UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAETEC COMMUNICATIONS, INC.,	:	
Plaintiff,	:	
v.	:	Civil Action No. 08-0397 (JR)
COMMPARTNERS, LLC,	:	
Defendant.	:	

MEMORANDUM ORDER

PAETEC Communications, Inc., seeks compensation for telephone calls made to individuals on its network that originated on the network of CommPartners, LLC. Now before the court are the parties' cross-motions for partial summary judgment (as to liability). For the reasons set forth below, PAETEC's motion [#36] is **granted** as to its statutory claim regarding the TDM-originated calls. CommPartners' "counter-motion" [#38] is **granted** as to the statutory claim regarding the VoIP-originated calls and as to the quasi-contractual claims.

Background

PAETEC and CommPartners are telecommunications companies. A long-distance call by a CommPartners customer to a PAETEC customer is completed, or "terminated," using PAETEC facilities. Decl. of John T. Ambrosi ¶ 7, attached to Pl. Mot. as Ex. B. In this action, PAETEC seeks compensation for calls it has terminated on behalf of CommPartners. PAETEC's claim is made pursuant to the "access charge" regime of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 et seq. PAETEC

alternatively asserts unjust enrichment and quantum meruit claims.

Crucial to this action is the distinction between two formats for transmitting calls: Time-Division Multiplexing ("TDM") and Voice over Internet Protocol ("VoIP"). VoIP is newer than TDM, and VoIP calls can be transmitted over either the public Internet or over closed networks. See Decl. of David S. Clark ¶¶ 10-11, attached to Pl. Mot. at Ex. A. Calls initiated in one format can be converted to the other during transmission, and a call may be converted once or multiple times. See Pl. Mot. at 6.

There are two types of calls at issue, to which different compensation regimes may apply: (1) calls that began on CommPartners' network in VoIP before being converted by CommPartners to TDM for transfer to PAETEC (the "VoIP-originated calls"); and (2) calls that both began and were transferred in TDM (the "TDM-originated calls"). PAETEC contends that both types of calls are subject to access charges. CommPartners concedes that access charges apply to the TDM-originated calls, but argues that they do not apply to VoIP-originated calls.

The access charge regime was established in the 1980s to govern compensation for long-distance telephony. See Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm., 461 F. Supp. 2d 1055, 1074 (E.D. Mo. 2006). "Access charges historically have included

significant implicit subsidies and by definition have been well above cost." Id. at 1075 (internal quotation marks omitted).

VoIP-Originated Calls

The central dispute here concerns PAETEC's assertion that its tariffs lawfully require application of access charges to VoIP-originated calls.

A. Tariff

Each carrier must file with the FCC a schedule of its charges for interstate wire communication using its network. See 47 U.S.C. § 203(a). This schedule is known as the carrier's tariff. Tariffs, once approved, "are the law, and not mere contracts." Bryan v. Bellsouth Comm'ns, Inc., 377 F.3d 424, 429 (4th Cir. 2004). The applicable portion of PAETEC's federal tariff provides that access services, to which access charges apply, include:

> all services and facilities provided by [PAETEC] for the origination or termination of any interstate or foreign telecommunications using [PAETEC's] network or origination or termination of other services utilizing the same [PAETEC] network services or functionality **regardless of the technology used in transmission.** This includes, but is not limited to, Internet Protocol or similar services.

PAETEC FCC Tariff No. 3, § 1.2, attached to Def. Cross-Mot. as Ex. 6 (emphasis added).[1]

[1] PAETEC's intrastate tariffs contain similar language.

Relying on the language of its tariff, PAETEC asserts that its termination of VoIP-originated calls is an access service. CommPartners begs to differ, arguing that the words "regardless of the technology used in transmission" refer only to the technology used by PAETEC, the terminating party. CommPartners loses this argument: the tariff contains no express or implied limitation on who is doing the transmitting. The terms of the tariff are unambiguous: access charges apply regardless of the technology used at any point in transmission.

CommPartners' next argument is more substantial. It is that, if PAETEC's tariff does cover VoIP-originated calls, it conflicts with general intercarrier compensation law, as established by the Communications Act and regulations promulgated thereunder. Here, PAETEC relies on the so-called "filed-rate doctrine," arguing that its tariff must prevail over any other consideration. The dispositive question, then, is whether the statutory provisions to which CommPartners avers are trumped by PAETEC's tariff.

B. Communications Act

CommPartners asserts two independent reasons why PAETEC's tariff may not be applied to VoIP-originated calls: (1) that its termination of VoIP-originated calls is an "information service" exempt from access charges; and (2) that

access charges cannot apply to VoIP-originated calls because "reciprocal compensation" applies instead.

1. Information Service Exception[2]

Information services are not subject to the access charge regime. See In re AT&T Access Charge Petition, 19 F.C.C.R. 7457, 7459-61, ¶¶ 4-7 (2004). Information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). They include "protocol conversion (i.e., ability to communicate between networks that employ different data-transmission formats)." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 977 (2005) (citing Second Computer Inquiry, 77 F.C.C. 2d 384, 417-23 (1980)). Information services are not telecommunications services, which merely transmit without alteration. See 47 U.S.C. §§ 153(43), 153(46); Brand X, 545 U.S. at 975-76. The two categories are mutually exclusive. See Sw. Bell, 461 F. Supp. 2d at 1078; Stevens Report, 13 F.C.C.R. 11830,

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[2] Under law prior to the 1996 Telecommunications Act, this exception was called the enhanced services exception or ESP exception. See Non-Accounting Safeguards Order, 11 F.C.C.R. 21905, 21955-58, ¶¶ 102-07 (1998). The Act essentially codified the pre-existing exception. See Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975-77 (2005) (noting similarity of the Act's terminology to that of pre-Act FCC decisions).

11507, ¶ 13 (1998). But services that combine both telecommunications and information components are treated as information services. See Brand X, 545 U.S. at 989-90; Sw. Bell, 461 F. Supp. 2d at 1078 (citing CALEA Order, 20 F.C.C.R. 14989 (2005)). CommPartners thus contends that VoIP-to-TDM conversion results in an information service.

The telecommunications industry has been "raging for years" with debate about these arguments, Pl. Reply at 7. The FCC, which has had the controversy on its docket for a decade, has been unable to decide it.[3] Two federal district courts have considered the issue. Both have decided that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. See Sw. Bell, 461 F. Supp. 2d at 1081-83; Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 999-1001 (D. Minn. 2003). Their reasoning is persuasive. As the Sw. Bell court observed, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service." 461 F. Supp. 2d at 1081-82

[3] The FCC has determined that non-net protocol conversions do not constitute information services. See In re AT&T, 19 F.C.C.R. at 7465-66, ¶¶ 12-13. That is, if a company converts a TDM signal to VoIP and then back to TDM before handing it off, no information service is provided. See id. at 7466, ¶ 13 ("This order . . . addresses only AT&T's specific service, and that service does not involve a net protocol conversion. . . . If the service evolves . . . , the Commission could revisit its decision in this order."). It could – but it hasn't.

(citing In re Non-Accounting Safeguards, 11 F.C.C.R. 21905, 21956, ¶ 104 (1996)).

I find that CommPartners' transmission and net conversion of the calls is properly labeled an information service.[4]

2. Reciprocal Compensation

Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.[5] See 47 U.S.C. § 251(b)(5); WorldCom, Inc. v. FCC, 288 F.3d 429, 433-34 (D.C. Cir. 2002). The reciprocal compensation regime was created by the Telecommunications Act of 1996 (the "1996 Act"), which also retained the pre-existing access charge regime, but in a limited fashion. See 47 U.S.C. § 251(g) (retention provision). Under the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a "pre-Act obligation relating to inter-carrier compensation." WorldCom, 288 F.3d at 433.

There cannot be a pre-Act obligation relating to inter-carrier compensation for VoIP, because VoIP was not developed

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[4] The parties disagree about whether the information service exception applies only to interstate calls, or whether it can reach intrastate traffic as well. See Pl. Reply at 11; Def. Reply at 11-13. I need not decide the issue, as the information service exception is but one of two independent grounds supporting CommPartners.

[5] Unlike access charges, reciprocal compensation can apply to information services. See Sw. Bell, 461 F. Supp. 2d at 1081 n.19.

until the 1996 Act was passed. Accord Sw. Bell, 461 F. Supp. 2d at 1080 ("[B]ecause [VoIP-to-TDM] is a new service developed after the [1996] Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable."). PAETEC's submission that the analysis should turn not on whether companies actually paid access charges for VoIP prior to the Act, but instead whether pre-Act law would have supported such charges -- is not so much an argument as an invitation to speculate. The invitation is declined.

C. Filed-Rate Doctrine

Under the Communications Act, tariffs "are the law, and not contracts"; and PAETEC's tariff imposes access charges on VoIP-originated calls. The FCC accepted PAETEC's tariff for filing, even though the compensation-governing provisions of the Communications Act and interpretive regulatory decisions thereunder point away from the access charges PAETEC purports to impose on VoIP-originated calls.

Under the filed-rate doctrine, customers are "charged with notice of the terms and rates set out in the filed tariff and may not bring an action against a carrier that would invalidate, alter, or add to the terms of the filed tariff." Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000). "The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the

FCC." Brown v. MCI Worldcom Network Servs., Inc., 277 F.3d 1166, 1171 (9th Cir. 2002).

In this case, nevertheless, PAETEC's tariff must give way. "A tariff filed with a federal agency is the equivalent of a federal regulation." Cahnmann v. Spring Corp., 133 F.3d 484, 488 (7th Cir. 1998). As such, a tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated. At least one circuit has reached a similar conclusion. In that case, Iowa Network Services ("INS") filed state and federal tariffs that purported to apply access charges to transmission of certain wireless traffic. See INS v. Qwest Corp, 466 F.3d 1091, 1093-95 (8th Cir. 2006). However, the statutory framework for the wireless traffic, combined with state and federal regulatory processes pursuant to that framework, established that access charges could not apply. See id. at 1095-97. After considering the conflict, the court held that the tariffs must yield. See id. at 1097. The court found that its decision did not improperly invalidate the tariffs, in violation of the filed-rate doctrine, because they could still be applied to traffic which the statutory and framework allowed them to reach. See id. Similarly, the decision did not alter the terms of the tariff; the disputed terms were simply ultra vires and lacked legal force.

The Eighth Circuit decision in Qwest may appear to be an inventive piece of legal legerdemain, but it applies the tools that are available to courts (the FCC has much better ones, but will not use them), and it is supported by sound policy considerations. The FCC sometimes has as few as fifteen days to consider whether to object to a tariff that contains a rate increase before it goes into effect. See 47 U.S.C. § 204(a)(3). To treat tariffs as inviolable would create incentives to bury within tariffs provisions that expand their rates beyond statutory allowance in the hope that the FCC will not notice. See INS v. Qwest Corp., 385 F. Supp. 2d 850, 899 (S.D. Iowa 2005) (characterizing the tariffs in that case as an attempt to "sidestep" the applicable legal framework and "a strategic attempt to thwart the impact of the 1996 Act"). The purposes of the filed-rate doctrine -- to prevent discrimination among consumers and preserve the rate-making authority of federal agencies, see Bryan v. Bellsouth Comm'ns, Inc. 377 F.3d 424, 429 (4th Cir. 2004); Hill v. BellSouth Telcomms., Inc., 364 F.3d 1308, 1316 (11th Cir. 2004) -- are not undercut by the Eighth Circuit's decision, or by mine.

There are differences between Qwest and this case, to be sure, but they do not justify a different outcome here. First, in the background of the Qwest case were rulings of the Iowa Utilities Board that access charges were inapplicable to the

traffic at issue. See Qwest, 385 F. Supp. 2d at 863. Those regulatory decisions were not dispositive, however; indeed, earlier in the case the Eighth Circuit reversed the district court for treating them as preclusive and ordered it instead to "decide for itself whether the traffic at issue is subject to access charges pursuant to INS's tariffs." INS v. Qwest Corp., 363 F.3d 683, 695 (8th Cir. 2004). Second, the court's refusal to apply the filed-rate doctrine in Qwest was supported both by the compensation-governing provisions of 47 U.S.C. § 251 and by the provision governing the scope of tariffs located at 47 U.S.C. § 203(a). See Qwest, 466 F.3d at 1095-97. My decision turns only on § 251, yet the Qwest decision could stand alone on its persuasive holding that tariffs cannot be applied inconsistently with the Communications Act, which is where § 251 resides.

Because the access charge regime is inapplicable to VoIP-originated tariff, and because a filed tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated, the filed-rate doctrine must yield in this case.

TDM-Originated Calls

CommPartners concedes its duty to pay access charges for TDM-originated calls. See Def. Cross-Mot. at 1 n.1. PAETEC suggests that this concession should entitle it to an award of attorneys fees and costs based on the terms of its tariff. See PAETEC Tariff F.C.C. No. 3 at § 2.4.6 (requiring such fees if

PAETEC "substantially prevails" in litigation). CommPartners disputes PAETEC's assertion. The parties urge an immediate determination of that question, but at this point I am ruling only on liability. The question of what it means to "substantially prevail" must await the damages phase, when the factual record will be more complete.

Quasi-Contractual Claims

Injecting common law claims into intercarrier compensation would undermine the complex scheme Congress and the FCC have established. Because the Communications Act establishes the exclusive methods of intercarrier compensation for the calls at issue, PAETEC's unjust enrichment and quantum meruit claims are statutorily barred. See Qwest, 466 F.3d at 1098; MCI WorldCom Network Servs., Inc. v. PAETEC Comm'ns, Inc., 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005).

JAMES ROBERTSON
United States District Judge