelled by the language of SDN's tariff. Sprint's Brief at p.5. Accordingly, an affirmative defense pled by Sprint in this matter has no bearing on whether the Commission can grant the relief requested by SDN. Setoff and recoupment are essentially equitable rights that can be enforced at the discretion of the Commission. Jacobs v. Dakota, Minnesota & Eastern R.R. Corp, 2011 SD 68, ¶28, ___NW2d ___, 2011 WL 4852273. Also, the claim relating to earlier payments arose out of a different transaction and a claim for offset or recoupment relating thereto is not appropriate. USPS v. Dewey Freight Systems, Inc., 31 F. 3rd 620, 623 (8th Cir. 1994); Hoaas v. Griffiths, 2006 S.D. 27, ¶23, 714 NW 2d 51 and In Re Terry, 443 BR 816, 821 (Mo. 2011).

More importantly, the MIEAC case shows a pattern by Sprint of applying its "accounting mechanism" regardless of the tariff language at issue. Sprint applied the same accounting mechanism to MIEAC at essentially the same time as it was applied to SDN (MIEAC at pg. 1). This policy is further evidenced in a recent federal case in Virginia wherein the Court determined that in the summer of 2009, Sprint launched a

coordinated effort to contest access charges with other carriers across the telecommunications industry due to a global economic downturn. Central Telephone Co. of Virginia et. al. v. Sprint, 759 F.Supp.2d 789 (2011) ("CenturyLink") (See Exhibit C attached hereto). In that case, Sprint had been paying access charges on VoIP-originated traffic for years pursuant to an Interconnection Agreement between the parties but began disputing these access charges in the summer of 2009. Similar to this instance, Sprint did not pay the current charges but rather unilaterally applied "credits" retroactively to previously undisputed amounts going back several years (CenturyLink at pg.797). The Court, in a contract dispute between the parties, found that Sprint's refusal to pay access charges was not because of any ambiguity in the ICA but likely due to the global economic downturn during that period. Likewise, in this case, it seems difficult to accept that Sprint's refusal to pay access charges is due to a careful review of SDN's tariff and its dispute notice provisions, but rather evolves from a much broader unilateral decision of stopping payment of undisputed access charges.

WHEREFORE, SDN requests that the Commission grant it Summary Judgment on Count Two of its Amended Complaint and order Sprint to immediately pay the undisputed portion of all invoices beginning in April of 2009 to the present date and to immediately begin payment of all undisputed amounts on all future invoices.

Dated this 17th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Darla Pollman Rogers, certify that a copy of South Dakota Network, LLC's Reply Memorandum in Support of Amended Motion for Partial Summary Judgment was sent by e-mail to each of the following individuals on November 17th, 2011:

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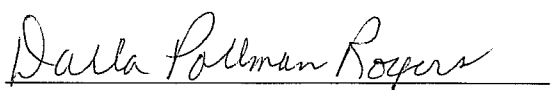

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