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	))))	**TC 09-098**
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	)))))))	

SPRINT COMMUNICATIONS COMPANY L.P.'S
REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT

Sprint Communications Company L.P. ("Sprint") respectfully submits this Reply Memorandum in Support of its Motion for Partial Summary Judgment.

I. SPRINT'S MOTION IS PROCEDURALLY PROPER

Northern Valley Communications, Inc. ("Northern Valley") devotes five pages of its brief to an argument that Sprint's motion is procedurally improper. Sprint's Motion for Partial Summary Judgment, however, asks the Commission to enter judgment on a "part" of Northern Valley's claims, solely on a question of law, which is exactly the relief contemplated under the rules. If the Commission grants Sprint's motion, not only will the claims in this litigation be better defined, but discovery, testimony, and the hearing will be better focused, saving the Commission, Staff, and parties considerable time and resources. Northern Valley's reliance on weak procedural arguments and distinguishable caselaw from a different jurisdiction should be seen for what it is – an attempt to avoid arguing the merits of an important issue.

A. This Motion Asks the Commission to Resolve an Issue Based on a Question of Law

"Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.'" *Horne v. Crozier*, 1997 S.D. 65, ¶ 5, 565 N.W.2d 50, 52 (quoting SDCL § 15-6-56(c)). Northern Valley attempts to modify this fundamental rule of law and argue that a motion for partial summary judgment can only be made to resolve an entire claim, rather than questions of law at issue in a case. This is simply unsupportable, which is made clear by Northern Valley's reliance on two cases from a different jurisdiction, neither of which is binding or on point.

For example, in *Rubin v. Islamic Republic of Iran*, 408 F. Supp. 2d 549 (N.D. Ill. 2005), the court recognized the general rule that "[a]lthough…commonly referred to as a 'partial summary judgment,' it is really no more than a pretrial adjudication, interlocutory in character, specifying certain issues to be 'deemed established' for trial." *Id.* at 552 (quoting 6 J. Moore & J. Wicker, Moore's Federal Practice ¶ 56.20 (2d ed. 1948)). The *Rubin* court granted a motion for partial summary judgment, entering a judgment regarding the proper parties who have standing to claim immunity under a particular statute, and recognizing that granting the motion did not create "constituent parts" of a claim (i.e., create new claims to be later litigated), but instead "promotes judicial economy." *Id.*

Here, Sprint's motion is consistent with the *Rubin* court's evaluation of the benefits of partial summary judgment: "Its purpose is to 'salvage some results from the judicial effort involved in the denial of a motion for summary judgment,' and to 'frame and narrow the triable issues if the court finds that such an order would be helpful to the progress of litigation.'" *Rubin*, 408 F. Supp. 2d at 552 (quoting 6 J. Moore & J. Wicker, Moore's Federal Practice ¶ 56.20 (2d

ed. 1948)). Certainly, if the Commission grants Sprint's motion, this purpose will be satisfied: (1) it will narrow – not expand nor duplicate – claims in this case, (2) it will promote judicial economy, and (3) it will help the progress of litigation.

The second case on which Northern Valley relies, *Capitol Records, Inc. v. Progress Record Distrib., Inc.*, 106 F.R.D. 25 (N.D. Ill. 1985), is also off point. *Capitol Records* involved a lawsuit founded on an allegedly unpaid bill. *Id.* at 26. The plaintiffs moved the court for partial summary judgment on an undisputed amount of damages. *Id.* at 28-30. The court entered judgment, *sua sponte*, regarding the defendant's liability, but refused to enter judgment regarding the amount of damages, as that judgment would have led to repetitive motions, failed to dispose of a claim until trial, and wasted judicial resources. *Id.* at 29-30. Sprint's motion, on the other hand, is not asking the Commission to set a rate or to engage in any piecemeal litigation of factual disputes. Instead, Sprint is merely asking the Commission to enter judgment as to a matter of law. The Commission's judgment will minimize the scope of pending motions (including Northern Valley's Motion to Compel and Sprint's Motion for Protective Order), save significant Commission and party resources, and reduce factual disputes that may arise before and during trial.

B. SDCL § 49-13-13 is Amenable to Summary Judgment

It is fundamental that statutory interpretation is a question of law. *State v. Burdick*, 2006 S.D. 23, ¶ 6, 712 N.W.2d 5, 7. It is, thus, absurd for Northern Valley to assert that the interpretation of SDCL § 49-13-13 is somehow different.

In this motion, Sprint is not asking the Commission to set a rate for the disputed calls – in fact, Sprint maintains that no rate should be set, at all. Instead, Sprint is requesting that the Commission exercise its authority to make a decision on statutory interpretation, entering

judgment on a "part" of Northern Valley's Counterclaim Count II, and finding the Commission *must* set any potential rate using rate of return regulation. *See* SDCL § 15-6-56(b).

C. The Rate Methodology to be Applied is a "Part" of Northern Valley's Counterclaim Count II

Northern Valley's Counterclaim Count II asks the Commission to enter a declaratory judgment, setting a rate and finding that the rate can be current access rates. Northern Valley Counterclaim, Count II, ¶ 2. Inherent in that request is also a request that the Commission determine, as a matter of law, the methodology it must use to set that rate. Thus, Sprint's motion, which asks the Commission to enter judgment as a matter of law defining the proper methodology it must use, is a request to dispose of a part of Northern Valley's claim, which is certainly within the scope of Rule 56.

II. SPRINT'S MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE GRANTED ON THE MERITS

For the purposes of this Motion, Sprint makes an important assumption: because Sprint's Motion focuses on Northern Valley's Counterclaim Count II, it is assumed that the Commission has decided that, under Count I, the disputed calls are not "access" and the Commission is now considering whether it should set a rate for the disputed calls and, if so, how that rate should be calculated.

Throughout its response, Northern Valley confuses its claims, forgets this assumption, and argues issues relevant only to Count I and entirely outside the scope of this Motion.

A. It is Not Possible for Calls to be "Access" and Outside the Scope of Northern Valley's Tariff

Sprint's Motion for Partial Summary Judgment asks the Commission to enter judgment regarding how the calls in dispute should be priced if the calls do not qualify as "access" under Northern Valley's tariff. Northern Valley misses this point and attempts to argue, under issues

presented in Counterclaim Count I, that the disputed calls are "access." Northern Valley's argument is relevant only to Count I and, thus, is entirely outside the scope of this Motion.

Not only is Northern Valley's argument outside the scope of this Motion, but it is also founded on a misinterpretation of South Dakota law. Under South Dakota law, "[a]ccess charges for switching and transporting telecommunications services between facilities shall be published in the tariff filed by the telecommunications company providing the access." SDCL § 49-31-19 (emphasis added); ARSD 20:10:27:07 (access charges "shall" be per tariff). Even those telecommunications companies exempt from certain regulation pursuant to SDCL § 49-31-5.1 must file its access tariffs with the Commission for approval. *Id.* Therefore, pursuant to South Dakota law, tariffs are official statements as to what constitutes "access" and what rate will be charged for "access." Calls are subject to "access charges" only if they fall within the definition of the (1) statute and (2) tariff. If the tariff does not define something as "access," South Dakota law does not, either. There is no gap, as Northern Valley might like the Commission to believe, where service could be "access," even though it does not fall within the scope of its access tariff.

The FCC has held, for interstate traffic, that calls outside the scope of a tariff are not "access" calls. In the *Farmers II* decision, the FCC held that because Farmers had not met the requirements in its tariff, "the service Farmers provided to Qwest for calls of the conference call companies was not 'switched access service.'" *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 24 F.C.C.R. 14801, 2009 WL 4073944, Second Order on Reconsideration, ¶ 22 (F.C.C. Nov. 25, 2009) ("*Farmers II*"). The FCC continued, "[w]e will not expand the term 'switched access' as used in the tariff before us to encompass more than what the tariff itself delineates." *Id.* ¶ 24. And, when the D.C. Circuit Court of Appeals affirmed *Farmers II*, it

specifically rejected Northern Valley's claim (p. 9) that FCC precedent requires that a carrier collect its tariffed rate for a "functionally equivalent service:"

> . . . *Farmers II*, the filed rate doctrine does not apply. The Commission has long instructed that a service that does not "fall within the plain meaning" of the tariff is not governed by the tariff whether or not it is "functionally similar" to a tariffed service. *W. Union Corp. v. S. Bell Tel. & Tel. Co.,* 5 FCC Rcd. 4853, 4855 (1990); *see also* 47 U.S.C. § 203(c); *New Valley Corp. v. Pac. Bell,* 15 FCC Rcd. 5128, 5132–33 (2000). Although it did not decide how traffic to the conference calling companies should be classified, *see Farmers III,* 25 FCC Rcd. at 3427 n. 43, the Commission based its conclusion, that in the absence of an end user such traffic did not constitute switched access service under the tariff, on the controlling plain text of Farmers' tariff. The service was outside of the tariff and, as such, the filed rate doctrine could not protect Farmers from liability to Qwest.

Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa v. F.C.C., 668 F.3d 714, 722-23 (D.C. Cir. 2011). *See also AT&T Corp. v. YMax Commc'ns Corp.*, File No. EB-10-MD-005, 26 FCC Rcd. 5742, Memorandum Opinion & Order, ¶ 23 (Apr. 8, 2011) ("*YMax Order*") ("Given that Switched Access Service, as described in the Tariff, must involve traffic to and from End Users, as YMax has no End Users, as defined in the Tariff, YMax has not provided AT&T with such Switched Access Services."). Similar treatment is appropriate under state law.

Sprint is aware that the Commission, in Docket TC10-014, issued an order establishing that CLECs would be subject to price regulation for "Switched Access Services." *In the Matter of the Investigation of Pricing Regulation for Switched Access Services Provided by Competitive Local Exchange Carriers*, Docket TC10-014, Order Finding Pricing Regulation Appropriate for CLECs' Switched Access Services; Order Denying in Part and Granting in Part Qwest's Motion; Order Taking Judicial Notice; and Order Closing Docket (May 4, 1010). This Order does not impact Sprint's motion because the Commission will proceed on Counterclaim Count II only if the calls are <u>not</u> "Switched Access Service." Because the Commission will be pricing a new service not qualifying as "access," the order in Docket TC10-014 does not, on its terms, have any application.

Because Counterclaim Count II is directed to non-access calls, the Commission should, for the purposes of this Motion, disregard Northern Valley's Counterclaim Count I assertion that these are access calls.

B. Northern Valley Waived its Rights Under SDCL § 49-31-5.1

Under South Dakota law, small independent telephone companies, including Northern Valley, are exempt from certain Commission regulation. SDCL § 49-31-5.1. One advantage of this exemption is that these companies are not bound by the Commission's rate-making regulation and they can, instead, enter into their own agreements with customers where they define their services and set rates for those services. An exempt company can, however, waive this exemption and "elect to have its rates regulated by the commission and be subject to commission regulation." *Id.* (emphasis added). Under South Dakota law, therefore, Northern Valley has two options with respect to the non-access "service" described in Counterclaim Count II: (1) it can maintain its exemption from Commission rate setting and remain free to set rates by contract, or (2) it can waive this exemption and elect to have the Commission regulate its rates. Northern Valley cannot seem to decide which option it wants to take.

Northern Valley waived its exemption. Northern Valley brought Counterclaim Count II and asked the Commission to set a rate, which would necessarily result in a waiver of its exemption. Northern Valley Counterclaim Count II, ¶ 2. To provide foundation and establish standing for its Counterclaim Count II, Northern Valley confirmed it waived any such exemption in its response to Sprint's Request for Admission No. 17:

> **[Sprint's] RFA 17.** With respect to your Counterclaim Count II, admit the "service" for which you would seek to recover is unregulated by the Commission pursuant to SDCL § 49-31-5.1.
>
> **[Northern Valley's] Response:** … Subject to and without waiving its General and Specific Objections, denied. If the service is not tariffed intrastate access

> service, the Commission will, pursuant to SDCL § 49-13-13, consider and determine how to classify the service that has been provided.

See Exhibit D to Sprint's Statement of Undisputed Fact, Response to RFA 17, p. 13. Now, Northern Valley wants to change its tune and argue that affirmatively asking this Commission to set this rate did not waive its exemption and, further, somehow expanded the Commission's rate setting authority. Northern Valley Mem. pp. 10-11.

Northern Valley is stuck in a Catch-22. If the service within Counterclaim Count II is a non-access service and Northern Valley requests that the Commission set a rate, then the Commission is tasked with setting a rate pursuant to SDCL § 49-13-13, and it can only act within the scope of its authority as set forth by statute. *Affiliated Distillers Brands Corp. v. Gillis*, 81 S.D. 44, 49, 130 N.W.2d 597, 599 (S.D. 1964). The statutory scope to set rates for non-access service requires that the Commission set a rate based on Northern Valley's financial information by applying rate of return (or price) regulation. SDCL § 49-31-4. If, on the other hand, Northern Valley desires the "service" within Counterclaim Count II to be unregulated, then the Commission lacks <u>any</u> authority to set a rate.

This result is the only practical way to interpret the Commission's authority. If a carrier requests regulation of non-access services under SDCL § 49-31-5.1, no one would dispute the Commission would be statutorily restricted to set the rate as prescribed in SDCL § 49-31-4. Northern Valley cannot expand the Commission's rate-setting ability by claiming a service is exempt from Commission regulation under § 49-31-5.1 and then turn around and ask the Commission to set a rate based on methodology not prescribed by statute. This Motion asks the Commission to decide its rate-setting authority so that the parties can determine the scope of evidence needed for hearing and proceed to hearing with the correct understanding of the pricing methodology that will apply.

C. The "Service" Within the Scope of Counterclaim Count II is Noncompetitive

Northern Valley's final argument is that Sprint has somehow failed to prove that terminating a call over to a telephone number controlled by one carrier – Northern Valley – is a non-competitive service. Northern Valley Opp'n. Mem., pp. 11-12. Yet Sprint established within its Statements of Fact 5, 6, and 7 that the only way to get calls to Northern Valley's CCC partners is through Northern Valley's network. Northern Valley did not present any facts that would create material disputes on these points.

While Northern Valley cites to SDCL § 49-31-3.2, it fails to analyze the factors presented in the statute with the undisputed evidence presented. That analysis shows this call termination to be a non-competitive service:

SDCL § 49-31-3.2	
(1) The number and size of alternative providers of the service and the affiliation to other providers	There are no other alternative providers of this call termination service.
(2) The extent to which services are available from alternative providers in the relevant market	Such services are not available, at all.
(3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions of service	None.
(4) The market share, the ability of the market to hold prices close to cost, and other economic measures of market power	100% market share for Northern Valley.
(5) The impact on universal service	N/A

Northern Valley's suggestion that there is no evidence that would allow the Commission to find this call termination service to be noncompetitive is incorrect. The undisputed facts clearly show this call termination service to be non-competitive.

CONCLUSION

For the above reasons, Sprint respectfully requests the Commission grant Sprint's Motion for Partial Summary Judgment.

Dated: April 20, 2012

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 20th day of April, 2012, copies of **SPRINT COMMUNICATIONS COMPANY L.P.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** was served via email to:

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