

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF )  
SOUTH DAKOTA NETWORK, LLC, AGAINST )  
SPRINT COMMUNICATIONS COMPANY LP )  
)  
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 )

TC 09-098

**REPLY MEMORANDUM IN SUPPORT OF SPRINT COMMUNICATIONS COMPANY  
L.P.'S MOTION TO DISMISS NORTHERN VALLEY'S COUNTERCLAIM**

Sprint Communications Company L.P. ("Sprint") respectfully submits this reply memorandum in support of its Motion to Dismiss Northern Valley Communications, L.L.C.'s ("Northern Valley") Counterclaim for Declaratory Relief.

**ARGUMENT**

**I. NORTHERN VALLEY HAS ATTEMPTED TO ADDRESS ITS PROCEDURAL DEFECT**

Northern Valley admits that it failed to follow Commission rules when it served its amended pleading without first obtaining permission. Northern Valley Opp. p. 3. Northern Valley attempts to remedy this violation by moving for leave to amend, claiming that this amendment will not prejudice Sprint because the parties have agreed to extend the schedule to allow for additional discovery. Northern Valley Opp. p. 5.

Northern Valley is correct that the current procedural schedule has essentially been abrogated because SDN and Northern Valley waited until just before the November 8, 2011, deadline to ask to conduct Sprint depositions. The parties have agreed they will attempt to reset

case deadlines once depositions are set, and those new case deadlines will allow for any additional discovery necessary to address new claims.

While Sprint does not concede that Northern Valley has demonstrated good cause for its amendment, Sprint does not claim surprise, and does not (on the current facts) claim undue harm associated with the additional delay. However, having been accused by Northern Valley of having “no incentive to timely resolve this matter,”<sup>1</sup> Sprint hopes the Commission will take note that Sprint worked diligently to obtain its discovery consistent with the procedural schedule agreed to by the parties earlier this year. Given that Northern Valley and SDN have caused this latest delay, Sprint hopes not to be the target of further accusations of this sort.

## **II. THE COMMISSION SHOULD DISMISS COUNT II TO THE EXTENT IT ASKS THE COMMISSION TO INVOKE EQUITABLE POWERS**

Sprint moved the Commission to dismiss Count II of Northern Valley’s Counterclaim to the extent Northern Valley asks the Commission to address equitable issues. Sprint’s concern was that Northern Valley’s allegation that Sprint would be “unjustly enriched” amounted to an attempt to litigate equitable claims. In its response, Northern Valley fails to clarify its intended scope of Count II and fails to even use the word “equitable.” While Northern Valley is being coy with the Commission, it has been more direct with Sprint. On October 31, 2011, Northern Valley served deposition notices for the following week, and included the following statement in the cover letter:

Accordingly, please let us know before the close of business on Tuesday, November 1, 2011, whether Sprint will voluntarily agree to delay these depositions until a reasonable period of time after the PUC decides Sprint’s pending motion to dismiss Northern Valley’s unjust enrichment claims, or whether Sprint would like to jointly move for an extension of the schedule to accommodate the anticipated delay.

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<sup>1</sup> Northern Valley’s Motion for Adoption of Procedural Schedule, ¶ 11.

Attached as Exhibit A (emphasis added). Accordingly, the Commission should directly address whether Northern Valley can proceed on what it views as its “unjust enrichment claims.”

The Commission is a creature of statute that lacks equitable powers. *See* Sprint’s Mem. In Supp. of Mot. to Dismiss, pp. 2-3. Northern Valley never asserts otherwise. In its Memorandum, Sprint cited to *O’Toole v. Board of Trustees of South Dakota Retirement System*, 648 N.W.2d 342 (S.D. 2002) for the proposition that the Commission has only those powers granted to it by the Legislature. Sprint’s Mem. In Supp. of Mot. to Dismiss pp. 2-3. Northern Valley agrees with this proposition: “*O’Toole* stands for the simple and undisputed proposition that a state agency may not act outside of its statutory mandate.” Northern Valley Opp. p. 7. As Northern Valley concedes, the court in *O’Toole* held that the board could only do that which was authorized by statute, regardless of whether additional relief would provide a just remedy for a breach of fiduciary duty. 648 N.W.2d at 347.

No statute grants the Commission equitable powers, and the Commission recognized this in *Black Hills Fibercom, L.L.C. v. Qwest Corp.*, Am. Interim Decision and Order, Docket CT03-154, 2005 WL 856149 at \*9 (S.D. PUC Mar. 14, 2005). There, the Commission concluded:

With respect to Qwest’s claims of intentional interference with business relations and unjust enrichment, the Commission finds that to the extent these claims may state causes of action under state law despite the interstate nature of the service, the Commission nevertheless lacks jurisdiction because these claims are grounded in the common law of tort and equity.

*Id.* at \*9 (emphasis added). Northern Valley attempts to distinguish this case by citing to the above quotation and claiming that the Commission dismissed the equitable claims “because it did not have the jurisdiction to determine how unjust enrichment would apply in light of the ‘interstate nature of the service.’” Northern Valley Opp. p. 8. Northern Valley’s characterization of that quotation is patently incorrect – the Commission plainly assumed the equitable claims were valid, but held it could not adjudicate such claims. The *Black Hills* decision is on point and

supports a dismissal of Northern Valley's Count II to the extent it seeks to enforce equitable rights.

Northern Valley's goal is to use this pleading to renew its request to obtain huge amounts of discovery about Sprint's business practices, customers, and revenues in order to obtain equitable relief from this Commission. The Commission can and should put this to rest by issuing an order that Counterclaim Count II is dismissed to the extent it asks the Commission to address equitable issues. Northern Valley can attempt to litigate its unjust enrichments claims in either or both of the two federal court cases where it asserts those claims directly.

**III. THE COMMISSION SHOULD DISMISS COUNT II BECAUSE THERE IS NO REGULATED RATE IT CAN IMPOSE ON A RETROACTIVE BASIS**

Once the Commission confirms it cannot address equitable remedies, the question becomes whether the Commission has any statutory authorization to set a retroactive rate for call connection company ("CCC") traffic in the event it is found not to be subject to Northern Valley's intrastate access charges. Northern Valley compiles a hodge-podge of statutory citations, but ultimately fails to present any coherent roadmap for the establishment of retroactive rates to be applied to a non-tariffed, non-access service. As such, Count II should be dismissed.

**A. The Commission Should Not Indulge Northern Valley's Request to Engage in Retroactive Ratemaking**

As an initial matter, Northern Valley has not tried to disguise the fact that it believes the Commission can lawfully engage in retroactive ratemaking: it says so in footnote 3 of its Opposition and when it argues that SDCL § 49-13-13 allows the Commission to set a "retroactive rate." Northern Valley Opp. p. 11.

Northern Valley's position not only flies in the face of a bedrock principle of administrative law, it would render much of the established regulatory process obsolete. If Northern Valley's argument were accepted, no regulated carrier would ever need a contract or a

tariff, and the Commission would never be asked to set rates in advance. Instead, the carrier providing the service would simply file a complaint after the fact and the Commission would set a retroactive rate and order payment.

This is no way to regulate public utilities, and it is unreasonable to believe that this is what the Legislature intended. Therefore, the Commission should reject Northern Valley's request to engage in retroactive ratemaking.

**B. Nothing in South Dakota Law Requires Sprint to Pay in Arrears for a Non Tariffed Service**

The Commission should reject Northern Valley's argument that it is entitled to payment of a regulated rate in the absence of an applicable tariff or contract. Northern Valley first cites to SDCL § 49-2-10, which says, "A common carrier is entitled to reasonable compensation and no more." Northern Valley Opp. p. 10. Yet this cannot be read to supersede other requirements imposed on carriers who wish to obtain an approved rate and enforce that approved rate before the Commission. Northern Valley then cites to SDCL § 49-31-37, a statute that criminalizes the use of false credit card or telephone numbers to obtain long distance service without paying for it. Northern Valley Opp. p. 10. The notion that this creates a civil cause of action against an entity not accused of such conduct is farfetched at best.

Northern Valley next relies on SDCL § 49-13-13. While this statute does contain the phrase "just and reasonable," that is not enough to provide Northern Valley with the extraordinary relief it requests. When read in context, the Commission's ability to "determine and prescribe the just and reasonable charge" in SDCL § 49-13-13 allows the Commission to impose a remedy when a carrier's initial rate has been successfully challenged as unjust, unreasonable, or discriminatory. In other words, when a customer challenges a carrier's rate level – something not done here – the Commission can modify the rate to bring it into

compliance with South Dakota law. This is far different than suggesting a carrier can invoke that provision to establish a retroactive rate for a service that has never been the subject of an earlier tariff filing. Yet by arguing that SDCL § 49-13-13 is divorced from the “regulatory regime for rate-setting that is applicable for establishing prospective rates,” Northern Valley would achieve that untenable result. Northern Valley Opp. p. 15. Northern Valley’s argument should be rejected.

**C. Northern Valley’s Alleged Non-Access Service is Not Subject to Commission Regulation**

Sprint agreed that if Northern Valley is providing a service not covered by its intrastate access tariff, regulation of such a non-access “service” would be subject to the procedure set forth in SDCL § 49-31-4. To utilize this procedure, Northern Valley must elect to have its rate for this service regulated by following a particular procedure:

The election to be regulated shall be made by filing with the Commission a certified copy of the resolution of the board of directors . . . Commission regulation shall become effective thirty days after receipt of the resolution by the Commission.

SDCL § 49-31-5.1. Northern Valley responds that if the traffic is “access traffic,” but outside the scope of Northern Valley’s intrastate tariff, then no election is necessary. Northern Valley Opp. p. 14. That argument does not help Northern Valley. It concedes that a non-access service would require an election, and if its access service not described in its existing tariff, Northern Valley would still require a modification to its access tariff in advance of applying those rates. SDCL § 49-13-19. Either way, Northern Valley needs to seek permission to charge its rate ahead of time, not retroactively.

**D. The Commission Would Have to Consider Issues of Federal Law**

Finally, Northern Valley does not concede that compensation questions related to intrastate non-access traffic would implicate federal law. Northern Valley Opp. p. 18. Yet this

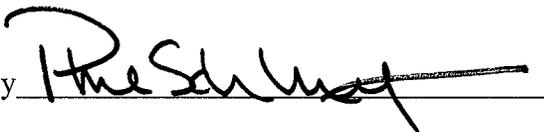
Commission is well aware that 47 U.S.C. § 251(b)(5) requires all LECs to enter into reciprocal compensation arrangements for “telecommunications,” which include many intrastate communications. *See* 47 C.F.R. § 51.701. Sprint’s point is that, even if the Commission has state law authority to establish compensation obligations for non-access traffic, if that traffic is “telecommunications” within the meaning of Section 251(b)(5), there may be other considerations that bear on how the Commission could lawfully proceed. *See, e.g.,* ARSD 20:10:32:20 - :36. This is just one more reason not to take the path offered by Northern Valley.

### CONCLUSION

For the above reasons, Sprint respectfully requests the Commission grant Sprint’s Motion to Dismiss.

Dated: November 11, 2011

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 11th day of November, 2011, a copy of **REPLY MEMORANDUM IN SUPPORT OF SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO DISMISS NORTHERN VALLEY'S COUNTERCLAIM** was served via email upon:

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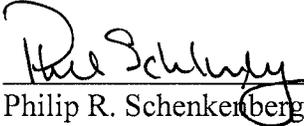
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