

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

**IN THE MATTER OF THE COMPLAINT FILED)
BY SOUTH DAKOTA NETWORK, LLC)
AGAINST SPRINT COMMUNICATIONS)
COMPANY L.P. REGARDING FAILURE TO)
PAY INTRASTATE CENTRALIZED EQUAL)
ACCESS CHARGES AND TO IMMEDIATELY)
PAY UNDISPUTED PORTIONS OF SDN'S)
INVOICES.)**

**ORDER GRANTING
PARTIAL SUMMARY
JUDGMENT; ORDER
GRANTING LEAVE TO FILE
COUNTERCLAIMS; ORDER
DENYING DISMISSAL OF
COUNTERCLAIM**

**IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY LP AGAINST SPLITROCK)
PROPERTIES, INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM, INC.,)
AND CAPITAL TELEPHONE COMPANY)**

TC09-098

On October 29, 2009, South Dakota Network LLC (SDN) filed with the Public Utilities Commission (Commission) a complaint against Sprint Communications LP (Sprint) for 1) failing to pay intrastate centralized equal access charges at the rates approved by the Commission; 2) failing to immediately pay undisputed portions of SDN's invoices as required by SDN's Tariff; and 3) for payment by Sprint of SDN's costs of action, reasonable attorneys fees incurred by SDN, and for twice the amount of damages sustained by SDN, if SDN is required to recover its damages by suit or on appeal. On November 24, 2009, Sprint filed a Motion to Dismiss Count III, an Answer, Affirmative Defenses, and Counterclaims, and a Third Party Complaint. On December 14, 2009, SDN replied to the counterclaim of Sprint.

On December 23, 2009, SDN filed a Corrected Reply to Sprint's Counterclaim. On January 22, 2010, Sancom, Inc. (Sancom), Northern Valley Communications, LLC (Northern Valley) and Splitrock Properties, Inc. (Splitrock) filed answers to Sprint's Third Party Complaint. On February 11, 2010, Sprint filed a Motion to Dismiss Northern Valley's Cross-Claim and a Motion to Dismiss Sancom's Cross-Claim. On February 22, 2010, SDN filed a Response to Sprint's Motion to Dismiss Count III. On February 23, 2010, the Commission granted Sprint's Motion to Dismiss Count III. On February 26, 2010, Northern Valley and Sancom filed a Consolidated Memorandum in response to Sprint's Motion to Dismiss Cross-Claims. On June 7, 2010, SDN filed a Stipulation to File and Serve Amended Complaint. On June 21, 2010, Sprint filed an Answer to SDN's Amended Complaint. On September 1, 2010, SDN filed a Motion for Summary Judgment and Memorandum in Support of Summary Judgment.

On January 19, 2011, Sprint filed a Motion Requesting a Protective Order Requiring the Parties to Comply with a Confidentiality Agreement and a Confidentiality Agreement. On February 1, 2011, Northern Valley and Sancom filed a revised Confidentiality Agreement. On February 1, 2011, the Commission granted Sprint's Motion Requesting a Protective Order Requiring the Parties to Comply with a Confidentiality Agreement. On April 12, 2011, Sprint filed a Motion Requesting Approval of First Amendment to the Confidentiality Agreement which the Commission granted on April 19, 2011. On April 21, 2011, Sprint filed a Motion Requesting Approval of Stipulation Regarding Expert Discovery and a Stipulation Regarding Expert Discovery which the Commission granted on May 3, 2011.

On May 27, 2011, Northern Valley filed a Motion to Compel. On June 7, 2011, Sancom filed to join Northern Valley's Motion to Compel. On June 8, 2011, Northern Valley and Sancom filed a Motion for Adoption of Procedural Schedule. On June 14, 2011, Sprint filed an Amended Motion to Dismiss Northern Valley's Cross-Claims and an Amended Motion to Dismiss Sancom's Cross-Claims. On July 12, 2011, Sprint filed a Motion to Resolve Discovery Dispute between Sprint and Sancom. On August 24, 2011, Sprint filed a letter stating that Sprint and Sancom had resolved the issues regarding Sprint's Motion to Resolve Discovery Dispute. On August 30, 2011, the Commission granted Sprint's Amended Motion to Dismiss Northern Valley's Cross-Claim and Sprint's Amended Motion to Dismiss Sancom's Cross-Claims. The Commission did not act on Northern Valley's Motion to Compel because Northern Valley withdrew the motion. The Commission did not act on Northern Valley and Sancom's Motion for Adoption of Procedural Schedule because the parties agreed to try and come to an agreement on a procedural schedule.

On September 7, 2011, Sprint filed a Proposed Revised Procedural Schedule wherein the only part not agreed to by all of the parties was paragraph 9. Alternative language for paragraph 9 was proposed by Sprint and Northern Valley/Sancom. On September 9, 2011, Splitrock filed a Stipulation for Dismissal of Third Party Complaint of Sprint Communications, LP against Splitrock Properties. On September 27, 2011, the Commission approved the Stipulation for Dismissal and dismissed Sprint's Third Party Complaint filed against Splitrock. In addition, the Commission approved the Proposed Revised Procedural Schedule with the paragraph 9 language proposed by Northern Valley and Sancom.

On September 23, 2011, SDN filed an Amended Motion for Partial Summary Judgment. On October 7, 2011, Northern Valley filed a Counterclaim Against Sprint. On October 17, 2011, Sprint filed a Motion to Dismiss Northern Valley's Counterclaim. On October 27, 2011, Sprint filed a Motion to Enforce Subpoenas and Modify Procedural Schedule. On November 7, 2011, Northern Valley filed a Motion for Leave to file Counterclaims. At its November 22, 2011, meeting, Sprint requested that no action be taken on its Motion to Enforce Subpoenas and Modify Procedural Schedule

The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31.

At its December 20, 2011, meeting, the Commission considered SDN's Amended Motion for Partial Summary Judgment, Northern Valley's Motion for Leave to File Counterclaims, and Sprint's Motion to Dismiss Northern Valley's Counterclaims. After listening to the arguments of the parties, the Commission voted unanimously to grant SDN's Amended Motion for Partial Summary Judgment. The Commission voted unanimously to grant Northern Valley's Motion for Leave to File Counterclaims. The Commission denied Sprint's Motion to Dismiss Northern Valley's Counterclaim (Commissioner Hanson, dissenting).

Summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *De Smet Farm Mutual Ins. Co. of South Dakota v. Gulbranson Development Co. Inc.*, 2010 SD 15, ¶ 16, 779 NW2d 148, 154-55. With respect to SDN's Amended Motion for Partial Summary Judgment, the Commission finds that there is no dispute as to any material fact. Along with its motion, SDN filed an Amended Statement of Undisputed Material Facts and an Amended Affidavit of Mark Shlanta, the Chief Executive Officer of SDN. Sprint filed an Affidavit of Regina Roach in Support of Sprint's Opposition to SDN's Motion for Summary Judgment but did not file any statement of any material facts in which it contended a genuine issue exists to be tried. Pursuant to SDCL 15-6-56(c)(3), "[a]ll material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party."

The Commission finds that SDN is entitled to partial summary judgment as a matter of law. As set forth in SDN's Statement of Undisputed Material Facts, Sprint, as an interexchange carrier (IXC), ordered centralized equal access (CEA) services "pursuant to the SDN intrastate tariff to originate and terminate long distance or toll calls from its customers that are served on an originating basis from LECs [local exchange carriers] that use the SDN CEA service to connect with IXCs or seek to complete calls to numbers served by those same LECs." SDN's Statement of Undisputed Material Facts, ¶ 10. CEA services allow "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." *Id.* at ¶ 6. Sprint began to dispute SDN invoices with the May 2009 invoice for April services. *Id.* at ¶ 12. Sprint disputed the portion of the invoices that were alleged to be related to traffic Sprint identified as "pumped" or "stimulated" traffic. *Id.* "Pumped" traffic is traffic that "Sprint alleges is stimulated by illegal activities of the LEC to which the traffic is terminated." *Id.* In addition to disputing a portion of SDN's billing for the 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 traffic delivered from Sprint, through SDN, to Sancom, Splitrock, Northern Valley, and Capital." *Id.* at ¶ 13. Sprint demanded a refund of \$1,704,262.08 and created a debit balance on the account payable. Affidavit of Regina Roach, ¶ 4. Sprint did not dispute the portion of the invoices that Sprint characterized as "unpumped" traffic and, in fact, approved compensation for the charges related to non-pumped traffic. *Id.* at ¶ 5; Tr. at 20. However, these "approved amounts" were not paid to SDN but were instead applied to reduce the account payable debit balance created by Sprint's refund claim for prior amounts billed by SDN. Affidavit of Regina Roach, ¶ 6. The result is that Sprint has not made any payments to SDN since April of 2009, although Sprint continues to receive CEA services each month. SDN's Statement of Undisputed Material Facts, ¶ 22.

SDN's Motion for Partial Summary Judgment regards Sprint's treatment of the "undisputed" portions of the invoices. SDN asserts that under its intrastate tariff, Sprint is required to pay the undisputed portion of the bills. Sprint agrees that this is a question to be resolved as a matter of tariff but claims that SDN's intrastate tariff allows Sprint to hold all amounts in dispute during the pendency of the dispute. Sprint believes the tariff allows it to offset payments it made to SDN between June 2007 through April 2009 by withholding payment of current undisputed charges.

The tariff language at issue is found in section 2.4.1(B)(2) which, provides in part, as follows:

In the event that a billing dispute concerning any rates or charges billed to the customer by SDN is resolved in favor of SDN, any payments withheld pending settlement of the dispute shall be subject to the late payment penalty. If the customer disputes the bill on or before the payment date, and pays the undisputed amount on or before the payment date, any late payment charge for the disputed amount will not start until ten (10) days after the payment date.

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. Following payment of the undisputed amount, efforts to resolve the complaint, shall continue and for not less than forty-five (45) days after the rendering of the disputed bill, the service shall not be disconnected for nonpayment of the disputed amount.

If the billing dispute is resolved in favor of the customer, no late payment penalty will apply to the disputed amount. In addition, if the customer disputes the billed amount and pays the total amount (i.e., the nondisputed amount and the disputed amount) on or before the payment date and the billing dispute is resolved in favor of the customer, the customer will receive a credit for a disputed amount penalty from SDN if the billing dispute is not resolved within ten (10) working days following the payment date or the

date the customer furnishes to SDN documentation to support its claim plus ten (10) working days, whichever date is the later date. The disputed amount penalty shall be the disputed amount resolved in the customer's favor times a penalty factor.

No collection fee may be levied in addition to the late payment penalty. This does not prohibit cost-justified charges for disconnection and reconnection of service.

If the customer makes a partial payment in a timely manner, and does not designate the service for which payment is made, the payment shall be credited prorated between the bill for SDN's services and related taxes. The late payment charge will be applied to only the outstanding balance for SDN's services.

SDN may initiate collection efforts with the issuance of a final bill when the termination of service is at the customer's request. For all other bills, no collection effort other than rendering of the bill shall be undertaken until the delinquency date[.]

With respect to each bill, Sprint only disputed a portion of the bill which was the part Sprint alleged involved "pumped" traffic. Thus, for each bill there was an undisputed portion. Section 2.4.1(B)(2) of SDN's intrastate tariff specifically provides that "[i]n 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." (emphasis added.) The Commission concludes that Sprint's practice of offsetting prior payments with undisputed portions of the bills is not allowed under the tariff. The tariff clearly allows SDN to require Sprint to pay the "undisputed portion of the bill." Nothing in the tariff allows a customer of SDN to withhold the "undisputed portion of the bill" as a "credit" for past amounts paid by the customer because the customer now believes that it should not have paid those past amounts. Given that the tariff clearly requires a customer to pay the "undisputed portion of the bill" upon request of SDN, the Commission grants SDN's Motion for Partial Summary Judgment as it relates to Count II, including late charges and interest, and requires Sprint to pay the undisputed portions of the bills on a going forward basis.

Regarding Northern Valley's Motion for Leave to File Counterclaims, Sprint withdrew its objection. Tr. at 34-35. Therefore, the Commission grants Northern Valley's Motion for Leave to File Counterclaims.

With respect to Sprint's Motion to Dismiss Counterclaims, the Commission first notes that the withdrawal of Sprint's opposition to Northern Valley's Motion for Leave to File Counterclaims resulted in Sprint's motion to dismiss being limited to Count II of Northern Valley's counterclaim only. Count II of the counterclaim asked that "in the event the Commission determines that the rate in Northern Valley's intrastate tariff does not apply, Northern Valley requests that the Commission enter a declaratory judgment against Sprint" declaring that Northern Valley would still be entitled to reasonable compensation and declaring a reasonable rate for the access services which could be Northern Valley's tariffed intrastate access rate.

In its motion, Sprint asserted that Count II of Northern Valley's Counterclaim should be dismissed to the extent Northern Valley asks the Commission to address equitable issues. Sprint further argued that Count II should be dismissed because there is no regulated rate the Commission may impose retroactively for non-access traffic. Northern Valley asserted that it is not asking for the Commission to go beyond its statutory jurisdiction but is asking the Commission to apply its statutory authority, including SDCL 49-13-13. Tr. at 48-49. Northern Valley further stated that it is difficult to draw a bright line around what could be considered equitable powers and noted that the reference to "just and reasonable" as used in SDCL 49-13-13 are words that can be associated with equity. Tr. at 57.

A motion to dismiss tests the legal sufficiency of the pleading. *Gruhlke v. Sioux Empire Federal Credit Union Inc.*, 2008 SD 89, ¶ 17, 756 N.W.2d 399, 408. The claim must "allege facts,

which, when taken as true, raise more than a speculative right to relief." *Id.* The Commission finds that Northern Valley has demonstrated that its Count II has the legal sufficiency to proceed. The Commission finds that Count II of Northern Valley's counterclaim alleges "facts, which, when taken as true, raise more than a speculative right to relief" and finds that the counterclaim may proceed forward and therefore denies Sprint's Motion to Dismiss.

It is therefore

ORDERED, that SDN's Amended Motion for Partial Summary Judgment is granted; and it is

FURTHER ORDERED, that Northern Valley's Motion for leave to File Counterclaim is granted; and it is

FURTHER ORDERED, that Sprint's Motion to Dismiss Counterclaims is denied.

Dated at Pierre, South Dakota, this 18th day of January, 2012.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.	
By:	<u>Joy King</u>
Date:	<u>1-18-12</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Chris Nelson

CHRIS NELSON, Chairman

Kristie Fiegen

KRISTIE FIEGEN, Commissioner

Gary Hanson

GARY HANSON, Commissioner (dissenting on denial of motion to dismiss)