

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT)
OF VENTURE COMMUNICATIONS) SD PUC DOCKET CT20-001
COOPERATIVE AGAINST AT&T)
MOBILITY)

**MEMORANDUM IN SUPPORT OF AT&T MOBILITY'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

COMES NOW, William Van Camp, as the Attorney of record for New Cingular Wireless PCS, LLC dba AT&T Mobility (Mobility) and offers this Memorandum in Support of Mobility's Motion for Partial Summary Judgment.

BACKGROUND

On May 13, 2020 Venture Communications Cooperative (Venture) filed a complaint against Mobility. On June 16, 2020, Mobility filed an Answer and Counterclaim to the Complaint. Venture's complaint is that Mobility failed to pay for interconnection facilities ordered by Mobility in access services requests (ASRs) at the rate set forth in Venture's price list.

In 2004 Venture and Mobility's predecessor entered into a reciprocal Interconnection, Transport and Termination Agreement (ICA or Agreement). Mobility's Statement of Undisputed Material Facts (hereinafter "Facts") @ 1. The ICA was filed with the commission on February 18, 2004 and approved by it on April 5, 2004. Venture Complaint at 3. This Agreement was amended by the Parties effective July 1, 2012. Facts @ 2. This Agreement, along with the Amendment, sets forth the terms, conditions and prices under which Venture and Mobility will interconnect their respective networks.

Critically, in this dispute, Mobility and Venture had amended the ICA to conform to the FCC's *Transformation Order*¹ and *Order on Reconsideration*² in which the FCC adopted default 'bill-and-keep' compensation for the exchange of non-access (i.e. local) traffic between LECs and CRMS providers (Connect America Order).

¹ *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (USF/ICC Transformation Order or USF/ICC Transformation Further Notice), aff'd, In re FCC 11-161, 753 F.3d 1015 (10th Cir. 2014) (In re FCC 11-161), cert. denied, 135 S. Ct. 2050, and 135 S. Ct. 2072 (2015).

In late 2017, Mobility added three new DS1 interconnection trunks between its Mobile Telephone Switching Office (MTSO) in Sioux Falls and three Venture end offices located in Sisseton, Highmore and Britton. These trunks were added allowing Venture's end users to be able to continue to place local calls using seven-digit dialing. After installation, Venture began billing Mobility \$2,754.00 for each DS1 trunk, ostensibly, due to its price catalog. Venture Complaint @ 9.

As the Parties have been unable to resolve their dispute, Mobility believes this matter is a question of contract interpretation based on the ICA, its Amendment and the traffic delivered to Venture's end users. The nature of the traffic is clear. It should not be subject to factual dispute as it is controlled by the parties' Agreement and the Connect America Order. As such, Mobility believes the relief claim of Venture can be resolved by this Commission via summary judgment.

STANDARD OF REVIEW

Summary Judgment is properly granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". *Estate of Lien v. Pete Lien and Sons*, 740 N.W.2d 115, 119 (S.D. 2007); SDCL § 15-6-56(c). The evidence must be viewed most favorably to the non-moving party and reasonable doubt should be resolved against the moving party. The non-moving party, however, must present specific facts showing that a genuine, material issue for trial exists. *Anderson v. First Century Credit Federal Union*, 738 N.W. 2d 40, 45 (S.D. 2007). The party opposing a motion for Summary Judgment "must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment." *Rotenburger v. Burghduff*, 729 N.W.2d 175, 178 (S.D. 2007). Furthermore, the non-moving party may not rest on its pleadings and must point to specific facts which establish a genuine material issue for trial. *Schwaiger v. Avera Queen of Peace Health Services*, 714 N.W.2d 874,878 (S.D. 2006). A party cannot create an issue of material fact with only argument and no contradictory evidence. *DFA Dairy Financing Services*,

² *Connect America Fund et al.*, Order on Reconsideration, adopted December 23, 2011.

L.P. v. Lawson Special Trust, 781 N.W.2d 664, 671 (SD 2010). “Cases involving the interpretation of written documents are particularly appropriate for dissolution by Summary Judgment, such interpretation being a legal issue rather than a factual one.” *Estate of Lien* at 119. (initial citations omitted).

Issues of credibility or factual disputes irrelevant to the elements of the cause of action are further insufficient to preclude summary judgment. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 2709, 91 L.E.2d 20. Summary judgment should not “be viewed as a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action.” *Accounts Management, Inc., v. Litchfield*, 1998 SD 24, 576 N.W.2d 233, 234. SDCL§15-6-56(a) allows for Summary Judgment on any part of a claim or counter claim.

ARGUMENT

It is a general premise of law that in looking at a contract such as the ICA, the Court, in this case the Commission, must look to the language used in the document to determine the parties intent. If the intent is clear the Commission must declare and enforce it. *Estate of Lien @122*. The language in the ICA and its Amendment is clear and does not require additional interpretation. Nor could the ICA be argued to be ambiguous allowing extrinsic evidence to show what the parties meant in their agreement. Absent ambiguity, the Commission should not consider extrinsic evidence regarding the intent of Venture in seeking to apply its price catalog to traffic it cannot bill for. See, *Lillibridge v. Mead School District* 746 N.W 2d, 428, 432 (SD 2008). The Supreme Court has found a contract “ambiguous only when it is capable of more than one meaning when it is viewed objectively by a reasonable, intelligent person...” *Singpiel v. Morris*, 283 N.W. 2d 715, 719 (SD 1998).

Venture claims the ICA and its Amendment do not control the compensation for the end user traffic which is the subject of its complaint. *Venture Complaint @ 6*. However, a clear reading of the ICA, its Amendment and the FCC Connect America Order requires a Commission ruling that Venture’s Complaint, as filed, is without merit.

Mobility purchases DS1 dedicated transport facilities between its network and Venture’s end offices. These are provided by South Dakota Network (SDN). Mobility pays SDN for these trunks. *Facts @ 4*. Under Section 4.3 of the ICA Mobility sends its

end users originating calls to SDN and SDN delivers the traffic to Venture for termination to its end users. Facts @ 3. Under this arrangement, Mobility compensates SDN to act as its agent for the delivery of traffic to Venture and SDN compensates Venture for its services pursuant to separate agreement between SDN and Venture. Upon information and belief, SDN compensates Venture for the delivery of the traffic³. This is as contemplated by the plain language of Section 4.3 of the ICA.

The nature of transport and termination of local traffic Venture provides to Mobility is largely the local switching and transport of calls between Venture's end users' landlines and the handoff to Mobility's interconnection facility provided by SDN. Facts @ 5. Even though Venture does provide the switch port for the interconnection facility, that port whether at the DS1 level (as Mobility claims) or at the DS0 level (as Venture claims) is irrelevant because the port is part of the end office and the switching and transport services the FCC requires be treated as bill and keep. This is clearly governed by the ICA Amendment. Venture should not be able to seek additional compensation for traffic which by its clear nature is not compensable through an improper claim concerning its price catalog.

The purchased DS1 dedicated transport facilities between Mobility's network and the Venture end office allows Venture end users to make local calls to Mobility's wireless end users using only 7 digit dialing. AT&T compensates SDN for those facilities. Mobility purchased those transportation facilities from SDN – not Venture. The basis for this arrangement is found in Section 3.3 of the ICA. See also, Section 3.3.1 of the ICA which allows Mobility to purchase facilities and transportation from third party providers for the delivery of traffic to Venture and Venture's end users. This Commission on Summary Judgment can determine the nature of the services provided by SDN and Venture for the traffic between Mobility and Venture's end users.

While Section 3 and 4 of the ICA cover the interconnection facilities arrangement, the compensation for the actual exchange of local traffic, including the trunk port where the DS1 provided by SDN connects to the Venture

³ Mobility has requested from Venture pursuant to written discovery the confirmation of this payment and the terms on which Venture is compensated. Though this discovery response was due on May 17, 2021, it has not been received. Mobility reserves the right to amend or supplement this memorandum when outstanding discovery responses from Venture have been received.

end office switch and end office switching functionalities, are covered by Section 5.0 "Transport and Termination Compensation." Section 5.1 states:

Rates -The CRMS Provider and the Telephone Company shall reciprocally and symmetrically compensate one another for Local Traffic terminated on either Party's network. The rates at which the Parties shall compensate each other for the Transport and Termination of Traffic are set forth in Appendix A hereto.

Under the terms of the ICA Amendment, Venture and Mobility agreed that as of July 1, 2012, all non-access telecommunications traffic "shall be exchanged on a bill-and-keep basis." However, despite the terms of the ICA, and the Amendment thereto, Venture has sought to bill Mobility under the provisions of Section 3.1 of the ICA, when the services which Venture provides are for end office switching and are covered by Section 5 of the ICA.

Even if Venture could charge AT&T under §3.1, the applicable rate for the end office trunk port would be the lowest Telephone Company interstate and intrastate rate published in the Telephone Company's tariffs or pricing catalog. Venture has asserted that a "Telephone Tariff" that appeared to be filed with the Commission in 2004 (though no longer) is its 'price catalog' and has chosen to bill AT&T for 'trunks' at the DSO level. While AT&T disputes Venture's claim that this document qualifies as a 'price catalog' under the terms of the ICA, even if it did, Venture's intrastate and interstate tariffs do not have a stand-alone rate for the end office trunk port. What amount if any Venture may be owed for the provisioning of end office trunk ports can be determined at hearing on Mobility's claim for a refund for overpayment.

As a practical matter, the DS1 facilities that AT&T Mobility maintains to the Venture's end offices serve very little traffic. A recent review of the volume of traffic between Venture end users and Mobility suggest that on average these facilities handle less than twenty (20) minutes per month. While under different conditions, accepted principles of network engineering would suggest that other arrangements be made to accommodate such small traffic volumes, Mobility maintains these facilities in order to accommodate seven (7) digit local dialing by Venture's end users. Even without Venture's unjustified billing, AT&T Mobility costs for the Venture end user calls is approximately \$128.99 per minute of use. With

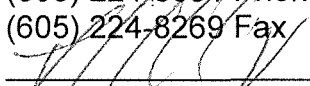
Venture's additional billing of \$2,754.00 per DS1 trunk is added, the per minute of use increases to \$542.09 per minute of use. Pre-filed testimony of Dan Le @ 148-158. Such a claim by Venture for the services it provides violates the intent (as an impermissible work around) of the FCC's requirement that compensation for transport and termination be 'bill-and-keep.' Separate from the clear language of the ICA and its amendment, this warrants Summary Judgment. The claim of Venture also clearly imposes an unjust and unreasonable cost on Mobility.

CONCLUSION

The attempt by Venture to recast the nature of the service provided Mobility in an effort to collect a catalog price for a service is cannot collect for under the Parties Agreement and the Connect America Order should not proceed. Summary judgment as to this claim is warranted as under the Parties Agreement no material fact remains for hearing.

Dated this 19th day of May, 2021.

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CERTIFICATE OF SERVICE

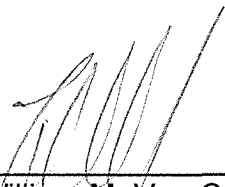
William M. Van Camp hereby certifies that on the 19th day of May, 2021, he served the foregoing AT & T Mobility's Memorandum in Support of Summary Judgment electronically with the Venture Communications Cooperative's counsel of record with copies of the same to the following persons electronically:

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