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 NUMBER TC 09-098
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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	**NORTHERN VALLEY COMMUNICATIONS, L.L.C.'S AMENDED OPPOSITION TO SPRINT'S MOTION FOR PROTECTIVE ORDER REGARDING CORPORATE DEPOSITION NOTICE**

Northern Valley Communications, L.L.C. ("Northern Valley"), by and through counsel, and pursuant to S.D. Admin. R. 20:10:01:01.02 and SDCL § 15-6-26(c), hereby submits this Amended Opposition to Sprint Communications Company LP's ("Sprint") Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice ("Sprint Mem.").

PROCEDURAL BACKGROUND

Northern Valley first served its Notice of Corporate Deposition of Sprint on October 31, 2011. *See* Sprint Mem., Exhibit A. That scheduled deposition was postponed, as Northern Valley was unable to obtain responsive discovery information from Sprint in time to prepare for the deposition. Since that time, Northern Valley has continued its efforts to try to obtain relevant and responsive information from Sprint. As set forth in Northern Valley's Motion to Compel, those efforts have, to date, been in vain.

On February 14, 2012, Sprint's counsel requested a meet-and-confer about the topics contained in Northern Valley's Notice of Corporate Deposition. *See* Email exchange between P.

Schenkenberg and D. Carter, attached hereto as **Exhibit A**. Northern Valley's counsel responded by questioning whether a meet-and-confer would be effective until the Commission had an opportunity to resolve the Motion to Compel that was at that time about to be filed by Northern Valley. *Id.* Sprint's counsel wisely pointed out that by engaging in a meet-and-confer at that time, Sprint could file its Motion for Protective Order and the two motions could be decided in tandem, thereby avoiding the need to "push everything back a couple more months." *Id.* Northern Valley's counsel agreed with this suggestion, that it would "be preferable to have this resolved at the same hearing." *Id.* Accordingly, the parties agreed to hold a telephonic meet-and-confer on February 17, 2012.

On February 15, 2012, Northern Valley filed its Motion to Compel against Sprint. Consistent with the parties' agreement, in coordinating with Commission staff about dates for a hearing on that Motion to Compel, Sprint represented its intent to file "two additional motions" that it believed should be heard with Northern Valley's Motion to Compel. Accordingly, a hearing was subsequently set for April 10, 2012, in order to allow briefing on those motions. *See* Email exchange between P. Schenkenberg, K. Cremer, *et al.*, attached hereto as **Exhibit B** (on March 19, 2012, Sprint's counsel confirms April 10, 2012, hearing date).

On February 17, 2012, Northern Valley and Sprint held their telephonic meet-and-confer. At the commencement of the call, Northern Valley's counsel stated that he had tried unsuccessfully to locate a document articulating Sprint's concerns about the deposition topics. Sprint's counsel confirmed at that time that Sprint had not prepared any such document, and rather, that they intended to articulate their concerns for the first time during the call. Northern Valley's counsel clearly and repeatedly expressed his belief that such a process was likely to prove ineffective, as it is often necessary for counsel to have an opportunity to evaluate potential

objections and conduct research about their merits. Thus, trying to respond to Sprint's concerns on the fly, without time to undertake that research, was unlikely to yield positive outcomes. The meet-and-confer proceeded for approximately one hour, during which Sprint made various demands for Northern Valley to defend or modify its list of topics, while providing no support for its demands. At the conclusion of the call, Sprint's counsel agreed it would put its objections in writing, in order to allow Northern Valley to respond to them more fully.

Sprint sent its follow up letter two and a half weeks later, on March 6, 2012, articulating its concerns about Northern Valley's Notice of Corporate Deposition. *See* Sprint Mem., Exhibit B. On March 15, 2012, counsel for Northern Valley and Sprint were in Kentucky for other litigation. At the conclusion of that business, Sprint's counsel informed Northern Valley's counsel that it no longer intended to file the Motion for Protective Order at that time, but rather intended to reserve that motion until after the Commission ruled on the Motion to Compel and Motion for Partial Summary Judgment. Thereafter, according to Sprint's counsel, it expected Northern Valley to issue and serve another Notice of Corporate Deposition, engage in further meet-and-confers, and then brief and argue a Motion for Protective Order. In other words, Sprint had now decided to "push everything back a couple more months" by abandoning its efforts to resolve concerns about the Notice of Corporate Deposition. Accordingly, on March 19, 2012, Northern Valley notified Sprint's counsel that, due to Sprint's decision to abandon the meet-and-confer process, Northern Valley would not be responding individually to the issues raised in Sprint's March 6, 2012, letter. *See* Letter from D. Carter to P. Schenkenberg (March 19, 2012), attached hereto as **Exhibit C**.[1]

[1] This letter incorrectly states that the discussion in Kentucky occurred on February 15, 2012. *See id*. at 2. It should have stated that the discussion occurred on March 15, 2012.

Moreover, because Sprint had abandoned its efforts to meet and confer, and because it expressed no present intent to seek a protective order, Northern Valley asked Sprint to provide dates when its corporate designees would be available for deposition. *Id* at 2. Sprint declined to discusses dates, except between "May 21 and June 8," some nine weeks later. *See* Email exchange between P. Schenkenberg and D. Carter (March 19 – 27, 2012), attached hereto as **Exhibit D**. Sprint also claimed that Northern Valley's original notice of deposition was "withdrawn," and that, as a result, Sprint had no duty to engage in discussions with Northern Valley. Given Sprint's apparent refusal to work cooperatively with Northern Valley, either to resolve Sprint's concerns or schedule the deposition, Northern Valley prepared and served an Amended Notice of Corporate Deposition on Sprint on April 3, 2012. *See* Sprint Mem., Ex. C. That Amended Notice addressed certain of the issues raised in Sprint's March 6, 2012, letter, and was modified to ensure that Sprint's witnesses would be prepared to offer testimony aimed at testing the representations Sprint has made to this Commission about the purported burden to provide certain of the data (*e.g.,* revenue data) that Northern Valley seeks, and set Sprint's deposition for May 22, 2012.[2] Sprint ~~undertook no effort to engage in any meet and confer on the Amended Notice of Deposition. Rather, Sprint~~ filed a Motion for Protective Order on April 17, 2012.[3]

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[2] The April 10, 2012, hearing on Northern Valley's Motion to Compel and Sprint's Motion for Partial Summary Judgment was canceled due to an emergency and reset for May 17, 2012.

[3] While it is generally incumbent on a party that is seeking a Protective Order to obtain it prior to the date set for the deposition or otherwise attend and be prepared for the deposition, Northern Valley has agreed to postpone the deposition until after resolution of the motions and until it receives the responsive discovery from Sprint in a good faith effort to try to conduct Sprint's corporate and fact witness deposition at the same time.

STANDARD

"Admittedly, [the South Dakota] rules [of civil procedure] permit expansive discovery:

> The scope of pretrial discovery is, for the most part, broadly construed. *Bean v. Best*, 76 S.D. 462, 80 NW2d 565 (1957). SDCL 15-6-26(b) provides, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the **subject matter involved in the pending action**...." A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial."

Maynard v. Heeren, 563 NW2d 830, 838 (SD 1997) (alternation in original) (emphasis added). "The reason for the broad scope of discovery is that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in this possession.'" *Fair v. Royal & Sun Alliance*, 278 F.R.D. 465, 470 (D.S.D. 2012) (quoting 8 Wright & Miller, § 2007).

SDCL 15-6-26(c) permits a protective order limiting or preventing discovery to be granted upon a showing of "good cause." "Good cause is established on a showing that disclosure will work a clearly defined and serious injury." *Bertelsen v. Allstate Ins. Co.*, 796 NW2d 685, 704 (SD 2011) (quoting *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)). Broad, non-specific allegations of harm are not sufficient to justify disturbance of the otherwise broad right to discovery, as articulated by the Supreme Court of South Dakota. *See id.* The "burden rests on the party opposing discovery" to demonstrate that a Protective Order is warranted. *Id* at 705.

DISCUSSION

I. SPRINT HAS NOT MET ITS BURDEN OF ESTABLISHING ITS RIGHT TO A PROTECTIVE ORDER NARROWING THE DEFINITION OF "SPRINT" CONTAINED IN THE DEPOSITION NOTICE

Sprint argues that Northern Valley has improperly defined "Sprint" too broadly and that the Commission should narrow the definition of "Sprint" to mean only Sprint Communications Company, LP. Sprint Mem. at 6-7. Sprint also complains generally about the fact that the definition includes Sprint's attorneys, which Sprint contends "***could*** infringe on protected communications. . . ." *Id* at 7 (emphasis added). Sprint fails to offer any legal support for the notion that the definition of "Sprint" should be limited only to Sprint Communications Company, LP or that the inclusion of Sprint's attorneys is *per se* improper. Case law demonstrates that Sprint's arguments are without merit.

In *Murphy v. Kmart Corporation*, 255 F.R.D. 497 (D.S.D. 2009), the United States District Court for the District of South Dakota considered the propriety of a Rule 30(b)(6) deposition that sought information from corporate entities related to the actual party in the case. After examining the limited case law on the subject, the court concluded that a corporate defendant could be required to designate a witness to provide testimony regarding its corporate parent, as well as sister corporations. *Id.* at 507-509. The Court's analysis also makes clear that a corporation could be compelled to provide testimony regarding a corporate subsidiary. *Id.* The court's determination was based on an analysis of whether the corporate defendant "has sufficient control over or access to" these related entities "to be charged with knowledge of these entities." *Id.* at 509. There, Kmart, like Sprint here, failed to provide the Court with any information to demonstrate that it lacked this requisite level of control or access. Accordingly, because it

appeared likely that such control or access existed, Kmart was ordered to designate a witness to testify on behalf of the other corporations.

Not only has Sprint not met its burden of demonstrating that it lacks control or access to the information requested by Northern Valley's deposition topics, but it has itself already established that requiring testimony about related corporate entities is appropriate. Indeed, during the corporate deposition of Northern Valley's corporate designee, Sprint repeatedly asked questions about Northern Valley's parent company and subsidiaries. Moreover, Northern Valley has only limited insight into how Sprint and its various subsidiaries, sisters and parents are staffed, making it virtually impossible (and cost prohibitive) to obtain comprehensive information from Sprint through any other means. Consistent with the clear goal of "shift[ing] certain burdens to the entity that is in a better position to obtain useful information," as reflected in Rule 30(b)(6)'s requirement for a corporation to designate individuals to provide binding testimony, it is clear that Sprint should be required to provide full and honest answers based on any information that is accessible to it or in its control. *See S.C. Johnson & Son, Inc. v. Dial Corp.*, No. 08 C 4696, 2008 WL 4223659, at *2 (N.D. Ill. Sept. 10, 2008).

Sprint's related request for the Commission to strike the word "lawyer" from the definition of "Sprint," and excuse the corporate deponent from being prepared to offer any testimony that relates to actions taken by its attorneys, is similarly misguided. There is no room for dispute that in-house attorneys engage in non-privileged activities. For example, they may wear many hats within the organization and serve in a business, rather than a legal, capacity with regard to certain issues, thus possessing non-privileged facts. "The corporate context . . . can pose challenges to application of the privilege because of the difficultly in some circumstances in distinguishing between communications made to obtain business—as opposed to legal—advice;

or, where the communications are with in-house counsel, distinguishing whether counsel was acting in his legal—as opposed to a general business—capacity." *First Financial Bank, N.A. v. Citibank, N.A.*, No. 1:11-cv-0226-WTL-DML, 2012 WL 626272 at *4 (S.D. Ind. Feb. 24, 2012) (citing *United States v. Singhal*, 800 F. Supp. 2d 1, 9 (D.D.C. 2011); *Lindley v. Life Investors Ins. Co.*, 267 F.R.D. 382, 391 (N.D. Okla. 2010); *Southeastern Pennsylvania Trans. Auth. v. Caremarkpcs Health, L.P.*, 254 F.R.D. 253, 257–58 (E.D. Pa. 2008); *LaFarge North America, Inc. v. Matraco–Colorado, Inc.*, No. 07-80112-Civ., 2008 WL 2474638 at *5 (S.D. Fla. June 19, 2008)).

Indeed, Sprint's argument here mirrors the argument it made to the United States District Court for the District of Kansas in *Sprint Communication Co., LP v. TheGlobe.com*, 236 F.R.D 524 (D. Kan. 2006). There, the Court rejected Sprint's argument that it could not provide a witness to testify about certain 30(b)(6) topics because the only living witnesses with knowledge were Sprint's in-house attorneys. The court admonished Sprint that its arguments rested on a "faulty premise," and reminded Sprint that it was free to designate *anyone* to testify regarding the topics, and need not designate in-house counsel. *Id.* at 527-29. Rather, Sprint could comply with its duties by "choosing one or more non-attorney deponents – regardless of prior and/or actual knowledge regarding the subject matter – and having them review memoranda, notes, applications, documents and all other matters 'reasonably available' to the corporation . . . ." *Id.* at 529.

Importantly, the court in *TheGlobe.com* also rejected the notion that a 30(b)(6) witness could properly prepare to testify on behalf of the corporation without obtaining relevant, non-privileged information from in-house counsel. Specifically, the Court stated:

> [T]he Court finds it necessary to address one rather ancillary argument presented by Sprint: that all information pertaining to the subjects listed in

> the Notice are protected from disclosure by attorney-client privilege as a result of the fact that Sprint attorneys were involved in prosecuting the patents at issue. Again, the Court is not persuaded by Sprint's argument. As a preliminary matter, the attorney-client privilege does not protect facts communicated to an attorney. Moreover, clients cannot refuse to disclose facts which their attorneys conveyed to them and which the attorneys obtained from independent sources. ***When a corporation produces an employee under Fed. R. Civ. P. 30(b)(6) to testify to corporate knowledge, the employee must provide responsive underlying factual information even though such information was transmitted through or from corporate lawyers.***

Id. (emphasis added). Like the federal court in Kansas, this Commission should respectfully reject Sprint's efforts to avoid hiding relevant, non-privileged information. Sprint may take care to avoid having its corporate witness testify about truly privileged matters, and may make appropriate objections and instructions at the deposition. Thus, there is absolutely no reason to issue a protective order that improperly narrows the definition of "Sprint" as set forth in Northern Valley's Amended Notice of Corporate Deposition. Sprint's Motion on this issue should be denied.

II. SPRINT'S CLAIMS OF BURDEN RING HOLLOW

Sprint contends generically that it will be required to "expend a significant amount of time" to properly prepare its witnesses to testify on behalf of the corporation. Sprint Mem. at 8. It further argues that because the amount of intrastate traffic in this case is limited, it should not have to invest the time that would be required to provide fully responsive information, but rather the Commission should limit the discovery that Northern Valley receives. *Id.* Sprint's argument fails for two independent reasons. First, Sprint's generalized assertions of burden are insufficient to warrant the entry of a protective order. Second, given the significant burden that Sprint has imposed on Northern Valley in this case, Sprint's arguments about burden are fundamentally deficient to establish that the burden is *undue* when Sprint is judged by the standard it has itself set in this litigation.

As an initial matter, the case law is clear that "the party seeking to avoid discovery," "ha[s] the burden of demonstrating that they have a basis for doing so . . . ." *Fair,* 278 F.R.D. at 475. It is equally clear that the fact that answering discovery requests "will be burdensome and expensive is not itself a reason for a court's refusing to order which is otherwise appropriate." *Id.* at 476 (collecting cases). Where, as here, the party opposing discovery does nothing other than "make the bald assertion that [the] discovery requests are an 'undue burden,'" they "do not carry their own burden of demonstrating that responding to the discovery requests will be onerous, expensive, or require labor out of proportion to the value of the discovery." *Id.* While Sprint provides generalized discussion about what is typically required for a witness to be prepared to testify, its attorney expressly states that it does not know how much time or effort would be required to prepare witnesses to testify with regard to Northern Valley's deposition notice. *See* Sprint Mem., Affidavit of Bret Lawson, at 2 ¶ 5 ("I do not know the total number of hours Sprint witnesses would expend. . . .").

Moreover, insofar as Sprint attempts to argue that the burden to prepare its witnesses to be deposed in this case is somehow significantly out of line with other similar cases, that claim is highly speculative. Northern Valley's counsel is counsel in many similar cases. The Notice of Deposition served in this case is drawn largely from the notices in those other cases. Moreover, Sprint's witnesses have now been deposed in some of those cases. Thus, much of the initial preparatory work that is required to ready a witness to testify on Sprint's behalf would have already occurred, so there is no reason to assume that Sprint's witnesses would be starting from scratch. Rather, their preparation would be incremental, largely focused on determining whether Sprint has treated Northern Valley differently than other LECs from which it has been withholding payment for all these years. Moreover, several of Northern Valley's deposition

topics are necessary as a result of Sprint's continued refusal to provide meaningful interrogatory responses or documents to Northern Valley. If Sprint remedies these refusals, there is little doubt that the amount of work necessary to prepare its witnesses to testify would be significantly reduced. In other words, much of the burden about which Sprint complains is the result of its own obstinacy. No protective order can cure that.

In any event, Sprint's complaints about burden should be put in context with regard to the burden that Northern Valley has already borne at Sprint's behest. When measured against the bar that Sprint itself has set, there is no doubt that Sprint's burden arguments lack the good faith necessary to render a protective order either necessary or appropriate. As the Commission is aware, Sprint and Northern Valley were party to a case in the United States District Court for the District of South Dakota, addressing the same issues in this case, long before Sprint brought Northern Valley into this case. Early in its involvement in this case, Sprint and Northern Valley agreed to try to obtain full discovery in this case (including both interstate and intrastate issues), so as to avoid the need to engage in piecemeal and repetitive discovery. Northern Valley has fully lived up to its end of this bargain.

During the course of this case alone, Sprint has propounded 131 interrogatories, 20 requests for admission, and 82 requests for production on Northern Valley. In addition, Northern Valley has participated in multiple days of depositions. In total, Northern Valley has produced 101,397 pages of responsive material. In contrast, Sprint has produced approximately 18,000 pages of documents (most of which were publicly-available pleadings from other cases) and responded (usually without any substantive information) to only 13 interrogatories. In short, Northern Valley's deposition notice does not impose a burden on Sprint that in any way comes close to the burden Northern Valley has already experienced in this case. Sprint should not be

allowed to initiate duplicative litigation and then refuse to provide relevant discovery. Thus, Sprint's claims of burden should be rejected.

III. RESPONSES TO SPECIFIC OBJECTIONS MADE BY SPRINT

In addition to its broad arguments addressed above, Sprint also takes aim at a number of particular deposition topics. Northern Valley incorporates, by its reference, the discussions above, and responds only to those Sprint arguments that go beyond the dispute regarding the definition of "Sprint" or the generalized assertions of burden.

A. Topic 4[4]

Topic 4 requires Sprint to provide a witness to testify about Sprint's understanding of Northern Valley's tariff and to provide the facts that Sprint contends support its position that the traffic is not compensable under those tariffs. Sprint does not dispute that the information sought by this topic is relevant to this action. Indeed, Sprint's understanding of Northern Valley's tariff, and the basis for its refusal to pay, is central to this case. Sprint offers no support for its position that it can demand full discovery from Northern Valley, and then continue to resist articulating its legal basis for its continued refusal to pay Northern Valley's access charges. Moreover, as Northern Valley articulated in its Motion to Compel and Reply in Support of Motion to Compel, contention interrogatories seeking this information are fully appropriate. Thus, asking Sprint to provide testimony about the basis for its refusal to pay Northern Valley can be no less appropriate. Sprint has failed to meet its burden of showing why this topic should be off limits for a corporate deposition and this portion of its Motion for Protective Order should be denied.

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[4] The specific text of the topics are set forth in Sprint's Memorandum and the Amended Notice is attached as Exhibit C thereto. Accordingly, Northern Valley does not separately provide the text for each deposition topic herein.

B. Topics 5, 6 and 21

Topics 5, 6 and 21 seek to understand whether Sprint has relationships with calling services providers that reflect the characteristics of the very relationships Sprint contends are improper in this case. If Sprint has such relationships, it would tend to show that its reasons for not paying Northern Valley are largely pre-textual and part of its continued efforts to manage cash flow. *See, e.g., Central Tel. Co. of Virginia v. Sprint Commc'ns Co. of Virginia,* 759 F. Supp. 2d. 789, 792 (E.D. Va. 2011) ("Quite frankly, Sprint's justifications for refusing to pay access . . . defy credulity. . . . Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost-cutting efforts, and the witnesses who testified in support of the defense were not at all credible."); *see also A.G. Schneiderman Files Groundbreaking Tax Fraud Lawsuit Against Sprint For Over $300 Million* (April 19, 2012) ("starting in 2005, Sprint illegally failed to collect and pay New York sales taxes on an arbitrarily set portion of its revenue from these fixed monthly access charges. To carry out this plan, Sprint repeatedly and knowingly submitted false records and statements to New York State tax authorities. Sprint concealed this practice from taxing authorities, its competitors, and its customers.") (available at: http://www.ag.ny.gov/press-release/ag-schneiderman-files-groundbreaking-tax-fraud-lawsuit-against-sprint-over-300-million). On the other hand, if Sprint has no relationship in which it shares revenues with a conference call provider, then preparing someone to testify to that will be minimal. Accordingly, Sprint has failed to meet its burden with regard to these topics.

C. Topic 7

Sprint contends that it should not have to prepare a witness to discuss its conversations with other IXCs about the activities of conference service providers ("CSPs") in South Dakota.

Sprint's contention is that these conversations could not be relevant because the calls those IXCs sent are outside of the scope of this case. Sprint's arguments miss the mark for at least two independent reasons. First, insofar as Sprint and other IXCs engaged in a concerted effort to refuse payment and starve Northern Valley and other LECs out of the business of serving free conference call providers, those conversations should come to light. They are relevant because they would tend to show that Sprint's purported concerns about Northern Valley's tariff language are pre-textual. Second, this request specifically seeks information about facts that Sprint may have learned from those IXCs about lower rates that could be obtained through Least Cost Routing agreements for the delivery of traffic to Northern Valley's network. This information may lead to the discovery of admissible evidence regarding Sprint's failure to mitigate its purported damages. In short, the information sought by Northern Valley is relevant to the subject matter of this dispute and the Motion for Protective Order should be denied.

D. Topic 10

Topic 10 is closely related to Topic 7, as it seeks to understand whether Sprint sought to block Northern Valley's traffic, or considered doing so, and/or whether it considered directing its traffic to Northern Valley through other carriers. Again, this information is relevant and discoverable because it explores the extent to which Sprint attempted to mitigate its purported damages in this case. These types of issues have been repeatedly explored at depositions of IXCs in similar cases and Sprint presents no support for the notion that these questions do not fit within the broad scope of discovery applicable here in South Dakota. Sprint has again failed to meet the required burden to justify a protective order.

E. Topic 21

Topic 21 was addressed in conjunction with topics 5 and 6 above.

F. Topic 22

Topic 22 seeks information related to the demand of Sprint's customers for the conference calling services at issue in this dispute. This information is relevant to Northern Valley's Count II, which seeks recovery for the services if it is determined that the tariff does not apply, as it demonstrates that Sprint has received a valuable service from Northern Valley. That issue has been fully briefed by the parties, so Northern Valley does not repeat its arguments here.

G. Topic 23

Sprint argues that Topic 23, relating to its decisions to pay other LECs' access charges for conference calling traffic, should be stricken because "Northern Valley was unable to tie this information to a claim or defense in this case. . . ." Sprint Mem. at 15. As Northern Valley has explained on numerous occasions, Sprint's suggestion that requested discovery must tie directly to a claim or defense is inconsistent with the standard of discovery here in South Dakota, which allows discovery regarding the "subject matter" of the case. SDCL 15-6-26(b). Thus, Sprint's argument here (like the majority of its other ones) is premised on an inapplicable legal standard. For this reason, during the February 17, 2012, meet-and-confer, Northern Valley declined to engage in a theoretical exercise with Sprint, whereby Sprint's counsel appeared prepared to demand that Northern Valley defend each and every discovery topic to his satisfaction, despite Sprint's failure to provide any advanced notice about what objections it had to these topics. This rules of discovery places no such burden on Northern Valley because, "[s]imply put, '[i]t is not up to [Sprint] to determine what discovery [Northern Valley] needs.'" *Kmart,* 255 F.R.D. at 507 (alteration in original). The motion should be denied.

H. Topic 24

Sprint argues that it should not have to prepare a witness about relevant statements made

to various government agencies. Sprint again tries to flip the burden applicable in a motion for a protective order by arguing that Northern Valley did not tie this topic to a specific claim or defense. The burden, however, is *not* Northern Valley's, but rather Sprint's, as the party seeking the protective order bears the burden of establishing that discovery should be prevented. Here, Northern Valley seeks to understand what Sprint has told lawmakers and regulators about the exact traffic at issue in this case and about Northern Valley itself. These conversations are in no way privileged, and could lead to admissible evidence. For example, if Sprint has informed policymakers that they should reduce "access rates" on this type of traffic, it would be relevant to examining whether Sprint's arguments about whether Northern Valley's tariff applies to the traffic are pre-textual. Further, insofar as Sprint articulated criteria to lawmakers or regulators in an effort to define what is or is not so-called "traffic pumping," that information would also be relevant and likely admissible. Sprint's representations to the individuals making relevant policies on the issues in this case should not be shielded from discovery. Sprint has not demonstrated that this topic should be stricken.

I. Topic 25

Topic 25 seeks information related to the agreements Sprint and other IXCs made regarding delivery of traffic to Northern Valley. To the extent Sprint has agreements for other IXCs to deliver its traffic, that information may be relevant and admissible to examine whether Sprint mitigated its damages, if any. On the other hand, if Sprint agreed to voluntarily deliver another carrier's traffic, and collected revenues on that traffic, the information may be relevant to Northern Valley's Count II, which seeks recovery for its services if it is determined that the tariff does not apply. That issue has been fully brief by the parties, so Northern Valley does not repeat its arguments here.

J. Topic 26

Topic 26 asks Sprint to testify about its knowledge regarding the types of services provided by the CSPs related to this case. Sprint and other IXCs have a long tradition of distorting the issues in these cases by arguing that the cases are about "adult calling." There is no reason Sprint should not be prepared to offer binding testimony that it knows that ***none*** of the CSPs that receive service from Northern Valley are involved in adult calling. Sprint knows this as a fact, has always known it as a fact, and should be required to confirm as such under oath. There is no reason to protect Sprint from responding to this topic.

K. Topic 27 - 44

Topics 27 - 44 are relevant to Northern Valley's Count II, which seeks recovery for its services if it is determined that Northern Valley's tariff does not apply. This issue has been fully briefed by the parties, so Northern Valley does not repeat its arguments here.

Northern Valley does note, however, that several of these topics were added for the first time when Northern Valley served its Amended Notice of Deposition on Sprint. Specifically, topics 32, 34, 36, 38, 40 and 42 are virtually identical to each of their immediately-preceding topics, but specifically inquire about Sprint's ability to provide certain data. These topics were added out of an abundance of caution and based on Northern Valley's concern that Sprint's Response to Northern Valley's Motion to Compel may have been carefully crafted to paint a picture that distorts the true burdens that would be imposed by Northern Valley's interrogatories and document requests. As Northern Valley has stated, its counsel has previously been confronted with claims from IXCs about the burdensomeness of providing revenue data, only then to depose a corporate witness who discloses that the claims of burden are based on the effort that would be required to provide the requested data for the most historical time periods (say, for

2005), but that, with regard to more recent time periods, the burden is *substantially less*. Moreover, Northern Valley has come to understand that Sprint has retained the same vendor as that other carrier and, thus, Northern Valley reasonably believes that Sprint's ability to provide the requested data is on par with that other carrier. Thus, while Northern Valley hopes Sprint is not engaging in similarly misleading conduct in this case, it certainly has a good faith basis to be skeptical, and should be able to use the corporate deposition to test the representations Sprint has made here. Accordingly, these topics were added to avoid a situation in which Sprint contends it does not maintain certain information in the ordinary course of business, but then fails to adequately prepare a witness to testify about the effort that would be required to provide that information. Insofar as the Commission agrees Sprint's revenues could be relevant to this dispute, Sprint's Motion for Protective Order should be denied.

L. Topics 46 & 47

Sprint contends that Topics 46 and 47 should be eliminated because, according to Sprint, they seek only information about Sprint's claims of burden. According to Sprint, because the revenue information is not relevant, exploring whether Sprint accurately portrayed its burden to the Commission is similarly irrelevant. Respectfully, if Sprint has made representations to the Commission about purported burden, and if those statements could have in any way impacted the Commission's evaluation of the pending motions, then Northern Valley should be entitled to explore the accuracy of those representations. Further, Sprint's argument misses the mark because, regardless of whether it ultimately prevails, it has known for many years that Northern Valley was seeking this information from Sprint. If Sprint failed to interrupt the archival of this information (which Sprint does not, and in light of court rulings requiring this information to be disclosed by other carriers, could not argue may *never* be relevant to the parties' litigation), then

it raises serious questions about whether Sprint has engaged in the spoliation of evidence and otherwise failed to fulfill its discovery obligations. *See, e.g., Peskoff v. Faber*, 244 F.R.D. 54, 61 (D.D.C. 2007) ("Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . When a party is under a duty to preserve information because of pending … litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'") (alteration in original); Fed. R. Civ. P. 37, advisory committee notes (2006 amendments) ("When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, **intervention in the routine operation of an information system** is one aspect of what is often called a 'litigation hold.'") (emphasis added). In short, inquiring into the actions Sprint took to fulfill its discovery obligations is perfectly reasonable. Sprint's Motion regarding these topics is unavailing and should be denied.

CONCLUSION

Sprint has wholly failed to fulfill its duty of establishing the need for a protective order. The information sought by Northern Valley is relevant to the subject matter of this litigation and reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Sprint's Motion should be denied in its entirety.

Dated: May 8, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 8th day of May 2012 upon the following:

Ms. Patricia Van Gerpen
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