

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC 09-098

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

**SPRINT COMMUNICATIONS COMPANY LP'S ANSWER,
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Sprint Communications Company LP ("Sprint"), by and through its attorney of record, Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, 440 Mount Rushmore Road, Third Floor, P.O. Box 8045, Rapid City, South Dakota 57701, and Philip R. Schenkenberg, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, pursuant to ARSD 20:10:01:09, hereby submits its Answer, Affirmative Defenses, and Counterclaims to the Complaint of South Dakota Network, LLC ("SDN") and in support thereof, respectfully alleges as follows:

1. With respect to the introductory paragraph of the Complaint, no response is necessary to SDN's characterization of this action. Sprint denies that the Complaint was properly filed pursuant to ARSD 20:10:01:07.01, as a "consumer complaint" is defined in ARSD 20:10:01:01.01 as "any complaint other than a complaint filed by a telecommunications company."

2. Admits the allegations contained in paragraph 1 of the Complaint on information and belief.

3. With respect to the allegations contained in paragraph 2 of the Complaint, Sprint admits that SDN provides intrastate switched access service pursuant to its South Dakota Tariff

No. 2 on file with the South Dakota Public Utilities Commission (“Commission”) and denies the remaining allegations.

4. Admits the allegations contained in paragraph 3 of the Complaint, except that Sprint is a limited partnership, not a corporation.

5. Sprint incorporates its prior responses to the allegations contained in paragraph 4 of the Complaint.

6. Denies the allegations contained in paragraph 5 of the Complaint as stated, and states affirmatively that since April 1, 2009, SDN has issued intrastate switched access bills that include intrastate minutes of use that are subject to SDN’s South Dakota Tariff No. 2, and intrastate minutes of use that are not subject to SDN’s South Dakota Tariff No. 2 or are unjust or unreasonable.

7. Sprint denies paragraph 6 of the Complaint as stated, and states affirmatively that during the months identified SDN billed Sprint the rates in its South Dakota Tariff No. 2 for intrastate minutes subject to that tariff, and for intrastate minutes not subject to that tariff.

8. Sprint admits the allegations contained in paragraph 7 of the Complaint, except to state that as noted above, SDN has overbilled Sprint by billing for minutes not subject to its South Dakota Tariff No. 2 or are unjust or unreasonable.

9. With respect to the allegations contained in paragraph 8 of the Complaint, Sprint admits that it is obligated to pay for access services provided by SDN and properly billed in accordance with SDN’s South Dakota Tariff No. 2 and state and federal law, and denies all remaining allegations.

10. Sprint denies the allegations contained in paragraph 9 of the Complaint.

11. With respect to the allegations contained in paragraph 10 of the Complaint, Sprint admits that it has refused to pay the bills issued. However, to the extent Sprint has determined the portion of those bills that are for switched access services subject to SDN's South Dakota Tariff No. 2, Sprint has an internal accounting mechanism through which those amounts reduce the account payable associated with SDN's prior overbillings, which are explained in more detail in Sprint's Counterclaim.

12. Sprint denies the allegations contained in paragraph 11 of the Complaint, and states affirmatively that SDN owes Sprint the amounts described in Sprint's Counterclaim.

13. Sprint incorporates its prior responses to the allegations contained in paragraph 12 of the Complaint.

14. With respect to the allegations contained in paragraph 13 of the Complaint, Sprint admits the quoted language is contained within SDN's South Dakota Tariff No. 2, which speaks for itself, but denies there is any legal significance to that clause under these circumstances.

15. Sprint denies the allegations contained in paragraph 14 of the Complaint as stated, admits that SDN has made demands, and restates its response to the allegations contained in paragraph 10 of the Complaint.

16. With respect to the allegations contained in paragraph 15 of the Complaint, Sprint admits the claim amount, but states that detail was provided distinguishing the intrastate versus interstate portion of that claim.

17. Sprint denies the allegations contained in paragraph 16 of the Complaint as stated. Sprint states affirmatively that SDN has overbilled Sprint since June of 2007, as is further described in its Counterclaim, and it restates its response to the allegations contained in paragraph 10 of the Complaint.

18. Sprint denies the allegations contained in paragraph 17 of the Complaint.

19. Sprint provides no response to the allegations contained in paragraph 18 of the Complaint as it has moved to dismiss Count III.

20. Sprint provides no response to the allegations contained in paragraph 19 of the Complaint as it has moved to dismiss Count III.

21. Sprint provides no response to the allegations contained in paragraph 20 of the Complaint as it has moved to dismiss Count III.

FIRST AFFIRMATIVE DEFENSE

22. SDN's Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

23. SDN's recovery is barred in full or in part by the filed rate doctrine.

THIRD AFFIRMATIVE DEFENSE

24. Any amounts owed by Sprint must be set off against amounts previously overbilled by SDN.

FOURTH AFFIRMATIVE DEFENSE

25. Any amounts claimed by SDN are barred by estoppel and the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

26. Any amounts claimed by SDN are barred by SDN failure to provide adequate consideration for the requested payment.

COUNTERCLAIMS

Sprint Communications Company LP, for its counterclaims against South Dakota Network, LLC, respectfully alleges as follows:

PARTIES

27. Sprint Communications Company LP (“Sprint”) is a limited partnership with its principal place of business at 6200 Sprint Parkway, Overland Park, Kansas 66251, and is authorized to conduct business in the State of South Dakota.

28. On information and belief, SDN is a limited liability company with its principal place of business at 2900 West 10th Street, Sioux Falls, South Dakota 57104.

JURISDICTION

29. The Commission has jurisdiction over this Complaint pursuant to SDCL 49-13-1, SDCL 15-6-13, SDCL 1-26-15, and ARSD 20:10:01:01.02.

BACKGROUND

30. Sprint has been certificated by the Commission to provide intrastate interexchange service within South Dakota. In its provision of intrastate interexchange services, 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.

31. The rates for intrastate switched access services are regulated by the Commission pursuant to SDCL Chapter 49-31 and ARSD Chapter 20:10:27.

32. In accordance with South Dakota law, including the filed rate doctrine, intrastate switched access charges may be assessed only pursuant to and in a manner consistent with a filed and approved tariff. In the absence of tariff authority to bill for a call, intrastate switched access charges may not be billed, and no payment is due.

33. SDN operates as a monopoly in providing centralized equal access to various telecommunications companies in South Dakota. The intrastate switched access services identified in SDN’s South Dakota Tariff No. 2 are centralized equal access services provided in

conjunction with the provision of originating and terminating switched access services provided by Participating Telecommunications Companies. *See* SDN South Dakota Tariff No. 2, § 1.2. For calls that do not constitute originating or terminating switched access calls by Participating Telecommunications Companies, no centralized equal access services are provided by SDN and its South Dakota Tariff No. 2 does not apply.

34. Four of SDN's Participating Telecommunications Companies have been identified by Sprint as engaged in traffic pumping activities. Those Participating Telecommunications Companies are Sancom, Inc. ("Sancom"), Splitrock Properties, Inc. ("Splitrock"), Northern Valley Communications, LLC ("Northern Valley"), and Capital Telephone Company ("Capital").

35. On information and belief, Sancom, Splitrock, and Northern Valley have an ownership interest in SDN.

36. Traffic pumping occurs when a local exchange carrier ("LEC") partners with a second company ("Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers or recordings. The Call Connection Company generates huge call volumes to numbers assigned to the LEC, the LEC unlawfully bills those calls as if they are subject to access charges, interexchange carriers unwittingly pay those bills, and the LEC and Call Connection Company share the profits. These schemes normally occur in rural areas where LECs have high enough access rates to allow them to share profits with the Call Connection Companies.

37. For many reasons, LECs do not provide switched access services to interexchange carriers ("IXCs") for calls delivered to Call Connection Companies. For example, the Iowa Utilities Board decided on September 21, 2009 in its docket FCU 07-02 that intrastate switched

access charges do not apply to calls delivered to Call Connection Companies because 1) Call Connection Companies are not end users of local exchange service, 2) such calls are not terminated to an end user's premises, and 3) such do not terminate in the LEC's certificated local exchange area. The Iowa Utilities Board ordered LECs to refund improperly billed intrastate switched access charges billed to IXC's, including Sprint.

38. For reasons identified in the Iowa Board's order, and for other reasons, calls delivered to Call Connection Companies are not subject to switched access charges under the Participating Telecommunications Companies' intrastate switched access tariffs. Sprint is presently involved in litigation with Sancom, Splitrock and Northern Valley in which it has alleged that those three Participating Telecommunications Companies have wrongfully billed Sprint intrastate switched access charges for traffic delivered to Call Connection Companies. Those cases remain pending.

39. Because the calls to the Participating Telecommunications Companies are not subject to intrastate switched access charges, SDN does not provide centralized equal access service under its South Dakota Tariff No. 2 when it delivers such calls to Participating Telecommunications Companies.

40. Sancom, Splitrock, Northern Valley, and Capital have been engaged in traffic pumping since at least June of 2007. SDN knew or reasonably should have known these companies were involved in traffic pumping. SDN has unlawfully billed Sprint centralized switched access charges for calls delivered to Call Connection Companies and Sprint paid those bills through May 2009. 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. 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. SDN has refused to issue a refund.

41. Beginning with SDN's bills dated May 2009 through current, Sprint has disputed its obligation to pay SDN's switched access charges for traffic delivered to Sancom, Splitrock, Northern Valley, and Capital. After reducing the bill amount by the amount of the unlawful charges, Sprint has applied the remaining balance to reduce the account payable debit balance created by Sprint's refund claim for prior amounts unlawfully billed by SDN. This process has reduced but not extinguished SDN's liability to Sprint on its refund claim.

Count I
Refund of Amounts Unlawfully Billed Pursuant
to State Access Tariff

42. Sprint restates and reallages its prior allegations.

43. Beginning in June 2007 SDN has billed Sprint pursuant to its South Dakota Access Tariff No. 2 for calls that are not subject to that tariff.

44. In accordance with South Dakota Law, including the filed rate doctrine, SDN can collect only those charges authorized by its South Dakota Tariff No. 2, and must refund amounts unlawfully billed and collected.

45. SDN has billed, collected and retained amounts over and above what is authorized by its South Dakota Tariff No. 2.

46. Sprint is entitled to a judgment against SDN in an amount to be proven at a hearing, plus interest and penalties as provided in SDN's South Dakota Tariff No. 2 and South Dakota law.

Count II
Declaratory Judgment

47. Sprint restates and realleges its prior allegations.

48. There is an actual controversy between Sprint and SDN with respect to whether SDN provides intrastate switched access services for calls to Participating Telecommunications Companies engaged in traffic pumping.

49. Sprint is entitled to a declaration pursuant to ARSD 20:10:01:34 and SDCL 21-24-1 that SDN cannot assess intrastate switched access charges for calls to Participating Telecommunications Companies engaged in traffic pumping.

**Count III
Unreasonable Practice**

50. Sprint restates and realleges its prior allegations.

51. SDN has issued bills to Sprint with respect to intrastate minutes of use for which it has no tariff authority to bill and/or are a result of an unjust or unreasonable practice in violation of SDCL 49-13-13.

52. Sprint is entitled to an award of damages for SDN's unjust and unreasonable practice in an amount to be determined at a hearing.

PRAYER FOR RELIEF

For the foregoing reasons, Sprint respectfully requests that the Commission enter an order as follows:

1. Dismissing the Complaint in its entirety, with prejudice;
2. Awarding Sprint its costs of this action, including reasonable attorneys' fees to the full extent of the law; and
3. Awarding Sprint such other and further relief as the Commission deems just and equitable.

For the foregoing reasons, Sprint is entitled to judgment:

1. On Count I, for an award of money damages in an amount to be proven at

- a hearing, plus applicable interest and penalties;
2. On Count II, for a declaration that SDN cannot assess intrastate switched access charges for calls to Participating Telecommunications Companies engaged in traffic pumping;
 3. On Count III for an award of money damages in an amount to be determined at a hearing; and
 4. Awarding Sprint such other and further relief as the Commission deems just and equitable.

Dated: November 23, 2009

GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

By 

Talbot J. Wieczorek

Gunderson, Palmer, Nelson & Ashmore, LLP
440 Mount Rushmore Road
Third Floor
P.O. Box 8045
Rapid City, SD 57701
605.342.1078

Philip R. Schenkenberg
BRIGGS AND MORGAN, P.A.
80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
612.977.8400

Attorneys for Sprint Communications Company
LP