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., NORTHERN VALLEY, INC., AND CAPITAL TELEPHONE COMPANY	**NORTHERN VALLEY COMMUNICATIONS, LLC'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL**

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 § 15-6-37(a), hereby submits this Memorandum in Support of its Motion to Compel against Sprint Communications Company LP ("Sprint").

BACKGROUND

I. RELEVANT PROCEDURAL HISTORY

Northern Valley is a South Dakota competitive local exchange carrier ("CLEC") that provides access services to interexchange carriers ("IXCs") like Sprint. Northern Valley provides services pursuant to its interstate and intrastate tariffs. Some of Northern Valley's customers provide conference calling services using telephone numbers provided by Northern Valley. When Sprint's customers originate a call destined for Northern Valley's customers, it sends that traffic to Northern Valley for termination, a service Northern Valley provides pursuant to the terms of its tariff. Beginning in September 2007, Sprint unlawfully stopped paying for the

services Northern Valley had been providing to Sprint and other IXCs for years. Adding insult to injury, Sprint continues to send its customers' traffic to Northern Valley's customers without paying for any of those access services, knowing that Northern Valley, as a common carrier, is obligated to protect consumers by maintaining their ability to transmit telephone calls. While Sprint continues to take free service from Northern Valley, Sprint also continues to charge and collect its long-distance charges from its own subscribers.

Based on Sprint's refusal to pay for the services it was receiving from Northern Valley, Northern Valley filed a complaint in federal court in the District of South Dakota against Sprint on February 7, 2008. *See Northern Valley Commc'ns L.L.C. v. Sprint Commc'ns Company*, Complaint, Civ. No. 08-1003 (D.S.D.). Northern Valley asserted claims of breach of contract for Sprint's refusal to pay pursuant to Northern Valley's tariffs, and alternative claims for breach of implied contract for Sprint's refusal to pay pursuant to Northern Valley's tariffs and unjust enrichment for Sprint's refusal to pay for the valuable services that Northern Valley provided to Sprint. *Id*. at 3-4. This companion federal case is now stayed pending a primary jurisdiction referral to the FCC regarding the interstate issues, and the resolution of this case regarding the intrastate issues. Northern Valley has also filed a second federal case against Sprint, which covers the time period after July 23, 2010, when Northern Valley's revised interstate access tariff became effective. *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Company, LP*, Civ. No. 11-4053 (D.S.D.).

While the initial federal case between Northern Valley and Sprint was pending, South Dakota Network, LLC ("SDN") initiated the above-captioned proceeding against Sprint on October 29, 2009. SDN's complaint alleged that Sprint had failed to pay SDN's access charges for intrastate calls in South Dakota. Sprint answered on November 24, 2009, and filed a third-

party complaint against Northern Valley and other LECs on the same date. Sprint's claims against Northern Valley seek a declaration that Northern Valley's intrastate access tariff does not permit Northern Valley to assess access charges when Northern Valley's end-user is a conference calling company, and that Northern Valley is liable for any intrastate access charges Sprint might owe SDN.

Northern Valley filed cross-claims against Sprint on January 22, 2010, seeking payments for the intrastate access charges Sprint has refused to pay Northern Valley. On February 11, 2010, Sprint filed a Motion to Dismiss Northern Valley's Cross-Claims. *See* TC 09-098, Sprint Communications Company LP's Motion to Dismiss Northern Valley's Cross-Claim (Feb. 11, 2010). While the Commission granted Sprint's Motion to Dismiss on September 15, 2011, based on its determination that the claims were duplicative in violation of SDCL § 49-13-1.1, Northern Valley expressed its intent to re-file its claims as claims for declaratory judgment, as Sprint had done. Northern Valley did so on October 7, 2011, lodging two alternative claims. Northern Valley's first claim asks the Commission to declare that its intrastate access tariff is applicable to the conference calling traffic at issue in this case. The alternative claim asks that, if the Commission determines the intrastate tariff is inapplicable, it nevertheless declare that Northern Valley is entitled to reasonable compensation for that traffic.

Sprint moved to dismiss Northern Valley's alternative claim on October 17, 2011. According to Sprint, Northern Valley's alternative count exceeded the Commission's jurisdiction. Northern Valley rebutted Sprint's assertion by relying on SDCL § 49-13-13, which provides that if the Commission determines Northern Valley has improperly billed for a service not covered by its tariff, "**the commission may determine and prescribe the just and reasonable charge, to be observed as the maximum to be charged.**" SDCL § 49-13-13 (emphasis added). At a

hearing held on December 20, 2011, the Commission agreed that Northern Valley was entitled to proceed on Count II. *See* TC 09-098, Order Granting Partial Summary Judgment; Order Granting Leave to File Counterclaims; Order Denying Dismissal of Counterclaims (Jan. 18, 2012), at 5 ("The Commission finds that Northern Valley has demonstrated that its Count II has the legal sufficiency to proceed.").

II. THE DISCOVERY AT ISSUE

Northern Valley served its first document requests and first interrogatories on Sprint nearly one year ago, on March 21, 2011. Sprint responded to Northern Valley's discovery requests on April 21, 2011, and then served first amended responses on April 29, 2011. *See* Sprint's Sprint Communications Company, LP's Answers to Northern Valley Communications, LLC's First Interrogatories (April 21, 2011), attached hereto as **Exhibit A**; Sprint's First Amended Responses to Interrogatories (April 29, 2011), attached hereto as **Exhibit B**. Relying primarily on general objections, including its position that Northern Valley could not maintain its claims against Sprint, Sprint provided virtually no substantive information, and refused to respond to any request that it deemed related to Northern Valley's "unjust enrichment claim." *See* Exhibit B, Sprint's First Amended Responses to Interrogatories; *see also* Letter from R. Buntrock to P. Schenkenberg (Apr. 25, 2011), attached hereto as **Exhibit C**.

Even as the parties attempted to resolve the issue regarding Northern Valley's ability to maintain its alternative claim for declaratory relief, Northern Valley sought to work cooperatively with Sprint to narrow their discovery dispute in hopes that it could avoid the need for further motions practice. For example, Northern Valley's counsel wrote to Sprint on November 7, 2011, following an earlier telephone conversation, for the purpose of conveying Northern Valley's desire to "work expeditiously towards the resolution of open discovery issues

so that this case can proceed to final resolution." *See* Letter from D. Carter to P. Schenkenberg (Nov. 7, 2011) (the "November 7, 2011 Letter"), attached hereto as **Exhibit D**. The November 7, 2011, Letter asks Sprint to engage in a meet and confer process to address any discovery disputes that would remain, even if the Commission agreed that Northern Valley could maintain its alternative declaratory judgment claim. *Id.* The five-page letter sets forth in detail Northern Valley's concerns about Sprint's refusal to provide meaningful discovery. *Id.*

Sprint purported to respond to Northern Valley's concerns by providing Second Amended discovery responses on December 5, 2011. *See* Sprint Communication Company LP's Second Amended Answers to Northern Valley Communications, LLC's First Interrogatories (Dec. 5, 2011), attached hereto as **Exhibit E**; Sprint Communications Company LP's Second Amended Responses to Northern Valley Communications, LLC's First Document Requests (Dec. 5, 2011), attached hereto as **Exhibit F**. However, when Northern Valley's counsel compared the Second Amended Responses to Sprint's First Amended Responses, it quickly became apparent that Sprint had provided little, if any, additional substantive information. *See* Sprint Communication Company LP's Second Amended Answers to Northern Valley Communications, LLC's First Interrogatories (Dec. 5, 2011) (changes between First Amended and Second Amended responses in redline) (the "Redline Interrogatories"), attached hereto as **Exhibit G**; Sprint Communications Company LP's Second Amended Responses to Northern Valley Communications, LLC's First Document Requests (Dec. 5, 2011) (changes between First Amended and Second Amended responses in redline) (the "Redline Document Responses"), attached hereto as **Exhibit H**.

Since that time, Northern Valley has expended considerable effort trying to obtain relevant and responsive information from Sprint, but has been unable to do so. Among the discovery sought by Northern Valley is information that may be relevant to determining whether

Northern Valley is entitled to compensation even if Northern Valley's tariff does not apply to the traffic at issue. Though the Commission has now denied Sprint's request to dismiss Northern Valley's Count II, Sprint recently made clear that it would continue to refuse to supplement its production to provide discovery relevant to this claim. *See* Letter from P. Schenkenberg to D. Carter (Feb. 2, 2012) (the "February 2, 2012, Letter"), attached hereto as **Exhibit I**. In other words, Sprint has decided to ignore the Commission's order denying Sprint's Motion to Dismiss. Northern Valley has also tried unsuccessfully to get Sprint to remove all of its improper redactions from its earlier discovery productions. However, despite several months in which to do so, it has failed to remove improper redactions from emails and their attachments. Accordingly, Northern Valley is compelled to return to the Commission again seeking an order requiring Sprint to fulfill its discovery obligations in good faith.

STANDARD

"The proper standard for ruling on a discovery motion is whether the information sought is 'relevant to the subject matter involved in the pending action....' This phraseology implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 20 (S.D. 1989) (quoting and citing SDCL § 15-6-26(b)(1) and 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2008 (1970) respectively).

Thus, the standard of relevancy at issue here is appropriately broad. Because S.D. Admin. R. 20:10:01:01.02 incorporates the rules of civil procedure used in the circuit courts, SDCL § 15-6-26(b)(1) establishes the general scope and limits of discovery in this proceeding. The rule states:

> **Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action**.... 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). "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." *Kaarup*, 436 N.W.2d at 19 (citing 8 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2001 (1970)). In short, "[a]ll relevant matters are discoverable unless privileged." *Id*. at 20. Northern Valley's discovery requests meet this standard and Sprint's objections to the contrary are wholly without merit.

ARGUMENT

I. Sprint's Failure to Provide Interrogatory Responses and Documents

As set forth more fully below, Sprint refuses to provide substantive responses to a number of Northern Valley's interrogatories or to provide a host of responsive documents. Sprint suggests, for some, that Northern Valley is not entitled to obtain a substantive response until such time as Sprint files its opening testimony, which is scheduled to follow the deposition of Sprint's witnesses. For others, Sprint merely contends that providing a substantive response would be burdensome, but then refuses to engage in good faith conversations or otherwise articulate what data it contends it could provide that would mitigate its perceived burden. In short, Sprint attempts to use its purported burden as a way to avoid discovery all together, despite Northern Valley's repeated efforts to work cooperatively with Sprint to gain access to reasonably available and responsive information. For these reasons, Northern Valley respectfully requests that the Commission order Sprint to provide supplemental responses to the following interrogatories and document requests:

A. Interrogatory No. 1[1]

INTERROGATORY NO. 1: State all factual and legal bases upon which You rely to support your claim that Calling Service Providers are not "end users."

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence insofar as the Interrogatory is not limited to Calling Service Providers doing business with Northern Valley in the state of South Dakota. Sprint also objects to this Interrogatory to the extent it seeks any information protected by the attorney-client privilege, joint defense or common interest privilege, and/or the attorney work product doctrine.

Subject to and without waiving its objections, Sprint states that the information produced by Northern Valley and Calling Service Providers and developed in discovery—including the contracts, understandings, relationships, payment streams, and course of dealing between Northern Valley and Calling Service Providers—will show conclusively that Calling Service Providers are not end users of Northern Valley local exchange service or end users of its access services. Sprint will present its case in its prefiled testimony.

Northern Valley's Interrogatory No. 1 asks Sprint to provide the factual and legal bases for its contention that the conference calling service providers at issue in this case do not qualify as "end users." Sprint's complaint specifically alleges that the Calling Service Providers are not end users. *See* TC 09-089, Sprint's Third Party Complaint, ¶¶ 13 – 14, (Nov. 24, 2009). However, Sprint has refused to provide any basis to support its bare-bones assertion, instead relying solely on the findings of the Iowa Utilities Board in a case decided under Iowa law and based on the specific facts developed in that case. Northern Valley's interrogatory asks Sprint to articulate the basis for its allegation, as it relates to *South Dakota law* and *Northern Valley*.

Sprint refuses to provide *any* substantive response, however, asserting that it may refuse to provide this most fundamental information until all of its witnesses have been deposed and it submits its affirmative pre-filed testimony. In its February 2, 2011, letter, Sprint confirmed that it would not update its response, saying that it "believes its response[ ] [is] appropriate and consistent with Commission practice." Ex. I, at 1. Not knowing the factual basis for Sprint's

[1] The text of the discovery request and Sprint's current response is included for reference.

claims, however, makes it exceedingly difficult for Northern Valley to adequately prepare for the deposition of Sprint's witnesses.

Sprint's letter also confusingly suggests that it is not prejudicial to Northern Valley to obtain this information for the first time as part of Sprint's filed testimony because "Northern Valley will have an opportunity to conduct discovery as to statements made in Sprint's filed testimony." *Id.* However, the schedule adopted by the Commission contemplates that all discovery will be completed prior to any testimony being filed with the Commission. Thus, it is not at all clear that Northern Valley would be able to depose Sprint's witnesses for a second time after Sprint's opening testimony has been filed. In any event, there is no reason for Sprint to delay providing a substantive response to this discovery request.

Further, Sprint's refusal to respond to this interrogatory is counter to the great weight of authority recognizing the need for parties to respond to "contention interrogatories," such as the one propounded by Northern Valley. Contention interrogatories are useful in "ferreting out or narrowing the issues; providing leads to evidence or information regarding the extent of proof that is required; avoiding wasteful preparation; eliminating unnecessary testimony; facilitating a settlement; [and] generally expediting the fair disposition of the lawsuit. . . ." John Kimpflen, *et al*., *Federal Procedure, Lawyers Edition*, 10A Fed. Proc., L. Ed. § 26:525 (2011) (citations omitted). "Besides the benefit of narrowing and sharpening the issues for trial, another benefit of contention interrogatories is that they may expose a substantial basis for a motion for summary judgment, thereby leading to an expeditious and inexpensive determination of the suit or lead to early settlement of a case when the plaintiff discloses a strong basis in support of the claim." *Id.* Courts have repeatedly held that parties "are entitled to know with some degree of precision what the factual content of the charges made against them is," and if a party "knows of no further

information it is required to so state." *Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.,* 64 F.R.D. 459, 463 (S.D.N.Y. 1974) (citation omitted).

Indeed, Sprint originally recognized the usefulness and validity of this interrogatory as reflected in its initial Answers and First Amended Answers. *See* Exs. A & B. There, Sprint objected to this interrogatory on the basis that it was "**premature** to the extent that discovery is continuing and facts regarding Northern Valley's relationship with Calling Service Providers are in the possession, custody, or control of Northern Valley, Calling Service Providers with whom Northern Valley does business, and/or other third parties." *Id.* (emphasis added). Now, however, after obtaining exhaustive discovery from Northern Valley and the Calling Service Providers, including conducting the depositions of witnesses of Northern Valley's employees and representatives of each Calling Service Provider, Sprint has changed course, asserting that it has no duty to provide this information. Thus, Sprint's newly-found position that it has no obligation to respond to this request must be rejected for what it is – the latest in Sprint's long efforts to hinder Northern Valley's ability to obtain meaningful discovery in this case.

For the foregoing reasons, and in the interest of justice, Sprint should be required to provide a substantive response to Interrogatory No. 1.

B. Interrogatory No. 2

INTERROGATORY NO. 2: State all factual and legal bases upon which You rely in asserting that Northern Valley is not entitled to payment from Sprint in accordance with Northern Valley's tariffed rates for terminating switched access calls from Sprint's customers. To the extent that your analysis varies based on the applicable tariff, set forth your analysis with regard to each relevant tariff.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, Sprint objects to the Interrogatory to the extent it seeks information relating to Northern Valley's Tariff No. 3, which became effective in July 2010 and is outside the scope of the referral to the Commission. Sprint further objects to this Interrogatory on the grounds that it is vague, ambiguous, and misleading insofar as it implies (incorrectly) that Northern Valley terminates switched access calls to Calling Service Providers.

Subject to and without waiving its objections, Sprint states that the information produced by Northern Valley and Calling Service Providers and delivered in discovery—including the contracts, understandings,

relationships, payment streams, and course of dealing between Northern Valley and Calling Service Providers—will show conclusively that tariffed switched access charges are not due under the terms of Northern Valley's tariffs. Sprint will present its case in its prefiled testimony.

Like Interrogatory No. 1, this interrogatory is a contention interrogatory focused on adding substance to the bare-bones assertions Sprint made in its complaint against Northern Valley, so that Northern Valley may adequately prepare for the depositions of Sprint's witnesses. This interrogatory goes to the very heart of the issues in this case, and without a reasonable response, Northern Valley is unfairly disadvantaged in its ability to prepare for depositions. Moreover, as with Interrogatory No. 1, Sprint previously objected to this request as "premature" because it expressed a need to first obtain information from Northern Valley and the Calling Service Providers in discovery before it could respond. *See* Exs. A & B. Having obtained that discovery, Sprint has no good faith basis to decline to provide a substantive response. Sprint should be compelled to respond to Interrogatory No. 2.[2]

C. Interrogatory No. 4 and Document Request No. 15

INTERROGATORY NO. 4: Identify all LECs to whom Sprint has paid, or currently does pay, terminating switched access charges associated with calls made to and/or terminated with Calling Service Providers. For each of these LECs, identify:

a. the LEC to whom payment was made;
b. the time period during which such payments were made;
c. whether Sprint made such payments pursuant to one or more tariffs, contracts, settlement agreements, or otherwise; and
d. whether Sprint has made any objections or taken any action to recoup these payments.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, the Interrogatory is not properly limited to information relating to any payments by Sprint for South Dakota call traffic to Calling Service Providers. Sprint further

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[2] Sprint has objected to the request to the extent it relates to the application of Northern Valley's interstate access tariff. As reflected in Northern Valley's filings regarding the procedural schedule, the parties had agreed to attempt to consolidate discovery in the federal cases in order to avoid the need for duplicative discovery procedures. To the extent that Sprint now refuses to provide discovery consistent with that agreement, Northern Valley will seek and obtain the discovery through the federal court, thereby necessitating separate depositions. Accordingly, and recognizing the limitations of the Commission's jurisdiction, Northern Valley's Motion to Compel is limited to seeking to compel Sprint to provide discovery relating to the intrastate traffic.

objects to this Interrogatory insofar as its seeks information that is confidential pursuant to agreements with third parties and is subject to production only pursuant to court or administrative order or via subpoena. Sprint also objects to this Interrogatory on the grounds that it is vague, ambiguous, and misleading insofar as it implies (incorrectly) that Northern Valley or other LECs terminate switched access calls to Calling Service Providers.

Subject to and without waiving its objections, and answering as to the state of South Dakota, Sprint states that it does not knowingly pay terminating access charges to any LECs for pumped traffic without disputing those charges.

REQUEST NO. 15: Produce all Documents that refer, relate to or identify any instances in which Sprint has paid terminating access charges to any LEC that serves Calling Service Providers, including all Documents relating to Sprint's validation that such charges were owed, including any analysis of relevant tariffs.

RESPONSE: Sprint further objects to this Request insofar as its seeks documents that are confidential pursuant to agreements with third parties and are subject to production only pursuant to court or administrative order or via subpoena. Sprint further objects to this Request on the grounds that it is overly broad, unduly burdensome, harassing and oppressive, seeks information that is confidential, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, this Request is not properly limited to Calling Service Providers doing business with Northern Valley in the state of South Dakota.

Interrogatory No. 4 and Document Request No. 15 collectively seek to understand to what extent Sprint has paid other LECs for traffic similar to that at issue in this case. Sprint refuses to respond to the extent that the information relates to LECs located in other states.[3] However, understanding whether Sprint pays LECs that provide service to conference calling providers in other states may reasonably lead to admissible evidence in this case, as it may tend to shed light on whether Sprint's withholding is actually premised on a good faith belief that the practices are improper under state law, or whether, as Northern Valley contends, it is part of a national effort on Sprint's part to improve its financial performance. *See, e.g., Central Tel. Co. of Virginia v. Sprint Commc'ns Co. of Virginia*, 759 F. Supp. 2d. 789, (E.D. Va. 2011) (describing Sprint's explanation for its refusal to pay access charges as a "post hoc rationalizations developed by in-house counsel and billing division as part of Sprint's cost cutting efforts," and that "on the

[3] Sprint's suggestion that it should only provide information related to South Dakota conflicts with its behavior in this case where it produced testimony and pleadings from cases lodging in a variety of other states. Indeed, Sprint's earliest document productions in the federal case consisted almost exclusively of publicly-available filings and testimony from other states.

whole, Sprint's conduct from mid-2009 onward reveals a company less concerned with meeting its contractual obligations than meeting its bottom line."). Stated differently, if Sprint knowingly pays other carriers for the exact traffic it disputes with regard to Northern Valley, this fact is likely admissible as a statement against interest and, at the very least, is a proper area for discovery. Because the information sought by Northern Valley is likely to lead to admissible evidence, Sprint's objections should be overruled and Sprint should be required to answer this interrogatory in full and provide responsive documents.

D. Interrogatory No. 7

INTERROGATORY NO. 7: For each month from January 1, 2005 to the present, set forth (a) the total volume of minutes; and (b) gross revenues that Sprint has collected from its long distance customers as a result of calls placed to and/or terminated at any of the following telephone numbers assigned to Calling Service Providers by Northern Valley:

Telephone Numbers
[list omitted to conserve space]

For all Sprint long-distance customers who made calls to CSPs during this period who pay a flat, non-usage-sensitive fee (unlimited long distance plans) for Sprint's long-distance service, set forth the number of such customers each month, the average price(s) they paid for such long-distance service, and the percentage of such customers' long-distance calls to CSPs vis-à-vis their total long-distance usage under those unlimited-calling plans.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, harassing and oppressive, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Interrogatory improperly seeks information related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Furthermore, the Interrogatory improperly seeks information that Sprint does not maintain in the ordinary course of business, and generating responsive information would be enormously expensive and time consuming, as it would require individual evaluation of millions of CDRs. Sprint has no obligation to perform studies or create analyses to answer interrogatories.

Volumes of Minutes

Sprint's long distance services are billed and tracked based on the origination point of the service. Sprint does not maintain minute of use information for its long distance services by termination points. To provide such information, Sprint would have to extract it from its records. The level of effort for Sprint to extract termination minutes by geographic area would be significant both in effort and costs. The period length of this request runs back more than five years. Sprint has an active database against which it may be able to run queries on minutes of use going back six month, but obtaining terminating minutes of use by geography for any longer period would require turning either to archived material no longer stored in the active database or to call detail records. For the archived material, unarchiving this amount of detailed information is time consuming and would force Sprint to incur unexpected information technology costs and possibly additional labor costs. Moreover, the archives for the minute of use database themselves only go back an additional seven month, totaling 13 months of available minute data, and would thus be insufficient to complete the inquiry. If call detail records were used instead, extracting minutes of use to a

> geographical area from billings of records of individual customers would require not only work but substantial amounts of expensive computer time. The call detail records older than 18 months would need to be unarchived to complete the request.
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> Sprint further states that Sprint understands the parties have no dispute as to the number of minutes delivered to Northern Valley's CCC partners, making this inquiry unnecessary for purposes of this case.
>
> Revenues
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> Sprint's long distance services are billed and tracked based on the origination point of the service. Sprint does not maintain revenue information for its long distance services by termination points. Calculating revenues for specific calls would be even more difficult to perform than the calculation of minutes of use. In order to attempt to associate revenue with terminating location, after determining the minutes of use terminating to the numbers identified (as described above), Sprint would have to determine which of those minutes were associated with particular customers, which calling plans those customers were on at each point in time, and the applicable rates. The bulk of Sprint's retail customers are on unlimited plans from which Sprint derives no revenue for each minute of use, much less minutes to particular terminating points. Other customers are on plans in which they receive a certain number of minutes "in plan" and then pay only for minutes above that amount. For these customers, Sprint would need to determine which calls exceeded the customer's plan minutes and how revenue should he allocated. Still others are billed per-minutes rates, which may have varied over time. Attempting to determine what revenues were associated with calls terminating to specific numbers for any time period, much less a period of more than four years, would be an extremely complicated and burdensome task that would have to be performed individually for the millions of customers for each month covered in this data request.

Sprint modified its response to Interrogatory No. 7 as part of its Second Amended Interrogatory Responses on December 5, 2011, as the parties prepared to argue Sprint's Motion to Dismiss with regard to Northern Valley's Count II. Upon review of the Redline Interrogatories, *see* Ex. G, it is clear that Sprint updated this interrogatory not to provide a substantive response, rather, perhaps anticipating that it would lose the Motion to Dismiss, Sprint's modifications appear to be an attempt to double-down on its efforts to avoid having Northern Valley gain access to this relevant and responsive information. Sprint's supplementation is no supplementation at all, but rather must be viewed and treated as an effort to untimely bolster its earlier improper general objections. *See, e.g., McLeod, Alexander, Powell, & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990) ("the mere statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and irrelevant' is not adequate to voice a successful objection to an interrogatory.") (citing *Josephs v. Harris*, 677 F.2d 985, 991-92 (3d Cir. 1982)); *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 400 (S.D. Fla. 2008)

("Objections which state that a discovery request is 'vague, overly broad, or unduly burdensome' are, by themselves, meaningless. . . ."); *Hodgon v. Nw. Univ.*, 245 F.R.D. 337, 340 & n.4 (N.D. Ill. 2007); *see also* Fed. R. Civ. P. 33(b)(4) ("The grounds for objection to an interrogatory *must be stated with specificity*.") (emphasis added). Thus, and as discussed below, Sprint should be required to provide this discovery.

1. Sprint Should Produce Discovery Regarding Disputed Call Volumes

Sprint strains to create reasons why it would be unduly burdensome to articulate the volume of intrastate traffic that it is disputing in this litigation in response to Interrogatory No. 7 and refuses to provide documents in response to Document Request No. 26. Sprint's objections make no sense as a practical matter, however. If Sprint does not know how much traffic it is disputing, how can it possibly present its case or calculate its purported damages? Sprint's representations about the purported burdensomeness of this request are made all the more suspect when it goes on to represent that it "understands that the parties have no dispute as to the number of minutes delivered to Northern Valley's [conference call service customers], making this inquiry unnecessary for purposes of this case." *See* Response to Interrogatory No. 7. Respectfully, how could Sprint know whether the parties are in agreement on the volume of traffic, if it does not know what that volume is? And, in any event, Sprint's perception of what is "necessary" for discovery in this case is not the legal standard by which discovery is judged, rather discovery is permitted if it is relevant to the issues in the case. Discovery relating to the volumes of traffic at issue in this dispute is undoubtedly relevant.

Fundamentally, Sprint cannot be allowed to provide such an evasive response and then leave open the possibility to assert later, in its expert reports or otherwise, that it disputes Northern Valley's calculations regarding the volume of disputed traffic. The fact that responding

may require Sprint to do some work to provide a straightforward response, is no basis for it to decline to answer this discovery request, because Sprint's objections ignore the obvious fact that "a relatively large degree of complexity and a certain amount of burdensome labor must be expected; and where the plaintiffs are simply being asked to specify and illuminate the very claims which they have raised in their complaint, they *must accept that burden*." *Harlem River*, 64 F.R.D. at 465 (emphasis added). Thus, there is no doubt that Sprint should be compelled to respond to the interrogatory and provide documents regarding the volume of minutes in dispute.

2. Sprint's Revenue Is Also Discoverable

Sprint should also be compelled to provide responsive information regarding the revenue that it has received with regard to the traffic at dispute in this case. While it may not be the sole evidence that the Commission considers if it must determine the "reasonable compensation" that Northern Valley is due pursuant to SDCL § 49-13-13, there is little doubt that Sprint's revenues on the disputed traffic are among the evidence that would be relevant to that consideration. Insofar as Sprint questions the applicability of Northern Valley's intrastate tariff to the traffic at issue, a consideration of the revenue it has generated during the period of time in which it has refused to pay Northern Valley any compensation for this traffic is both an integral part of this proceeding and well within the Commission's jurisdiction.

For instance, the information sought by Northern Valley regarding Sprint's revenue is directly relevant to the question of what rate is "just and reasonable" because, as the FCC has recognized and as anyone familiar with access charges understands, the payment for the use of the LEC's network in the context of wireline traffic is "necessarily imputed" into the rates the IXC charges its long-distance subscribers. *See Petitions of Sprint PCS & AT&T Corp.*, 17 FCC Rcd. 13192, 13199 (discussing the distinctions between wireline and wireless network plans and

noting that, unlike the calling party's network pays (CPNP) compensation regime applicable to the wireline network, access charges are not "necessarily imputed" into the wireless carrier's charges). Sprint's revenues will also reflect whether Sprint has received a valuable service from Northern Valley from which Sprint has profited or, as Sprint has previously suggested, it lost money as the result of Northern Valley's services.

Courts have also looked at revenues of the party receiving services to resolve the other party's compensation for those services when a tariff does not apply. *See e.g., Manhattan Telecomms. Corp. v. Global NAPS, Inc.*, No. 08-CIV-3829 (JSR), 2010 WL 1326095, at *3 (S.D.N.Y. Mar. 31, 2010) (evaluating the evidence presented, including that the defendant "itself profits from its transmission of traffic for its customers," and testimony that "an internal study determined an average gross revenue of $0.002 per minute over the last five years," in evaluating whether a carrier could be found liable for traffic that it routed to a LEC's network, but for which the Court could not determine if the access tariff was applicable).

And, as mentioned above, relevancy in South Dakota is broadly defined under the applicable discovery rules and discovery is not limited to particular claims – "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to **the subject matter** involved in the pending action…." SDCL § 15-6-26(b)(1) (emphasis added). Analyzing the same discovery rule in the federal context, the Supreme Court has said, "[t]he key phrase in this definition – 'relevant to the subject matter involved in the pending action' – has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, **any issue** that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (footnotes and citations omitted) (emphasis added). Accordingly, the revenue information is relevant.

Sprint's sole basis for refusing to provide this relevant discovery therefore boils down to its representation that to do so would be unduly burdensome. As noted above, Northern Valley believes Sprint has waived this argument by asserting only a generalized objection until nearly a year after Northern Valley served its discovery requests. *Compare* Ex. B, First Amended Interrogatory Responses, *with* Ex. E, Second Amended Interrogatories (the additional objections are also underscored in Ex. G, the Redline Interrogatories). Nevertheless, to the extent the Commission considers Sprint's late assertions regarding undue burden, it should conclude that they are not sufficient to allow Sprint to escape discovery regarding its revenues for several reasons.

Northern Valley does not dispute that there may be some difficulty associated with fulfilling this request, but considering that fact alone would ignore Northern Valley's repeated requests for Sprint to engage in a meet and confer process so the parties could explore what data Sprint does have available and potentially arrive at an agreeable sampling protocol that would lessen the burden while providing insight into the relevant data. *See, e.g.,* Ex. D, November 7, 2011, Letter, at 2. Sprint has ignored these requests. However, Northern Valley's counsel has learned through experience that IXCs have mischaracterized the burdensomeness of responding to similar requests by focusing on the burden associated with retrieving older legacy data, while not offering a clear assessment of the relative ease with which the IXC could, with today's advanced computing systems, obtain and provide revenue data for more recent time periods. The same is likely true here. At the very least, therefore, the Commission should order Sprint to engage in a good faith meet and confer process with Northern Valley, which should include, at a minimum, requiring Sprint to identify one or more individuals with knowledge regarding their data repositories that will answer questions about their data systems. Moreover, to the extent

that the Commissioners would find it useful and appropriate, Northern Valley would be pleased to have Commission staff participate in those discussions in order to help resolve this dispute.

E. Interrogatory No. 8 and Document Requests No. 26, No. 35 and No. 36

INTERROGATORY NO. 8: For the period January 1, 2005 to the present, set forth the gross revenues associated with being selected to deliver traffic on behalf of other carriers as a result of Least Cost Routing for each month for the traffic delivered to Northern Valley by Sprint.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Interrogatory improperly seeks information related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Sprint further objects to this Interrogatory as vague and ambiguous as the phrase "being selected to deliver traffic on behalf of other carriers as a result of Least Cost Routing" is unclear and undefined.

REQUEST NO. 26: For the period January 1, 2005 to present, produce one or more Documents that identify the volumes of traffic delivered to Northern Valley by Sprint on its own behalf and on behalf of each of its wholesale customers and gross revenues associated with the traffic delivered on behalf of each wholesale customer.

RESPONSE: Sprint objects to this Request on the grounds that it is overly broad, unduly burdensome, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks information related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Sprint incorporates its objections to Interrogatories No. 7 and 8.

REQUEST NO. 35: Produce one or more Documents sufficient to demonstrate the gross revenues that You have received during the relevant time period from other telecommunications carriers as a result of Least Cost Routing and being selected to deliver traffic for or on behalf of other carriers to Northern Valley.

ANSWER: Sprint further (*sic*) objects to this Request as vague and ambiguous as the phrase "for the Least Cost Routing delivery of traffic to Northern Valley on behalf of other carriers"[4] is unclear and undefined. Sprint further objects to this Request on the grounds that it is overly broad, unduly burdensome, oppressive and harassing, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks documents related to Northern Valley's unjust enrichment claim which is not properly before the Commission.

As with the Interrogatory No. 7 discussed above, this series of discovery requests seeks to understand the revenue Sprint has received as a result of being able to terminate long-distance traffic to Northern Valley's network without compensation for the past several years. These discovery requests, however, focus on Sprint's revenues resulting from its voluntary decision to

[4] Sprint's contention that it does not understand the meaning of "least cost routing" is highly doubtful. In any event, Northern Valley has offered to discuss this with Sprint and provide any necessary clarification, but Sprint has not followed up on that offer.

sell the route to Northern Valley on a wholesale/least-cost-routing basis, rather than the revenues it has received from its retail customers. Here again, Sprint has chosen to ignore the Commission's decision to allow Northern Valley to maintain its claim for declaratory relief regarding the appropriate compensation that would be due if Northern Valley's tariff does not apply, continuing to play semantic games and asserting that "Northern Valley's unjust enrichment claim" is "not properly before the Commission."

In any event, Sprint can and should provide the discovery sought by these requests. Northern Valley specifically observes that Sprint does not object to Interrogatory No. 8 as being unduly burdensome. As Northern Valley's counsel is involved in litigating similar cases against Sprint in several other fora, it has begun to slowly understand the weak foundation upon which many of Sprint's objections to discovery are based. For example, after several years of litigation, Northern Valley's counsel has come to generally understand that Sprint's records allow it to provide specific revenue data regarding wholesale revenue for traffic terminating to specific LECs for at least the past several years. If this is true as to Northern Valley, there is no reason for Sprint to refuse to respond to Interrogatory No. 8 in full, and to provide responsive documents. If Sprint contends the data is not available for Northern Valley, its witnesses should be required to explain under oath why it can provide such data with regard to some LECs, but not with regard to Northern Valley. In short, Northern Valley believes that the evidence sought through these requests is both relevant and available. It should be produced.

F. Interrogatory No. 9 and Document Request No. 23

INTERROGATORY NO. 9: For the period January 1, 2005 to the present, identify all instances where Sprint has increased the price charged to other carriers for delivering traffic to Northern Valley under the terms available for Least Cost Routing. For each instance identified:

a. describe all Communications among Sprint personnel regarding the decision to increase the price;

b. describe all Communications between Sprint personnel and employees or representatives of the other carrier;

c. provide the date or time frame of the Communications;

d. describe the reason or bases for the increase; and
e. produce all Documents and Communications relating to the increases.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, harassing and oppressive, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Interrogatory improperly seeks information related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Furthermore, this Interrogatory improperly seeks information relating to "all" communications among Sprint personnel internally and between Sprint Personnel and representatives of "other" carriers, and seeks information on all price "increases" over a nearly five year period. Sprint further objects to this Interrogatory on the grounds that the phrase "terms available for Least Cost Routing" is vague and ambiguous.

REQUEST NO. 23: Produce all Documents that evidence, refer, or relate to any increase in price that Sprint has charged to any wholesale long distance carrier customer in connection with delivering traffic to Northern Valley during the period January 1, 2005 to present.

RESPONSE: Sprint objects to this Request on the grounds that it is overly broad, unduly burdensome, oppressive and harassing, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks documents related to Northern Valley's unjust enrichment claim which is not properly before the Commission.

REQUEST NO. 35: Produce all Documents that refer, relate to or evidence increases in the prices charged by Sprint for the Least Cost Routing delivery of traffic to Northern Valley on behalf of other carriers.

RESPONSE: Sprint further (*sic*) objects to this Request as vague and ambiguous as the phrase "for the Least Cost Routing delivery of traffic to Northern Valley on behalf of other carriers" is unclear and undefined. Sprint further objects to this Request on the grounds that it is overly broad, unduly burdensome, oppressive and harassing, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks documents related to Northern Valley's unjust enrichment claim which is not properly before the Commission.

Interrogatory No. 9, Document Request No. 23 and Request No. 35 seek to explore the extent to which Sprint increased its rate to its wholesale or least-cost routing customers for delivering traffic to Northern Valley and Sprint's representations regarding the basis for those rate increases. In Northern Valley's counsel's experience, IXCs who deliver traffic to LECs that provide service to conference call providers increased their rates for such traffic, expressly representing that the increase was based on costs associated with terminating that traffic. In other words, the IXCs would increase their rates while telling their customers it was because they were paying higher terminating access charges, when, in reality, the IXC was withholding those payments. If Sprint made similar increases and similar representations with regard to Northern

Valley, it would be admissible evidence that tends to undermine Sprint's contention that it was not receiving access services from Northern Valley and be relevant to the Commission's determination of whether Northern Valley is entitled to compensation even if its tariff is found to not apply. Thus, the discovery sought by this request is relevant to the issues in the case and not, as Sprint suggests, only relevant to "Northern Valley's unjust enrichment claim" which Sprint continues to insist is "not properly before the Commission."

Sprint has also objected to this request on the basis that it seeks information regarding "all" relevant communications. Sprint does not explain why such a request is improper under the discovery rules or would be unduly burdensome. To the extent those communications are recorded in writings, such as letters or emails, Sprint may, of course, produce those in lieu of detailing those communications. However, to the extent the communications were oral in nature, Sprint never explains why it would be unreasonable to require Sprint to make a good faith inquiry and set forth the substance of those communications in response to this interrogatory. In short, Sprint again attempts to rely on broad objections as a means of avoiding *any* discovery into a topic that it clearly would prefer the Commission not take into consideration in evaluating this case. The Commission, however, deserves to consider a full record and, thus, should order Sprint to respond.

G. Interrogatory No. 13

INTERROGATORY NO. 13: With regard to each person whom You expect to call as an expert witness at trial, state:
a. the individual's name;
b. the subject matter on which the expert is expected to testify;
c. the substance of the facts and opinions to which the expert is expected to testify; and
d. a summary of the grounds for each opinion.

ANSWER: Sprint objects to this Interrogatory on the grounds that it is premature as Sprint has not yet identified any expert testimony it will present at the hearing. Sprint has retained Don Wood (Wood and Wood, Alpharetta Georgia) for purposes of this case. Subject to and without waiving its objections, Sprint will present its case in its prefiled testimony in accordance with a prehearing schedule set by the Commission.

Consistent with SDCL § 15-6-26(b)(4)(A)(i), Northern Valley has sought to require Sprint "to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and provide a summary of the grounds for each opinion." Sprint has refused to provide anything other than the name of a single expert witness. This is inconsistent with South Dakota law and Sprint has offered no explanation for its refusal. Sprint should be ordered to supplement its response. Moreover, pursuant to SDCL § 15-6-26(b)(4)(A)(ii), Northern Valley respectfully requests that the Commission require Sprint to make Mr. Wood available for deposition after Sprint has complied with its duty to provide a summary of Mr. Wood's opinions and the basis for those opinions.

H. Document Request No. 1

> **REQUEST NO. 1: Produce all Documents that refer, relate to or evidence any statements made by or to Sprint relating to "traffic pumping," any Access Theft Case, any Calling Service Provider, or Northern Valley's relationship with or provision of any services to Calling Service Providers, including, without limitation, all statements Sprint has made internally, to any other IXC, to any governmental body or regulatory agency, or any other third party.**
>
> RESPONSE: Sprint objects to this Request to the extent that it seeks information that is protected by the attorney-client privilege, the joint defense or common interest privilege, and/or the attorney work product doctrine. Sprint further objects to this Request on the grounds that it is overly broad, unduly burdensome, oppressive and harassing, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks information related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Furthermore, the Request is not properly limited to Calling Service Providers doing business with Northern Valley in the state of South Dakota. Sprint also objects to this Request on the grounds that the term "Access Theft Case" is misleading insofar as it implies or presupposes (incorrectly) that Sprint has stolen access services.
>
> Subject to and without waiving its objections, Sprint states that it has previously produced publicly available pleadings and filings, and non-public internal and external Sprint documents relating to Calling Service Providers doing business with Northern Valley in the state of South Dakota. Sprint will identify a reasonable number of custodians and search for and produce additional documents, if any, that are not publicly available, postdate Sprint's earlier document production, and relate to Calling Service Providers doing business with Northern Valley in the state of South Dakota.

Northern Valley does not dispute that Sprint has produced at least some documents that are responsive to this document request. However, in an effort to understand to what extent

Sprint's production was complete, several months ago Northern Valley asked Sprint a simple question: "Are the documents Sprint has produced to date all of the documents responsive to this request?" *See* Ex. D, November 7, 2011, Letter. Sprint's belated response to this question was anything other than simple, however. Rather, Sprint states that in order to actually provide fully responsive documents, it would "have to re-run its document production" and that there is potentially an "enormous number of documents to be reviewed for production." Ex. I, February 2, 2012, Letter, at 2. Sprint also contends that "Sprint's internal statements regarding traffic pumping" have nothing "to do with this case, and do not bear at all on either Sprint's cross-claim or Northern Valley's Counterclaim." *Id.*

Sprint's recent letter raises serious concerns about whether Sprint is fulfilling its discovery obligations by undertaking a good faith examination of all available evidence. If Sprint asserts that its internal communications regarding the very conduct that it contends excuses it from paying Northern Valley's access charges are not relevant to this case, then it begs the fundamental question of what Sprint contends *is* relevant? Northern Valley has very serious concerns that Sprint may have preserved responsive documents for only a very narrow subsection of its employees that actually possess responsive documents, and intentionally chose not to conduct a comprehensive search as required by the South Dakota Rules of Civil Procedure. Accordingly, Northern Valley requests that Sprint be required to produce any non-privileged (and log any privileged) documents that reflect "Sprint's internal statements regarding traffic pumping." Northern Valley further requests that Sprint be required to provide an individual that can testify regarding the steps it has taken to comply with its document preservation obligations and to prevent the spoliation of relevant evidence.

I. Document Request No. 34

REQUEST NO. 34: Produce all Documents that refer, relate to or evidence revenue-sharing

agreements that Sprint has with third-party entities in South Dakota.

RESPONSE: Sprint objects to this Request on the ground that the term "revenue-sharing agreements" is vague, ambiguous, and undefined. Sprint further objects to this Request on the grounds that it is overly broad, unduly burdensome, oppressive and harassing, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In particular, but without limitation, this Request improperly seeks documents related to Northern Valley's unjust enrichment claim which is not properly before the Commission. Sprint also incorporates its objection to Doc. No. 16.

Sprint has alleged that among the reasons it is not lawfully required to pay Northern Valley's tariffed access charges for the calls at issue in this dispute is because Northern Valley shares a portion of the revenue it receives (when an IXC actually pays its access bills) with the conference calling company that helped to generate that traffic. *See generally* Sprint's Third Party Complaint, ¶ 12. As such, Document Request No. 34 seeks to examine to what extent Sprint itself engages in a similar practice of sharing revenue with customers as a result of the volume of services that they receive from Sprint. Sprint has refused to provide any documents in response to this request here in South Dakota, even though, as it is well aware, documents of this nature have been produced by other IXCs in similar cases. Moreover, Sprint has done nothing to substantiate its boilerplate objection that providing this information for the State of South Dakota would be unduly burdensome and repeats its common refrain that "Northern Valley's unjust enrichment claim [ ] is not properly before the Commission." These objections are devoid of merit and should be rejected.

As Northern Valley has stated previously, to the extent that Sprint is engaged in conduct similar to the conduct about which it complains in this case, Northern Valley should be entitled to discovery about Sprint's practices. Such evidence is likely to be admissible as a statement against interest and undermines Sprint's arguments that the conduct is unlawful. Accordingly, Sprint should be compelled to provide responsive evidence.

II. SPRINT REFUSES TO CORRECT ITS IMPROPER REDACTIONS

Even though this Commission has previously evaluated the parties' arguments about this

issue, and decided in favor of Northern Valley, Sprint has continued its impermissible practice of redacting relevant and responsive documents containing information that Sprint has privately determined is somehow irrelevant to Northern Valley. Neither the South Dakota Rules of Civil Procedure nor the Protective Order entered in this case permits Sprint to unilaterally redact information from the otherwise relevant documents.

Following the entry of the Protective Order by the Commission – which rejected Sprint's contention that it should be able to redact confidential, but non-privileged information from spreadsheets – Sprint eventually produced all of its previously improperly-redacted spreadsheets. However, despite having ample opportunity to address the issue, Sprint has continuously refused to advise Northern Valley whether it will also remove the improper redactions from its other discovery documents, such as responsive emails and PowerPoint presentations. After trying to address the redaction issue with Sprint since November 2011, Northern Valley must assume that Sprint's silence is tantamount to a refusal to provide proper discovery and, thus, moves for an order compelling Sprint to remove the redactions. *See, e.g.,* Email exchange between P. Schenkenberg and D. Carter (Nov. 20, 2011 – Nov. 23, 2011) (the exchange involves Sprint's initial incomplete production of unredacted materials and the need for Sprint to fully review its prior productions to ensure that it satisfied its discovery obligations), attached hereto as **Exhibit J**; Email from P. Schenkenberg to D. Carter and Letter from P. Schenkenberg to D. Carter (Jan. 5, 2012) (Sprint finally provided a full production of unredacted spreadsheets, but then attempted to negotiate to provide unredacted emails, without unredacting the email attachments), attached hereto as **Exhibit K**; Letter from D. Carter to P. Schenkenberg (Jan. 10, 2012) (the letter asserts Northern Valley's position that Sprint must unredact both the email and the attachments), attached hereto as **Exhibit L**. In addition to these letters, Northern Valley's counsel has sent

Sprint several follow up emails and requests in an effort to understand whether it intends to remove the redactions, but for several weeks Sprint was unable or unwilling to answer that question, thus causing needless delay. Now, even though Northern Valley has already rejected Sprint's effort to avoid a full and complete production, *see* Ex. K, Sprint has again repeated its offer to remove only some of the improper redactions, while continuing its efforts to retain others. *See* Letter from P. Schenkenberg to D. Carter (Feb. 13, 2012), attached hereto as **Exhibit M**.[5] Northern Valley does not agree with Sprint's proposal, which can only be understood as an *ad hoc* effort to avoid having unhelpful documents come to light because Sprint's position does not rest on any sound legal principles. *See* Letter from D. Carter to P. Schenkenberg (Feb. 13, 2012), attached hereto as **Exhibit N**.[6] Rather than allowing Sprint to continue to play its game of hide the ball, Northern Valley must respectfully insist that it receive the full scope of discovery to which it is entitled by the South Dakota Rules of Civil Procedure.

As the United States District Court for the Western District of North Carolina has stated, there is "no better way to ensure that a motion to compel will be filed than to unilaterally black out large portions of documents as the human mind is naturally curious." *David v. Alphin*, 3:07-CV-11, 2010 WL 1404722, at *7 (W.D.N.C. Mar. 30, 2010). In *David*, the defendants, just like

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[5] In order to avoid the need to file a separate motion regarding this issue, and the delay that would occur as a result, Northern Valley also tentatively moves to have Sprint's February 13, 2012, Letter declared non-confidential as set forth in paragraph 14 of the Protective Order. To the extent that a meet and confer does not resolve this issue in advance, Northern Valley will ask the Commission to confirm that Sprint's correspondence does not contain its confidential, proprietary or trade secret information and cannot be designated for protection purely because of Sprint's desire for to hide its discovery tactics from other tribunals litigating similar cases.

[6] For the benefit of the Commission, Northern Valley has attached the documents specifically referenced by Sprint in its February 13, 2012, letter as examples of the redactions that Sprint inserted into these documents. *See* Exhibits M-1 to M-9. This is not intended to be an exhaustive demonstration of the improper redactions, but rather a sampling to provide more clarity about this issue.

Sprint here, took it upon themselves to redact portions of documents that they deemed "non-responsive or irrelevant." *Id.* The court, however, compelled production of all such redacted documents in unredacted form, ruling that "where a Protective Order is in place, [ ] generally the Federal Rules provide no procedural device for unilateral redaction by a party and it is a procedure that is not favored." *Id.* at 7-8. As Sprint knows, there is a Protective Order entered in this case that provides ample protection for its confidential information.

Similarly, in *Evon v. Law Offices of Sidney Mickell*, S-09-CV-0760-JAM-GGH, 2010 WL 455476 (E.D. Cal. Feb. 3, 2010), the court ordered the production of unredacted versions of the documents the defendant sought to obfuscate, stating

> Redaction is, after all, an alteration of potential evidence…. [A] party should not take it upon him, her or itself to decide unilaterally what context is necessary for the non-redacted part disclosed, and what might be useless to the case. It should not come as a shock to those involved in litigation, that parties may see the outcome differently. Moreover, protective orders are available to shield irrelevant, but important-to-keep-confidential information, and ***unless the protective order permits partial production, a document should be produced in its entirety***.

Id. at 2 n.1 (emphasis added); *see also Orion Power Midwest, L.P. v. Am. Coal Sales Co.*, 2:05-CV-555, 2008 WL 4462301, at *2 (W.D. Pa. Sept. 30, 2008) ("Rule 34 talks about production of 'documents,' as opposed to the relevant information contained in those documents…. There is no express or implied support for the insertion of another step in the process (with its attendant expense and delay) in which a party would scrub responsive documents of non-responsive information."); *In re Atl. Fin. Fed. Sec. Litig.*, CIV. A. 89-0645, 1991 WL 153075, at *4 (E.D. Pa. Aug. 6, 1991) (ordering the production of unredacted documents because "defendants are already well-protected from improper disclosure by the confidentiality order"); *Dow Chemical Canada Inc. v. HRD Corp.*, No. 05-023-JJF, 2009 WL 4039904 (D. Del. Nov. 20, 2009) (granting plaintiff's motion to compel and requiring the production of unredacted documents

where the defendant had unilaterally redacted "irrelevant" information); *Beverage Distributors, Inc. v. Miller Brewing Co.*, 2:08-CV-827, 2010 WL 1727640, at *4 (S.D. Ohio Apr. 28, 2010) (compelling production of unredacted documents because of the "fact that the producing party is not harmed by producing irrelevant information or by producing sensitive information which is subject to a protective order restricting its dissemination and use….").

As the authorities above show, absent rare circumstances not present here, courts have been reflexively opposed to the idea that producing parties can be the sole arbiter of what is irrelevant in document (which includes an email together with all of its attachments) that contains relevant information. The law is clear that, absent a privilege, Sprint must produce all documents in an unaltered state even if a given document contains both relevant and irrelevant information. Sprint is not free to decide for itself what information in a given document it wants to produce and what it wants to claim is irrelevant. The Commission should, therefore, order Sprint to reproduce all documents responsive to Northern Valley's discovery requests that it has improperly redacted, in their unredacted form, and to cease redacting – except for privilege – on a going-forward basis.

III. THE COMMISSION SHOULD ASSESS FEES AND COSTS AGAINST SPRINT

Pursuant to SDCL 15-6-37(a)(4)(A), the Commission should require Sprint to pay Northern Valley the reasonable expenses incurred in obtaining discovery. Sprint's continued refusal to provide discovery and to remove its redactions is not substantially justified. Moreover, Northern Valley has made more than a good faith effort to obtain this discovery without involving the Commission, but was unable to do so. Accordingly, South Dakota law provides that an award of expenses is warranted.

CONCLUSION

For the foregoing reasons, Northern Valley requests the Commission order Sprint to fulfill its discovery obligations under South Dakota law by compelling it to produce information and materials that are relevant to this proceeding.

Dated: February 15, 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 15th day of February 2012 upon the following:

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