

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED)
COMPLAINT OF SOUTH DAKOTA) DOCKET NO. TC09-098
NETWORK, LLC, AGAINST SPRINT)
COMMUNICATIONS COMPANY L.P.)
)
IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST SPLITROCK)
PROPERTIES, INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM, INC.,)
AND CAPITAL TELEPHONE COMPANY)
)

**SPRINT COMMUNICATIONS COMPANY L.P.’S
MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER
REGARDING NORTHERN VALLEY’S CORPORATE DEPOSITION NOTICE**

I. INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) brings its Motion for Protective Order in conjunction with Sprint’s Motion for Partial Summary Judgment, and Sprint’s Opposition to Northern Valley’s Motion to Compel. At the heart of all of these motions is the scope of the claims and defenses before the Commission and the proper scope of discovery in this action.

Northern Valley Communications, Inc. (“Northern Valley”) contends that South Dakota law allows it the opportunity to engage in essentially a limitless fishing expedition, obtain information beyond the pleadings, and force Sprint to provide discovery despite significant demonstrated burdens. This contention was made clear in Northern Valley’s discovery requests and its corresponding Motion to Compel. The theme continues in Northern Valley’s list of 47 deposition topics on which it demands Sprint prepare and provide company witnesses to testify. Sprint brings this motion for a protective order, and asks the Commission to limit the number and scope of topics so that Sprint has to provide discovery only on matters relevant to the

parties' claims and defenses. While the deposition topics are addressed individually below, the relevance arguments to be made have already been briefed on Northern Valley's Motion to Compel, and on Sprint's Motion for Partial Summary Judgment. As such, if the Commission decides it must set a rate using Northern Valley's business and financial information (not Sprint's), the information on Sprint's business practices and revenues will be beyond the scope of the claims and defenses, and thereby not appropriate for deposition testimony.

II. PROCEDURAL HISTORY

On October 31, 2011, Northern Valley served on Sprint a Notice of Corporate Deposition of one or more corporate representatives to testify on various topics, subject to Rule 30(b)(6) of the South Dakota Rules of Civil Procedure, SDCL § 15-6-30(b)(6). April 17, 2012 Affidavit of Philip Schenkenberg ("Schenkenberg Aff.") ¶ 2 and Ex. A. Northern Valley's notice requested that Sprint prepare and produce, on 8 days' notice, one or more corporate representatives on 37 unique topics, covering an extraordinary – and in many cases, improper – breadth of material.

The November 2011 deposition dates were canceled, but Sprint understood that Northern Valley intended to re-serve its notice later in the case. As a result, on Friday, February 17, 2012, counsel for Sprint and Northern Valley engaged in a good faith telephone conference, during which Sprint's counsel explained Sprint's concerns with many of the deposition topics. Schenkenberg Aff. ¶ 3. This good-faith meet-and-confer process did not resolve Sprint's concerns with the scope of the notice. Schenkenberg Aff. ¶ 4. During the conference, Northern Valley's counsel was reluctant to and generally refused to narrow the scope of the deposition topics. *Id.* On March 6, 2012, Sprint documented its concerns in writing. Schenkenberg Aff. ¶ 5 and Ex. B. Northern Valley did not respond to these specific concerns. *Id.* On April 3, 2012, Northern Valley served an Amended Notice of Corporate Deposition on Sprint. Schenkenberg Aff. ¶ 6 and Ex. C. Instead of pulling back on the breadth of the topics, Northern

Valley's amended notice included ten additional topics not in the original Rule 30(b)(6) notice. *Id.*

There are three broad categories of requested topics that Sprint believes are improper and for which Sprint seeks a protective order: (1) Northern Valley's definition of "Sprint" is too broad: Sprint should not be required to speak for any entity other than the party in this case, Sprint Communications Company L.P.; (2) these requests are extremely burdensome, especially given the small size of the intrastate claim before the Commission; and (3) certain topics would require Sprint to prepare a witness to testify on matters wholly outside the pleadings and irrelevant to any matter before the Commission. Sprint therefore moves the Commission for a protective order, pursuant to SDCL § 15-6-26(c), limiting the scope of the topics for which Sprint must prepare a representative.¹

III. DISCOVERY STANDARDS

A. Standard for Rule 15-6-30(b)(6) Depositions

South Dakota law provides a process for a litigant to obtain deposition testimony of a corporate representative:

A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision does not preclude taking a deposition by any other procedure authorized in these rules.

SDCL § 15-6-30(b)(6) (emphasis added).

¹ Sprint notes that Northern Valley agrees the Commission cannot require Sprint to produce discovery with respect to interstate matters. *See* Sprint's Opp'n. to Northern Valley's Motion to Compel, pp. 4-5. As such, Sprint does not separately argue this issue herein.

This standard imposes a significant burden on the deponent and the corporate entity. One person – the deponent – must be able to testify as to matters known by the entire organization. Because one person rarely has that level of personal knowledge, there is an affirmative obligation to ensure that the witness has been educated to provide sufficient testimony. *See, e.g., Dwelly v. Yamaha Motor Corp.*, 214 F.R.D. 537, 540 (D. Minn. 2003) (“[T]he Rule only operates effectively when the requesting party specifically designates the topics for deposition, and when the responding party produces [deponents] . . . and prepares them so that they may give complete, knowledgeable and binding answers on behalf of the corporation”) (quotation omitted). Therefore, because of the significant burden of a Rule 30(b)(6) deposition on a corporate party, it is important that the topics be relevant and reasonably narrow in scope. In a Rule 30(b)(6) notice, “the requesting party must take care to designate, with painstaking specificity, the particular subject areas that are intended to be questioned, and that are relevant to the issues in dispute.” *Prokosch v. Carolina Lighting, Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000) (emphasis added).

B. The Commission Can Protect Sprint From Discovery That is Irrelevant and/or Burdensome

The standard for relevance in a Rule 30(b)(6) context is in accord with the general rule regarding the scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SDCL § 15-6-26(b)(1) (emphasis added). Under the South Dakota Rules of Evidence, “‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” SDCL § 19-12-1. “Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.” *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (emphasis added) (broad scope of discovery “should not be misapplied . . . to allow fishing expeditions”). Thus, while the “scope of pretrial discovery is, for the most part, broadly construed . . . ‘discovery, like all matters of procedure, has ultimate and necessary boundaries.’” *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 19-20 (S.D. 1989) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). Pursuant to these rules, the Commission should protect Sprint from testifying on any topic, or portion of any topic, if the topic, or portion of the topic, seeks information beyond the scope of this action.

Further, even if the topic relates to relevant information, the Commission must limit the frequency or scope of discovery otherwise allowed by the rules if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation.

SDCL § 15-6-26(b)(1)(A). In addition, the Commission may issue a protective order to relieve Sprint of its obligation to produce a corporate witness if it finds that such an order will protect

Sprint from “annoyance, embarrassment, oppression, or undue burden or expense.” SDCL § 15-6-26(c).

In the present case, the topics discussed below do not describe the topics with sufficient particularity, are not related to the action pending before the Commission, will not lead to admissible evidence, and create burdens on Sprint that drastically outweigh any benefit to Northern Valley. Accordingly, the Commission should enter a protective order, limiting Sprint’s obligations with respect to the topics discussed herein.

IV. NORTHERN VALLEY’S DEFINITION OF “SPRINT” IS TOO BROAD; SPRINT’S WITNESSES SHOULD NOT BE REQUIRED TO SPEAK FOR ANY ENTITY OTHER THAN SPRINT, AND SHOULD NOT HAVE TO TESTIFY ON THE KNOWLEDGE OF SPRINT’S LAWYERS

In its notice, Northern Valley defines “Sprint” broadly to include not only Sprint Communications Company L.P., but also all of its affiliates, agents, and even lawyers. Schenkenberg Aff. Ex. C, Definition E. However, by its terms, Rule 30(b)(6) allows Northern Valley to depose “a private corporation,” which does not extend to every affiliate, agent, and lawyer of that private corporation. During the February 17 phone conference, Sprint’s counsel asked Northern Valley’s counsel to narrow the definition of “Sprint” to Sprint Communications L.P., the party in this dispute. Schenkenberg Ex. B. Northern Valley’s counsel refused. *Id.* The Commission should order that, to the extent Sprint is required to produce a Rule 30(b)(6) witness, that witness needs only to provide information as a representative of the party to this matter: Sprint Communications Company L.P.

In addition, by defining “Sprint” the way that it does, many of Northern Valley’s requested deposition topics ask for testimony regarding the knowledge of Sprint’s lawyers. The Commission should protect Sprint’s witnesses from testifying on the knowledge of Sprint’s attorneys. For example, Topic 7 relates to communications between Sprint and any other

interexchange providers (“IXCs”) regarding call connection companies’ (“CCCs”)² activities in South Dakota. Schenkenberg Aff. Ex. C, Topic 7. Likewise, Topic 9 instructs a witness to be prepared to testify regarding communications between representatives of Sprint and Northern Valley. Schenkenberg Aff. Ex. C, Topic 9. Sprint’s witness will be able to testify about such communications by Sprint’s business representatives, but should be relieved from her obligation to testify regarding communications made by Sprint’s lawyers. SDCL § 15-6-26(c)(4). Such questions could infringe on protected communications and are not related to the issues before the Commission.

To the extent topics are not completely stricken (as argued below), the Commission should issue a protective order, limiting Northern Valley’s definition of “Sprint” within the entirety of its Rule 30(b)(6) deposition notice.

V. THE SMALL SIZE OF THE INTRASTATE CLAIM SHOULD PARALLEL THE AMOUNT OF WORK SPRINT SHOULD BE REQUIRED TO DO TO PREPARE ITS WITNESS

It is undisputed that the Commission’s jurisdiction is limited to intrastate services, and the intrastate amounts in dispute are quite small. *See* Sprint’s Opp’n. to Northern Valley’s Mot. to Compel, pp. 4-5. This is especially important because the amount of discovery sought, and the burden associated with responding, greatly outweigh the intrastate amounts at issue. As briefed fully in Sprint’s Opp’n. to Northern Valley’s Mot. to Compel (pp. 4-5), the Commission should consider the small size of the intrastate claim in deciding how much burden Sprint should be required to take on to prepare its Rule 30(b)(6) witness.

Currently, Northern Valley’s notice requests that Sprint prepare a witness or witnesses to testify on 47 distinct and expansive topics. If the number and scope of topics are not narrowed,

² Sprint has used the term “call connection company” and the acronym “CCC,” which Sprint understands to have the same meaning as the term “calling service provider” (“CSP”), used by Northern Valley. Schenkenberg Aff. Ex. C, Definition R.

Sprint will be required to designate 3-5 different witnesses, and those witnesses will need to engage in internal investigations and review documents that have not previously been done for these kinds of cases. April 17, 2012 Affidavit of William (Bret) Lawson ¶ 4. Even deposition notices with a reasonable scope of topics require a corporate party's witness to expend a significant amount of time preparing for deposition. For example, one Sprint manager who has served as a corporate representative witness in other cases can spend up to two days preparing for a single topic, and can spend two weeks preparing for a corporate representative deposition that includes a reasonable amount of topics. *Id.* at ¶ 5. This does not count hours spent by others who provide her with information, Sprint's internal counsel's time or resources, or Sprint's outside counsel's time. *Id.*

Where, as here, the amount of discovery requested and burden of responding greatly outweigh the value of a claim, the Commission can and should limit the scope of the discovery. SDCL §§ 15-6-26(b)(1)(A) and 15-6-26(c)(4).

VI. CERTAIN TOPICS WOULD REQUIRE SPRINT TO PREPARE A WITNESS TO TESTIFY ON MATTERS UNRELATED TO THE PARTIES' CLAIMS AND DEFENSES

Many of Northern Valley's requested topics extend well beyond matters related to the claims and defenses in the pleadings.³ Sprint has already explained why the applicable legal standards do not allow discovery of Sprint's financial and business information, and why the Commission can set a rate only by looking to Northern Valley's information. *See* Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 7-16; Sprint's Mem. in Support of Mot. for Partial Summary Judgment, pp. 5-8. As discussed below, the Commission should order that the

³ Northern Valley's Amended Notice of Corporate Deposition includes 47 topics. Schenkenberg Aff. Ex. C. Beyond the extremely broad definition of "Sprint," Sprint does not object to Topics 1-3, 8-9, 11-13, 14-20, and 45.

scope of these topics be narrowed or eliminated to protect Sprint from any duty to prepare witnesses to testify to information outside the scope of the pleadings.

A. Topic 4

Northern Valley's Topic 4 reads:

4. Sprint's understanding of Northern Valley's federal and state switched access tariffs, and their local exchange tariffs, general tariff, price lists or other written offerings for providing local services, and the reasons and material facts that Sprint maintains supports the position that the traffic at issue in these actions is not compensable under such tariffs.

Schenkenberg Aff. Ex. C, Topic 4.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. Sprint should not have to marshal all evidence it obtained in discovery from Northern Valley and its CC partners.

Topic 4 goes beyond the scope of discovery to the extent it asks Sprint to testify on discovery received from Northern Valley and its CCC partners. As briefed fully in Sprint's Opposition to Northern Valley's Motion to Compel, Sprint is not required to review documents that have already been produced to assist Northern Valley's discovery efforts. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 19-20. The Commission should thus order that Sprint is not required to disclose all reasons and material facts it might rely on in the case.

B. Topics 5 & 6

Northern Valley's Topics 5 and 6 read:

5. The relationship, if any, between Sprint and Calling Service Providers, including but not limited to Free Conferencing and GCP.

6. The distinction or similarity of products and/or services offered by Sprint and Calling Service Providers or other conferencing service providers with which it conducts business.

Schenkenberg Aff. Ex. C, Topics 5 and 6.

1. **Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. **This case cannot turn on Sprint's business relationships.**

Together, Topics 5 & 6 seek information regarding Sprint's relationships (if any) with CSPs, and any conferencing services offered by Sprint and CSPs. As Sprint has briefed in detail in its Opposition to Northern Valley's Motion to Compel, Sprint's business relationships are irrelevant to the issues before the Commission. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 7-12. Information regarding Sprint's relationships with CSPs (if any) will not help the Commission (1) determine Sprint's liability for tariff charges, or (2) set a rate in the event the tariff does not apply.

3. **The language of Topic 6 is overbroad.**

Finally, the language of Topic 6 is overbroad. As written, it seems to ask Sprint to identify all conferencing service providers with whom it does business (in any respect), to understand what services are offered by conference providers, to compare those to services offered by Sprint. This is not reasonably specific or focused, and extends into relationships that cannot possibly be helpful in this case.

To avoid opening the doors to an unhelpful fishing expedition, the Commission should order that Sprint is not required to produce a corporate witness on Topics 5 and 6. SDCL § 15-6-26(c)(4).

C. **Topic 7**

Northern Valley's Topic 7 reads:

7. All communications between Sprint and any other IXC regarding Calling Service Providers' activities in South Dakota, including but not limited to issues related to the routing of calls to Calling Service Providers, the billing or disputing of related LEC invoices, other IXCs' settlements of their respective disputes with any LEC vis-a-vis traffic to Calling Service Providers, and your use of other IXCs' networks to route calls to Northern Valley's network under Least Cost Routing contracts or related agreements.

Schenkenberg Aff. Ex. C, Topic 7.

1. **Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. **Information within the scope of this topic is not discoverable.**

Topic 7 asks Sprint to prepare a witness to testify to all communications between Sprint and other interexchange carriers ("IXCs") regarding CSP activities in South Dakota. It also asks for information regarding Sprint's use of IXC networks to route calls to Northern Valley under least cost routing contracts. This topic is irrelevant to this action: this topic will not generate information that can be used to determine whether Northern Valley's intrastate tariff applies, or to set a rate in the event it does not. First, calls sent to other IXCs are outside the scope of the billing disputes in this case. Second, as briefed fully in Sprint's Response to Northern Valley's Motion to Compel, Sprint's relationships with other IXCs cannot be tied to a claim or defense in this case. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 31-33. Accordingly, the Commission should strike Topic 7 and should relieve Sprint of its duty to prepare a corporate witness on this topic. SDCL § 15-6-26(c)(4).

D. Topic 10

Northern Valley's Topic 10 reads:

10. Sprint's consideration of blocking (or call degradation or choking) or its actual blocking (or call degradation or choking) of telephone traffic involving or implicating a Calling Service Provider in South Dakota, Sprint's consideration of delivering or actual delivering of traffic involving or implicating a Calling Service Provider in South Dakota to any other IXC under Least Cost Routing contracts or like arrangements that Sprint knew or suspected did not have the capacity or intention to deliver the traffic at issue, and any knowledge Sprint possessed regarding any other IXCs' capacity or intention or action taken to block, degrade or choke such traffic.

Schenkenberg Aff. Ex. C, Topic 10.

- 1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

- 2. Sprint's "consideration" of an activity is outside the scope of the issues before the Commission.**

Topic 10 relates to call blocking in South Dakota. Sprint has already provided a discovery response clarifying that there has been no call blocking of CSP traffic in South Dakota. See Sprint's Resp. to Northern Valley's Document Request No. 10. Now, Northern Valley is asking a witness to be prepared to testify on Sprint's "consideration" of call blocking. There is absolutely no connection to that line of questions and the issues before the Commission. Thus, the Commission should protect Sprint from testifying with respect to Topic 10's reference to Sprint's "consideration" of call blocking. SDCL § 15-6-26(b)(1), 15-6-26(c)(4).

- 3. CSP traffic sent by Sprint to other IXCs (if any) under least-cost routing arrangements is not a part of this case.**

The second half of Topic 10 focuses on consideration of or delivering of CSP traffic to IXCs under least cost routing arrangements where Sprint "knew or suspected" the IXC did not

have the capacity to deliver the traffic. Again, those calls, if they exist, were not sent by Sprint through South Dakota Network, LLC (“SDN”) and then delivered to Northern Valley and, thus, did not generate a billing dispute that is presently before the Commission. In addition, Sprint’s business relationships with other IXCs are not within the scope of the claims or defenses in this case. Sprint’s Opp’n. to Northern Valley’s Mot. to Compel, pp. 31-33. Accordingly, the Commission should protect Sprint and strike Topic 10. SDCL § 15-6-26(c)(4).

E. Topic 21

Northern Valley’s Topic 21 reads:

21. The identity of all companies which Sprint engages or has engaged to provide conferencing services to Sprint’s customers or other customers, or any company whose conferencing services Sprint has promoted or marketed, and the terms pursuant to which such relationships are/were governed and the revenues which Sprint has earned relative to each such relationship.

Schenkenberg Aff. Ex. C, Topic 21.

- 1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

- 2. The topic is outside the scope of the claims or defenses of this case.**

Northern Valley believes it can go fishing into Sprint’s general business and financial information, but cannot justify why it should get to do so. During the February 17 telephone conference, Northern Valley indicated that Topic 21 was intended to discover whether Sprint sells conferencing services; how it earns revenue from such services; and what revenues, if any, it has earned from such services since 2005. Schenkenberg Aff. Ex. B. However, Northern Valley was unable to explain how this could be used to either determine whether Northern Valley’s tariff applies, or to set a rate in the event it does not. *Id.* As briefed fully in Sprint’s

response to Northern Valley's Motion to Compel, Sprint's revenues, motives, and other business arrangements are outside the scope of the matters before the Commission. Sprint's Brief in Opp'n. to Northern Valley's Mot. to Compel, pp. 7-12; SDCL § 15-6-26(b)(1). There is no plausible argument for the relevance of information about Sprint's financial performance. Accordingly, the Commission should protect Sprint from preparing a corporate witness on Topic 21. SDCL § 15-6-26(c)(4).

F. Topic 22

Northern Valley's Topic 22 reads:

22. All studies or analyses Sprint has undertaken of its customers' demand for calls to Calling Service Providers and the percentage, over time, of Sprint's customers' calls to Calling Service Providers vis-à-vis total traffic volume, and how those percentages differ, if at all, based on whether your consumers subscribe to a per-minute-based calling plan or an Unlimited Plan.

Schenkenberg Aff. Ex. C, Topic 22.

- 1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

- 2. The topic is outside the scope of the claims and defenses in this action.**

Topic 22 asks for information regarding Sprint's customers' demand for services of CSPs. Northern Valley apparently believes that this information could be used by the Commission to set a rate in accordance with its Counterclaim Count II. Sprint disagrees, and has already briefed why, under South Dakota law, any rate must be set based on Northern Valley's information, not Sprint's. Sprint's Opp'n. to Northern Valley's Mot. To Compel, pp. 9-15; Sprint's Mem. in Support of Mot. for Partial Summary Judgment, pp. 5-8. Therefore, the Commission should strike Topic 22.

G. Topic 23

Northern Valley Topic 23 reads:

23. Whether and, if so, the manner in which Sprint pays interstate or intrastate access charges, transit fees, or any other form of compensation to any LEC or other company due to or arising from the provision of conferencing services.

Schenkenberg Aff. Ex. C, Topic 23.

- 1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.**

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

- 2. Sprint's relationships with other LECs is a matter outside the scope of this case.**

Topic 23 asks for information regarding Sprint's relationships with other LECs, with respect to calls delivered to CSPs. Northern Valley's attempt to obtain information about Sprint's relationships with other LECs serving CSPs, under other arrangements, in other states, and on different facts, should be rejected. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 21-22. During the February 17 conference, Northern Valley was unable to tie this information to a claim or defense in this case, or explain how the information sought would be admissible or lead to admissible evidence. Schenkenberg Aff. Ex. B. Accordingly, because Topic 23 is not within the scope of this case, the Commission should relieve Sprint of its duty to prepare a corporate witness on this topic. SDCL § 15-6-26(c)(4).

H. Topic 24

Topic 24 reads:

24. All communications between Sprint and any employee or representative of the United States House of Representatives, United States Senate, Federal Communications Commission, South Dakota Legislature or South Dakota Public Utilities Commission regarding or referencing any Calling Service

Provider, including but not limited to any of the Calling Service Providers, or Northern Valley, or otherwise related to activity which Sprint refers to as “traffic pumping” or “access stimulation.”

Schenkenberg Aff. Ex. C, Topic 24.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. This topic is outside the scope of this action.

Topic 24 asks that Sprint prepare a witness to testify about all communications and filings between Sprint and numerous categories of governmental employees regarding CSPs, traffic pumping, or access stimulation. Again, during the February 17 conference, Northern Valley was unable to tie this information to a claim or defense in this case or explain how the information would either be admissible or lead to admissible evidence. Schenkenberg Aff. Ex. B. Accordingly, the Commission should strike Topic 24 and relieve Sprint of its duty to prepare a corporate witness on this topic. SDCL § 15-6-26(c)(4).

I. Topic 25

Northern Valley’s Topic 25 reads:

25. Least Cost Routing agreements between Sprint and other IXCs that apply or during any relevant time has applied to traffic destined for Northern Valley.

Schenkenberg Aff. Ex. C, Topic 25.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. This topic relates to information outside the scope of this action.

Topic 25 relates to least-cost routing agreements between Sprint and other IXCs. This information is outside the scope of this dispute because it cannot be used to determine whether Northern Valley's intrastate tariff applies, or to set a rate in the event it does not. Sprint's Opp'n. to Northern Valley's Mot. To Compel, pp. 7-16. Accordingly, the Commission should strike Topic 25 and relieve Sprint of its duty to prepare a corporate witness on this topic. SDCL § 15-6-26(c)(4).

J. Topic 26

Northern Valley's Topic 26 reads:

26. Sprint's understanding of the types of individuals and entities which utilize Calling Service Providers' services and, in particular, services provided by Free Conferencing and GCP and any other CSP parties to the above-captioned actions, and Sprint's assertions relating to the nature of the services provided by Calling Service Providers.

Schenkenberg Aff. Ex. C, Topic 26.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. This topic relates to matters outside the scope of this action.

Topic 26 asks for Sprint's information about the types of individuals and entities that utilize CSP services, and the claims and general assertions relating to the nature of services provided by CSPs. As fully briefed in Sprint's Response to Northern Valley's Motion to Compel, this information cannot be used to determine whether Northern Valley's intrastate tariff applies, or to set a rate in the event that it does not. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 7-16.

In addition, to the extent Topic 26 asks Sprint to testify on discovery received from Northern Valley, Sprint is not required to regurgitate facts it obtained in discovery in order to help Northern Valley prepare its case. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 19-20.

As such, the Commission should relieve Sprint of its duty to prepare a corporate witness on Topic 26. SDCL § 15-6-26(c)(4).

K. Topics 27-44 – Northern Valley's Unjust Enrichment Topics.

Northern Valley's Topic 27-44 read:

27. The amount of traffic Sprint delivered to Northern Valley (directly or indirectly) that originated with customers of other carriers that Sprint accepted for carriage under Least Cost Routing arrangements and the rate Sprint charged for such carriage.
28. Any increase or decrease in rates Sprint has made under Least Cost Routing arrangements for traffic Sprint delivered to Northern Valley on behalf of other carriers.
29. The financial impact, if any, which the emergence of Calling Service Providers has had on Sprint's revenues relative to the state of South Dakota from January 1, 2005 to the present.
30. Whether (and, if so, all material circumstances surrounding), Sprint has ever changed or considered changing the terms or pricing of any of its long-distance calling plans (whether of the "unlimited" variety or per-minute variety) in whole or in part because of the effect that so-called "access stimulation" was having on those plans' profitability for Sprint.
31. The average monthly volume of calls (in minutes of use) that Sprint has projected or anticipated a subscriber to any Sprint Unlimited Plan will make, and the average monthly volume of calls that Sprint has projected or anticipated a subscriber to any Sprint Unlimited Plan will make to a Calling Service Provider, to Northern Valley, or the class of carriers identified as rural CLECs, and the actual volumes of such traffic.
32. Sprint's ability to calculate or estimate the average monthly volume of calls (in minutes of use) that a subscriber to any Sprint Unlimited Plan will make, and the average monthly volume of calls that a subscriber to any Sprint Unlimited Plan makes to a Calling Service Provider, to Northern

Valley, or the class of carriers identified as rural CLECs, and the actual volumes of such traffic.

33. The average monthly volume of calls (in minutes of use) that Sprint has projected or anticipated a subscriber to any non-Unlimited Plan will make, and the average monthly volume of calls that Sprint has projected or anticipated a subscriber to any Sprint non-Unlimited Plan will make to a Calling Service Provider, Northern Valley, or the class of carriers identified as rural CLECs, and the actual volumes of such traffic.
34. Sprint's ability to calculate or estimate the average monthly volume of calls (in minutes of use) that a subscriber to any of Sprint's non-Unlimited Plans makes, and the average monthly volume of calls that a subscriber to any Sprint non-Unlimited Plan makes to a Calling Service Provider, Northern Valley, or the class of carriers identified as rural CLECs.
35. The average monthly terminating switched access charges Sprint has anticipated paying in association with calls made by a Sprint Unlimited Plan subscriber, including the anticipated average rate per minute both nationally and for calls to Northern Valley or the class of carriers identified as rural CLECs.
36. Sprint's ability to calculate or estimate the average monthly terminating switched access charges Sprint pays for calls made by a Sprint Unlimited Plan subscriber, including the average rate per minute both nationally and for calls to Northern Valley or the class of carriers identified as rural CLECs.
37. The revenue you have received from Sprint Unlimited Plan and non-Unlimited Plan subscribers on a monthly basis from January 2005 to present.
38. Sprint's ability to calculate or estimate the revenue you have received from Sprint Unlimited Plan and non-Unlimited Plan subscribers on a monthly basis from January 2005 to present.
39. The costs you have incurred or estimated to have incurred in providing your long-distance services on a monthly basis from January 2005 to present, including any differences in actual or estimated costs of service to residential and business customers.
40. Sprint's ability to calculate or estimate the costs you have incurred or estimated to have incurred in providing your long-distance services on a monthly basis from January 2005 to present, including any differences in actual or estimated costs of service to residential and business customers.

41. The volume of traffic per month terminating to Northern Valley's telephone numbers assigned to any Calling Service Provider that were originated by a subscriber to Sprint's Unlimited Plan.
42. Sprint's ability to calculate or estimate the volume of traffic per month terminating to Northern Valley's telephone numbers assigned to any Calling Service Provider that were originated by a subscriber to Sprint's Unlimited Plan.
43. All matters related to any services through which Sprint derives income, indirectly or otherwise, from or through a Calling Service Provider.
44. Revenues received by Sprint from other IXCs as a result of Least Cost Routing agreements for traffic involving or implicating both Calling Service Providers and Northern Valley, and the percentage of traffic Sprint derived to Northern Valley that (a) was originated by Sprint's subscribers versus the traffic that Sprint delivered to Northern Valley that (b) originated on another carriers' network.

Schenkenberg Aff. Ex. C, Topics 27-44.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. Topics relating to Northern Valley's attempt to set a rate using Sprint's financial and business information is irrelevant to this action.

The Commission's authority is based only on statute and the Commission does not have the authority to adjudicate equitable claims. *See, e.g.*, Dec. 20, 2011 Hearing Tr. pp. 53-54 (Staff's Recommendation), p. 67 (Commissioner Nelson). Accordingly, Northern Valley has no unjust enrichment claim, and it has represented to the Commission that it is seeking only to enforce statutory rights. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 2-3. Despite these representations, Northern Valley continues pursuing what it unabashedly calls its "unjust enrichment" claim, an equitable claim. The Commission's ability to set a just and reasonable rate emanates from a statute that contemplates setting rates based on the costs of a regulated

service provider, which in this case would be Northern Valley. Sprint's Opp'n. to Northern Valley's Mot. to Compel, pp. 2-4; Sprint's Mem. in Support of Mot. for Partial Summary Judgment, pp. 5-8. Topics regarding the financial impact on Sprint of traffic pumping are not relevant to any element of any claim or defense in this case. This statutory remedy is far different in nature than a claim in equity, considered by a court, which could examine the behavior of the party receiving a service to determine whether principles of equity require compensation, and set such compensation.

Through its Motion for Partial Summary Judgment, Sprint asked the Commission to decide that, if, pursuant to Northern Valley's Counterclaim Count II, a rate must be set, that rate must be set using rate of return regulation, as defined by South Dakota law. Sprint's Mem. in Support of Mot. for Partial Summary Judgment, pp. 5-8. Here, Sprint reiterates its request that the Commission decide it lacks statutory authority to consider Sprint's revenues or business operations in setting a rate for this intrastate "service" offered by Northern Valley. *Id.*

Because the Commission cannot set a rate using Sprint's business and financial information, the Commission should strike Topics 27-44.

3. Many topics would require undue burden, or responsive information is not available.

Finally, Sprint should not have to respond to a number of these topics based on burdensomeness already documented on Northern Valley's Motion to Compel. Those are as follows:

- Topics 27, 28 and 44 ask for least cost routing information that Sprint has documented is not reasonably available to it. *See Tillotson Aff.* ¶¶ 3-9.
- Topics 41 and 42 ask for call volume information that sprint has documented is either not available or could only be calculated with extreme burden. *See Hellwig Aff.* ¶¶ 4-5.

For these additional reasons, the Commission should strike Topics 27, 28, 41, 42, and 44.

L. Topics 46 & 47

Northern Valley's Topics 46 and 47 read:

46. The operation and capabilities of any system or systems that are or have been used by Sprint to run queries on minutes of use and/or to analyze call details records as described in the Affidavits of Karine M. Hellwig and Bruce R. Tilloston in support of Sprint's opposition to Northern Valley's Motion to Compel.
47. Any actions taken by Sprint to run queries responsive to Northern Valley's discovery on data before it was archived and/or efforts Sprint took to intervene in the archival of that data.

Schenkenberg Aff. Ex. C, Topics 46-47.

1. Sprint should not have to speak for any entity other than Sprint Communications Company L.P.

To the extent Sprint is required to produce a witness on this topic, that witness should be speaking only for Sprint Communications Company L.P. *Supra* § IV.

2. These topics do not relate to the matter before the Commission.

This topic is designed to test the statements within the affidavits of Ms. Hellwig and Mr. Tillotson, which Sprint used to show undue burden in response to Northern Valley's Motion to Compel. While it would normally be proper for a litigant to explore statements made by an opposing party in affidavits, this situation is slightly different. If the Commission rules in favor of Sprint on the threshold relevance issue, then the issue of burden is never reached, and the affidavits submitted on the issue of burden information are irrelevant to the case, and there is no reason for Northern Valley to depose Sprint on its assertions of burden.

CONCLUSION

For the above-stated reasons, the Commission should issue a protective order, relieving Sprint of the need to produce a corporate representative under Rule 30(b)(6) for the topics listed above, or in the alternative narrowing those topics as requested.

DATED this 17th day of April, 2012.

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