

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF)
SOUTH DAKOTA NETWORK, LLC, AGAINST)
SPRINT COMMUNICATIONS COMPANY LP)

TC 09-098

)
IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY LP AGAINST SPLITROCK)
PROPERTIES, INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM, INC.,)
AND CAPITAL TELEPHONE COMPANY)

**SPRINT'S OPPOSITION TO SDN'S
MOTION FOR SUMMARY
JUDGMENT**

Sprint Communications Company L.P. ("Sprint") respectfully submits this memorandum in opposition to South Dakota Network, LLC's ("SDN") amended motion for summary judgment. SDN claims Sprint has violated SDN's intrastate tariff by not issuing checks to SDN for what SDN calls the undisputed portion of the invoices. SDN is wrong. Sprint is simply employing its standard "Account Payable (AP) Debit Balance" mechanism to take advantage of its right to withhold the full amount of the parties' dispute during the pendency of this case. Sprint's AP Debit Balance mechanism not only complies with the terms of SDN's intrastate tariff, it is also supported by basic tenets of South Dakota law concerning payment and offset. SDN's motion should be denied.

I. FACTS AND SPRINT'S AP DEBIT BALANCE MECHANISM

This case involves traffic pumping activities of five local exchange carriers ("LECs") in South Dakota – Sancom, Inc. ("Sancom"), Splitrock Properties, Inc. ("Splitrock"), Northern Valley Communications, LLC ("Northern Valley"), Capital Telephone Company ("Capital"), and Native American Telecom, LLC ("NAT"). Affidavit of Regina Roach ("Roach Aff.") ¶¶ 3-5. Sprint asserts (for a number of reasons) that the pumped traffic at issue does not qualify as terminating switched access traffic as it is delivered to these five LECs. SDN is the conduit through which Sprint delivers traffic to these LECs, and Sprint asserts that because the traffic is

not subject to terminating switched access charges (at the end of the calls), it is also not subject to centralized equal access charges billed by SDN (in the middle). Sprint's Answer ¶¶ 6-9.¹

SDN acted as a conduit for this pumped traffic since at least June 2007. Roach Aff. ¶ 3. During that time, SDN has issued monthly bills for total traffic, without breaking out which traffic is associated with traffic pumping, and which traffic is not. On or about June 11, 2009, Sprint submitted a dispute and request for refund to SDN with respect to switched access charges assessed by SDN for traffic delivered from Sprint, through SDN, to Sancom, Splitrock, Northern Valley, and Capital. Roach Aff. ¶ 4.² That dispute was for time periods between June 2007 and April 2009, and Sprint demanded a refund in the amount of \$1,704,262.08. *Id.* SDN has refused to issue a refund. *Id.* Because of the refund claim, Sprint's books reflected an Account Payable due from SDN in the refund amount. *Id.*

For months following April 2009, Sprint has timely disputed each SDN bill on the basis that it contains charges for pumped traffic that is not subject to switched access charges. Roach Aff. ¶ 5. Each month when it receives a bill, Sprint 1) determines the amount of traffic it believes is pumped traffic, 2) determines the charges that it would owe SDN if pumped traffic were excluded from the bill, and 3) applies the charges that would be owed to reduce the existing AP Debit Balance created by Sprint's refund claim. *Id.* ¶¶ 5-6. For example, for the May 2009

¹ A federal court in Minnesota has interpreted a Minnesota Centralized Equal Access tariff in this way. *Minn. Indep. Equal Access Corp. v. Sprint Commc'ns Co.*, No. Civ. 10-2550 (MJD/SER), 2011 WL 3610434, at *6 (D. Minn. Aug. 15, 2011) ("The Court concludes that, read together, the tariff states that switched access is provided under the tariff when there is completion of the telephone call to "end users" and in conjunction with switched access from an LEC. Whether MIEAC is providing switched access service, and, thus, can charge for switched access service, depends upon whether the LEC – Tekstar – is also providing switched access service.") (attached as Exhibit A hereto).

² The dispute related to NAT traffic arose later.

invoice, SDN billed Sprint \$85,923.47 for interstate and intrastate usage charges. *Id.* Sprint determined that \$52,153.95 was attributable to interstate pumped traffic. *Id.* Sprint then did the following calculation:

- \$1,704,262.08 (AP Debit Balance) - \$33,769.51 (total approved charges) = \$1,670,492.57 (new AP Debit Balance)

Id.

These calculations have continued for every billing month since May 2009, and have reduced, but not eliminated, Sprint's refund claim. Most recently, SDN's September 1, 2011 invoice billed Sprint \$89,767.89 for usage charges. Sprint disputed \$51,717.31, and Sprint applied the remaining \$38,050.58 to reduce its AP Debit Balance to \$177,879.70. Roach Aff. ¶ 8. This means that as of September 1, 2011, Sprint has withheld \$177,869.70 less than the total amount in dispute. *Id.*

When the AP debit balance is extinguished, Sprint will send checks to SDN for the amounts it determines are associated with non-pumped traffic (because there will no longer be an AP Debit Balance). Roach Aff. ¶ 9.

SDN's Amended Complaint alleges that Sprint owes the intrastate switched access charges SDN has billed – both for pumped and non-pumped traffic – since May 2009 (Count I). SDN also challenges Sprint's practice of reducing its AP Debit Balance as described above with respect to amounts billed under the intrastate tariff (Count II). On this motion, SDN is raising the second issue (Count II), and seeks an order requiring Sprint to issue it a check for the amount by which it has reduced its AP Debit Balance with respect to intrastate traffic since the initial dispute was filed.³ As discussed below, Sprint is simply applying this mechanism as a way to

³ In accordance with the recently-adopted procedural order, the Commission is not being asked on this motion to determine any issues between Sprint and the Third Party Defendants. Procedural Order, ¶ 7.A. As such, the Commission must assume that the calls delivered through

hold disputed amounts pending resolution of this dispute, which is allowed by SDN's intrastate tariff and South Dakota law.

II. SPRINT HAS EVERY RIGHT TO HOLD UP TO THE TOTAL AMOUNT IN DISPUTE UNTIL THE DISPUTE IS RESOLVED

A. Sprint's AP Debit Balance Accounting Mechanism Results in Sprint Holding Disputed Amounts Pending Resolution of the Dispute

SDN's argument on this motion is that Sprint is withholding undisputed amounts. SDN Brief at 9. To the contrary, Sprint's AP Debit Balance mechanism allows it to hold up to, but not more than, the amount of the parties' dispute. In fact, as of today, Sprint is holding far less than the total amount in dispute between the parties. As noted above, Sprint asserted that it had been overbilled and demanded a refund claim in amount of \$1,704,262.08. For that period, then, the total dispute amount was \$1,704,262.08, and SDN was holding all of those funds. Since then, through the application of the AP Debit Balance mechanism, Sprint has reduced the AP debit balance by \$1,526,392.30. Roach Aff. ¶¶ 4,8. That means that Sprint is now holding \$1,526,392.30 of the \$1,704,262.08 in dispute for the June 2007 – April 2009 time period. Sprint has no intention of holding undisputed amounts – once Sprint has reconciled the entire disputed amount for that prior time period, it will begin remitting checks to SDN for any portion of SDN's invoices attributable to non-pumped traffic. *Id.* ¶ 9.

SDN to call connection companies are not subject to terminating access charges. In addition, because SDN is only moving on its Count II, the Commission must also assume that such calls are not subject to access charges under SDN's tariff. For that reason, Sprint is not addressing SDN's factual allegations that all calls it handles are subject to its access tariff. *See, e.g.*, SDN Statement of Facts, ¶ 10. Those are legal arguments, are not material to this motion in any event, and as SDN notes will be fully addressed later in this proceeding. SDN Brief, p. 6 ("the disputed portions of this traffic are not at issue in this Amended Motion.").

B. Sprint is Holding Disputed Amounts, as Allowed Under SDN's Tariff

SDN asserts that Sprint's use of the AP Debit Balance mechanism during the pendency of the parties' dispute violates SDN's Tariff No. 2. However, SDN's intrastate tariff clearly allows Sprint to hold all amounts in dispute during the pendency of the dispute.

As an initial matter, Sprint agrees that this is a question to be resolved as a matter of tariff. The filed rate doctrine "forbids a regulated entity [from charging a] rate [] for its services other than those properly filed with the appropriate federal regulatory authority." *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) (emphasis added) (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)). As such, SDN can obtain a preliminary money judgment – which is what it seeks – only if that result is compelled by the language of its tariff. As SDN recognizes, the rules of construction for interpreting tariffs require that any ambiguity in tariff language should be strictly construed against its author. *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338, 1240 (8th Cir. 1971) (cited in SDN Brief at 8).

SDN's Tariff No. 2 addresses billing disputes, and provides:

In the event that a billing dispute concerning any rates or charges billed to the customer by SDN is resolved in favor of SDN, any payments withheld pending settlement of the dispute shall be subject to the late payment penalty. If the customer disputes the bill on or before the payment date, and pays the undisputed amount on or before the payment date, any late payment charge for the disputed amount will not start until ten (10) days after the payment date.

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. Following payment of the undisputed amount, efforts to resolve the complaint, shall continue and for not less than forty-five (45) days after the rendering of the disputed bill, the service shall not be disconnected for nonpayment of the disputed amount.

If the billing dispute is resolved in favor of the customer, no late payment penalty will apply to the disputed amount. In addition, if the customer disputes the billed amount and pays the total amount (i.e., the undisputed amount and the disputed amount) on or before the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty

from SDN if the billing dispute is not resolved within ten (10) working days following the payment date or the date the customer furnishes to SDN documentation to support its claim plus ten (10) working days, whichever date is the later date. The disputed amount penalty shall be the disputed amount resolved in the customer's favor times a penalty factor.

No collection fee may be levied in addition to the late payment penalty. This does not prohibit cost justified charges for disconnection and reconnection of service.

If the customer makes a panda [sic] payment in a timely manner, and does not designate the service for which payment is made, the payment shall be credited prorated between the bill for SDN's services and related taxes. The late payment charge will be applied to only the outstanding balance for SDN's services.

SDN may initiate collection efforts with the issuance of a final bill when the termination of service is at the customer's request. For all other bills, no collection effort other than rendering of the bill shall be undertaken until the delinquency date[.]

SDN Tariff 2.4.1(B)(2). The tariff clearly anticipates that disputed amounts may be withheld and are not due while the dispute is pending. By holding disputed amounts, the customer risks paying late fees if SDN prevails, but that is entirely at the customer's option. And, under the tariff there is by design no penalty for withholding disputed amounts if the disputing carrier turns out to be correct. *Id.*

Furthermore, the tariff does not prohibit a customer from disputing charges billed and paid in prior periods. Thus, a customer can file a retroactive dispute and request a refund, as Sprint did here. When such a retroactive claim is made, the customer still has the right to hold the disputed charges while the dispute is resolved, and SDN can point to no provision in its tariff taking away that right as to retroactive claims. As such, Sprint is simply exercising this right by using its AP Debit Balance mechanism to hold the full amount of the dispute. *Id.*

Sprint's approach makes accounting sense. Sprint and SDN have an ongoing relationship and a running account – the relationship can be thought of as a running, aggregate ledger. When Sprint enters a disputed amount in that ledger, it may put the account in a status where Sprint has

a debit balance (that is, it is owed money by SDN) for some time. A simple example is if a customer owes \$500 on his VISA bill for January, and accidentally pays twice, for a total of \$1000. There is now a \$500 credit on the account that is owed to the customer. If the customer then spends \$300 in February, when his February VISA bill comes he does not have to send a check for the \$300 in charges – he has overpaid in a prior month, and the \$300 in charges reduces his positive balance from \$500 to \$200. Once the positive balance is reduced to \$0, he will now have to issue a check. The facts of this case are no different. Sprint is not physically sending a check to SDN for current charges for non-pumped traffic because the account still has a credit balance in Sprint’s favor due to Sprint’s prior overpayment of amounts in dispute.

Because Sprint is simply enforcing rights it has under SDN’s tariff, SDN’s summary judgment motion must be denied.

C. Sprint is Paying a Sum of Money by Crediting SDN’s Account

SDN relies on the language in its tariff stating that a customer must pay a sum of money equal to the amount of “the undisputed portion of the bill.” SDN Brief at 8. SDN argues that this language is clear and does not contemplate the AP Debit Balance methodology used by Sprint. SDN Brief at 8. SDN misconstrues the word “undisputed” and the phrase “pay a sum of money.” As a result, SDN’s argument fails.

First, as described above, Sprint is holding disputed amounts, not undisputed amounts. Second, Sprint is providing SDN with a “sum of money” in the form of a credit every time it employs the AP Debit Balance mechanism. A credit to an account is not only the functional equivalent of a payment, it is clearly envisioned by SDN’s tariff. *See* Tariff No. 2, 2.4.1(B)(2) (allowing for a credit to a customer’s account if the customer chooses not to withhold disputed amounts and any billing dispute is resolved in its favor, and allowing for partial payments to be credited in a prorated manner between services and applicable taxes).

SDN's suggestion that "pay" must mean the issuance of a check fails. SDN's tariff fails to define the terms "pay," "payment," "sum," "money," or "sum of money." Absent such a definition, the term should be construed according to its plain and ordinary meaning (*Bd. of Regents v. Carter*, 89 S.D. 40, 228 N.W.2d 621 (1975)), and construed in favor of the customer. *Penn. Cent. Co.*, 439 F.2d 1338, 1240. The Merriam-Webster Dictionary (New Ed. 2004) defines "pay" as "to make due return to for goods or services" or to "discharge indebtedness for." Money is also defined as "something...accepted as a medium of exchange." *Id.*; *see also Stavig v. Van Camp*, 46 S.D. 302, 192 N.W. 760, 762 (1923) ("One of the definitions of the word 'payment' found in Webster's New International Dictionary, is: 'The thing given to discharge a debt or obligation.'"). Sprint is "paying" SDN a sum of money by crediting SDN's account and reducing the AP Debit Balance.

CONCLUSION

Sprint's AP Debit Balance practice is consistent with SDN's Tariff No. 2 and South Dakota law. Sprint is exercising its right to hold all amounts in dispute pending resolution by the Commission, and is crediting SDN for what it calls undisputed charges. SDN's motion should be denied.

Dated: November 7, 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 7th day of November, 2011, I served a true and correct copy of Sprint's Brief in Opposition to SDN's Motion for Summary Judgment in the above-entitled action electronically to:

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