

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

	)	DOCKET NUMBER TC09-098
	)	
IN THE MATTER OF THE	)	
AMENDED COMPLAINT OF	)	MEMORANDUM IN SUPPORT OF
SOUTH DAKOTA NETWORK, LLC,	)	AMENDED MOTION FOR
AGAINST SPRINT	)	PARTIAL SUMMARY JUDGMENT
COMMUNICATIONS COMPANY,	)	
LP	)	
	)	

AMENDED MEMORANDUM IN SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT

COMES NOW, South Dakota Network, LLC (SDN), by and through its undersigned attorneys, and for its Memorandum in Support of its Amended Motion For Partial Summary Judgment on Count 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 Tandem<sup>1</sup> and are referred to in its tariff as Centralized Equal Access,

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<sup>1</sup> 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

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

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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).

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, which had been paid without protest, 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.<sup>2</sup> 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 despite tariff provisions requiring otherwise, since May of 2009, Sprint has paid for neither the disputed nor the undisputed traffic because Sprint claims authority to offset earlier payments it made to SDN without protest (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

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<sup>2</sup> For purposes of SDN's Amended Motion for Partial Summary Judgment, SDN is not disputing the classification of the traffic by Sprint and is relying on Sprint's representation as to whether the traffic is "pumped" or "unpumped" for billing purposes only.

SDN to terminate the call to the appropriate LEC. SDN does not know why Sprint's end user chose to establish this communication. The purpose of the traffic, whether a chat line, free conferencing, or any other reason a Sprint customer has for making a long distance call, 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 pumped, 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 2.4.1(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 month. This effort is contrary to 2.4.1(B)(2) of the tariff which provides that in this circumstance Sprint must pay the undisputed portion of the billing and only "following (this) payment" may it pursue resolution of the undisputed portion. Hence, if Sprint desires to pursue its contest of the disputed portions

of the invoices, payment of the undisputed portions is a condition precedent thereto.<sup>34</sup> SDN now seeks to collect, through this motion for summary judgment, the undisputed portion of its invoices. The disputed portions of this traffic are not at issue in this Amended Motion for Partial Summary Judgment and will be addressed at the hearing on the merits.

## II. Procedural History

On September 1, 2010, SDN filed a Summary Judgment Motion on Count 1 and Count 2 of its Amended Complaint. Since that time the parties have engaged in extensive discovery. Recently, the FCC issued a Notice of Proposed Rule Making (NPRM) to address some of the outstanding intercarrier compensation issues, including pumped or stimulated traffic. The FCC is expected to provide some direction yet this year.<sup>5</sup> Accordingly, SDN hereby holds its September 1, 2010, Motion for Summary Judgment in abeyance at this time and moves forward on its Amended Motion for Partial Summary Judgment on Count 2 of its Amended Complaint. Count 1 will be addressed either by a later summary judgment Motion or at a hearing on the merits.

## III. Standard of Review

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

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<sup>3</sup> In fact, CPNE rules prevent a carrier from inspecting calling and called end user information.

<sup>4</sup> SDN is also authorized under its tariff to disconnect its service to Sprint but has chosen not to do so at this point because it would adversely affect many customers in South Dakota.

<sup>5</sup> The role played by tandem/CEA providers is not specifically addressed in the NPRM.

party demonstrated the absence of any disputed 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 Count 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.

A. 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 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 authorized Tariff that controls the payment of invoices, not the “internal accounting mechanism” applied by Sprint.<sup>6</sup>

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 2.4.1(B)(2) (emphasis added).<sup>7</sup> Only “following payment” may Sprint seek resolution of the disputed portion of the billing. It

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<sup>6</sup> SDN’s federal tariff, which has been authorized by the FCC, has similar language.

<sup>7</sup> SDN is not aware of Sprint or any other carrier challenging this language.

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 unilaterally determining that payments previously made without protest may now be credited against current undisputed billings. There is no ambiguity in the tariff. As a condition precedent to asserting its current claim regarding disputed portions of its billings, Sprint must pay the undisputed portions of the invoices.

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; 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 (8<sup>th</sup> Cir. 2006) (quoting Evanns v. AT&T Corp., 229 F.3d 837, 840 (9<sup>th</sup> Cir. 2000)). This doctrine is equally applicable to rates filed with state regulatory agencies. Firstcom, Inc. v. Qwest Corp., 555 F 3d 669, 679 (8<sup>th</sup> Cir. 2009).

Tariffs are interpreted no differently than any other contract. Penn Cent. Co. v. General Mills, Inc. 439 F2d 1338, 1240. In interpreting a tariff, some well established rules of construction apply. 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.

Nor can Sprint legitimately argue that the undisputed amounts it owes on its billings since May, 2009 can be used to offset invoiced amounts on earlier bills, paid without protest, which it now seeks to describe as disputed billings. Those billings were paid without any dispute and involve antecedent obligations not directly related to the billings which Sprint now seeks to designate as including additional disputed charges. The prior billings are separate and distinct from those incurred since May, 2009, which were protested in part. The claim relating to earlier payments arose out of a different transaction and a claim for offset or recoupment relating thereto is not appropriate. USPS v. Dewey Freight Systems, Inc., 31 F. 3<sup>rd</sup> 620, 623 (8<sup>th</sup> Cir. 1994); Hoas v. Griffiths, 2006 S.D. 27, ¶23, 714 NW 2d 51 and In Re Terry, 443 BR 816, 821 (MO. 2011). Even if authorized by SDN's tariff, which the clear language of the tariff refutes, an offset argument would only apply to invoices issued since May of 2009.

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, and at the very least should be required to adhere to the plain language of the tariff and pay the undisputed portion of the invoices.

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. 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 the undisputed portion of the invoices under the tariff, as a matter of law.

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

Dated this 23<sup>rd</sup> day of September, 2011.

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