

**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

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
RESPONSE IN OPPOSITION
TO MOTION TO RESCHEDULE
AUGUST 28, 2012, HEARING DATE**

Northern Valley Communications, L.L.C. ("Northern Valley"), by counsel, hereby responds in opposition to Sprint Communications Company, LP's ("Sprint") Motion to Reschedule the August 28, 2012, Hearing Date. Because Sprint has not met its burden of demonstrating that good cause exists to delay resolution of Northern Valley's Motion for Summary Judgment, Sprint's request for needless delay should be denied.

BACKGROUND

On June 26, 2012, in agreeing that discovery from Sprint would not be completed and thus a hearing during the last week of August would be impractical, Northern Valley specifically requested that the afternoon of August 28, 2012, be set aside for further motions practice. In response, Sprint agreed to set aside the afternoon of August 28, 2012, for motions argument. On July 11, 2012, Northern Valley filed its Motion for Partial Summary Judgment, allowing ample opportunity for the parties to complete briefing in advance of the August 28, 2012, hearing date.

Thirteen (13) days later, on July 24, 2012, Northern Valley asked Sprint to confirm that it would be filing its response to the motion on July 31, 2012, and that it was agreeable to Northern

Valley filing its reply by August 21, 2012. In response, Sprint indicated that it would like to convene a call to talk about Northern Valley's request for confirmation and "scheduling generally." A call with counsel was convened the very next day, July 25, 2012. During the call, Sprint's counsel expressed for the first time its desire to delay the resolution of Northern Valley's motion until October. Sprint's stated reasons for the delay was a desire to file what it described as a cross-motion for summary judgment and to consult with its expert witness(es). Thus, despite knowing it was Northern Valley's intent to have its motion heard on August 28, 2012, Sprint set silently for two weeks before ever raising any concerns about its ability to proceed with the August 28th hearing.

After the call, Northern Valley had an opportunity to conduct research and evaluate whether Sprint's stated reasons constituted just cause for requesting an approximately 45-day delay in resolving Northern Valley's Motion for Partial Summary Judgment. Northern Valley's research, as described more fully below, led it to conclude that Sprint's stated reasons were not sufficient under the rules and relevant case law to justify a delay in evaluating Northern Valley's motion. For this reason, Northern Valley declined to agree to this delay, which it views as needless and a tactic to avoid having the Commission finally reach the merits of Sprint's refusal to pay Northern Valley for the intrastate access charges due for both undisputed residential and business customers and the disputed conference calling traffic. Northern Valley respectfully requests that the Commission deny Sprint's motion and proceed with the scheduled hearing.

STANDARD

Though Sprint's Motion fails to articulate any standard by which it should be judged, Northern Valley respectfully submits that the appropriate standard is set forth in SDCL 15-6-56(f). SDCL 15-6-56(f) provides that when a motion for partial summary judgment has been presented, the Commission "may refuse the application for judgment or *may order a continuance*" if "it appear[s] from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition." *Id.* (emphasis added). The rule further provides that judgment may be denied or a continuance granted "to permit affidavits to be obtained or depositions to be taken or discovery to be had" or that the Commission "may make such other order as is just." *Id.*

DISCUSSION

Sprint's motion to reschedule the August 28, 2012, hearing is tantamount to a motion for a continuance and thus should be judged by SDCL 15-6-56(f). Under this standard, Sprint's motion fails for both procedural and substantive reasons.

I. SPRINT'S MOTION IS PROCEDURALLY DEFECTIVE

SDCL 15-6-56(f) requires that a motion for continuance be granted only if "from the affidavits of a party opposing the motion" it appears that the party opposing the motion for summary judgment cannot "present by affidavit facts essential to justify his opposition." SDCL 15-6-56(f). Sprint has failed to present *any* affidavits to support its motion, making it procedurally defective. *See, e.g., Hamilton v. Bangs, McCullen, Butler, Foye & Simmons, LLP*, Civ. No. 10-5009, 2011 WL 902489, *7 (D.S.D. March 15, 2011) ("Under Rule 56(f), a party opposing summary judgment may 'seek a continuance and postpone a summary judgment decision' but 'the party opposing summary judgment is required to file an affidavit with the

district court showing what specific facts further discovery might uncover.") (citations omitted) *Cassidy, Inc. v. Hantz*, 717 F.2d 1233, 1235 (8th Cir. 1983) (a party that fails to present an affidavit and to seek a continuance "cannot complain that the district court did not provide it an adequate opportunity to conduct discovery"); *Nguyen v. CNA Corp.*, 44 F.3d 234 (4th Cir. 1995) (affirming district court and concluding that there was no abuse of discretion when district court denied plaintiff's motion for continuance because plaintiff failed to file an affidavit specifying which aspects of discovery required more time to complete); Wright, Miller, et al., 10B Fed. Prac. & Proc. Civ. § 2740 (3d ed.) ("The rule [allowing for more discovery before resolution of a motion for summary judgment] will not be liberally applied to aid parties who have been lazy or dilatory, however. The most obvious indication of lack of diligence is a failure on the part of the nonmovant to present affidavits under either subdivision (e) or (f).") (citations omitted).

Sprint's motion is also procedurally defective because it does not address the requirements for a continuance under Rule 56(f). "[T]o justify a continuance, the Rule 56(f) motion must demonstrate 1) why the movant needs additional discovery and 2) how the additional discovery will likely create a genuine issue of material fact." *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 534-35 (5th Cir. 1999) (citing *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993)). If ample time has been permitted for discovery already, the motion should not be lightly granted. *Anderson v. Keller*, 739 NW2d 35, 41 (SD 2007) (affirming circuit court's denial of Rule 56(f) motion where "ample time" had been provided for discovery). Here, Sprint's motion does not provide any details about what additional discovery is needed or how that discovery would create a genuine issue of material fact. Thus, Sprint's motion does not meet the standard and is defective. The motion should be denied on these grounds alone.

II. SPRINT'S PROFFERED REASONS DO NOT SUPPORT THE REQUESTED CONTINUANCE

In addition to being procedurally defective, as discussed more fully below, Sprint's motion fails to establish that good cause exists, under Rule 56(f), to justify a delay in evaluating Northern Valley's pending motion for summary judgment.

A. SPRINT'S DESIRE TO FILE A CROSS-MOTION IS NOT A BASIS TO DELAY

Sprint's first reason for delay is that it apparently desires to file a cross-motion for summary judgment. Sprint Motion at 2. A desire to file a competing motion is not an articulated basis for continuing the consideration of a motion for summary judgment and Sprint offers no case law or rule in support of its position. Nor does Northern Valley agree with Sprint's assertion that it would be "prudent" for the Commission to delay resolving Northern Valley's motion for forty-days or more in order to enable Sprint to file its motion. Sprint has had full and complete discovery from Northern Valley for months now and offers no explanation as to why, if it so desired, it could not have prepared and filed such a motion already. Rather, it appears that Sprint's new-found desire to file a cross-motion is little more than an effort to delay resolution of Northern Valley's motion.

Conversely, if the Commission requires Sprint to respond to the pending motion and holds the hearing as scheduled on August 28, 2012, the issues that Sprint would be left to brief (and Northern Valley to respond to) could potentially be narrowed. This narrowing of issues could save both parties and the Commission from unnecessarily wasting time and expense in addressing Sprint's motion and could also help to narrow the scope of issues to be covered at the depositions of Sprint's witnesses and in the preparation of expert reports, should they be necessary.

Moreover, there can be no concern that Sprint would be prejudiced by requiring it to focus on responding to Northern Valley's motion for summary judgment first, before it goes about pursuing its own motion. Sprint's opposition to Northern Valley's motion will enable it to fully apprise the Commission of its position on the legal issues and whether it believes that there are material facts in dispute that preclude either party from obtaining summary judgment before a full hearing on the merits.¹ Thus, moving forward with the current schedule will not deny the Commission the benefit of Sprint's position, but rather will allow it to take the issues up in an orderly fashion.

For the foregoing reasons, Northern Valley respectfully submits that the Commission should deny Sprint's motion and conclude that Sprint's desire to file a cross motion does not warrant delaying the resolution of Northern Valley's motion for a month and a half.

B. SPRINT'S UNSUPPORTED ASSERTION THAT IT IS UNABLE TO RESPOND TO THE MOTION BY JULY 31 DOES NOT WARRANT A CONTINUANCE

Sprint next contends that it is not able to respond to Northern Valley's Motion by July 31, as proposed by Northern Valley. Its asserted basis for this inability is that the motion contains "an enormous amount of information" and that Sprint's expert "is in the process of preparing a report" that Sprint would like to use. Sprint Mot. at 2. These assertions, even if they were properly supported by affidavit, would not warrant the continuance sought by Sprint.

1. Sprint's Motion Does Not Establish That Additional Time Is Necessary to Respond to Northern Valley's Motion

Sprint's motion inextricably links its desire for delay to its desire to file a

¹ Stated differently, either Sprint believes that there are disputed facts that preclude summary judgment *for either party*, in which case there is no reason to file a cross-motion, or it agrees that the facts are undisputed and that it is a purely legal matter for the Commission to decide. In either situation, the Commission does not need Sprint's cross-motion in order to fully evaluate whether Northern Valley is entitled to judgment as a matter of law on the issues set forth in its motion for partial summary judgment.

cross-motion. In so doing, Sprint fails to articulate when it could reasonably respond to Northern Valley's motion for partial summary judgment if it focused on preparing that response, rather than diverting its energies to its so-called cross-motion. Northern Valley respectfully submits that, had Sprint raised this issue on its own initiative, rather than two weeks after receiving Northern Valley's motion, and only then after Northern Valley initiated conversation, that Sprint's concerns about timing would deserve more credence. As presented, however, Northern Valley cannot help but view the request with skepticism. Based on its delay in requesting an extension, and by then tying its requested delay to a desire to file a cross-motion, Sprint has left Northern Valley (and the Commission) without the ability to evaluate the extent to which a scheduling modification is necessary to allow Sprint to properly respond to the pending motion or merely sought for delay and in order to advance Sprint's tactical cross-motion. Under these circumstances, Sprint has failed to meet its burden of demonstrating good cause, and Sprint should be required to file its response by July 31, 2012.

Nevertheless, in the spirit of reasonable compromise, Northern Valley would be willing to cut its time to file its reply brief by nearly half, in order to allow Sprint an additional 10 days to respond to the motion. This compromise will allow Sprint an extension without needlessly jeopardizing the previously-agreed upon hearing date. Specifically, Northern Valley would propose the following schedule:

August 10, 2012: Sprint's Response to Motion for Partial Summary Judgment

August 23, 2012: Northern Valley's Reply to Motion for Partial Summary Judgment

August 28, 2012: Hearing on Motion for Partial Summary Judgment

2. Sprint's Request for Time to Work With Its Expert is Not a Proper Basis for a Continuance

Finally, Northern Valley addresses Sprint's argument that it needs additional time in order to work with its expert witness. *See* Sprint Motion at 2. First, as demonstrated by the emails attached to Sprint's motion, it was counsel's understanding from the telephone call with Sprint that Sprint desired additional time to consult with its expert because the expert was working on material relevant *to the cross-motion*, not on opposing Northern Valley's motion. Since that time, however, Sprint has stated that it wants to use the expert witness both for responding to Northern Valley's motion as well as for its own cross-motion. Sprint offers no case to support its position that this is an appropriate request, rather the case law discussed below establishes that Sprint's request should be denied.

Under South Dakota law, Sprint is not allowed to rely upon an expert's report in refuting Northern Valley's motion for partial summary judgment in this case. Northern Valley's motion for summary judgment involves the interpretation of a contract (*i.e.*, the tariff) and the application of state laws. Neither of these issues are amenable to expert opinion, as South Dakota law holds that an expert cannot offer legal opinions or opine on a question of law in a summary judgment context. *See Heib v. Lehrkamp*, 704 NW2d 875, 884 (SD 2005) (expert opinion on probable cause had "no place" in the court's summary judgment analysis because it was a question of law); *see also Southern Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 ("expert testimony on legal matters is not admissible"). Further, South Dakota case law establishes that the proper interpretation of a contract presents a legal question. *See, e.g., Von Sternberg v. Caffee*, 692 NW2d 549, 552, n1 (SD 2005) ("Interpretation of a contract presents a legal question.") (citing *Cotton v. Manning*, 600 NW2d 585, 588 (SD 1999)); *Farm Credit Services of America v. Dougan*, 704 NW2d 24 (SD 2005) ("Contract claims raise

questions of interpretation, and therefore, absent any factual disputes, they remain legal questions.") (citing *State Farm Mut. Auto. Ins. Co. v. Vostad*, 520 NW2d 273, 275 (SD 1994)). Based on these legal principles, Sprint has failed to demonstrate why a continuance should be granted to allow it additional time to consult with its own expert witness when the expert's opinion would be inadmissible. For these reasons, the motion for continuance should be denied.

CONCLUSION

For the foregoing reasons, Northern Valley respectfully requests that the Commission proceed with resolving Northern Valley's motion for summary judgment on August 28, 2012, the date which has already been set aside for the hearing on this matter. Northern Valley further requests that the Commission adopt the following procedural schedule:

August 10, 2012: Sprint's Response to Motion for Partial Summary Judgment

August 23, 2012: Northern Valley's Reply to Motion for Partial Summary Judgment

August 28, 2012: Hearing on Motion for Partial Summary Judgment

Dated: July 30, 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 30th day of July 2012 upon the following:

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