

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

IN THE MATTER OF THE COMPLAINT)
FILED BY SPRINT COMMUNICATIONS)
COMPANY, LP AGAINST NATIVE)
AMERICAN TELECOM, LLC) **Docket No. TC10-026**
REGARDING TELECOMMUNICATIONS)
SERVICES)

**SOUTH DAKOTA NETWORK, LLC’S BRIEF IN RESPONSE TO MOTION FOR
SUMMARY JUDGMENT**

South Dakota Network, LLC (“SDN”) hereby files this Brief in Response to Motion for Summary Judgment filed by Sprint Communications Company, LP (“Sprint”) against Native American Telecom, LLC (“NAT”).

I. PROCEDURAL HISTORY

On May 4, 2010, Sprint filed a Complaint before this Commission against NAT. Sprint’s Complaint disputes certain switched access charges being assessed by NAT to Sprint. However, in the context of disputing such charges, Sprint raised certain tribal and state jurisdictional issues related to the regulation of both interstate and intrastate interexchange services provided within South Dakota.

SDN filed a Petition to Intervene on May 21, 2010, not only because the jurisdictional and Commission authority issues raised in Sprint’s Complaint will affect SDN and its member companies, but also because of the potential impact of any Commission decisions in this docket on Docket TC09-098 (SDN’s complaint against Sprint). On June 18, 2010, the Commission granted intervention to SDN as well as SDTA, Midstate, AT&T, and the Crow Creek Sioux Tribe Utility Authority (CCSTUA).

On December 11, 2012 Sprint filed a Motion for Summary Judgment on its Amended Complaint and specifically sought declaration from the Commission that:

1) NAT cannot provide telecommunications anywhere within the State of South Dakota without a certificate of authority from the Commission;

2) NAT cannot invoice for intrastate telecommunications services until it has a lawful tariff on file with the Commission;

3) NAT's invoices to Sprint for intrastate services that NAT has issued without a certificate of authority and lawful tariff on file with the Commission are void; and

4) The Commission has sole authority to regulate Sprint's interexchange services within the State of South Dakota, and conversely, the Crow Creek Sioux Tribal Utility Authority cannot regulate Sprint's activities in this State.

SDN files this Brief to respond to the Motion for Summary Judgment filed by Sprint and the Response filed by NAT and more specifically to comment on its potential limited application to SDN. SDN also relies on the brief filed in response to the Motion to Dismiss on September 27, 2010 which speaks directly to the jurisdictional issue and hereby incorporates that document herein.

II. ARGUMENT

A. Standard of Review

The standard of review for a motion for summary judgment is well settled law — is the pleader entitled to judgment as a matter of law? Risse v. Meeks, 1998 SD 112, ¶ 10, 585 NW2d 875, 876 (citing Estate of Billings v. Deadwood Congregation of Jehovah Witnesses, 506 NW2d 138, 140 (SD 1993)). SDN does not take a position on whether Sprint is entitled to a judgment as a matter of law on the issues for which it seeks determination.

B. Background

1. 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, 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 IXCs, which allows the IXCs to access the LECs that subtend SDN’s Access Tandem. SDN charges centralized equal access switching and transport fees to IXCs for the tandem switched access services it provides, the provision and pricing of which

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).

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 competitive local exchange carrier "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.

NAT is a tribally-owned telecommunications company organized as a limited liability company under the laws of South Dakota. NAT has filed an application for a certificate of authority with the Commission and claims to provide local exchange services to persons and businesses located on the Reservation. The long distance traffic that comes from Sprint customers to NAT uses SDN's Feature Group D ("FGD") facilities ordered by Sprint to complete those calls. SDN bills Sprint for the access charges associated with the transport of that traffic. SDN has not been paid for providing the FGD service.

C. The Dispute

Sprint filed this complaint against NAT to raise the jurisdictional issues identified herein, but also to seek a determination that NAT must repay Sprint the amounts it inadvertently paid NAT for what it claims is unauthorized and illegal switched access charges. Sprint relies on the

fact that NAT does not have a certificate of authority or a valid tariff on file. NAT appears not to dispute this matter and admits that it has not invoiced Sprint for intrastate access charges since the Commission and South Dakota Circuit Court's jurisdiction decisions in this docket. NAT's Memorandum in Response to Summary Judgment at p. 18.

SDN also filed a complaint against Sprint for nonpayment of centralized equal access charges by Sprint (Docket No. TC09-098). A portion of the traffic at issue in that case includes a portion of CEA charges associated with NAT's traffic which is the traffic in dispute in this matter. SDN wants to make it very clear that the issues cited herein should not have any impact on SDN's complaint against Sprint relative to the same issue, i.e., Sprint's nonpayment of CEA charges to SDN.

Unlike NAT, SDN has a certificate of authority from this Commission. It has the proper authority through not only this Commission but the FCC to provide the services it provided to Sprint and to NAT. FCC Order in File No. W-P-C-64861; South Dakota Public Utilities Commission Order F3860.

In addition, unlike NAT, SDN has a valid tariff on file with the Commission. The CEA charges billed to Sprint were charged in accordance with its tariff. The traffic from Sprint uses FGD facilities, which Sprint ordered from SDN as required by SDN's tariff, and accordingly Sprint is billed for that access traffic. Further, SDN's tariff states, SDN shall not be liable for any act or omission of any other carrier or customer providing a portion of a service, nor shall SDN for its own act or omission hold liable any other carrier or customer providing a portion of a service. SDN's tariff 2.1.3. Regardless of this Commission's decision, Sprint should remain liable to SDN for its tariffed charges for the services Sprint ordered and uses.

Whether or not NAT is billing Sprint for intrastate charges does not affect the services SDN provides to Sprint. SDN is entitled to payment by Sprint for the charges for the services Sprint ordered and uses, and that SDN provided. Regardless of the outcome in this matter, Sprint should be precluded from later arguing that because NAT did not have a certificate of authority, a tariff on file, or did not bill intrastate services, that SDN's charges are also not valid. This simply cannot be supported under SDN's tariff or Sprint's actions by ordering a tariffed service though it knew NAT may not have had the requisite authority to provide terminating access service.

III. CONCLUSION

SDN requests that when deciding the issues in this matter that the Commission not go beyond the limited scope of this docket and determine that SDN is adversely affected by the decisions made relative to the Summary Judgment motion.

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