

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT OF SOUTH DAKOTA NETWORK, LLC, AGAINST SPRINT COMMUNICATIONS COMPANY LP	DOCKET TC09-098
IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY LP AGAINST SPLITROCK PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, L.L.C., SANCOM, INC., AND CAPITAL TELEPHONE COMPANY	<b>NORTHERN VALLEY COMMUNICATIONS, L.L.C. AND SANCOM, INC.'S REPLY SUPPORTING MOTION TO COMPEL</b>

Northern Valley Communications, LLC ("Northern Valley") and Sancom, Inc. ("Sancom"), by and through counsel, and pursuant to S.D. Admin. R. 20:10:01:01.02, 20:10:01:22.01 and S.D. Codified Laws § 15-6-37(a), hereby submit this Reply supporting Northern Valley's motion to compel against Sprint Communications Company, LP ("Sprint") to resolve a threshold issue of relevance regarding whether Northern Valley may obtain discovery from Sprint on certain issues that the parties jointly agreed should be referred to the South Dakota Public Utilities Commission ("PUC") by a federal court.<sup>1</sup> After agreeing to refer certain issues to the PUC for resolution related to Northern Valley's tariff and Sprint's obligation to pay access charges pursuant to that tariff or outside of that tariff, Sprint now refuses to engage in discovery on the referred issues, and asks the PUC to bless its refusal to do so. Regardless of whether the discovery relates to an unjust enrichment claim, a federal judge has referred related issues to the PUC for guidance and Northern Valley should be able to obtain discovery from

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<sup>1</sup> Sancom has joined Northern Valley's motion to compel. The discussion in the reply will focus on Northern Valley, however, the arguments apply equally to Sancom.

Sprint on those issues. The PUC should not condone Sprint's discovery deficiencies and, instead, find that Northern Valley and Sancom are entitled to discovery from Sprint related to the three issues referred to the PUC by the federal court.

As described in Northern Valley's memorandum supporting its motion to compel, three *issues* were referred by the federal court to the PUC for guidance. Northern Valley Mem. at 7-10 (filed May 26, 2011). Northern Valley does not argue any *claims* were referred to the PUC, and does not ask the PUC to award it any relief on *claims*. Northern Valley simply asks that the PUC provide guidance to the federal court on three issues related to intrastate traffic. Despite requesting that a federal court refer these very issues to the PUC, Sprint now tries to resist discovery on those issues, thereby requiring the PUC to intervene and resolve this initial discovery dispute. The PUC should reject Sprint's arguments and find that the three issues described in Northern Valley's motion to compel are before the PUC and that Northern Valley is entitled to discovery from Sprint on those issues.

## **ARGUMENT**

### **I. THREE ISSUES HAVE BEEN REFERRED TO THE PUC FOR GUIDANCE AT THE REQUEST OF BOTH PARTIES**

Sprint's argument against Northern Valley's motion to compel can be reduced to Sprint's erroneous claim that "[t]he Court specifically did not refer issues to the [PUC], it merely stayed the federal case to allow this docket to take its course." Sprint Opp. at 9 (filed June 21, 2011) (emphasis in original). Starting from this erroneous premise, Sprint then argues it should not have to provide any discovery to Northern Valley if it relates in any fashion to an unjust enrichment claim, which some of the referred issues do. Sprint Opp. at 8. Sprint's premise is wrong. The Court is expecting guidance from the PUC on these issues, and Sprint has acknowledged the PUC's expertise in providing guidance on these issues. Even Sprint's own

evidence shows that it and Northern Valley jointly requested a referral of the issues to this Commission. Sprint now tries to argue that did not occur.

As outlined in Northern Valley's memorandum supporting its motion to compel, the parties have been involved in litigation in federal court for some time. Northern Valley Mem. at 3-4. After a Federal Communications Commission ("FCC") decision made it apparent to Northern Valley that FCC guidance would be necessary to resolve the federal case, Northern Valley sought and obtained, over Sprint's objection, a referral of three issues to the FCC by the Federal District Court in South Dakota. Northern Valley Mem. at 7-9. The three issues referred by the Federal Court to the FCC were:

- (1) Whether, under the facts of the present dispute between Northern Valley and Sprint, Northern Valley is entitled to collect interstate switched access charges it has billed to Sprint pursuant to Northern Valley's interstate access tariff for calls to numbers assigned to free calling providers.
- (2) In the event that the services provided by Northern Valley to Sprint, by which calls placed by Sprint's customers are delivered to free calling providers served by Northern Valley, do not qualify as switched access service under Northern Valley's applicable interstate access tariff, determination of the proper classification of these services, whether such services are subject to federal tariffing requirements, and whether Northern Valley is entitled to obtain compensation for these services.
- (3) In the event that the services provided by Northern Valley to Sprint do not qualify as switched access service under Northern Valley's applicable interstate access tariff, but Northern Valley is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

*See Northern Valley Commc'ns L.L.C. v. Sprint Commc'ns Company*, ECF No. 110, at p. 30, Docket No. 1:08-cv-01003 (D.S.D. Mar. 15, 2010).

After those issues were referred to the FCC, Northern Valley and Sprint filed a "Joint Unopposed Motion to Refer or Stay Issues with Respect to Intrastate Traffic" in the federal case. *See Sprint Opp.*, Exhibit B ("Joint Motion"). The Joint Motion was designed to resolve

jurisdictional issues raised by Sprint in this proceeding. Northern Valley Mem. at 8-10. Sprint does not dispute any of this in its opposition. Sprint also cannot hide the fact that specific excerpts from the Joint Motion demonstrate conclusively that Sprint agreed the PUC should resolve the same three issues with respect to intrastate traffic above that had been referred to the FCC for interstate traffic. Sprint's claims to the contrary now demonstrate that Sprint is not seeking a resolution of this proceeding, but instead trying to hobble Northern Valley's ability to obtain discovery on relevant issues to this proceeding. In reference to the three issues that were referred to the FCC, the parties specifically stated in their Joint Motion:

- "Sprint, too, agrees that if, as this court found, FCC expertise is important in deciding **specified questions** for interstate traffic, **SD PUC expertise is equally useful in deciding these questions for intrastate traffic.**" Ex. B at 4 (emphasis added).
- "the questions of the meaning of the tariff terms, **whether Northern Valley and Sancom would be entitled to any compensation outside of their tariffs, and what a reasonable rate would be if they are, exist for the intrastate traffic as well as the interstate traffic, but must be decided under state rather than federal law.**" *Id.* (emphasis added).
- "The expertise of the SD PUC is as relevant for the intrastate traffic as the expertise of the FCC is for the interstate traffic." *Id.*
- "The argument for ensuring that intrastate issues are decided by the SD PUC has particular weight here, because there is already a proceeding at the SD PUC." *Id.* (citing the above captioned proceeding).
- "These claims between Sprint and the three LECs [Splitrock, Northern Valley, and Sancom] raise the same issues for intrastate traffic under state law that this Court referred to the FCC for interstate traffic under federal law." *Id.* at 5.
- "A decision by this Court can ensure what all parties agree is best under the present circumstances: that the intrastate issues bearing on this case can and should be resolved by the PUC in the existing PUC action." *Id.* at 6 (emphasis added).
- "this Court can ensure that the key intrastate issues are decided by the SD PUC by referring the issues to the SD PUC, just as it referred the interstate issues to the FCC." *Id.*

- "the parties jointly request that this Court should either (1) refer to the SD PUC questions related to intrastate traffic that parallel the questions it referred to the FCC for interstate traffic and make resumption of the proceedings in this Court contingent on resolution of those questions, (2) or, alternatively, **Sprint believes that the Court may simply confirm that the lifting of the stay in this case is contingent on resolution of those questions in the pending SD PUC proceeding.**" *Id.* at 7 (emphasis added).<sup>2</sup>

Thus, Sprint's argument that court "merely stayed the federal case to allow this docket to take its course" is belied by its own request in the Joint Motion. Sprint Opp. at 9. Sprint requested and knows it requested that the federal court seek guidance on the same issues or "questions" from the PUC that were referred to the FCC. Whether the action of the federal court is characterized as a referral of the issues to the PUC or a stay of the case while awaiting resolution of those issues by the PUC, in either case, the federal court is expecting the PUC to address those issues and provide guidance on them. For Sprint to suggest otherwise, in light of what it agreed to in the Joint Motion, is beyond the pale.

Moreover, Sprint's claims about what was intended to be referred to the PUC are belied by email correspondence between Northern Valley and Sancom's counsel and Sprint's counsel during the time after Sprint filed its first motion to dismiss in early 2010. *See* Exhibit A, email correspondence between Marc Goldman and Ross Buntrock, Mar. 10, 2010 to Mar. 22, 2010. As noted there, Sprint's counsel agreed "that the intrastate claims should be addressed by the PUC." Ex. A, Mar. 17, 2010, email. Sprint even drafted the first version of the Joint Motion, which included identical language to the above such as: "Sprint, too, agrees that if, as this court found, FCC expertise is important in deciding specified questions for interstate traffic, SD PUC

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<sup>2</sup> Sancom also filed a similar motion for primary jurisdiction referral over Sprint's objections. *See Sancom, Inc. v. Sprint Commc'ns Co., LP*, ECF No. 97, Docket No. 4:07-cv-4107-KES (D.S.D. Dec. 14, 2009); *id.*, ECF No. 108 (Jan. 20, 2010). The federal court granted Sancom's motion and referred the same three issues above to the FCC, and for the same reasons outlined above. *Id.*, ECF No. 112 (Mar. 15, 2010). The federal court also entered a similar order in response to Sancom and Sprint's joint motion. *Id.*, ECF No. 114, (May 26, 2010).

expertise is equally useful in deciding these questions for intrastate traffic." Ex. A, Draft Joint Mot. at 3. As Sprint drafted: "**A decision by this Court can ensure what all parties agree is best under the present circumstances: that the *intrastate issues* bearing on this case can and should be resolved by the PUC in the existing PUC action.**" *Id.* at 4 (emphasis added). There is no doubt that Sprint agreed that the court should seek resolution of the same three issues by the PUC that were referred to the FCC. In response to the parties' Joint Motion, the Court did just that, and Sprint cannot argue otherwise in light of the email correspondence and Joint Motion.

And, because those issues are in this proceeding, Northern Valley is entitled to discovery from Sprint on those issues. Sprint cannot resist discovery by arguing those issues are not present in this proceeding. Relevancy is broadly defined under the applicable discovery rules and discovery is not limited to "claims" – "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to *the subject matter* involved in the pending action." S.D. Codified Laws 15-6-26(b)(1) (emphasis added). There is no doubt the subject matter of the proceeding involves the three referred issues.

## **II. NORTHERN VALLEY HAS NOT REQUESTED THE PUC RESOLVE EQUITABLE CLAIMS OR AWARD EQUITABLE RELIEF**

Sprint also argues that Northern Valley is requesting that the PUC "award equitable relief or litigate equitable claims" and that Northern Valley is seeking discovery on "equitable claims, equitable issues, or equitable damage awards." Sprint Opp. at 12, 14. Sprint argues that the PUC has no jurisdiction to decide equitable claims, and therefore, Northern Valley should obtain no discovery on those issues. Sprint Opp. at 10-11. As demonstrated repeatedly, Northern Valley is not asking the PUC to resolve any claims or award Northern Valley any monetary relief. Northern Valley has agreed to withdraw any demand for monetary damages, such that a

resolution of the claims will not require the PUC act in anyway contrary to its jurisdiction.

Northern Valley simply seeks the PUC's guidance on the same three issues for intrastate traffic that were referred to the FCC for interstate traffic. These issues are within the special expertise of the PUC. Northern Valley is entitled to discovery from Sprint to resolve those issues regardless of whether those issues may overlap with an unjust enrichment claim.

Certainly, the authority that Sprint relies on recognizes the difference between requesting the PUC to resolve claims better left to a court and requesting the PUC resolve telecommunications issues within the special expertise of the PUC. *See Matter of the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Communications of the Midwest, Inc. Regarding Failure to Provide Service*, Final Decision and Order Granting Motion to Dismiss, Docket CT02-021 (Rel. Sep. 26, 2003) ("The issues presented by the Complaint are predominantly contract formation or equitable reliance issues *as to which the special expertise of the Commission concerning telecommunications services is largely inapplicable*, and where such traditional legal and equitable issues significantly preponderate, the matter is more appropriately within the province of the legal expertise and general jurisdiction of the courts.") (emphasis added).<sup>3</sup> Here, of course, the federal court recognized that the three issues identified above are within the special expertise of the PUC. At one time, Sprint acknowledged that the PUC has the expertise to resolve the three issues as well as shown above in the quotations from the Joint Motion, until it apparently became more expedient for Sprint to argue otherwise.

Northern Valley does not request that the PUC act outside its jurisdiction, but simply that it provide guidance on the three issues for intrastate traffic so that the federal court can resolve

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<sup>3</sup> Available at <http://puc.sd.gov/commission/orders/complaint/2003/CT02-021fin.pdf> (last visited June 27, 2011)

the claims that remain there based on the guidance provided by the PUC. The PUC will not be awarding any damages to Northern Valley, nor resolving any claims, in providing guidance on the referred issues. Instead, the PUC will simply be applying its telecommunications expertise to three specific issues and the federal court will benefit from the PUC's guidance in resolving the claims based on the PUC's guidance.

### **III. SPRINT'S REVENUES AND COSTS ARE RELEVANT TO DETERMINING WHAT RATE SHOULD APPLY TO NORTHERN VALLEY'S TRAFFIC IF NORTHERN VALLEY'S TARIFF DOES NOT APPLY**

Sprint argues that the PUC cannot resolve the second and third issues because it would require the PUC to "set a retroactive regulated rate" and violate the filed rate doctrine. Sprint Opp. at 14. There does not appear to be much, if any, South Dakota law on the interplay of the filed rate doctrine and the ability of a carrier to obtain compensation outside of the tariff if the tariff does not apply to the services provided by the carrier. In the various federal cases that have addressed similar issues, there have been several decisions finding that unjust enrichment and *quantum meruit* claims can be maintained as an alternative theory of recovery and the filed rate doctrine was not a bar to relief. *See, e.g., Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, 659 F. Supp. 2d 1062, 1070 (D.S.D. Sept. 25, 2009) (Kornmann, J.) ("Where, as here, it is alleged that the charges as set out in Northern Valley's tariff do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.") (*citing Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)); *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, No. 08-cv-1130, 2009 WL 2155930, at \*3 (D. Minn. July 15, 2009) ("In the absence of clarity regarding how those services are classified and regulated, it would be premature to address application of the filed rate



doctrine to Tekstar's claim of quantum meruit.") (*citing Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654-57 (3d Cir. 2003)).<sup>4</sup>

The FCC has also indicated that a carrier may be entitled to relief for services provided, even if the services were outside a carrier's tariff. *Qwest Commc'ns Corp. v. Farmers and Merchs. Mut. Tel. Co.*, 24 FCC Rcd. 14801, at n.96 (Rel. Nov. 25, 2009) ("*Farmers and Merchants II*"). Like the FCC, the PUC has the expertise to address whether a carrier can obtain compensation for services provided outside of the carrier's tariff and, if so, what a reasonable rate would be.

Because the PUC should address the three issues referred by the federal court, including whether Northern Valley is entitled to compensation for services outside of its tariff, Northern Valley should be entitled to discovery from Sprint related to those issues. Sprint's final arguments against Northern Valley's motion to compel address whether the specific requests that Northern Valley has made of Sprint would be relevant to determining a reasonable rate for the services Northern Valley has provided Sprint if the services fall outside of Northern Valley's tariff, *i.e.* whether the discovery is relevant to the third issue. Sprint Opp. at 15-17. Sprint argues a rate analysis would be focused on "the market, and the costs of the providing carrier" and not "one customer's gross revenues or profits." *Id.* at 15. Sprint, of course, ignored the fact that "affordability of the price for the service in the market it is offered" is one of the factors that the PUC is required to consider. *Id.* at 15 (citing S.D. Codified Laws § 49-31-1.4). Affordability is determined by the customer's ability to pay for the service, which can be determined by the

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<sup>4</sup> Even cases that determined an unjust enrichment claim would be dismissed because of the filed rate doctrine were later referred to the FCC to determine whether the carrier could obtain compensation for services outside of the tariff. *See Sancom, Inc. v. Qwest Commc'ns Corp.*, 643 F. Supp. 2d 1117, 1126 (D.S.D. 2009) (dismissing an unjust enrichment claim), referred to the FCC by *Sancom, Inc. v. Qwest Commc'ns Corp.*, No. Civ. 07-4147-KES, 2010 WL 960005 (D.S.D. Mar. 12, 2010).

revenues obtain by the customer. If the rate is not "affordable," the customer will not have any revenue, but if it is affordable, the customer will have revenue. The PUC has engaged in this very analysis in *In re U S west Communications, Inc.*, TC96-107, 1997 WL 912636 (S.D.P.U.C. Nov. 24, 1997), where the PUC examined whether a proposed rate would "result in a drop of net income" to companies paying the charges in determining the "affordability of the proposed switched access charges." *Id.* at 4. Thus, Sprint's revenues and profits are relevant under South Dakota law in determining a reasonable rate for Northern Valley's services.

Northern Valley also provided several other reasons why Sprint's revenues are relevant to a determination of a reasonable rate for Northern Valley's services to Sprint. Northern Valley Mem. at 18-20. In the absence of significant South Dakota law on the subject, Northern Valley reasonably pointed to federal law, which has determined that revenues of a customer are relevant to a determination of whether a rate is reasonable because the customer was still able to make a profit itself. See *In re Petitions of Sprint PCS & AT&T Corp.*, For Declaratory Ruling Regarding CMRS Access Charges, 17 FCC Rcd. 13192, 13198 (2002); *Manhattan Telecomms. Corp. v. Global NAPS, Inc.*, No. 08-civ-3829 (JSR), 2010 WL 1326095, at \*3 (S.D.N.Y. Mar. 31, 2010).

Sprint also argues that the FCC has revised its *Farmers and Merchants II* decision, but Sprint's argument only highlights the need for PUC guidance on the three issues. The FCC recently decided "a carrier may be entitled to some compensation for providing a non-tariffed service, *depending on the totality of the circumstances.*" *In re All Am. Tel. Co, v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd. 723, 731 ¶ 19 (2011) (emphasis added). The "totality of circumstances" certainly does not exclude relevant profits and revenues of the customer paying for the carrier's service, and in fact is often used to determine a rate as described above. In short, Sprint has put forth no reason why Northern Valley's discovery requests are

unreasonable, nor why Northern Valley cannot obtain discovery on the three issues referred to the PUC by the federal court.

**V. NORTHERN VALLEY IS ENTITLED TO ITS FEES FOR THE PREPARATION AND PROSECUTION OF THIS MOTION**

Because Sprint has no credible opposition to Northern Valley's discovery, Northern Valley should be awarded its fees to compensate it for the costs associated with the preparation and prosecution of this motion to compel discovery. *See* S.D. Codified Laws § 15-6-37(a)(4). Sprint makes no effort in its opposition to demonstrate that its actions were substantially justified or that other circumstances make an award of expenses unjust. *See* S.D. Codified Laws § 15-6-37(a)(4)(A).

**CONCLUSION**

For the foregoing reasons, Northern Valley requests the PUC resolve this threshold issue and 1) order Sprint to produce information and materials even if they relate to Northern Valley's unjust enrichment claim; and 2) award Northern Valley its fees for the preparation and prosecution of this motion.

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