Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR SUMMARY RELIEF AS TO QUANTUM DENIED: March 5, 2002

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, Michael D. Tully, and Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

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

BORWICK, Board Judge.

We deny appellant's motion for summary relief as to quantum because there is a factual issue in dispute. We will not suspend proceedings in this case due to GSA's filing a complaint with the Federal Communications Commission (FCC) challenging the validity of AT&T Communications' (AT&T's) FTS 2000 contract tariff amendment, which passed through Universal Service Fund (USF) charges to the Government.

Background

We granted appellant's motion for summary relief as to entitlement, holding that AT&T was entitled to recover USF charges from the Government in accordance with AT&T's tariff amendment filed with the FCC. We rejected the Government argument that the contract price as opposed to the filed tariff rate controlled, stating:

> 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.
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> 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).

AT&T Communications v. General Services Administration, GSBCA 14932, et al., 01-2 BCA ¶ 31,529, at 155,655. However, we refused to grant appellant's motion for summary relief as to quantum, noting:

> 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. The issue of the proper rate to be charged can also be addressed in that petition.

Id.

AT&T now has eliminated the factual dispute over the proper tariff rate (4.9% versus 4.1%). In its motion for summary relief with respect to quantum, AT&T states:

> 1. The General Services Administration (GSA) believes that the proper base figure for calculating USF charges under [appellant's] FTS2000 tariff (Tariff) is $277,956,274.
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> 2. AT&T believes that the proper base for calculating USF charges under the Tariff is $290,063,866; however, in an effort to resolve this case promptly, AT&T has previously stipulated to GSA's base figure of $277,956,274.
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> 3. The USF rate in the Tariff for charges incurred between January 1, 1998 and July 31, 1998 is 4.9%. GSA believes that the USF rate under the Tariff for charges incurred between August 1, 1998 and December 7, 1998 is 4.1%.
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> 4. AT&T believes that the USF rate in the Tariff for charges incurred from August 1, 1998 through December 7, 1998 is 4.9%; however, in an effort to resolve this case promptly, and for purposes of this appeal only, AT&T hereby stipulates that the USF rate in the Tariff for charges incurred from August 1, 1998, through December 7, 1998, is 4.1%.
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> 5. GSA calculates that under the Tariff, AT&T is entitled to $12,799,317. AT&T calculates that under the Tariff, it is entitled to $14,213,129; however, in an effort to resolve this case promptly, and for purposes of this appeal only, AT&T hereby stipulates and agrees with GSA that AT&T is entitled to $12,799,317.

Appellant's Statement of Uncontested Facts in Support of Motion for Summary Relief With Respect to Quantum (Statement of Uncontested Facts) (citations to pleadings and exhibits omitted).

Paragraph one of AT&T's Statement of Undisputed Facts is based upon GSA's Response to AT&T's Motion for Summary Relief. In that response, GSA disputed that the base for calculating USF charges was $290,063,866. GSA stated that "Government's billing records show different amounts--1998 net charges in the amount of $277,956,274." Respondent's Opposition to Appellant's Motion for Summary Relief (Respondent's Opposition). This statement was based on the declaration of Mr. Robert Menna, an employee of respondent's contractor/consultant Mitretek. Mr. Menna stated that "$277,956,274 is the most that could be subject to the USF charges. The actual amount is probably slightly less, but Mitretek is unable to determine given the information available on the invoices, how much less." Respondent's Opposition, Exhibit F.

Respondent now advises that GSA is prepared to challenge before the FCC "the legality of AT&T's December 1997 amended Tariff No. 16 which added a 4.9% charge to cover AT&T USF contributions." Respondent's Opposition to Appellant's Motion for Summary Relief on Quantum (Respondent's Opposition on Quantum) at 2 n.1. GSA has filed a pre-complaint statement with the FCC in which it maintains that "AT&T's use of the tariffing process to eviscerate its contractual arrangement with GSA is an unjust and unreasonable practice that violates section 201(b) of the Communications Act [of 1934]." Id., Exhibit 1 at 5 (§ II). Before the FCC, GSA will argue that AT&T's tariff is unlawful

under the Sierra-Mobile[1] exception to the filed rate doctrine because, allegedly, the tariff filing conflicted with a pre-existing contract. GSA will also argue that an FCC ruling[2] stands for the proposition that "common carriers cannot use the tariffing process to eviscerate terms of a negotiated contract." Id.

In light of these and corollary arguments to be made to the FCC, respondent suggests that this Board should continue to apply the doctrine of primary jurisdiction to the instant motion and should "not only continue to defer ruling on quantum to allow GSA to pursue the matter before the FCC, the Board should affirmatively refer this issue to the FCC sua sponte." Respondent's Opposition on Quantum at 2.

As stated in our earlier opinion, we deferred our quantum determination for a specific and narrow reason--to allow the FCC to sort out conflicting rates in separate provisions of the applicable tariff, a task which we determined to be within the province of the FCC's expertise. See AT&T Communications, 01-1 BCA at 155,655. GSA now requests the Board to delay the quantum determination so that it may argue the validity of the tariff before the FCC.

We rejected a similar argument in the companion case filed by Sprint Communications Co., L.P. There GSA argued that we lacked jurisdiction to grant contractual relief in the face of claim that a tariff was not just and reasonable. We agreed that we were not to be enmeshed in tariff questions but that we would "insist upon compliance with the officially filed tariff, as revised." Sprint Communications Co. L.P. v. General Services Administration, GSBCA 15139, 00-1 BCA ¶ 30,909, at 152,499.

In this appeal, we earlier noted, in granting AT&T's motion for summary relief on entitlement, that AT&T's revision of the FTS2000 tariff on December 17, 1997, which passed-through the USF charges, became the "only lawful charge, when it became effective, without challenge by GSA." AT&T Communications, 01-2 BCA at 155,655. Consequently, we would not delay a ruling on quantum on the basis of the doctrine of primary jurisdiction should the matter be ripe for appropriate for summary relief.

However, the matter is not appropriate for summary relief because of a disputed issue of fact, i.e., the proper amount of the revenue base for calculating USF charges. GSA states:

> [T]he $277,956,274 revenue figure cited is not only less than the revenue figure asserted by appellant, but is the maximum figure based on a limited review of billing invoices and that the revenue figure is likely to be less. . . . After completing discovery and further analysis, respondent avers that the base revenue figure will probably be less.

Respondent's Statement of Genuine Issues ¶ 1.

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[1] See Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956); United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956).

[2] GSA cites "Bell Atlantic v. Global NAPS, 15 F.C.C.R. 20665 ¶ 21 (2000)."

Summary relief is only appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Xerxe Group v. United States, 278 F.3d 1357, 1358 (Fed. Cir. 2002); HPI/GSA-3C, LLC v. General Services Administration, GSBCA 15674 (Feb. 8, 2002); Granco Industries, Inc. v. General Services Administration, GSBCA 14900, et al., 99-2 BCA ¶ 30,568; Twigg Corp. v. General Services Administration, GSBCA 14387, 98-2 BCA ¶ 29,803. Appellant's motion for summary relief must be denied because of the dispute of fact over the amount of the revenue base. GSA's estimated base figure to which AT&T was prepared to stipulate is not a firm figure. The Board recognizes GSA's right to thoroughly analyze the relevant billing invoices and to derive a firm figure that GSA will back without reservation as the proper base for applying the tariff percentages. The Board will allow discovery for this limited purpose.[3]

Decision

Appellant's motion for summary relief as to quantum is **DENIED**.

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ANTHONY S. BORWICK
Board Judge

We concur:

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EDWIN B. NEILL
Board Judge

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MARTHA H. DeGRAFF
Board Judge

[3] GSA is to report to the Board within two weeks of the date of the opinion when it can complete the task of deriving a firm figure for the revenue base.