Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED AS TO ENTITLEMENT: July 24, 2001

GSBCA 14932, 15409, 15449

AT&T COMMUNICATIONS,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard J. Conway, J. Andrew Jackson, Robert J. Higgins, and Robert J. Moss of Dickstein Shapiro Morin & Oshinsky LLP, Washington, DC, counsel for Appellant.

John E. Cornell and Michael D. Tully, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **DeGRAFF**.

BORWICK, Board Judge.

In this matter, we grant AT&T Communications' (AT&T's) motion for summary relief on entitlement only regarding its claim against the General Services Administration (GSA) for payment of the Federal Communication Commission's (FCC's) Universal Service Fund (USF) charges under the FTS2000 contract.

Background

AT&T has filed a motion for summary relief, together with a statement of undisputed facts. GSA opposes AT&T's motion and has filed a statement of genuine issues, in which it agrees with many of AT&T's statements but disagrees with other statements. We set forth the areas of agreement and disagreement and later explain why the matters on which the parties disagree do not prevent us from granting AT&T's motion on entitlement only.[1]

In December 1987, GSA issued request for proposals (RFP) KET-JW-87-02. The RFP sought proposals for two ten-year contracts under the FTS2000 program for Government-wide long-distance services. AT&T submitted a proposal in response to the RFP and was ultimately awarded one of the two FTS2000 contracts, contract number GS00K89AHD0008. Appellant's Statement of Uncontested Facts ¶ 1; Respondent's Statement of Genuine Issues ¶ 1.

At the time AT&T submitted its proposal under the RFP, the FCC considered AT&T to be the dominant long-distance carrier. The FCC required AT&T, as a dominant carrier, to file tariffs with the FCC covering all of its long-distance services. Because of that requirement, the prices AT&T offered to the Government in response to the RFP were tariffed prices. Appellant's Statement of Uncontested Facts ¶ 2. Respondent disagrees with the last sentence of this statement. Respondent maintains that according to the FTS2000 RFP the awardee would be required to file a tariff that incorporated the offered prices and that complied with the contract terms. Respondent's Statement of Genuine Issues ¶ 2.

The FTS2000 RFP provided that GSA would consider without evaluation penalty either "(A) a non-tariffed firm fixed price contract offer for the ten-year term; (B) a firm fixed price tariff offer for the ten-year term; or (C) a firm fixed price contract offer based in part upon a firm fixed price tariff(s) for the ten-year term." Respondent's Opposition, Exhibit I at 2, ¶ L.7d.(2). If an offeror submitted a tariff-based proposal, the offeror was required to submit a tariff in draft form at the time of initial proposals. In addition the fixed price tariff was to be a ten-year fixed term tariff with fixed rates and was to be filed with the FCC within thirty working days of award, with the final tariff to be submitted to GSA for review and coordination as soon as available, but prior to submission to the FCC. The fixed-price tariff was to include an express waiver of the right of the offeror or its subcontractor for the tariffed services to initiate tariff increases, except as provided in the Economic Price Adjustment clause, Section H.10. Id. ¶ L.7(d)(3)(A), (B).

In December 1988, GSA awarded a contract for telecommunications services to AT&T based on the tariffed prices set forth in AT&T's proposal. The contract also incorporated a number of Federal Acquisition Regulation (FAR) clauses, including FAR 52.243-1 Changes-Fixed Price; and FAR 52.233-1 Disputes. Appellant's Statement of

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[1] GSBCA 15409 and 15439 are appeals from contracting officer's decisions concerning the validity of AT&T's tariff, as it relates to AT&T's claim for reimbursement of USF charges, under the FTS2000 contract. Appellant's motion for summary relief concerns those dockets. GSBCA 14932 is an appeal from the contracting officer's decision on appellant's claim for reimbursement of the USF charges under the FTS2000 contract's Tax clause. In view of our disposition of appellant's motion, we stay further proceedings in GSBCA 14932.

Uncontested Facts ¶ 4. Respondent agrees with this statement, subject to the qualifications stated in its answer to the complaint in GSBCA 15409. Answer ¶¶ 5, 6. In its responses to those paragraphs, respondent denies that AT&T offered tariff prices. Respondent maintains that the prices AT&T offered to the Government were to be tariffed prices, that AT&T's offer was not based on existing tariff prices, and that its future tariff for FTS2000 was to incorporate important customer pricing protections.

Upon receiving contract award, and in accordance with FCC tariff requirements, AT&T promptly filed a tariff with the FCC covering the services set forth in the contract. That tariff, AT&T FCC Tariff No. 16, Section 5 (FTS2000 tariff), covered all of the services provided under the contract. Thereafter, whenever the contract was modified substantively, AT&T revised its FTS2000 tariff to reflect the contract modification, as required by the FCC. Appellant's Statement of Uncontested Facts ¶ 4, Respondent's Statement of Genuine Issues ¶ 4. As to this statement, respondent notes that Section 5 is not the only portion of the FTS2000 tariff applicable to the services provided under the FTS2000 contract. Respondent's Statement of Genuine Issues ¶ 4.

Effective March 10, 1989, the FTS2000 tariff provided that:

> AT&T expressly waives the right to initiate tariff revisions seeking to increase the applicable rates under which the Customer has obtained FTS2000 [services] during the specified ten-year service period, except for such increases as may be agreed upon between AT&T and the Customer and filed in this tariff. In addition, AT&T will defend the tariff and oppose any tariff rate increase during FCC proceedings affecting FTS2000.

Respondent's Statement of Genuine Issues, Exhibit A (FTS2000 tariff, § 5.2.7.E RATE CHANGES).

In 1996, Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Section 254 of the Act authorized the FCC to promulgate regulations implementing new universal telecommunications service requirements. The Act expressly mandated contributions by telecommunications providers to a newly created Universal Service Fund to subsidize access by eligible schools, libraries, and healthcare providers to certain advanced telecommuncations services. Appellant's Statement of Uncontested Facts ¶ 5; Respondent's Statement of Genuine Issues ¶ 5.

On May 8, 1997, the FCC issued Order 97-157, which implemented the new universal service principles enunciated by the Act. The Order, as subsequently modified and reflected in FCC regulations, requires that, beginning on January 1, 1998, all interexchange carriers, including AT&T, make contributions to the USF based on their respective interstate and international long-distance service receipts. Appellant's Statement of Uncontested Facts ¶ 6; Respondent's Statement of Genuine Issues ¶ 6.

In issuing the May 8, 1997 Order the FCC made the following finding:

> Although we do not mandate that carriers recover contributions in a particular manner, we note that carriers are permitted to pass through their contribution

> requirements to all of their customers in an equitable and nondiscriminatory fashion. Furthermore, we find that universal service contributions justify contract adjustments. . . . By assessing a new contribution requirement, we create an expense or cost of doing business that was not anticipated at the time the contracts were signed. Thus we find that it would serve the public interest to allow telecommunications carriers and providers to make changes to existing contracts for service in order to adjust for this new cost of doing business.

(citing 12 F.C.C.R. at 9209); see Appellant's Statement of Uncontested Facts ¶ 7. Respondent agrees with this statement but notes that the FCC subsequently stated that access charge reductions have offset USF increases. Respondent's Statement of Genuine Issues ¶ 7.

In October 1997, AT&T notified GSA in writing that AT&T would pass the USF charges through to the Government as part of normal contract invoices. On December 18, 1997, in accordance with the FCC's tariff requirements, AT&T filed a revision to the FTS2000 tariff adding the USF charge to its FTS2000 tariff. The revision states:

> Services provided pursuant to this tariff are subject to an undiscountable monthly Universal Connectivity [USF] Charge, which is equal to 4.9% of the customer's total net interstate and international charges, after application of all applicable discounts and credits. Subject to billing availability, this charge will be applied with respect to charges billed after January 25, 1998.

Appellant's Statement of Uncontested Facts ¶ 8. Respondent agrees to this statement, but also asserts that AT&T forfeited its right to make such revisions, and that if the tariff revision is deemed valid, 4.9% is not the only effective rate in 1998. Respondent's Statement of Genuine Issues ¶ 8. Respondent notes that for all charges billed on or after July 31, 1998, the percentage was reduced from 4.9% to 4.1%. Respondent's Statement of Genuine Issues ¶ 8, Exhibits B-E.

On January 19, 1998, AT&T provided the FTS2000 contracting officer with a copy of AT&T's December 18, 1997, tariff revision, GSA never challenged the tariff revision before the FCC, and the tariff revision became effective in accordance with the FCC's tariff rules. Appellant's Statement of Uncontested Facts ¶ 9. GSA agrees with this statement, "but disputes the effectiveness of the charge." Respondent's Statement of Genuine Issues ¶ 9.

On February 1, 1998, AT&T began including the 4.9% USF charge in its FTS2000 invoices, for services provided during the month of January 1998, as required by the December 1997 revision to AT&T's FTS2000 tariff. AT&T continued to invoice the Government for USF charges under its FTS2000 tariff until the contract expired in December 1998. GSA refused to pay any of the USF charges included in AT&T's invoices. Appellant's Statement of Uncontested Facts ¶ 10. Respondent agrees with the above statement but states that it is unproven and disputed as to which services AT&T applied its charges and disputed as to what traffic volumes and percentages used by AT&T are correct. Respondent's Statement of Genuine Issues ¶ 10.

On November 19, 1998, appellant filed a certified claim alleging that AT&T had incurred a total of $12,493,609 of USF charges on revenues earned under the FTS2000 contract since the FCC's May 7, 1997, order went into effect, and that since February 1, 1998, GSA had withheld payment of the USF charges. AT&T claimed reimbursement of the USF charges. Appeal File, Exhibit 17.

AT&T maintains that the Government's total net interstate and international charges under the contract for 1998, after application of all applicable discounts and credits, grew to $290,063,866. Appellant's Statement of Uncontested Facts ¶ 11. Under the tariff, the Government must pay USF charges equal to 4.9 percent of the customer's total net interstate and international charges, after application of all discounts and credits. Id. AT&T alleges that respondent now owes AT&T $14,213,129. Id.

Respondent disagrees with the quantum calculation, stating that the Government records show that the 1998 net charges were $277,956,274. Respondent's Statement of Genuine Issues ¶ 11, Exhibits D-F. Respondent states that the total assessment for 1998 should be $12,799,317 and not $14,213,129. Id., Exhibit F.

As to this dispute concerning the net charge, in its reply memorandum AT&T states:

> AT&T will agree with GSA's formulation of net interstate charges, thus eliminating any dispute regarding this fact. The tariff itself eliminates any dispute regarding the applicable rate.
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> . . . .
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> To prevent further delay, AT&T hereby accepts (and stipulates to) GSA's formulation of net interstate charges in the amount of $277,956,274 for the purpose of these proceedings.

Appellant's Reply at 6. AT&T disputes GSA's contention that the 4.1% tariff rate should apply and maintains that the 4.1% rate has no application to FTS2000 USF charge. AT&T maintains that the 4.9% tariff rate is the only rate that applies to FTS2000 USF charge. Id. at 7. In a supplemental filing, AT&T explained that on July 1, 1998, AT&T intended to reduce the USF charge rate to 4.1 percent for the applicable tariff, and that section two of the tariff, which contains the general provision, was amended to reflect the 4.1 percent rate. However, AT&T neglected to amend section five of the tariff, which governs the FTS2000 contract, to reflect the rate change. AT&T thereafter calculated the USF charge and invoiced GSA using the 4.1 percent rate, which was inconsistent with the 4.9 percent rate specified in although section five of the tariff. Appellant's Supplemental Motion at 1-2.

Discussion

AT&T moves for summary relief on the basis of the filed tariff doctrine; GSA opposes the motion. Summary relief is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Granco Industries, Inc. v. General Services Administration, GSBCA 14902, 99-2 BCA ¶ 30,568; Twigg Corp. v. General Services Administration, GSBCA 14387, 98-2 BCA ¶ 29,803. The purpose of

summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. Vivid Technologies, Inc. v. American Science & Engineering, Inc., 200 F.3d 795, 806 (Fed. Cir. 1999); Executive Construction, Inc. v. General Services Administration, GSBCA 15225, 00-2 BCA ¶ 30,977. The established facts, as well as any inferences of fact drawn from such facts, must be viewed in a light most favorable to the opposing party. Barmag Barmer Maschinenfrabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 835-36 (Fed. Cir. 1984).

Here, the facts concerning the tariff filings are uncontested. The parties dispute whether under the RFP and resulting FTS2000 contract, appellant's original contract pricing was based on a tariff or was to be incorporated into a subsequent tariff. GSA and AT&T also part company over the effect of the tariff filings on what GSA views as AT&T's contractual commitment not to increase its contract pricing by filing a tariff varying from the offered contract prices. The nature of AT&T's original contract pricing as tariff based or non-tariff does not prevent us from passing on the applicability of the filed tariff doctrine here, since as we shall shortly see--and have ruled earlier--the tariff filing, not the offered contract pricing, controls under the filed tariff doctrine.

In Sprint Communications Co. L.P. v. General Services Administration, GSBCA 15139, 00-1 BCA ¶ 30,909, we concluded that the contractor was entitled to recover its USF charges to the Government under the filed tariff doctrine, despite the contractor's submitting firm, fixed prices for the contract term. We held that the "filed tariff" doctrine, enunciated in Louisville & Nashville Railroad v. Maxwell, 237 U.S. 94 (1915), and also applicable to goods and services provided under the Communications Act of 1934, American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214 (1998), made the tariff rate the controlling rate, despite Sprint's submission of different fixed contract prices. Sprint, 00-1 BCA at 152,498, 152,506. We so concluded because under the filed tariff doctrine, the rate of the carrier duly filed is "the only lawful charge." Louisville & Nashville Railroad, 237 U.S. at 97. Furthermore, the rights of the parties as defined by a tariff cannot be "varied or enlarged by either contract or tort of the carrier." Keogh v. Chicago & North Western Railway Co., 260 U.S. 156, 163 (1922); see Sprint, 00-1 BCA at 152,498-99.

Here, as regards the filed tariff doctrine, AT&T stands in a position no different from Sprint. It is true that the contract required that the fixed-price tariff include an express waiver of the right of AT&T to initiate tariff increases. Further, AT&T's early tariff waived AT&T's right to initiate tariff revisions seeking to increase the applicable rates under which the Customer has obtained FTS2000 services during the specified ten-year service period. Nevertheless, AT&T filed a revision to the FTS2000 tariff on December 17, 1997, adding the USF charge to its FTS2000 tariff. That tariff revision became the only lawful charge, when it became effective without challenge by GSA. 47 U.S.C. § 203(c); 47 CFR 1.773(a)(1)(i) (1998).

There are disputes of fact concerning quantum, which are not appropriate for summary relief. Further whether the proper charge pursuant to the July 1, 1998, erroneous tariff revision should have been 4.1 percent as intended or the 4.9 percent that remained in the tariff but not billed by AT&T to GSA is appropriately for the determination of the FCC, as the regulatory agency with special competence in construing telecommunications tariffs. Nippon Steel Corporation v. United States, 219 F.3d 1348, 1353 (Fed. Cir. 2000); Transway

Corp. v. Hawaiian Express Service Inc., 679 F.2d 1328, 1332 (9th Cir. 1982). In this regard, we note that GSA states that it now intends to file a petition with the FCC challenging the December 17, 1997, revision.[2] The issue of the proper rate to be charged can also be addressed in that petition.

Decision

Appellant's motion for summary relief is **GRANTED IN PART** as to entitlement.

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ANTHONY S. BORWICK
Board Judge

I concur:

_____
EDWIN B. NEILL
Board Judge

I concur for the reasons stated in my concurrence in Sprint Communications, 00-1, BCA ¶ 30,909.

_____
MARTHA H. DeGRAFF
Board Judge

[2] On July 13, respondent moved for suspension of proceedings on the filed tariff issue in these proceedings. Appellant vigorously objects to the motion, arguing that a stay pending FCC review would be inappropriate under the filed tariff doctrine. We agree with appellant that its motion for summary relief is now ripe for decision and we decline to suspend proceedings. Respondent's motion for suspension of proceedings is denied.