

**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)	
)	

**VENTURE COMMUNICATIONS COOPERATIVE REPLY AND
MEMORANDUM IN SUPPORT OF ITS OPPOSITION**

Venture Communications Cooperative, Inc. (“Venture”) hereby submits its Reply and Memorandum in Support of its Opposition to the Motion for Partial Summary Judgment (“MSJ”) filed by New Cingular Wireless PCS, LLC dba AT&T Mobility (“AT&T M”) in the above-captioned proceeding.¹ At a high level, AT&T M’s motion is premised upon several disputed facts, not the least of which is identified as number 5 in AT&T M’s Statement of Undisputed Material Facts: “Venture provides only the transporting of a call between its own end user and its end office switch and the hand off to the interconnection facility at its end office trunk port.”² While less than intuitive, AT&T M uses this “undisputed fact” to advance an argument that the facilities for which Venture is seeking payment are in fact subject to an FCC requirement that Venture provide these facilities without charge (i.e., “Bill and Keep”).³ This alleged “fact,” among others, is disputed by Venture. It is not true, and it does not support the conclusion that these facilities, ordered and used by AT&T M, are subject to FCC Bill and Keep requirements. The consequence is that the MSJ is not well taken and should be denied.

¹ ARSD 20:10:01:01:02 and SDCL 15-6-56(c).

² Pre-filed Testimony of Dan Le on Behalf of AT&T Mobility at lines 137-139 (“Le Testimony”); Affidavit of William M. Van Camp at 3.

³ See e.g., Memorandum in Support of AT&T Mobility’s Motion for Partial Summary Judgment (“Memorandum”) at p.4.

The standard of review for the MSJ is discussed first. The merits are discussed next, including the conclusion that the “undisputed” fact is undercut by the record and that AT&T M’s legal argument is flawed to boot.

Standard of Review

The MSJ correctly states the rule that summary judgment is proper where papers, deposition, affidavits, and other documents in use demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.⁴ Additionally, as this Commission doubtlessly is aware, the evidence must be viewed most favorably to the non-moving party – Venture – and reasonable doubt must be resolved against the moving party – AT&T M.⁵ And, while AT&T M emphasizes several cases standing for the proposition that the party opposing summary judgment must rely on specific facts that establish a material issue for trial,⁶ – a point with which Venture does not quarrel – AT&T M omits discussion of the heavy burden it carries with this motion.

In this respect, it should be noted that summary judgment is an “extreme remedy” in South Dakota and “. . . should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant.”⁷ Summary judgment has also been described as a “drastic remedy” by South Dakota

⁴ Memorandum at p. 2 citing *Estate of Lieu v. Pete Lieu and Sons*, 740 N.W. 2d 115, 119 (S.D. 2007); SDCL §15-6-56(c).

⁵ *Id.*, citing *Anderson v. First Century Federal Credit Union*, 738 N.W. 2d 40, 45 (S.D. 2007).

⁶ *Id.*, citing *Rotenburger v. Burghdoff*, 729 N.W.2d 175, 178 (S.D. 2007); *Schwaiger v. Avera Queen of Peace Health Services*, 714 N.W.2d 874, 878 (S.D. 2006); and *DFA Dairy Financing Services, L.P. v. Lawson Special Trust*, 781 N.W.2d 664, 671 (S.D. 2010).

⁷ *Wilson v. Great N. Ry.*, 83 S.D. 207, 212, 157 N.W.2d 19, 21 (1968).

courts, describing the circumstances under which it is warranted as leaving “...no room for controversy”.⁸

Venture submits that AT&T M’s MSJ does not satisfy this exacting legal standard. As will be seen, the nature of the service and facilities provided by Venture lie at the core of the parties’ dispute. In particular, AT&T M has asserted factual matters about Venture’s network facilities and related financial relationship, which simply are untrue.

The History of The Dispute and Nature of Venture’s Facilities

AT&T M has ordered and utilized DS0 trunk facilities from Venture (called Mobile Cellular Digital Trunks in Venture’s price catalog) so that certain of AT&T M’s customers may receive calls from Venture customers on a seven-digit basis. This arrangement avoids toll calling from specified Venture exchanges.⁹ AT&T M has been utilizing these types of facilities at least since 2012. Mr. Jandreau, Venture’s Assistant General Manager, describes AT&T M’s ordering of these special dialing facilities, through documents called Access Service Requests (“ASRs”).¹⁰ He also provides a detailed description of the ordering documents which are the source of the charges in Venture’s local pricing catalog.¹¹ Mr. Jandreau establishes that AT&T M tested and accepted the local trunk groups (the subject of this Complaint proceeding), utilized the facilities for approximately three years before questioning the billing of same and, ultimately, stopping payments to Venture.¹²

⁸ *Richard v. Lenz*, 539 N.W. 2nd 80, 83 (S.D. 1985) citing *Jenson v. Mayo Clinic*, 691 F 2d 405 (8th Cir. 1982).

⁹ See Pre-filed Testimony of Fay Jandreau at p. 3 (“Jandreau Testimony”).

¹⁰ *Id.*

¹¹ *Id.* at pp. 2-4.

¹² *Id.* at pp. 3-6.

Against this background, a key factual issue is whether Venture validly disputes AT&T M's assertion that Venture's charges are precluded by Bill and Keep under the parties' interconnection agreement ("ICA"), as amended. The MSJ states:

Even though Venture does provide the switch port for the interconnection facility, that port, whether at the DS1 level (as AT&T M claims) or at the DS0 level (as Venture claims) is irrelevant because the port is part of the end office switching and transport services the FCC requires be treated as bill and keep.¹³

This language appears to be drawn from AT&T M witness Le's pre-filed testimony, and while not set out separately in AT&T M's Statement of Undisputed Material Facts, the assertion immediately follows assertion number 5 in the Statement of Undisputed Material Facts.¹⁴ As discussed below, Venture's facilities do much more than simply provide a switch port.

Thus, Venture disputes, based on pre-filed testimony and papers here, that the seven-digit dialing trunks (or "ports" according to AT&T M) are subject to Bill and Keep. Mr. Jandreau's testimony establishes that the local trunks ordered by AT&T M are used to originate traffic from Venture's customers to AT&T M's customers and are therefore not covered by Transport and Termination functions governed by Bill and Keep. Although AT&T M ordered two-way DS0 trunks and could have chosen to terminate traffic down them, they do not.¹⁵ Thus, the subject traffic does not terminate from AT&T M to Venture.¹⁶ Indeed, AT&T M's witness Le admits that the seven-digit dialing facilities are used by Venture's customers to dial out.¹⁷ Moreover, these facilities are not used for the transport of a call between Venture's own end users and its end office switch, as Mr. Le alleges. Instead, the 24 DS0 facilities create a local presence for

¹³ Memorandum at p. 4.

¹⁴ See Le Testimony at p. 6; Statement of Undisputed Material Facts at ¶5.

¹⁵ See Affidavit of Fay Jandreau at ¶4.

¹⁶ *Id.* at p. 4.

¹⁷ *Id.* at p. 5.

AT&T M in Venture's three end office switches. These facilities in turn allow Venture's customers to call AT&T M's customers using seven-digit dialing.¹⁸ AT&T M selected its customers' NPA-NXXs which would be able to be called toll-free by Venture's customers. Venture multiplexes these DS0s up to a DS1 level, "hands off" the DS1 to AT&T M, where the call is eventually transported to AT&T M's switch in Omaha.¹⁹

As discussed earlier, AT&T M's argument that the "port" is part of "end office switching and transport" and subject to Bill and Keep, as alleged by Mr. Le, is a red herring notably absent on specifics. The MSJ makes the same argument, again without specifics, only citing to the ICA Amendment as support for this statement. But that document contains no such language.²⁰

Relatedly, AT&T M suggests that under the ICA Amendment the parties agreed that "Non-Access" telecommunications traffic is subject to Bill and Keep and that Venture's DSO charges violate the ICA. Memorandum, page 5. As discussed though, AT&T M runs from any discussion of the terminating nature of the traffic. Bill and Keep is specifically defined in terms of "terminating charges" to the terminating party (ICA § 3) and the accompanying Section 4 of the ICA makes clear its application to "Non-Access" traffic. None of this is acknowledged by AT&T M, though. And, as demonstrated throughout this Memorandum and Mr. Jandreau's Affidavit, the traffic at issue is not terminating, but traffic which originates from Venture's end user customers to those of AT&T M. Importantly, sections 51.701(c) and (d) of the FCC's Rules define "Transport" and "Termination" in terms of terminating functions for "Non-Access Telecommunications Traffic".

¹⁸ Jandreau Testimony at pp. 5-6; Affidavit of Fay Jandreau.

¹⁹ Affidavit of Fay Jandreau.

²⁰ Memorandum at p. 4.

In sum, Venture submits that AT&T M's "undisputed" factual allegation is not true, as Venture certainly disputes the allegations that it is billing for some "port" service to AT&T M, or that the traffic in any way falls within Bill and Keep requirements. As discussed below, the motion therefore is well short of the required legal standard.

AT&T M's Legal Argument Does Not Support Summary Judgment

The core of AT&T M's argument that the disputed charges are barred by Bill and Keep is based upon AT&T M's factual misstatements just discussed. These statements read together as follows:

The nature of transport and termination of local traffic Venture provides to AT&T M is largely the local switching and transport of calls between Venture's end users' landlines and the handoff to AT&T M'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 AT&T M claims) or at the DS0 level (as Venture claims) is irrelevant because the port is the 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.²¹

Having thus declared its DS1 facilities "irrelevant," AT&T M next argues that the DS1 transport facilities leased from SDN allow Venture's end user to make calls to AT&T M's customers on a seven-digit basis. AT&T M claims that Section 3.3 of the ICA is the "basis for this arrangement." ²²

This argument is wrong; it lacks foundation, is undercut by the ICA itself, and is the basis of a factual dispute, as discussed earlier. First, consider the contention that the DS0 is a port, that the port is part of end office switching and therefore free to AT&T M under Bill and Keep.²³

²¹ Memorandum at p. 4 (emphasis applied).

²² *Id.*

²³ *Id.*

Other than the “ICA Amendment,” there is no authority cited for this proposition. That omission is understandable since the ICA itself, including its Amendment, contains no such authority.

Second, this contention is undercut by the ICA Amendment. Specifically, Section 3 of the Amendment entitled “Bill and Keep” describes that term in pertinent part as follows:

Bill and Keep, for purposes of this Agreement and the existing Agreement between the Parties, shall mean that the originating party has no obligation to pay terminating charges to the terminating party.” (Emphasis supplied).

Mr. Jandreau’s testimony makes clear that the local trunk groups provided to AT&T M do not qualify as “Termination” under the ICA, as the seven-digit traffic is originating in nature.²⁴ Thus, AT&T M’s argument that this traffic and related facilities are subject to Bill and Keep is without merit. It is noteworthy that both the ICA and the relevant FCC rule definitions define “Transport and Termination” in terms of termination.²⁵

AT&T M’s claim that the DS1 facility leased from SDN allows local calling from Venture’s customers fares no better. Mr. Jandreau refutes this allegation squarely: “The ability to provide local dialing on a seven-digit basis to an AT&T M customer is provided by Venture’s end office, not by SDN.”²⁶ And while one may wonder why AT&T M ordered these facilities from Venture if they are unnecessary, at the very least, this Commission should credit Venture’s evidence as a valid factual dispute.

In sum, the allegation that Bill and Keep applies to Venture’s provision of DS0 trunks, which are the subject of Venture’s collection complaint, is meritless. A factual dispute clearly

²⁴ See Pre-filed Rebuttal Testimony of Fay Jandreau at p. 4 (“Jandreau Rebuttal”).

²⁵ See ICA, § 5.1; 47 C.F.R. § 51.701(c) and (d) (defining “Transport” and “Termination”).

²⁶ Jandreau Rebuttal at p. 5.

exists between the parties as to the nature of the traffic vis-à-vis seven-digit dialing and the underlying facilities ordered and utilized by AT&T M. The ICA Amendment undercuts the argument that this traffic is subject to Bill and Keep as it is not terminating traffic. Moreover, Venture disputes, as a factual matter, that the DSL facility AT&T M leases from SDN can provide seven-digit dialing without the local dialing facilities provided by Venture.

Relatedly, AT&T M makes other arguments in the Memorandum that contain factual misstatements and legal arguments requiring a response. First among these is AT&T M's claim that Venture's position is that the ICA does not control the compensation of end user traffic which is the subject of Venture's Complaint. AT&T M cites the Venture Complaint at page 6, but there is nothing remotely resembling any such claim by Venture. On the contrary, Venture's Complaint is replete with references to the parties' ICA.²⁷ It describes the incorporation of Venture's local pricing catalog within the ICA,²⁸ the historic use of the ICA,²⁹ and AT&T M's ordering of those facilities over a period of years.³⁰ If anything, AT&T M treats the ICA as a matter of convenience. It argues, for instance, that various sections of the ICA, and its amendment, cover this dispute.³¹ Yet, it has ignored the 24 month limitation period covering ICA disputes³² in its counterclaim, relying instead upon the statutory period in the South Dakota code.

AT&T M's claim that SDN compensates Venture for the delivery of "the traffic" is similarly incorrect.³³ Venture presumes that this statement refers to facilities purchased by

²⁷ See, e.g., Complaint at ¶6.

²⁸ *Id.* at ¶12.

²⁹ *Id.* at ¶¶6, 8, and 15.

³⁰ *Id.* at ¶8-15.

³¹ Memorandum at pp. 4-5.

³² ICA at Section 10, "Finality of Disputes."

³³ Memorandum at p.4.

AT&T M from Venture. Venture receives no payments from SDN for such traffic. Nor for any of AT&T M's leased DS1 circuits from SDN.³⁴

CONCLUSION

AT&T M's MSJ lacks merit and must be denied. Venture has provided a detailed showing of facts which establish one or more genuine factual issues for hearing. Venture shows, for instance, that the originating nature of the traffic at issue defeats AT&T M's argument that the traffic is covered by Bill and Keep requirements. Likewise, AT&T M's contention that Venture is compensated by SDN is a valid factual dispute.

At bottom, this case is about the nature of the traffic on DS0 facilities utilized by AT&T M – whether originating or terminating – and what Venture does to carry that traffic to AT&T M. This circumstance is precisely the factual inquiry which disqualifies summary judgment as requested by AT&T M. Venture has demonstrated on the present record that there is certainly a valid factual dispute as to the nature of the traffic and facilities which are at the heart of the MSJ. At the hearing, Venture believes this Commission will rule in Venture's favor on the merits. Under these circumstances, and against the specific facts in the present record, AT&T M's MSJ must be denied.

³⁴ Affidavit of Fay Jandreau at ¶5.

Dated this 18th day of June, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing in the above-entitled action was delivered by electronic mail this 18th day of June, 2021, to the following:

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