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March 22, 2004

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VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Re: ***Notice of Ex Parte Presentation***
CC Docket Nos. 96-262 and 01-92

Dear Ms. Dortch:

ITC^DeltaCom Communications Inc., d/b/a ITC^DeltaCom, through its attorneys, hereby submits this letter in response to the *ex parte* letter submitted by US LEC Corporation ("US LEC") on March 18, 2004, which advised the Commission of the March 15, 2004 decision by the Federal District Court (Northern District of Georgia) on cross-motions for summary judgment in the ongoing litigation between ITC^DeltaCom and US LEC regarding US LEC's practice of imposing the benchmark access rate for the routing of CMRS-originating "8YY" traffic via BellSouth's access tandem to ITC^DeltaCom without the consent of ITC^DeltaCom.

It may be helpful to summarize briefly the Court's holding. The Court granted ITC^DeltaCom's motion for partial summary judgment by holding that, as a matter of law, ITC^DeltaCom is not obligated to pay the disputed access charges imposed by US LEC. The Court held (at 11-15) that US LEC's Federal tariff does not require ITC^DeltaCom to pay access charges for CMRS-originating "8YY" traffic. In particular, the Court held that neither of the two tariff provisions referenced by US LEC can reasonably be construed to apply to CMRS-originating "8YY" calls that US LEC routes to ITC^DeltaCom on a transit basis. In addition, the Court held that the FCC's rules do not require ITC^DeltaCom to pay these access charges, noting (at 16) that "US LEC has not identified any rule that requires ITC to pay charges for services that are not covered in a tariff or in a contract." Lastly, the Court held that US LEC and ITC^DeltaCom do not have a contract, written or otherwise, pursuant to which ITC^DeltaCom is obligated to pay the disputed access charges to US LEC.

In addition, the Court denied US LEC's motion for summary judgment regarding ITC^DeltaCom's claims that US LEC engaged in common law fraud and negligent misrepresentation, and that US LEC violated the Georgia RICO Act and the Georgia Uniform Deceptive Trade Practices Act. The Court's holding is consistent with record evidence in the above-referenced proceeding that US LEC affirmatively concealed the CMRS-originating nature of the "8YY" traffic for which it billed ITC^DeltaCom. The Court held (at 7) that US LEC's invoices to ITC^DeltaCom "did not reveal that US LEC was charging ITC for the wireless calls." The Court also cited record evidence (at 18-19) showing that US LEC affirmatively encouraged CMRS carriers to use MF Signaling rather than SS7 Signaling, thereby concealing the wireless nature of the traffic. Among the evidence of US LEC's intent to defraud was the fact that US LEC employees had advised the CMRS carriers that IXCs would refuse to pay US LEC's access charges "if they realized the toll-free calls were wireless." (Order at 21). In fact, one US LEC employee told a wireless carrier that it should not use SS7 signaling because, with the wireless originating number being passed, US LEC may not receive the access charges on the "8YY" traffic. (Order at 21.) The Court concluded (at 19) that "[a] reasonable juror could conclude that US LEC, by using MF Signaling as it did, misrepresented the origin of calls." The Court also noted that US LEC's invoices to ITC^DeltaCom did not identify the calls as CMRS-originating, instead representing incorrectly that the calls "originated" on US LEC's network (Order at 20). Hence, the Court rejected US LEC's motion for summary judgment regarding the ITC^DeltaCom's claims noted above.

In ITC^DeltaCom's view, the Court's decision underscores the need for the Commission to promptly issue a declaratory ruling that US LEC's routing and access-charge scheme for "8YY" traffic is unlawful under the Communications Act and the Commission's precedents and policies. As US LEC notes in its March 18, 2004 *ex parte* letter, the issue in the above-referenced proceeding is "whether there is an FCC rule authorizing CLECs to impose access charges on [IXCs for] CMRS originated traffic." The record shows conclusively that there is no FCC rule, policy or precedent which authorizes US LEC or other CLECs to impose the benchmark rate on IXCs for engaging in transit routing of CMRS-originating "8YY" traffic. The claim made by US LEC that the industry has engaged in this practice "since at least 1996" is not only factually incorrect and unsupported by any record evidence, it is belied by the Court's finding that a reasonable juror could determine that US LEC affirmatively concealed the CMRS-originating nature of the traffic in order to defraud ITC^DeltaCom. The only "industry practice" established on the record in this proceeding is the lengths to which at least one CLEC will go to hide the CMRS-originating nature of this traffic so that IXCs will submit payments without realizing what they are paying for.

With respect to the retroactivity issue, the Commission should not consider applying its decision on a prospective-only basis as a way of mitigating the possible economic consequences for US LEC or other entities who have participated in this abusive practice. As the Court Order shows, there are factors beyond those at issue in this proceeding – for example,

whether a CLEC's tariff has been written to impose access charges for CMRS-originating "8YY" traffic – that will play an important and in some cases decisive role regarding the impact on specific companies. Rather than attempt to tailor its ruling based on difficult judgments of comparative impact, the Commission should follow its established precedents and practices by applying its declaratory ruling that this routing and access-charge practice is unlawful on a fully retroactive basis.

Please contact me at (202) 955-9676 if you have any questions regarding this filing.

Sincerely,

Robert J. Aamoth

cc: Jessica Rosenworcel (via email)
Christopher Libertelli (via email)
Matthew Brill (via email)
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

FILED IN CLERK'S OFFICE
U.S.D.C. - Newnan

MAR 15 2004

LUTHER D. THOMAS, Clerk
By

ITC DELTACOM COMMUNICATIONS, INC.,

Plaintiff,

v.

US LEC CORP., US LEC OF GEORGIA INC., US LEC OF ALABAMA INC., US LEC OF FLORIDA INC., US LEC OF TENNESSEE INC. (d/b/a/ US LEC OF MISSISSIPPI INC.), US LEC OF NORTH CAROLINA, INC., US LEC OF LOUISIANA INC., US LEC OF TENNESSEE, INC., US LEC COMMUNICATIONS, INC., US LEC OF PENNSYLVANIA, INC., US LEC OF SOUTH CAROLINA, INC., and US LEC OF VIRGINIA, L.L.C.,

Defendants.

CIVIL ACTION
NO. 3:02-CV-116-JTC

ORDER

This case is before the Court on the following motions: Plaintiff's Motion for Leave to File First Amended Complaint [#38-1]; Plaintiff's Motion for Partial Summary Judgment [#43-1]; Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 [#46-1]; Defendants' Motion for Summary Judgment [#48-1]; and Plaintiff's Motion to File in Excess of Page Limitations [#61-1].

(94)

This case involves two issues: whether Defendants[1] could legally charge Plaintiff access fees for toll-free calls placed by wireless customers to Plaintiff's customers; and whether Defendants fraudulently concealed the origin of these calls to induce payment from Plaintiff. Plaintiff moves for partial summary judgment contending that Defendants could not legally charge the access fees. Plaintiff's Motion for Partial Summary Judgment [#43-1] is **GRANTED**. Defendants move for summary judgment contending that no issue of material fact exists regarding the intentional concealment of the calls and that several of Plaintiff's claims fail as a matter of law. Defendants' Motion for Summary Judgment [#48-1] is **DENIED**.

Plaintiff's Motion to Amend [#38-1] and Motion to File in Excess of Page Limitations [#61-1] are **GRANTED**. Defendants' Motion for Sanctions [#46-1] is **DENIED with leave to renew**.

I. FACTUAL BACKGROUND

US LEC is a competitive local exchange carrier ("CLEC") that provides telecommunications services, including local and long distance calling, data, and internet access in the Southeastern and Mid-Atlantic Regions of the

[1]Defendants are US LEC Corporation and its subsidiaries. Defendants will be referred to collectively as "US LEC." Similarly, Plaintiff, ITC Deltacom Communications, will be referred to as "ITC."

United States. (DSMF ¶ 11.)[2] ITC is also a CLEC, and this lawsuit involves the toll-free calling services ITC offers its customers. In the context of providing toll-free service, ITC is considered and will be referred to as an interexchange carrier or "IXC." The payment dispute arises from US LEC's charges to ITC for routing wireless toll-free calls though its network to customers of ITC.

A. The Transfer of Wireless Toll-Free Calls to ITC

When a wireless customer dials a toll-free number belonging to one of ITC's customers, the call passes through several carriers to reach the customer. Initially, the call travels through the wireless carrier's system to the wireless carrier's switching office.[3] (Defs.' Mot. Summ. J. Ex. 29). At this point, the wireless carrier has options: it may switch the call to the local telephone exchange or incumbent local exchange carrier, Bellsouth in ITC's situation; or, it can switch the call to US LEC, which uses the local exchange

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[2]US LEC filed a Statement of Material Facts in conjunction with its Motion for Summary Judgment. The statements to which ITC does not object are considered admitted and will be cited as "DSMF." LR 56.1B(2), NDGa.

[3]In the telecommunications industry, a wireless carrier is referred to as Commercial Mobile Radio Service or "CMRS." For simplicity, the Court uses the term "wireless carrier." (Def.' Mot. Summ. J. Ex. 1.) See also In the Matter of Interconnection Between Local Exchange Carriers & Commercial Mobile Radio Service Providers, 11 F.C.C.R. 5020 (1996).

facilities pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(2)-(4). Id.

If US LEC receives the toll-free call, it transfers the call to Bellsouth. Id. Bellsouth then transfers the call to ITC, which delivers the call to its customer. Id. The Bellsouth connection is referred to as a tandem. Id. If the wireless carrier transfers the call to Bellsouth, the call is directly delivered to ITC, avoiding US LEC altogether. Currently, several wireless carriers have contracts with US LEC to transfer wireless toll-free calls to US LEC. (DSMF ¶ 22.)

The inducement for the wireless carrier to contract with US LEC is this. The delivery of the call to ITC's customer uses the networks of the wireless carrier, US LEC, and Bellsouth. US LEC and Bellsouth may charge fees for this use if provided for in their tariffs filed with the Federal Communications Commission ("FCC"). The wireless carrier, however, cannot charge fees to ITC unless it contracts with ITC to do so. See In the Matter of Petitions of Sprint PCS & AT&T Wireless, 17 F.C.C.R. 13,192 (2002). In other words, if the wireless carrier delivers the calls to Bellsouth, it receives no compensation from ITC. If the wireless carrier delivers the call to US LEC, however, US LEC will share fees it charges ITC. Therefore, ITC pays fees for use of US LEC's network which it otherwise would not have paid.

ITC objects to US LEC's revenue sharing contracts because the contracts allow wireless carriers to receive fees they could not obtain directly. (Pl.'s Partial Mot. Summ. J. at 17.) The validity of such contracts, however, is not the issue before the Court. Instead, the issue is whether US LEC could legally charge ITC access fees for the wireless toll free calls.

B. The Alleged Fraudulent Scheme

US LEC maintains a filed tariff with the FCC for the provision of access services. (DSMF ¶¶ 14, 15.) ITC contends that this tariff does not permit US LEC to charge for the toll-free wireless calls, and, consequently, US LEC hid the origin of the calls in order to charge a fee. Defendants allegedly accomplished this by misrepresenting the identifying information each call carries and the origin of the calls on invoices sent to ITC.

1. The Identifying Information of Each Call

Certain information is transferred with a call as it crosses the system of a telecommunications carrier; this is called "signaling." (Def.'s Mot. Summ. J., Ex.1 at 2.) The information conveyed depends on the type of signaling protocol used. In this case, US LEC received the wireless toll-free calls in two protocols: SS7 Signaling and MF Signaling.

Currently, approximately eight-five percent of the wireless traffic routed to US LEC's network is in SS7 Signaling. (DSMF ¶ 37.) SS7

Signaling conveys, among other information, the charge party number ("CPN"), which is also referred to as automatic number identification ("ANI"). Id. ¶ 38. The CPN and ANI information identifies the carrier and the 10-digit number that initiated the call. (Id. ¶ 39; Pl.'s Resp. Summ. J. Ex. 14, Black Dep. at 25.) When US LEC receives a wireless call in SS7 Signaling, US LEC forwards the CPN and ANI of the call to the next carrier. (DSMF ¶ 41.)

In contrast, MF Signaling cannot transmit the same information as SS7 Signaling. Id. ¶ 46. With limited exceptions, when the wireless carrier routes calls to US LEC in MF Signaling, US LEC does not receive the ANI or CPN. Id. ¶ 50. Irrespective of whether US LEC receives the wireless call in SS7 or MF Signaling, however, US LEC delivers the call to the next carrier in SS7 Signaling. Id. ¶ 55. US LEC inserts a billing telephone number ("BTN") assigned to one of its land-lines into the CPN or ANI fields when the incoming calls are converted from MF to SS7 Signaling. Id. ¶ 56, 60. The call is then transferred to the next carrier. Thus, according to ITC, the calls appear to initiate from a land-line belonging to US LEC rather than from the network of a wireless carrier.

2. Invoicing to ITC

On invoices to ITC, US LEC grouped the charges for transferring toll-free calls, whether wireless or land-line, under the heading "800 originating

calls," or toll-free calls that "originate" from US LEC's network. (Pl.'s Resp., Ex. 1, US LEC Invoice at 2, Ex. 10, Law Dep. at 61-62.) Consequently, the invoices did not reveal that US LEC was charging ITC for the wireless calls. Id., Ex. 10, Law Dep. at 61. ITC contends that had it known of the toll-free wireless calls, it would not have paid the invoices.

C. The Dispute Arose as to Whether US LEC Could Charge the Access Fees

A billing conflict developed between the parties, and, in July of 2001, ITC refused to pay US LEC's invoices. Subsequently, ITC demanded, and US LEC produced, Call Detail Records for the traffic sent by US LEC to ITC. (DSMF ¶ 138.) ITC identified to US LEC twenty numbers from which allegedly ninety percent of US LEC traffic originated. Id. ¶ 145. US LEC revealed that fifteen of the numbers were associated with wireless carriers. Id. ¶ 146. The numbers were also identified in the CNAM database as associated with certain wireless carriers. Id. ¶¶ 153-54.[4]

II. PROCEDURAL BACKGROUND

ITC filed this action contending US LEC could not charge for the wireless toll-free calls and that US LEC fraudulently hid the origin of the calls. Initially, ITC asserted claims under the Federal Racketeer Influenced

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[4]The CNAM is an industry database that associates numbers with customers. Id. ¶¶ 153-54.

and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, et seq., the Georgia RICO Act, O.C.G.A. § 16-14-1, et seq., common law fraud, and the Uniform Deceptive Trade Practices Act ("UDTPA"), O.C.G.A. § 10-1-370, et seq.

US LEC answered and counterclaimed for the unpaid access fees. US LEC also sent notice to ITC of the intent to seek sanctions under Federal Rule of Civil Procedure 11 because of the Complaint. Consequently, ITC moved to amend its Complaint to drop the Federal RICO claim and to add a second Georgia RICO claim and a negligent misrepresentation claim. ITC also filed the Partial Motion for Summary Judgment on US LEC's counterclaims, which is presently before the Court.

Subsequently, US LEC filed its Motion for Summary Judgment. Moreover, US LEC objected to the Motion to Amend, contending that its Motion for Summary Judgment rendered ITC's new claims futile. US LEC also filed the Motion for Sanctions Pursuant to Rule 11 based on the allegations of the initial Complaint. The Court will first address ITC's Partial Motion for Summary Judgment, then US LEC's Motion for Summary Judgment, ITC's Motion to Amend, and, finally, US LEC's Motion for Sanctions.

III. MOTIONS FOR SUMMARY JUDGMENT

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure defines the standard for summary judgment: Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." The substantive law applicable to the case determines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The district court should 'resolve all reasonable doubts about the facts in favor of the non-movant,' ... and draw 'all justifiable inferences ... in his favor ....'" United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991). The court may not weigh conflicting evidence nor make credibility determinations. Hairston v. Gainesville Sun Publ'g Co., 9 F.3d 913, 919 (11th Cir. 1993), reh'g denied, 16 F.3d 1233 (1994)(en banc).

As a general rule, "[the] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). However, the moving

party's responsibility varies depending upon which party bears the burden of proof at trial on the issue in question.

For issues upon which the moving party bears the burden of proof at trial, the moving party must affirmatively demonstrate the absence of a genuine issue of material fact as to each element of its claim on that legal issue. It must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial. If the moving party makes such a showing, it is entitled to summary judgment unless the non-moving party comes forward with significant, probative evidence demonstrating the existence of an issue of fact. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993) (quoting Four Parcels, 941 F.2d at 1437-38).

On the other hand, when the non-moving party bears the burden of proof at trial, the moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim. Instead, the moving party may simply point out to the district court that there is an absence of evidence to support the non-moving party's case on the issue in question. Id. at 1115-16. Of course, the moving party may offer evidence to affirmatively negate a material fact upon which the non-movant has the burden and which is essential to its claim. In either case, the non-moving party may not rely upon allegations or denials in the pleadings, but instead

must respond with sufficient evidence to withstand a directed verdict motion at trial. Fed. R. Civ. P. 56(e); Hammer v. Slater, 20 F.3d 1137, 1141 (11th Cir. 1994) (citing Fitzpatrick, 2 F.3d at 1116-17).

B. ITC's Motion for Partial Summary Judgment

US LEC's counterclaim seeks to recover the unpaid access charges for the toll-free wireless calls. In response, ITC contends that, as a matter of law, no duty existed to pay the access charges absent a written contract between ITC and US LEC.

The FCC has determined that a carrier seeking to impose charges on another carrier can establish a duty to pay such charges in three ways: pursuant to (1) tariff; (2) Commission rule; or (3) contract. In the Matter of Petitions of Sprint PCS & AT&T Corp., 17 F.C.C.R. 13,192, 13,196 (2002)[hereafter Sprint PCS & AT&T Decision]. Neither party contends that a written contract existed. See Advamtel v. AT&T Corp., 118 F.Supp.2d 680, 685 (E.D.Va. 2000).

1. US LEC's Filed Tariff

The first method by which US LEC may charge ITC is through the tariff it filed with the FCC; therefore, the issue is whether the tariff covers charges for toll-free wireless calls. "In general, the ordinary rules of contract interpretation apply in interpreting the language of tariffs." Ala. State Docks

Dept. v. Bunge Corp., 655 F.2d 64, 66 (5th Cir. Unit B. Sept 4, 1981). The Court looks to the four corners of the tariff and considers the instrument as a whole. S. Natural Gas Co. v. F.E.R.C., 780 F.2d 1552, 1558 (11th Cir. 1986). The terms are read in the sense generally used, and an ambiguous tariff is construed against the drafter. Coca-Cola Co. v. Atchison, Topeka, & Santa Fe Ry. Co., 608 F.2d 213, 220-21 (5th Cir. 1979).[5] Strict construction, however, is not justified if it ignores a reasonable alternative construction which conforms to the practical application of the tariff and the intent of the drafters. Id. at 221.

US LEC contends that the tariff requires ITC to pay for the toll free wireless calls under two provisions: (1) service options, § 2.1.2; and (2) transport services, § 2.2.

Section 2.1.2 provides as follows:

> The Company provides service options. Direct End Office Access switched access service is provided to those Customers whose traffic is carried only on Company facilities. Indirect Access switched access service is provided to those Customers who originate and terminate their switched traffic with the Company via the use of tandem switching facilities.

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[5]All decisions handed down by the former Fifth Circuit prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1207 (11th Cir. 1981).

The two service options are "Direct End Office Access" to US LEC's customer whose traffic travels only in US LEC's facilities. This option does not apply to the situation presented in this case.

US LEC argues that the second option, "Indirect Access," applies to Plaintiff who is a customer for purposes of switched calls. The plain meaning of the provision, however, is to describe the service to its own customers who either originate a call on US LEC which must be switched to complete or receive a call which has been switched.

Even assuming ITC is a "Customer," the transfer of wireless toll-free calls is not indirect access service as described in US LEC's tariff. The wireless toll free calls would neither "originate" or "terminate" with US LEC. The originating carrier is the carrier where the call begins, while the transit carrier is the carrier that delivers the call to the terminating carrier. Texcom, Inc. v. Bell Atl. Corp., 16 F.C.C.R. 21,493, 21,496 (2001). See Bellsouth Telecomms., Inc. v. MCImetro Access Transmission Servs., Inc., 317 F.3d 1270, 1274 (11th Cir. 2003)(holding decisions of the FCC are accorded deference.) Customers who "originate ... their switched traffic with [US LEC]" are those who begin their calls on US LEC's network. (Tariff § 2.1.2.) Similarly, for a call to "terminate" with US LEC, the call must end, or be answered, on US LEC's network. See In the Matter of Developing a Unified

Intercarrier Compensation Regime, 16 F.C.C.R. 9610, 9625 (2001). The calls in the present case originate with the wireless carrier and terminate with ITC. To hold otherwise "would destroy the distinction between traffic that begins with a certain carrier, and traffic that begins elsewhere and travels across another carrier's lines." Texcom, Inc., 16 F.C.C.R. at 21, 498.

Therefore, § 2.1.2 of the tariff, indirect access service, does not allow US LEC to charge ITC for the toll-free wireless calls. US LEC's tariff also provides for transport services:

> [T]he transmission of calls between the Customer designated premises and the end office where the Customer's traffic is switched to originate or terminate the Customer's communications. Id. § 2.2.

The transfer of wireless toll-free calls is not transport service under US LEC's tariff because the calls are not switched to originate or terminate through an "end office." US LEC's tariff defines "end office" as "a LEC switching system." (Tariff Definitions at p. 5.) The switching system that transfers the toll-free wireless calls to US LEC is a wireless switching system. (See Def.'s Resp. Pl.'s Partial Mot. Summ. J. at 13.) A wireless carrier is not an LEC; therefore, the "end office" cannot refer to a wireless carrier's switching system. (Tariff § 6.) See also Cellular Communications & Internet Ass'n v. F.C.C., 330 F.3d 502, 505 (D.C.Cir. 2003). Thus, § 2.2 of the tariff,

transport service, does not allow US LEC to charge ITC for toll-free wireless calls.

The tariff provisions do not cover the transfer of wireless toll-free calls to ITC. Therefore, ITC has no duty to pay US LEC access fees for such transfers under US LEC's tariff. See United States v. Associated Air Transp., Inc., 275 F.2d 827, 833 (5th Cir. 1960)(holding that if the charge is not in the tariff, it is not allowable).

2. The FCC Rules

The second way ITC could be required to pay the access fees would be pursuant to a Commission rule. US LEC relies on two FCC orders to support the access charges: In the Matter of Access Charge Reform: Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 16 F.C.C.R. 9923 (2001)[hereafter "Access Charge Reform"], and In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 5020 (1996)[hereafter "Interconnection Order"].

Access Charge Reform addressed conflicts between LECs and Interexchange Carriers ("IXC") over the rates set for access services. Specifically, the IXCs contended that the LECs, such as US LEC, were setting the rates for access services in their tariffs too high. 16 F.C.C.R. at 9925. To

address the issue, the FCC established a benchmark rate for access services that is conclusively presumed just and reasonable. Id. at 9939. Access Charge Reform, however, does not allow LECs to charge access fees absent an applicable provision in a filed tariff or a contract with the IXC.

In the Interconnection Order, the FCC addressed whether wireless providers could charge IXCs access charges in the same manner as LEC may. 11 F.C.C.R. 5020 at ¶ 116. The FCC recognized that LECs may recover access charges when they transfer wireless toll-free calls to IXCs. Id. Although, the Interconnection Order would have allowed the charge by wireless carriers it was a proposed rule which the FCC ultimately rejected. Sprint PCS & AT&T Decision, 17 F.C.C.R. 13,192 (2002). Moreover, the Interconnection Order never addressed whether an IXC is required to pay access charges when a LEC's tariff does not cover the service.

While FCC rules do not preclude US LEC from entering revenue sharing contracts with wireless carriers, US LEC has not identified any rule that requires ITC to pay charges for services that are not covered in a tariff or in a contract. Therefore, ITC had no duty to pay the access charges to US LEC under a Commission rule.

3. Open Account

The third method by which US LEC may charge ITC access fees is by contract. Although no written contract exists between the parties, US LEC contends that ITC is obligated to pay under the theory of open account. "[A] suit on open account may be maintained for the price of goods sold under contract where the price has been agreed upon... and nothing remains to be done except for the purchaser to make payment." Wolfe v. Brown-Wright Hotel Supply Corp., 73 S.E.2d 82, 84 (Ga. App. 1952). Here, ITC and US LEC have not agreed on a price for the access services; therefore, open account would not state a claim for recovery in this case.

ITC has no duty to pay charges for the toll-free wireless calls under US LEC's tariff, Commission rule, or contract. Sprint PCS & AT&T Decision, 17 F.C.C.R. 13,192, 13,196 (2002). ITC's Motion for Partial Summary Judgment is **GRANTED**.

C. US LEC's Motion for Summary Judgment

It is Motion for Summary Judgment, US LEC raises essentially three arguments: (1) the Filed Rate Doctrine bars all of ITC's claims; (2) no issue of material fact exists regarding misrepresentation or intent; and (3) the Federal RICO claim, the Georgia RICO claim, and the Uniform Deceptive Trade Practices Act ("UDPTA") claim all fail as a matter of law. ITC concedes

that summary judgment is appropriate on the Federal RICO claim, so this need not be addressed.

1. Filed Rate Doctrine

The Filed Rate Doctrine applies when a regulated company files a rate with the responsible agency. Am. Tel. & Tel. Co. v. Cent. Office Tele., Inc., 524 U.S. 412, 222, 118 S.Ct. 1956, 1963 (1998); Maislin Indus., U.S., Inc., v. Primary Steel, Inc., 497 U.S. 116, 127, 110 S.Ct. 2759, 2766 (1990); Fla. Mun. Power Agency v. Fla. Power & Light, Co., 64 F.3d 614, 615 (11th Cir. 1995). Thus, the doctrine applies to the services described in the tariff US LEC filed with the FCC. Am. Tel. & Tel. Co., 524 U.S. at 221-22, 118 S.Ct. at 1962. As discussed in Part III(B)(1), above, however, US LEC's tariff does not cover the transfer of wireless toll-free calls to ITC. Therefore, the Filed Rate Doctrine does not bar ITC's claims. Fla. Mun. Power Agency, 64 F.3d at 616.

2. Issue of Material Fact Regarding Misrepresentations

ITC contends that US LEC misrepresented the origin of the wireless calls in two ways. First, US LEC encouraged wireless carriers to use MF Signaling to prevent the transfer of the ANI or CPN information which would have identified a call's origin. Second, US LEC misrepresented the calls as "originating" on its invoices to ITC. US LEC contends that these did not amount to misrepresentations and moves for summary judgment on the

Georgia RICO, common law fraud, and UDTPA claims, all of which require Plaintiff to prove a misrepresentation.

a. The MF Signaling

An issue of material fact exists at to whether US LEC misrepresented the origin of the calls by using MF Signaling. First, ITC points to evidence that US LEC encouraged wireless carriers to use MF Signaling. US LEC told the employee of one wireless carrier, "[w]e prefer to go MF if possible." (Pl.'s Resp. Mot. Summ. J. Ex. 38.) Wireless carriers also complained that US LEC would not convert to SS7 Signaling or install SS7 lines. (Pl.'s Second Notice Suppl. Ex. A, VZW 00568, VZW 00437.) Second, ITC also points to evidence showing that the BTN misrepresented the origin of the calls. The BTNs were registered in the Local Exchange Routing Guide as land-line numbers belonging to US LEC rather than as wireless numbers. (Pl.'s Resp. Mot. Summ. J., Ex. 35, Epperson Expert Report at 5-6.) Moreover, ITC's experts assert US LEC could have used any number, including a wireless number, in the ANI and CPN fields. Id.; Grefrath Dep. at 56-58.

A reasonable juror could conclude that US LEC, by using MF Signaling as it did, misrepresented the origin of calls.

b. The Invoices to ITC

An issue of material fact also exists as to whether US LEC misrepresented the wireless toll-free calls on its invoices to ITC. The invoices charge ITC for "800 originating calls."[6] Using the word "originating" would refer to calls that begin on US LEC's own network rather than the network of a wireless carrier. Part III(B)(1), supra. US LEC's Director of Billing admitted that nothing on the invoices would have identified the toll-free calls as coming from wireless carriers. (Pl.'s Resp. Mot. Summ. J., Ex. 10, Law Dep. at 61-62, 71-72.)

Thus, an issue of material fact exists as to whether the invoices misrepresented the origin of the calls.

3. Issue of Material Fact Regarding Intent and Motive

Both the common law fraud claim and the Georgia RICO claim require ITC to prove intent on the part of the Defendants. See McDaniel v. Elliot, 497 S.E.2d 786, 788 (Ga. 1998)("[A] finding of specific intent to cause harm is inherent in the essential elements of a fraud claim...."); Jordan v. Tri County AG, Inc., 546 S.E.2d 523, 533 (Ga. App. 2001)("[R]acketeering activity" is defined to mean the commission of a crime in any of thirty-one specified categories of offenses.") Like any other material fact, summary judgment

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[6] "800 originating calls" refers to calls made to a toll free number.

may be granted on the issue of intent unless ITC can point to evidence from which a reasonable juror could conclude intent to defraud existed. Piamba Cortez v. Am. Airlines, 177 F3d 1272, 1292 n.14 (11th Cir. 1999)(quoting In re Aircrash Near Cali, 985 F.Supp. 1106, 1123-24 (S.D.Fla. 1997)).

The evidence creates an issue of material fact exists as to whether US LEC intentionally misrepresented the origin of the wireless toll-free calls. First, ITC submits evidence that US LEC did not cooperate with ITC as ITC investigated the charges in the invoices. (Pl.'s Resp. Mot. Summ. J., Ex. 12, ¶¶ 3-7.) Second, US LEC employees expressed concern to wireless carriers that interexchange carriers like ITC would refuse to pay access charges if they realized the toll-free calls were wireless. (Pl.'s Second Supp. Ex. A, USL 015277, USL 0148816-17, Ex. 2, AWS 000117-21). As one US LEC employee stated, "[w]ith the originating number being passed, US LEC may not receive commissions on the 800 traffic." (Pl.'s Suppl. Ex. 1, VZW 00437-438.)

An issue of material fact exists regarding intent.

4. Do the Georgia RICO claim and the UDPTA Claim Fail as a Matter of Law?

a. Georgia RICO

ITC asserts a claim against US LEC under the Georgia RICO Act, O.C.G.A. § 16-14-4(a). See Prince Heaton Enters., Inc. v. Buffalo's Franchise Concepts, Inc., 117 F.Supp.2d 1357, 1362 (N.D.Ga. 2000)(Thrash, J.)(holding

that a plaintiff must "allege a pattern of racketeering activity consisting of two or more distinct predicate acts, which are related and have continuity" for a Georgia RICO claim). US LEC contends that the Georgia RICO claim fails as a matter of law because a corporation cannot be liable for the acts of its employees unless "'the crimes were authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official acting in the scope of his employment.'" Clark v. Sec. Life Ins. Co. of Am., 509 S.E.2d 602, 604-05 (Ga. 1998)(quoting O.C.G.A. § 16-2-22(a)(2)).

ITC submits evidence that US LEC's managerial officials authorized and performed the allegedly fraudulent acts. First, evidence shows that one of US LEC's Vice Presidents presented the revenue sharing plan to a wireless carrier even though US LEC's tariff does not cover the transfer of toll-free wireless calls. (Pl.'s Second Suppl., Ex. A, Moeller Dep. at 211.) Second, substantial evidence exists to support ITC's claim that US LEC misrepresented the origin of the calls. Therefore, US LEC's Motion for Summary Judgment is **DENIED** as to the Georgia RICO claim.

b. Does the UDTPA Claim Fail as a Matter of Law

US LEC contends that the UDTPA claim fails as a matter of law because, first, the Act applies only to trademark violations contiguous with

the Lanham Act, 15 U.S.C. § 1125, and, second, the Act applies only where third parties are being deceived.

The UDTPA, O.C.G.A. § 10-1-372, provides:

> [A] person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he: ...
>
> (2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; ...
>
> (12) Engages in any other conduct which similarly creates a likelihood of confusion or misunderstanding. O.C.G.A. § 10-1-372.

Nothing in the statutory language limits UDPTA to violations contiguous to the Lanham Act or requires the deception of third parties. Moreover, US LEC fails to cite case law holding the UDPTA inapplicable to ITC's claim. See Kason Indus. v. Component Hardware Group, Inc., 120 F.3d 1199, 1204 (11th Cir. 1997)(holding that the UDPTA is the Georgia Statute most analogous to the Lanham Act for statute of limitations purposes.) In contrast, the Georgia Court of Appeals recently recognized a claim under UDPTA in a situation similar to ITC's. Catrett v. Landmark Dodge, Inc., 560 S.E.2d 101, 106 (Ga.App. 2002). Thus, ITC states a claim under the UDPTA, see O.C.G.A. § 10-1-372(a)(2),(12).

In summary, Defendants' Motion for Summary Judgment is **DENIED** as to all claims with the exception of the Federal RICO claim.

IV. ITC'S MOTION TO AMEND

A. Standard for Amendment

Once a responsive pleading has been served, a party may amend his or her complaint "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). The courts favor allowing amendment, Harris v. Garner, 216 F.3d 970, 996 (11th Cir. 2000), because Rule 15 "reinforces one of the basic policies of the federal rules - that pleadings are not an end in themselves but are only a means to assist in the presentation of the case." 6 Charles Alan Wright, et al., Federal Practice & Procedure, § 1473 at 521 (2d ed. 1990). See also Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962). So long as the movant is not guilty of undue delay, bad faith, dilatory motive, and repeated failure to cure deficiencies, amendment will be allowed unless it causes undue prejudice to the opposing party or is futile. Foman, 371 U.S. at 182, 83 S.Ct. at 230, Thomas v. Town of Davie, 847 F.2d 771, 774 (11th Cir. 1988). The decision to allow amendment is within the sound discretion of the court. Foman, 371 U.S. at 182, 83 S.Ct. at 230.

B. Analysis

ITC seeks to add a negligent misrepresentation claim and a Georgia RICO claim under O.C.G.A. § 16-14-4(c) to its Complaint, as well as to drop the Federal RICO claim. US LEC objects to amendment because (1) the new claims are futile and (2) ITC unduly and in bad faith delayed moving for amendment, causing US LEC prejudice. In the alternative, US LEC moves for additional discovery.

1. Futility of Amendment

a. Negligent Misrepresentation

US LEC contends the negligent misrepresentation claim is futile in light of its Motion for Summary Judgment. The elements of negligent misrepresentation are: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such person's reasonable reliance on the false information; and (3) economic injury as a proximate result. Smiley v. S & J Invs., Inc., 580 S.E.2d 283, 288 (Ga. App. 2003). The Court has already found an issue of material fact exists as to intentional misrepresentation; therefore, ITC's claim for negligent misrepresentation is not futile. Part III(C)(1),(2), supra.

b. Georgia RICO claim

ITC seeks to add a second Georgia RICO claim that US LEC "endeavor[ed] to violate" § 16-14-4(a). O.C.G.A. § 16-14-4(c). US LEC contends that this claim is futile as a consequence of its Motion for Summary Judgment and because ITC cannot prove damages. The Motion for Summary Judgment does not render the claim futile because ITC's substantive Georgia RICO claim survives. See, Part III (C)(4)(a), supra. In addition, in the Amended Complaint, ITC alleges that US LEC's attempts to violate § 16-4-4(a), even if unsuccessful, caused damages. As such, the new Georgia RICO claim, § 16-14-4(c), is not futile.

2. Undue Delay and Prejudice

US LEC contends that ITC knew the facts underlying the Motion to Amend since December of 2002, but waited until nearly the end of discovery before moving to amend. Consequently, ITC's delay was without justification and caused US LEC prejudice.

The delay is insufficient to deny the motion to amend. See Hester v. Int'l Union of Operating Eng'rs, AFL-CIO, 941 F.2d 1574, 1578-79 (11th Cir. 1991)("[T]he mere passage of time, without more, is an insufficient reason to deny leave to amend a complaint.")(citations omitted); Wright, et al., supra, § 1488. Amendments need not be made by some specific time during litigation

and have been granted after the close of discovery. Wright, et al., supra, § 1488 at 668. Moreover, ITC was promptly responding to US LEC's notice of sanctions. ITC attempted to amend its pleadings within the twenty-one day safe harbor period of Rule 11. See Fed.R.Civ.P. 11(c)(1).

Moreover, US LEC has not shown prejudice from ITC's delay. Wright et al., supra, at 668 (stating where prejudice is not found, amendment may be allowed). US LEC contends that the amendments are prejudicial because additional discovery will be needed. This argument is less than persuasive because ITC's substantive allegations have not changed. (Compare Compl. ¶¶ 16-17, and Am. Compl. ¶¶ 21, 25-28.)

The Motion to Amend the Complaint is **GRANTED**, Mathews v. City of Atlanta, 699 F.Supp. 1552, 1554 (N.D.Ga. 1988)(Forrester J.), and US LEC's Motion to Extend Discovery is **DENIED**. The need for additional discovery will be addressed during the Pretrial Conference of this case.

IV. US LEC'S MOTION FOR SANCTIONS

Pursuant to Rule 11, US LEC moves for sanctions against ITC and its attorneys because of certain allegations in the original Complaint. The Eleventh Circuit has held, "'in the case of pleadings the sanctions issue ... will normally be determined at the end of litigation.'" Donaldson v. Clark, 819 F.2d 1551, 1555 (11th Cir. 1987)(quoting Fed.R.Civ.P. 11 advisory committee's

note.) Thus, the Court declines to determine whether sanctions are appropriate at this juncture. The Motion for Sanctions is **DENIED with leave to renew**.

V. CONCLUSION

ITC's Partial Motion for Summary Judgment [#43-1] is **GRANTED** as to US LEC's counterclaims for breach of contract and open account.

US LEC's Motion for Summary Judgment [#48-1] is **DENIED** as to the Georgia RICO claim, O.C.G.A. § 16-4-4(a), the common law fraud claim, and the UDPTA claim, O.C.G.A. § 10-1-370. The motion is **MOOT** as to ITC's Federal RICO claim.

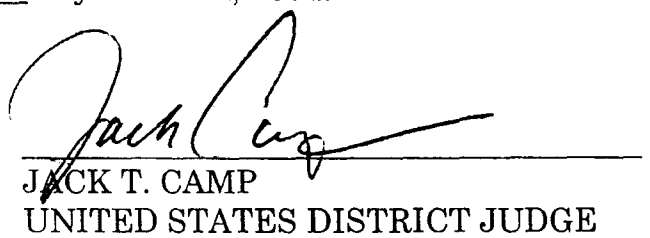
ITC's Motion to Amend [#38-1] is **GRANTED**.

US LEC's Motion for Sanctions [#46-1] is **DENIED with leave to renew**. ITC's Motion to File in Excess of Page Limitations [#61-1] is **GRANTED**.

The parties are reminded that the Pretrial Conference in this matter is scheduled for Friday, March 26, 2004. If the parties have been unable to

submit a Proposed Pretrial Order pending entry of this Order, the Court will address all scheduling issues at the conference.

SO ORDERED, this 15 day of March, 2004.



JACK T. CAMP
UNITED STATES DISTRICT JUDGE

ITC^Delta (3) sj.wpd