

**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	DOCKET TC09-098
IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY LP AGAINST SPLITROCK PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, L.L.C., SANCOM, INC., AND CAPITAL TELEPHONE COMPANY	NORTHERN VALLEY COMMUNICATIONS, L.L.C. AND SANCOM, INC.'S MOTION FOR ADOPTION OF PROCEDURAL SCHEDULE

Northern Valley Communications, L.L.C. ("Northern Valley") and Sancom, Inc. ("Sancom"), by counsel, state as follows as and for their Motion for the Adoption of a Procedural Schedule:

Summary of Procedural History

1. This case was initiated on October 29, 2009, when South Dakota Network, LLC ("SDN") filed its Complaint against Sprint Communications Company L.P. ("Sprint"). The minutes at issue in the Complaint are intrastate minutes delivered from Sprint to SDN's centralized equal access tandem switch, for delivery to certain entities utilizing telephone numbers assigned by Splitrock Properties, Inc. ("Splitrock"), Northern Valley Communications, L.L.C. ("Northern Valley"), Sancom, Inc. ("Sancom"), and Capital Telephone Company ("Capital") (hereinafter sometimes referred to as "Third Party Defendants"). Sprint had disputed SDN's access charge bills for that traffic, claiming that the minutes were not subject to tariffed centralized equal access charges. At the time the Complaint was filed Sprint was in litigation

with Splitrock,¹ Northern Valley² and Sancom,³ in federal district court in South Dakota regarding whether such minutes were subject to tariffed terminating access charges (hereinafter "The Federal Actions").

2. On November 23, 2009, Sprint moved to dismiss SDN's Count III, Answered Counts I and II, and asserted a Counterclaim. Sprint also filed Third Party Complaints against Splitrock, Northern Valley, Sancom and Capital. Sprint demanded declaratory relief against all third party defendants, and asserted that all third party defendants were obligated to reimburse Sprint for any damages it owed to SDN. Sprint demanded monetary relief only as to Third Party Defendant Capital.

3. Northern Valley and Sancom answered Sprint's Counterclaim on January 22, 2010, and both asserted cross-claims against Sprint for monetary damages. Splitrock answered Sprint's Counterclaim on January 22, 2010, but did not assert a cross-claim. Capital did not answer, remains in default and, on information and belief, is no longer in business.

4. On February 1, 2010, Sprint moved to dismiss the Northern Valley and Sancom claims for damages on the basis that such claims were barred by the election of remedies provision in SDCL § 49-13-1.1, as they had already sought monetary damages in Federal Court. Northern Valley and Sancom opposed the motion, and in so doing questioned the Commission's authority to resolve Sprint's request for declaratory relief, also relying on SDCL § 49-13-1.1.

5. Before briefing was completed on Sprint's motion to dismiss, it became clear the Federal District Court was likely to stay those cases and refer them to the Federal

¹ *Splitrock Properties Inc. v. Sprint Communications Company L.P.*, Case No. CIV 09-4075 (D.S.D.).

² *Northern Valley Communications vs. Sprint Communications Company L.P.*, Case No. CIV 08-1003 (D.S.D.).

³ *Sancom Inc. v. Sprint Communications Company L.P.*, Case No. CIV 07-4107 (D.S.D.).

Communications Commission ("FCC") and/or the Commission. The parties agreed they would await further direction before proceeding on Sprint's motion to dismiss.

6. On March 15, 2010, the Federal District Court stayed *Sancom v. Sprint* case, and referred issues to the FCC. On May 26, 2010, the Court clarified its order to make clear that issues of intrastate traffic were referred to the Commission. These orders are attached as Exhibits A and B hereto (hereinafter "Referral Orders").

7. On March 15, 2010, the Federal District Court stayed *Northern Valley v. Sprint* case, and referred issues to the FCC. On May 26, 2010, the Court clarified its order to make clear that issues of intrastate traffic were referred to the Commission. These orders are attached as Exhibits C and D hereto (hereinafter "Referral Orders").

8. On March 30, 2010, the Federal District Court stayed the *Splitrock v. Sprint* case, and referred issues to the FCC. This order is attached as Exhibit E hereto (hereinafter "Referral Orders").

9. On June 7, 2010, SDN filed its Amended Complaint, which included updated dispute totals for the Third Party Defendants and new dispute amounts for calls to entities utilizing numbers assigned by Native American Telecom, LLC ("NAT"). On September 1, 2010, SDN filed its Motion for Summary Judgment.

10. Since the federal court cases were stayed and referred in March 2010, all parties have been engaged in various discussions regarding 1) the procedure for undertaking discovery and presenting issues for disposition in this docket, and 2) potential negotiated resolution of certain issues raised in the pleadings. In addition, Sprint, Northern Valley, Sancom and Splitrock have been engaged in further discussions regarding 1) the procedure for undertaking discovery

and presenting issues for disposition at the FCC, and 2) coordinating discovery that will occur in other related dockets.

11. Since December 2010, counsel has exchanged draft procedural schedules, but have been unable to reach an agreement on a final schedule. *See, e.g.*, Email from J. Cremer to P. Schenkenberg, et al. (December 10, 2010), attached hereto as Exhibit F. Counsel for Northern Valley and Sancom convened telephone calls and sent numerous emails in the course of their repeated and consistent effort to seek full agreement on a stipulated scheduling order for this case. *See, e.g.*, Email from P. Schenkenberg to D. Carter, et al. (April 29, 2011), attached hereto as Exhibit G; Email from D. Carter to P. Schenkenberg, et al. (April 30, 2011), attached hereto as H; Email from D. Carter to P. Schenkenberg, et al. (June 3, 2011), attached hereto as Exhibit I. However, these efforts have proven unsuccessful and, in the interim, much time has passed. Northern Valley and Sancom feel compelled to move this case forward on a more expeditious path so the issues in the case may be resolved and, with this Commission's guidance, returned to the federal district court pursuant to the Referral Orders. Northern Valley and Sancom feel Sprint does not necessarily share this goal, because Sprint refuses to pay switched access charges for millions of minutes of traffic it delivers on a monthly basis, and, as such, has no incentive to timely resolve this matter. For that reason, Sancom and Northern Valley hereby ask that the Commission adopt a procedural schedule consistent with the proposal set forth below.

Issues to be Litigated and Manner of Proceeding

12. As part of this docket, the Commission will address the following issues:
- A. As between SDN and Sprint – the issues raised in the pleadings filed between them, including the issues currently before the Commission pursuant to SDN's Summary Judgment Motion filed September 1, 2010, with respect to intrastate traffic billed on or before August 1, 2011.

- B. As between Sprint and the Third Party Defendants, in order to ensure a fair opportunity for fact investigation and the preparation of pre-filed testimony, the parties agree that the hearing in this matter will encompass and address i) the issues raised in Sprint's third party complaints (and the answers thereto) with respect to intrastate traffic billed by SDN on or before August 1, 2011; and ii) the issues referred to the Commission by the Federal District Court pursuant to Exhibits A through E (the Referral Orders) with respect to intrastate traffic billed on or before August 1, 2011. In addition, while there was no explicit referral to the Commission in the Splitrock/Sprint case, the Commission will proceed as if there had been an order comparable to Exhibits B and D.

13. Upon entry of an order agreeing that the Commission has jurisdiction over the issues enumerated below, Sancom and Northern Valley will voluntarily withdraw their demand for an award of money damages in this case. As described in paragraph 12.B, however, issues related to intrastate traffic will nonetheless be litigated in this docket pursuant to the Referral Orders. Specifically, the Commission will respond to the following inquiries with regard to each Third Party Defendant:

- A. Whether, under the facts of the present dispute between Third Party Defendant and Sprint, Third Party Defendant is entitled to collect intrastate switched access charges it has billed to Sprint pursuant to the Third Party Defendant's intrastate access tariff for calls to numbers assigned to free calling providers.
- B. In the event the services provided by Third Party Defendant to Sprint, by which calls placed by Sprint's customers are delivered to free calling providers served by Third Party Defendant, do not qualify as switched access service under the Third Party Defendant's applicable intrastate access tariff, determination of the proper classification of these services, whether such services are subject to state tariffing requirements, and

whether Third Party Defendant is entitled to obtain compensation for these services.

- C. In the event the services provided by Third Party Defendant to Sprint do not qualify as switched access service under Third Party Defendant's applicable interstate access tariff, but Third Party Defendant is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

Discovery Generally

14. SDN, Sprint and Third Party Defendants have agreed it is in their interest to coordinate and consolidate discovery (including party and non-party depositions) in this case with discovery that is anticipated in cases venued elsewhere. For example, the parties agreed it is impractical to separate discovery for the claims, defenses and damages relating to the parties' intrastate dispute from the claims, defenses and damages relating to the parties' interstate dispute. Accordingly, to the extent that a party is providing documents or conducting depositions, it is the intent of the parties to seek and make available discovery that would be relevant to both interstate and intrastate matters. The parties thus expressly agree they intend to seek and make available full discovery relevant to (a) the interstate issues referred to the Federal Communications Commission pursuant to the Referral Orders, (b) the intrastate issues referred to this Commission pursuant to the Referral Orders, and (c) the issues raised in the Federal Actions.

15. Notwithstanding the above, Sprint and certain Third Party Defendants disagree about the scope of discovery that is relevant to the issues referred to the Commission and the Federal Communications Commission. The parties will articulate their respective positions in (or in response to) appropriate motion papers.

16. Discovery may be served by any party immediately (and, indeed, many parties have already served discovery requests and responses), but the parties agreed to take efforts to avoid lodging repetitive discovery requests. Responses to discovery requests are due 20 days

after service. Each party will have the ongoing obligation to update and supplement discovery responses. Within 7 days of receipt of each other's respective discovery responses, or as soon as practicable thereafter, both parties shall make a good faith effort to resolve any issues related to deficient discovery responses. If the parties are unable to resolve any discovery issues that may arise, any Motions(s) to Compel shall be filed with the Commission.

17. Discovery requests and responses shall not be filed with the Commission unless necessary in connection with a motion to compel or if introduced as a hearing exhibit.

18. The parties will coordinate depositions and discovery with those occurring in other related cases, to the full extent possible, so that this case proceeds efficiently.

19. Northern Valley has already provided to Sprint discovery responses, documents and deposition transcripts it previously provided to Qwest. In light of discovery disputes that occurred between Northern Valley and Sprint before the Federal District Court's stay, Sprint has not conceded that the information it has already received, combined with the information it will receive in accordance with this paragraph, will be full and complete. Accordingly, Sprint has propounded additional discovery requests for Sprint-specific information, to which Northern Valley is responding.

20. Similarly, Sancom has already provided to Sprint discovery responses, documents and deposition transcripts it previously provided to Qwest, to the extent that they have not already been provided. Sprint may utilize those materials, and any other materials received directly from Sancom, in its case. Sprint has not conceded that the information it has already received, combined with the information it will receive in accordance with this paragraph, will be full and complete, and Sprint has reserved its right to seek additional, non-duplicative discovery.

21. Sancom and Northern Valley have served discovery requests upon Sprint. Sprint's responses are the subject of an initial motion to compel that was filed by Northern Valley on May 27, 2011.

22. Northern Valley and Sancom understand that Splitrock previously provided to Sprint those discovery responses and documents it produced in connection with the matters styled as *Splitrock Properties, Inc. v. Sprint Communications Company, L.P.*, Civ. No. 09-4075 (D.S.D.) and *Splitrock Properties, Inc. v. Qwest Communications Corporation*, Civ. No. 08-04172 (D.S.D.). Sprint may utilize those materials, and any other materials received directly from Splitrock in this case. Sprint has propounded additional discovery in connection with this matter and Splitrock intends to do the same in conformance with this schedule.

Proposed Procedural Schedule

23. Northern Valley and Sancom propose the following procedural schedule, which based on correspondence with Sprint's counsel, they believe will be acceptable to Sprint, and hereby request that the Commission adopt it:

- A. All written discovery requests (other than requests directed at pre-filed testimony) shall be served no later than **September 30, 2011**. Written discovery requests directed at statements made in pre-filed testimony may be served within 14 days after the testimony is filed.
- B. All fact depositions shall occur no later than **October 28, 2011**.
- C. On or before **November 21, 2011**, SDN shall serve and file direct testimony, including exhibits, with respect to issues not resolved on its Motion for Summary Judgment.
- D. On or before **December 30, 2011**, Sprint may serve and file reply testimony to SDN's testimony, and direct testimony with respect to its third party complaints.
- E. On or before **February 3, 2012**, any third party defendant(s) shall serve and file reply testimony.
- F. On or before **March 12, 2012**, SDN and Sprint may file rebuttal testimony, which shall be limited to new matters raised in reply testimony.
- G. The hearing shall be set for 5 days beginning after **April 23, 2012**, or as the Commission's calendar allows. No witness shall be allowed to testify at the hearing unless that witness has pre-filed testimony pursuant to this schedule.
- H. A post hearing briefing schedule will be set at the hearing.

24. Northern Valley and Sancom also request that the Commission adopt an order reflecting that service in this case shall be accomplished by email, which is effective upon receipt by the party served.

25. Northern Valley and Sancom also request that the Commission adopt an order providing that documents produced in response to discovery requests shall be produced in searchable .pdf or .tif format or, in the case of worksheets, spreadsheets or cost calculations, in native, unprotected electronic format, and that the presence of "confidential" (but not privileged) material, shall not serve as a basis for refusing to provide the native of these documents.

Respectfully submitted,

Dated: June 8, 2011

James M. Cremer
James M. Cremer
BANTZ, GOSCH & CREMER, L.L.C.
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232; 605-225-2497 (fax)
jcremer@bantzlaw.com

Ross A. Buntrock (*pro hac vice*)
G. David Carter (*pro hac vice*)
ARENT FOX LLP
1050 Connecticut Avenue NW
Washington, DC 20036-5339
202-775-5734; 202-775-6395 (fax)
buntrock.ross@arentfox.com
carter.david@arentfox.com

Counsel for Northern Valley Communications, L.L.C.

Jeffrey D. Larson
Jeffrey D. Larson
LARSON & NIPE
P.O. Box 277
Woonsocket, SD 57385-0277
605-796-4245; 605-796-4227 (fax)
jdlarson@santel.net

Ross A. Buntrock (*pro hac vice*)
G. David Carter (*pro hac vice*)
ARENT FOX LLP
1050 Connecticut Avenue NW
Washington, DC 20036-5339
202-775-5734; 202-775-6395 (fax)
buntrock.ross@arentfox.com
carter.david@arentfox.com

Counsel for Sancom, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 8th day of June 2011 upon the following:

Ms. Patricia Van Gerpen
Executive Director
SD Public Utilities Commission
500 East Capitol Avenue, 1st Floor
Pierre, SD 57501-5070
605-773-3201; 866-757-6031 (fax)
patty.vangerpen@state.sd.us

Ms. Bobbi Bourk
Staff Analyst
SD Public Utilities Commission
500 East Capitol Avenue, 1st Floor
Pierre, SD 57501-5070
605-773-3201; 866-757-6031 (fax)
bobbi.bourk@state.sd.us

Ms. Margo D. Northrup
Attorney at Law
Riter Rogers Wattier & Northrup LLP
P.O. Box 280
Pierre, SD 57501-0280
605-224-5825; 605-224-7102 (fax)
m.northrup@riterlaw.com

Mr. Talbot Wiczorek
Attorney at Law
Gunderson Palmer Nelson & Ashmore LLP
P.O. Box 8045
Rapid City, SD 57709-8045
605-342-1078; 605-342-0480 (fax)
tjw@gpnlaw.com

Ms. Meredith A. Moore
Attorney at Law
Cutler & Donahoe LLP
100 North Phillips Avenue, 9th Floor
Sioux Falls, SD 57104-6725
605-335-4950; 605-335-4961 (fax)
meredithm@cutlerlawfirm.com

Ms. Karen E. Cremer
Staff Attorney
SD Public Utilities Commission
500 East Capitol Avenue, 1st Floor
Pierre, SD 57501-5070
605-773-3201; 866-757-6031 (fax)
karen.cremer@state.sd.us

Ms. Darla Pollman Rogers
Attorney at Law
Riter Rogers Wattier & Northrup LLP
P.O. Box 280
Pierre, SD 57501-0280
605-224-5825; 605-224-7102 (fax)
dprogers@riterlaw.com

Mr. William P. Heaston
Director, Business Development
SDN Communications
2900 W. 10th Street
Sioux Falls, SD 57104-2543
605-978-3596
bill.heaston@sdncommunications.com

Mr. Philip R. Schenkenberg
Briggs and Morgan, P.A.
80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
612-977-8400; 612-977-8650 (fax)
pschenkenberg@briggs.com

James M. Cremer

BANTZ, GOSCH & CREMER, L.L.C.
Attorneys for Northern Valley Communications, L.L.C.
305 Sixth Avenue SE; P.O. Box 970
Aberdeen, SD 57402-0970
605-225-2232; 605-225-2497 (fax)
jcremer@bantzlaw.com