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February 19, 2010

Patricia Van Gerpen, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol Avenue  
Pierre, South Dakota 57501

Re: In the Matter of the Complaint of South Dakota Network, LLC, Against Sprint  
Communications Company, LP – Docket Number TC09-098

Dear Ms. Van Gerpen:

Please find attached hereto a copy of the South Dakota Network, LLC's Response  
to Sprint Communications Company LP'S Motion to Dismiss Count III.

Sincerely yours,

A handwritten signature in cursive script that reads 'Margo D Northrup'.

Margo D. Northrup  
Attorney at Law

MDN/dk

Enclosures

CC: Service List

Robert C. Riter, Jr.  
Margo D. Northrup

Jerry L. Wattier  
Lindsey Riter-Rapp

Darla Pollman Rogers  
Robert D. Hofer, Of Counsel

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC09-098

IN THE MATTER OF THE )  
COMPLAINT OF SOUTH DAKOTA )  
NETWORK, LLC, AGAINST SPRINT ) SOUTH DAKOTA NETWORK, LLC'S  
COMMUNICATIONS COMPANY, LP ) RESPONSE TO SPRINT  
COMUNICATIONS  
COMPANY LP'S  
MOTION TO DISMISS COUNT III  
)  
)  
)  
)

COMES NOW, South Dakota Network, LLC, (hereinafter referred to as "SDN")  
and for its Response to Sprint Communications Company LP's, (hereinafter "Sprint"),  
Motion to Dismiss Count III, states and alleges as follows:

BACKGROUND

SDN filed a Complaint against Sprint before the South Dakota Public Utilities  
Commission (Commission) on October 29, 2009. On November 24, 2009, Sprint filed an  
Answer, Counterclaim, Motion to Dismiss Count III, and a Third Party Complaint against  
Sancom, Inc. (Sancom), Splitrock Properties, Inc. (Splitrock), Northern Valley  
Communications, LLC (Northern Valley) and Capital Telephone Company (Capital).  
SDN filed a Reply to the Counterclaim on December 14, 2009. Sancom, Northern  
Valley, and Splitrock filed responsive pleadings on January 22, 2010. Sprint filed a  
Motion to Dismiss Northern Valley's and Sancom's Crossclaims on February 11, 2010.

Sprint's Motion to Dismiss was filed pursuant to SDCL 15-6-12 and ARSD  
20:10:01:11.1. Although it is not clearly identified within the Motion to Dismiss, this  
Motion is filed either pursuant to SDCL 15-6-12(b)(5) or SDCL 15-6-12(c). In either  
case, if matters outside the pleadings are presented to and not excluded by the court, the

motion shall be treated as one for summary judgment and disposed of as provided in SDCL 15-6-56.

## ARGUMENT

Sprint has identified two reasons that SDCL 49-13-14.1 does not provide a basis for double damages and attorney's fees in this action and both should be rejected. Sprint first indicates double damages and attorney's fees can be recovered when damages are "recovered by suit". Sprint alleges that "suit" only includes instances wherein the action is brought in State Court and not before the Public Utilities Commission. It does not appear that "suit" is defined in this chapter or elsewhere in State Law.

Assuming that Sprint is correct and SDCL 49-13-14.1 does not apply to actions before the Commission, it does seem that the statute may apply if Sprint were to appeal any adverse decision to the Court or if SDN is ultimately required to utilize judicial procedures to enforce an Order from the Commission as set forth in SDCL 49-13-24<sup>1</sup>. Lacking Count III herein, would Sprint not claim that SDN is precluded from recovering its attorney's fees on any appeal? And the same argument by Sprint would likely result if SDN was required to utilize the Court system for recovery of monies ordered herein to be paid. Accordingly, SDN has asserted application of this statute to eliminate preclusion from recovery of its attorney's fees should this matter find its way into the court system.

Second, Sprint states that SDN has not made any allegation that Sprint has violated Chapters 49-7 to 49-11 or Sections 49-31-7 or 49-31-7.1, which is required by

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<sup>1</sup>SDCL 49-13-24 states, "If any telecommunications company or motor carrier does not comply with an order for the payment of money by the commission within the time limit of the order, any person for whose benefit the order was made may file in any court of competent jurisdiction of this state a petition or complaint setting forth the causes for which damages are claimed, the proceedings before the commission, and the report and order of the commission in the premises. The suit shall proceed in all other respects as other civil actions for damages, except as provided in §§ 49-13-25 and 49-13-26."

SDCL 49-13-14.1. In Count II, SDN has alleged that Sprint has engaged in an unauthorized and illegal self-help “accounting mechanism” whereby Sprint applies a “credit” to the disputed portion of the invoices (including the back claim amount), rather than paying the undisputed portion of the invoices as demanded by SDN in direct violation of SDN’s Tariff. (Complaint, ¶ 16 and 17) SDN alleges that this unauthorized and illegal self-help directly falls under the investigatory powers of this Commission. Pursuant to SDCL 49-31-7, in addition to other regulatory powers and duties, this Commission has the authority to investigate and require changes for a company in the way it conducts telecommunications company business. SDCL 49-31-7 specifically states, “If, in the judgment of the commission, any repair upon telecommunications facilities, a change in its rates, a change in the mode of operating telecommunications facilities or conducting telecommunications company business is necessary, reasonable and expedient in order to promote the safety, convenience and accommodation of the public, the commission shall notify the telecommunications company immediately, and such telecommunications company shall change the mode of operating its facilities or conducting its business, or repair, renew or replace such facilities in such manner, of such material and within such time as the commission may order (emphasis added).” SDN submits to this Commission that this illegal self-help is clearly the type of conduct considered under SDCL 49-31-7 and SDN has prayed for Judgment against Sprint of immediate payment of the undisputed portion of the invoices.

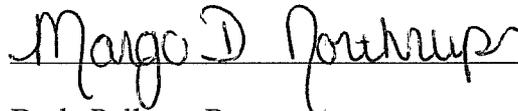
Sprint also cites to In the Matter of the Complaint Filed by WWC License LLC Against Golden West Telecommunications Cooperative, Inc., et al, SD Comm’n Case No. CT 05-001. At the outset, the Commission is an administrative agency and is not

bound by stare decisis. In re West River Elec. Ass'n, Inc., 2004 SD 11, ¶ 25, 675 NW2d 222, 229 However, SDN acknowledges that this Commission has previously held SDCL 49-13-14.1 only applies in the case of a suit brought in court. SDN is not necessarily asking this Commission to order double damages within this docket, but does not want to be precluded from arguing this in a potential appeal, or if enforcement of the Commission's order is required.

#### CONCLUSION

For the above reasons, SDN requests that the Commission deny Sprint's Motion to Dismiss Count III of the Complaint.

Dated this 19<sup>th</sup> day of February, 2010.



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## **CERTIFICATE OF SERVICE**

The undersigned certifies that on the 19<sup>th</sup> day of February, 2010, I served a true and correct copy of South Dakota Network, LLC'S Response to Sprint Communications Company LP's, Motion to Dismiss Count III in the above-entitled matter, by email to:

Ms. Patricia Van Gerpen  
Executive director  
South Dakota Public Utilities commission  
500 East Capitol  
Pierre, SD 57501

Ms. Karen E Cremer  
Staff Attorney  
South Dakota Public Utilities commission  
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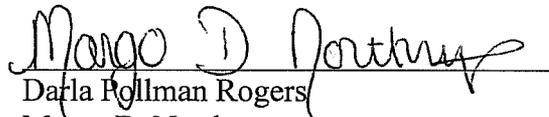
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Larson & Nipe  
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**And by first class mail to:**

Steve Boyd  
Capital Telephone Company, Inc.,  
2639 South Durango, Suite 102,  
Las Vegas, Nevada 89117

DATED this 19th day of February, 2010.

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NORTHRUP, LLP

  
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