

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC09-098

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

MEMORANDUM IN SUPPORT OF
MOTION FOR
SUMMARY JUDGMENT

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW, South Dakota Network, LLC (SDN), by and through its undersigned attorneys, and for its Memorandum in Support of its Motion For Summary Judgment on Counts One (1) and Two (2) of its Amended Complaint, states and alleges as follows:

I. Background

A. The Parties

SDN is the centralized equal access provider for many rural local exchange carriers (LECs) in South Dakota. SDN provides the software for equal access and a concentration and distribution function for originating and terminating traffic between the end offices of Participating Telecommunications Companies (PTC) and the SDN access tandem at which SDN's interexchange carrier (IXC) customers establish connectivity for the exchange of such traffic. The services are provided by SDN to the IXCs through the use of an Access Tandem¹ and are referred to in its tariff as Centralized Equal Access,

¹ Access Tandem - The term "Access Tandem" denotes a switching system that provides a concentration and distribution function for originating and terminating traffic between end offices and a customer's premises. The Access Tandem functions offered under this tariff apply to toll tandem functions but exclude local tandem functions. (SDN South Dakota Tariff No. 2, p. 31)

and Switched Transport, collectively “Switched Access”. Centralized Equal Access (CEA) allows end users to automatically select a presubscribed long distance carrier for toll calls via a centralized presubscription look-up and concentration service for delivery of traffic of end user long distance traffic to that end user's chosen service provider. CEA refers to the ability of an end user customer to dial the number 1 plus the 10 digit telephone number to select the provider of that customer's long distance service. Switched Transport provides for the origination and termination of traffic between PTC's or other Exchange Telephone Company facilities to SDN's centralized equal access tandem. Switched Transport is provided by SDN at its access tandem. SDN provides equal access and switched transport services to IXC's, which allows the IXC's to access the LEC's that subtend SDN's Access Tandem. SDN charges centralized equal access switching and transport fees to IXC's for the tandem switched access services it provides, the provision and pricing of which services are governed by SDN's federal and state tariffs. As a common carrier and provider of access tandem services, SDN's Sioux Falls access tandem is designated as such in the Local Exchange Route Guide (LERG) and accordingly provides tandem functionality to any participating carrier (LEC and/or CLEC) that chooses to utilize its services for purposes of exchanging traffic with interconnected long distance carriers.

Sprint is an IXC authorized to do business in the State of South Dakota. It has been certificated by the South Dakota Public Utilities Commission (Commission) to provide intrastate interexchange telecommunications services to various residential and business customers within South Dakota. Sprint purchases intrastate switched access services from originating carriers, intermediary carriers, and terminating carriers in

accordance with tariffs filed with and approved by the Commission, including centralized equal access tandem switching and switched transport services from SDN.

B. The Dispute

Sprint, as an IXC, ordered CEA services pursuant to the SDN intrastate tariff to originate and terminate long distance or toll calls from its customers that are either served on an originating basis from LECs that use the SDN CEA service to connect with IXCs or seek to complete calls to numbers served by those same LECs. SDN as the CEA provider, supplied the originating and terminating CEA services provided for under its tariff and accordingly, charged Sprint for intrastate CEA charges. SDN sent a monthly invoice to Sprint for these CEA charges for many years. SDN charged the amounts authorized in its intrastate access tariff for CEA service. (SDN Tariff, Section 5.7.1). Sprint paid these invoices in full until April of 2009.

With regard to SDN's May 2009 invoice for April services, Sprint disputed the portion of the traffic it claimed was "stimulated" or "pumped" traffic. (See Affidavit of Mark Shlanta, ¶ 7). In addition to disputing a portion of SDN's current billing for April 2009 CEA services, Sprint's dispute notice also attempted to dispute past invoices, i.e. from June 2007 through April 2009, by requesting a refund from SDN for payments Sprint made to SDN for traffic delivered from Sprint, through SDN, to Sancom, Splitrock, Northern Valley, and Capital. (See Answer of Sprint, ¶ 16). The traffic was delivered to SDN via Feature Group D (FGD) access services ordered by Sprint. FGD service establishes the connection path between an IXC and the SDN tandem switch, and in this case, was ordered by Sprint pursuant to SDN's tariff (SDN Tariff, Section 5.2).

Sprint provided SDN with a breakdown of what it refers to as “undisputed” and “disputed” portions of the SDN invoices. The disputed portion of the invoices purports to be related to traffic Sprint identifies as “pumped” traffic that Sprint alleges is stimulated by illegal activities of the LEC to which the traffic is terminated. The undisputed portion of the invoices is for what Sprint characterizes as “unpumped” traffic. Sprint has arbitrarily segregated the traffic as “pumped” and “unpumped” without providing the appropriate call detail records to verify the classification, despite requests for that information by SDN. It is undisputed that all of the traffic in question traversed FGD facilities and was switched through SDN’s CEA tandem switch. It is further undisputed that since May of 2009, Sprint has paid for neither the disputed nor the undisputed traffic because Sprint claims to offset earlier payments it made to SDN (June 2007 to April 2009) by withholding payment of current undisputed charges.

Sprint delivers the terminating traffic to the SDN CEA tandem switch, representing to SDN that it is switched access traffic as defined by SDN’s Tariff to be terminated to the LEC identified in the data flow (or signaling) that is inherent with each call. As a common carrier, SDN does not screen or otherwise analyze the nature of this traffic in the performance of its CEA functions; SDN is only aware at the time the traffic is delivered to SDN for transport to the terminating LEC that Sprint has sent this traffic using FGD services Sprint has ordered from SDN with call information sufficient for SDN to terminate the call to the appropriate LEC. SDN does not know why Sprint’s end user chose to establish this communication. The alleged source of the traffic, whether a chat line or free conferencing is beyond the tariff and responsibility of SDN. SDN provides CEA services for all traffic delivered to its tandem switch. Sprint’s allegation

that portions of the traffic are artificially stimulated, or otherwise illegal is without proof or justification in fact and law as it pertains to the CEA and switched transport services Sprint has purchased from SDN.

Accordingly, and pursuant to its tariff, SDN made demand for the total amount of the invoices. SDN has also repeatedly demanded immediate payment of the undisputed portion of the invoices. (See Aff. of Mark Shlanta, ¶13). 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 invoices, related to “unpumped traffic”. Instead of paying the undisputed portion of each invoice, as required by the tariff (SDN Tariff, Section 2.4.4(B)(2)), and as demanded by SDN, Sprint has engaged in an unauthorized and illegal self-help “accounting mechanism” whereby Sprint applies the undisputed portion of the current invoices as a “credit” to the disputed portion of the invoices, including the back claim amount. Sprint has not made any payments to SDN since April of 2009, although it continues to receive CEA services each month². SDN now seeks to collect, through this motion for summary judgment, the undisputed and disputed portion of its invoices.

II. Standard of Review

SDN is requesting the Commission: 1) to grant summary judgment on Counts One and Two of its Amended Complaint; 2) to require Sprint to make immediate payment to SDN of both the “disputed” and “undisputed” portion of the invoices since April of 2009, plus late charges permitted by SDN’s tariff, and interest; and 3) to instruct Sprint to pay SDN’s total monthly invoices, both the “disputed” and “undisputed” portion, on a go forward basis. The Commission must determine whether the moving

² SDN is also authorized under its tariff to disconnect its service to Sprint but has chosen not do so at this point because it would adversely affect many customers in South Dakota. (SDN Tariff, Section 1.8)

party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Jacobson v. Leisinger, 2008 SD 19, ¶ 24, 746 NW 2d 739, 745.

The attached Affidavit of Mark Shlanta, Chief Executive Officer of SDN, as well as the pleadings on file herein, confirms there is no genuine issue of fact and that summary judgment on Counts One and Two of the Amended Complaint filed by SDN should be granted. Summary judgment is appropriate when a party is entitled to a judgment as a matter of law. Witte v. Goldey, 1999 SD 34, 590 NW2d 568.

III. Arguments and Authorities

A. Count 1 – SDN is entitled to payment of all of the intrastate CEA charges.

As of April 1, 2010, Sprint owed a total of \$503,568.33 for intrastate minutes of use and this amount grows on a monthly basis³. This is intrastate traffic that Sprint has ordered, used, and benefited from and that has been switched through SDN's switch pursuant to its tariff. SDN is requesting Summary Judgment on Count 1 of its Amended Complaint and is demanding immediate payment of all of the intrastate CEA charges.

1. The Filed Rate Doctrine

Under section 203(a) of the Communications Act and SDCL 49-31-19, SDN is required to file tariffs with the FCC and the Commission. These tariffs have the effect of law. American Tel. & Tel. Co. v. Central Office Telephone, Inc., 524 US 214, 221-22;

³ As of July 31, 2010, Sprint owes SDN \$656,756.46 for intrastate minutes of use excluding late charges and \$2,298,936.90 total on all unpaid invoices dated May 1, 2009 through August 1, 2010, which amount includes late charges authorized by SDN's tariff (SDN Tariff, Section 2.4.1).

118 S.Ct. 1956, 141L. 3d. 2d 222 (1998). Under the filed rate doctrine, “once a carrier’s tariff is approved by the FCC, the terms of the federal tariff are considered to be ‘the law’ and to therefore ‘conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer.’” Iowa Network Serv., Inc. v. Qwest Corp., 466 F.3d 1091, 1097 (8th Cir. 2006) (quoting Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000)). This doctrine is equally applicable to rates filed with state regulatory agencies. Firstcom, Inc. v. Qwest Corp., 555 F 3d 669, 679 (8th Cir. 2009).

Pursuant to the Filed Rate Doctrine, SDN’s tariff conclusively and exclusively enumerates the rights and liabilities of the parties. In order for SDN to recover its intrastate CEA charges it must show 1) it operated under a filed tariff and 2) it provided services pursuant to the tariff. Advamtel, LLC v. AT&T Corp., 118 F. Supp. 2d 680, 683 (E.D.Va. 2000) (Advamtel I).

2. The services were provided pursuant to SDN’s tariff.

It is clearly undisputed by both Sprint and SDN that SDN is operating under a valid tariff, i.e. SDN’s South Dakota Tariff No. 2 (SDN Tariff) that this Commission considered and approved in an Order dated December 20, 2000 (as Tariff No. 1) and again in an Order dated October 1, 2007 (as Tariff No. 2) (Dockets TC00-106 and TC07-027). The dispute that arises is whether the services relative to the “pumped traffic” were provided pursuant to tariff. SDN asserts that all of the traffic, regardless of Sprint’s characterization of the traffic as pumped or unpumped, was traffic that traversed the FGD facilities ordered by Sprint and that is switched at SDN’s tandem switch and transported to the LECs that subtend its tandem, pursuant to the tariff.

Tariffs are interpreted no differently than any other contract. Penn Cent. Co. v. General Mills, Inc. 439 F2d 1338, 1240; 64 Am Jur2d 61. In interpreting a tariff, some well established rules of construction apply. Id at 1340. These rules of construction dictate (1) the terms of a tariff must be taken in the sense in which they are used and accepted; (2) where there is ambiguity, the tariff language should be construed strictly against its author; (3) such ambiguity or doubt must be reasonable, not the result of straining the language; (4) rules relating to tariffs should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results; and (5) strict construction against a tariff's author is not justified when the construction would ignore a permissible and reasonable construction which conforms to the intentions of the framers of the tariff. Id. 1340-41.

Sprint has stated in its pleadings that SDN has not in fact provided intrastate switched access services for calls to the Third Party Defendants that it claims are engaged in "traffic pumping". Counterclaim, ¶ 49. Sprint offers no fact or circumstance to substantiate a claim that SDN's services are not used for switched access traffic. It is the SDN tariff that controls and dictates whether intrastate switched access service has been provided. SDN's tariff indicates, "Unless covered under another separate contract or agreement, all traffic delivered by an IC to the SDN access tandem will be considered access traffic and billed accordingly". SDN Tariff, Section 5.1. Sprint can point to no other contract or agreement that provides this traffic is considered anything but access traffic.

It is important to first look at the function SDN is providing to the LEC and the IXC. SDN's function is to provide a single point of interconnection between the LECs

and the IXCs for the exchange of traffic. SDN provides tandem switching. The term “Access Tandem” denotes a switching system that provides a concentration and distribution function for originating and terminating traffic between end offices and a customer’s premises. SDN Tariff, Section 2.6. This means that SDN provides the technical means for the traffic to reach its destination. This is done via the FGD facilities ordered by Sprint. Without the Order by Sprint of the FGD facilities and the subsequent use of those facilities, SDN could not handle the call. Sprint ordered the FGD services and by doing so effectively assured SDN that those services would be used by Sprint to terminate switched access traffic. If Sprint sent traffic to SDN that it affirmatively knew or should have known was not switched access traffic, Sprint may have violated the tariff, but Sprint still owes SDN for the tariffed services provided by SDN to Sprint for the delivery of traffic under the tariff. Sprint cannot knowingly and continuously send terminating traffic to SDN that it has alleged to know is not access traffic and then avoid its payment obligations under the tariff by a seemingly spurious claim that the traffic is somehow illegal.

It is also important to look at the nature of the traffic SDN is handling. Sprint is sending this traffic to reach an end user customer that its own customer has called using Sprint’s long distance services. It is Sprint’s customer, largely, who initiates the call. The information that is part of the call record delivered to SDN is also available to Sprint. Sprint knows which of its customers made the call (and presumably has additional information on that customer by way of its retail relationship), the number called, and the LEC serving the called number. Sprint has all of this information prior to sending the call over the FGD facilities. To suggest that it is SDN and not Sprint that has a duty to

determine the legality of the traffic sent to it by Sprint and arbitrarily determined by Sprint to be illegal, is unreasonable and unsupported by the tariff, and defies common sense as well as the applicable law. SDN is merely the conduit in this transaction, providing the service that Sprint agrees it ordered and used but for which it now refuses to pay.

Sprint has alleged that a portion of these calls are part of an illegal or fraudulent calling scheme. That is an issue in which SDN has no involvement. SDN contends that if Sprint believes this is the case, then Sprint has the appropriate information and the affirmative obligation to ensure this traffic does not get transported to SDN on Sprint facilities or use SDN access services to be terminated in furtherance of an alleged illegal scheme. Sprint has the ability to take appropriate corrective action including making other arrangements consistent with the alleged nonaccess nature of the traffic to terminate the traffic. SDN cannot be required to police this activity. SDN has provided the tandem transport service as ordered by Sprint and as required by the tariff. Sprint cannot send traffic over FGD facilities and then attempt to avoid by nonpayment the services SDN has provided.

In addition, Sprint is getting compensated for carrying that traffic by its customers who make the calls either through per minute usage based (perhaps tariffed) charges or through some flat fee, all-you-can-use, long distance calling plan to which its customers subscribe. It is patently unfair for Sprint to encourage its customers to make these calls, facilitate the completion of the calls, and then refuse to pay the downstream tandem provider of transport and switching services that allow Sprint to live up to its obligations to its long distance customers.

B. Sprint should immediately pay the “undisputed portion” of the invoices.

Sprint should be required to pay the undisputed portion of the invoices and SDN is also requesting Summary Judgment on Count Two of the Amended Complaint. It is clearly agreed to by both Sprint and SDN, that relative to the undisputed portion of the traffic, the services were provided pursuant to the tariff (Sprint’s Answer and Counterclaim, ¶ 11). Contrary to the assertion of Sprint, it is the SDN Tariff that controls the payment of invoices, not the “internal accounting mechanism” applied by Sprint.

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.” (SDN Tariff, Section 2.4.4(B)(2) (emphasis added). It is clear that this language does not contemplate the self help credit methodology used by Sprint. SDN has clearly communicated to Sprint that it “required Sprint to pay a sum of money equal to the amount of the undisputed portion of the bill” in its demand letter to Sprint, and in subsequent communications with Sprint. (See Aff. of Mark Shlanta ¶ 13).

The language cited in Section 2.4.1(B)(2) clearly contemplates a sum of money and does not contemplate Sprint determining a credit should be applied towards previously paid but now disputed amounts. There is no ambiguity and Sprint must pay the undisputed portions of the invoices.

C. Under the Tariff Sprint Must Pay SDN’s Invoices

Sprint is liable for all of the traffic that traversed FGD facilities and has been switched through the SDN tandem switch pursuant to its tariff. It is Sprint’s and no one else’s decision to send that traffic to SDN. Sprint’s decision to withhold funds for the invoices in question is unlawful self-help. The FCC has opined that carriers are not

allowed to pursue other remedies not authorized in the tariff. See, e.g., MGC Communications, Inc. v. AT&T Corp., 15 FCC Rcd 308 (1999). Sprint is authorized under the tariff to dispute all or a portion of the invoices within the timeframe specified in the tariff. It is the decision of Sprint and no one else to send that traffic to SDN. Sprint is not authorized to unilaterally withhold and credit undisputed portions of current invoices to amounts that were previously paid and then disputed. To the best of SDN's knowledge and belief, neither the FCC nor any other judicial or regulatory body has condoned a deliberate failure to pay tariffed charges as an appropriate self-help remedy. MGC Communications, supra. This Commission has never allowed that to occur because there is no legal authority for the Commission to condone such conduct. It is clearly not authorized by the tariffs and Sprint has not provided any authority under South Dakota law which would support its position. The language of the tariff, as considered and approved by this Commission in Docket TC07-027 is clear, unambiguous, and controlling. SDN is entitled to payment of its invoices under the tariff, as a matter of law.

WHEREFORE, SDN requests that the Commission grant it Summary Judgment on Count One and Two of its Amended Complaint and instruct Sprint to immediately pay all invoices beginning in April of 2009.

DATED this 1st day of September, 2010.

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