BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

Northern Valley Communications, L.L.C. ("Northern Valley"), by and through counsel, and pursuant to A.R.S.D. 20:10:01:01.02, 20:10:01:22.01 and SDCL § 15-6-37(a), hereby submits this Memorandum in Support of Motion to Compel against Sprint Communications Company, LP ("Sprint").

Northern Valley respectfully requests the South Dakota Public Utilities Commission ("PUC") resolve a threshold issue of relevance relating to this proceeding and Northern Valley's discovery requests. Specifically, Northern Valley requests that the PUC find that Northern Valley is entitled to discovery on issues relevant to its alternative theory of recovery, unjust enrichment, and the compensation that Northern Valley would be entitled to collect if Northern Valley's tariff does not apply. In its general objections, Sprint has refused to provide *any* discovery related to Northern Valley's "unjust enrichment claim," contending that the "claim" is not before the PUC. While Sprint may be technically correct that no "claim" for unjust enrichment is before the PUC, as the result of a primary jurisdiction referral in a federal suit between Northern Valley and Sprint, related "issues" are before the PUC regarding Northern

Valley's entitlement to compensation if Northern Valley's tariff does not apply and a reasonable rate for such compensation. Sprint improperly relies on a semantic argument – improperly distinguishing between "claims" and "issues" – in order to avoid discovery entirely. Because the referred issues and an unjust enrichment claim overlap, Sprint's objection has the practical effect of denying Northern Valley any discovery on the important issues in this proceeding.

As explained below, several issues must be resolved by the PUC because they have been specifically referred to the PUC by a federal court in a federal case between Northern Valley and Sprint. The federal court is looking to the PUC for guidance on these referred issues, and Northern Valley is entitled to discovery from Sprint on these issues regardless of whether Northern Valley's request is also related to an unjust enrichment claim. The federal court will use the guidance provided by the PUC on the referred issues to resolve the claims and counterclaims in the federal case. Thus, as a threshold issue, Sprint should be ordered to provide discovery responses that relate to the referred issues even if they might also relate to an unjust enrichment claim. After the PUC resolves this threshold issue of relevancy, Sprint will need to revise its discovery responses and supplement those responses.

INTRODUCTION AND BACKGROUND

In asserting its general objections that it will not provide discovery related to Northern Valley's unjust enrichment claim, Sprint attempts to evade its basic discovery obligations. There is no basis for limiting discovery as Sprint has unilaterally done here. As described below, Sprint cannot resist discovery by claiming that an unjust enrichment claim is not in the proceeding when other relevant and related issues are undoubtedly in this proceeding. Regardless of whether the discovery relates to an unjust enrichment claim, a federal judge has referred related issues to the PUC for guidance. Thus, Sprint's objections are unfounded and the

PUC should order Sprint to respond in full to Northern Valley's discovery. Until this threshold issue is resolved, Sprint's discovery responses are wholly inadequate and Northern Valley is without critical discovery to resolve the issues in this proceeding.

I. Background on the Dispute

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. Beginning in September 2007, Sprint unlawfully stopped paying for the very same services that Northern Valley had been providing to Sprint and other IXCs for years. To be sure, nothing changed in Northern Valley's filed tariffs; rather, Sprint just stopped paying Northern Valley's bills. 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 own its subscribers.

II. Federal Case between Northern Valley and Sprint

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 Communications L.L.C. v. Sprint Communications Company*, Complaint, ECF No. 1, Docket No. 1:08-cv-01003 (D.S.D.) ("federal case").[1]

[1] Though not relevant to the instant motion, on April 18, 2011, Northern Valley initiated a second collection action against Sprint. *See Northern Valley Communications, LLC v. Sprint Communications Company, LP*, Civ. 11-4053 (D.S.D.). This collection seeks recovery for unpaid switched access invoices arising under or during the time since Northern Valley's F.C.C

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. Northern Valley's claims in the federal case seek to recover access charges for both interstate traffic and intrastate traffic. Sprint filed its answer and counterclaims on March 5, 2008. *Id.*, ECF No. 4.

Northern Valley's dispute with Sprint is not unique. At present, there are numerous other collection actions and complaints pending in federal courts and before state public utility commissions nationwide. All of these actions relate to the same fundamental dispute — attempts by LECs to collect payment of access charges for terminating calls to conference and chat-line operator customers in the face of IXC refusals to pay, justified by allegations of "access stimulation" by the LECs. The IXCs assert common legal defenses, alleging, for example, that the calls did not "terminate" at the conference bridge, or that the conference operators were not "end users" or that the calls do not constitute "access traffic." Similarly, the IXCs assert that revenue sharing between the LEC and the conference operator is forbidden. The LECs have argued these defenses are meritless and that they are entitled to compensation pursuant to their tariffs, but that if their tariffs do not apply, they are nevertheless entitled to some form of compensation for the valuable services they have provided the IXCs.

III. The PUC Proceeding

While the 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

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Tariff No. 3 became effective on July 23, 2010. This new collection action does not seek to recover amounts pursuant to Northern Valley's *intra*state tariff at issue here.

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 that Sprint might owe SDN. Northern Valley filed cross-claims against Sprint on January 22, 2010, seeking payments for the intrastate access charges that Sprint has refused to pay Northern Valley. One of Northern Valley's cross-claims was a claim for unjust enrichment for services that Northern Valley provided Sprint for intrastate traffic.

IV. The FCC's *Farmers and Merchants II* Decision

The day after Sprint filed its third-party complaint against Northern Valley and two other LECs, the Federal Communications Commission ("FCC") issued an order on reconsideration in a long-standing dispute involving Qwest's refusal to pay access charges to a LEC in Iowa, Farmers and Merchants, for calls to conference calling companies. *See Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Second Order on Reconsideration, 24 F.C.C.R. 14801 (2009) ("*Farmers and Merchants II*").

In its first order in that proceeding, the FCC "reject[ed] Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers." *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Memorandum Opinion & Order, 22 FCC Rcd. 17973, ¶ 38 (2007). In *Farmers and Merchants II*, more than two years after the initial opinion, a newly-constituted FCC reversed this conclusion. The question whether conference call companies made net payments now appears to be a key part of the Commission's analysis regarding the application of Farmers' tariff to conference calling traffic. *See Farmers and Merchants II*, ¶ 12 (the tariffs were inapplicable in part because

"nothing in the contracts [between Farmers and the conference calling companies] suggests that the conference calling companies would subscribe to any tariffed Farmers' service *or pay Farmers for their connections* to the interexchange network, as would ordinary end-user customers under the tariff.") (emphasis added).

The FCC went on to conclude in *Farmers and Merchants II* that "the *evidence* of the parties' actual course of dealing demonstrates that there was no purchase of [Farmers'] tariffed services," and that "based upon the totality of the circumstances and *facts of this case* . . . the conference calling companies do not constitute 'end users' within the meaning of the tariff provisions at issue." *Id.* ¶ 25. (emphasis added). As a result, the FCC decided that it will award damages to Qwest, in an amount to be determined at a future proceeding. *Id.* at 1.[2]

Despite its reversal of its prior order, the FCC did get one part of its analysis correct. Namely, it expressly rejected any suggestion that IXCs are entitled to take access services for free merely upon a conclusion that the specific services at issues did not squarely meet the terms of the LEC's tariff. As the FCC held:

> This is not to say that Farmers is precluded from receiving any compensation at all for the services that it has provided to Qwest. *See, e.g., New Valley Corp. v. Pacific Bell,* Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133 ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that the customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff.") *See also America's Choice, Inc. v. LCI*

[2] The FCC's Second Order on Reconsideration is now on appeal to the D.C. Circuit. *See Farmers and Merchants Mut. Tel. Co. of Iowa v. FCC*, 10-1093 (D.C. Cir.).

> *Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claims for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

Farmers and Merchants II, at n. 96. Accordingly, the FCC has made clear that the services provided by LECs in delivering calls from the IXCs' customer to conference calling providers are compensable, whether tariffed or not.

V. Referral by the Federal Court

Based on the individualized inquiry performed by the FCC in *Farmers and Merchants II* about whether the LEC's tariff applied, it became clear that Northern Valley would need to seek the guidance of the expert agency to resolve the issues associated with the application of its tariff and its ability to be compensated in the unlikely event that it is determined the tariffs do not cover the access services it has provided to Sprint. Thus, Northern Valley filed a motion for primary jurisdiction in the federal case to refer three issues to the FCC related to the interstate traffic at issue between Northern Valley and Sprint. *See Northern Valley Communications L.L.C. v. Sprint Communications Company*, ECF No. 91, Docket No. 1:08-cv-01003 (D.S.D. Dec. 14, 2009). Northern Valley drafted the three issues that were referred and intended them to help resolve the claims in the federal case, including unjust enrichment. On March 15, 2010, over Sprint's objections, *id.*, ECF No. 102 (Jan. 20, 2010), the federal court granted Northern Valley's motion and referred the three issues identified by Northern Valley to the FCC. *Id.*, ECF No. 110, at p. 30 (Mar. 15, 2010). Specifically, those three issues 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.

Id.

Because the federal court maintains jurisdiction over the case, the referral order does not refer any "claims" to the FCC, but rather refers "issues" that will allow the court to fully resolve the pending claims, once the FCC has provided its response. *See id*., at p. 24. As the federal court expressly stated, "the court seeks the FCC's guidance on the *issues* of whether the services Northern Valley provided in this case are subject to the tariff requirements, where these services fall into the regulatory regime, and *how Northern Valley can obtain compensation for these services if its access tariff does not apply*." *Id*. (emphasis added). The federal court further noted, "[w]hile the court does not refer this legal question to the FCC, the inconsistent rulings show the need for clarification by the FCC on how a CLEC may be compensated for services provided outside of its tariffs." *Id*. at p. 25. This clearly contemplates the FCC's guidance on issues related to Northern Valley's unjust enrichment claim, even if the claim itself is not before the FCC.

VI. Dispute Regarding Application of SDCL 49-13-1.1

While the referral motion was pending in the federal case, Sprint filed a motion to dismiss Northern Valley's cross-claims in this proceeding. *See* TC 09-098, Sprint Communications Company LP's Motion to Dismiss Northern Valley's Cross-Claim (Feb. 11,

2010). Sprint argued that SDCL 49-13-1.1 prevented Northern Valley from maintaining claims for damages in this proceeding, because Northern Valley's complaint at the federal court include claims for damages relating to intrastate traffic.

Northern Valley responded to Sprint's motion to dismiss by arguing that, to the extent it was applicable in the current circumstances, SDCL 49-13-1.1 operated to also bar Sprint's third-party claims against Northern Valley all together, because Sprint had already sought to pursue counterclaims against Northern Valley in the federal case. *Id*., Northern Valley's and Sancom's Consolidated Memorandum in Response to Sprint's Motion to Dismiss Cross-Claims (Feb. 26, 2010). Northern Valley argued that Sprint's suggestion that SDCL 49-13-1.1 barred only duplicitous claims for money damages, but nevertheless permitted it to pursue a declaratory judgment, was based on an erroneous interpretation of the statute.

VII. Referral of Intrastate Issues to the PUC

Rather than pursuing final resolution of the motion at the PUC, Northern Valley and Sprint agreed that, based on the referral of interstate issues to the FCC, it was appropriate to seek referral of the intrastate issues in the federal case to the PUC. By having the federal court enter a referral of these issues, the dispute over the PUC's jurisdiction would become moot. Northern Valley also agreed that it would withdraw its request for an award of money damages from the PUC, seeking only a resolution of the referred issues. Thus, on April 16, 2010, the parties filed a joint motion in the federal case to refer the same issues to the PUC related to intrastate traffic, or, in the alternative, stay the federal case with respect to the issues related to intrastate traffic until the PUC resolved the proceeding before it. *Northern Valley Communications L.L.C. v. Sprint Communications Company*, ECF No. 111, Docket No. 1:08-cv-01003 (D.S.D. April 16, 2010).

There is no doubt that Sprint and Northern Valley intended for the PUC to resolve for intrastate traffic the same issues that had been referred to the FCC for interstate traffic.

On May 26, 2010, the federal court granted Northern Valley and Sprint's motion and entered an order that "[t]his action is stayed pending (1) resolution of the dispute by agreement of the parties; (2) a final order in the pending SD PUC proceeding in SD Network, LLC v. Sprint Communications Co., Docket TC 09-098 (S.D. Pub Utils. Bd.) and a decision on the disputed issues by the FCC pursuant to the referral described in Docket 110; or (3) further order of the court." *Id*., ECF No. 112, at p. 2. Thus, even though an unjust enrichment claim was not referred to the PUC (just as it had not been referred to the FCC), specific issues related to an unjust enrichment claim were referred to the PUC (just as they were to the FCC).

In short, the federal court is expecting the PUC to provide guidance on the same issues for intrastate traffic that the FCC is providing for interstate traffic, regardless of whether the issues relate to claim of an unjust enrichment claim. And, that guidance expressly includes whether Northern Valley is entitled to compensation if Northern Valley's tariff does not apply and a reasonable rate for such compensation. Because those issues will be decided by the PUC for intrastate traffic, Northern Valley is entitled to discovery on them in this proceeding.

VIII. Northern Valley's Discovery Requests and Sprint's Response

While the parties awaited a decision on Northern Valley's motion for referral of issues to the FCC, the parties commenced discovery in accordance with the procedural schedule in place at that time in the federal case. When the case was stayed for referral of issues to the FCC, those discovery efforts were discontinued. Since that time, Northern Valley and Sprint have engaged in a series of conversations about scheduling and discovery for this matter and Northern Valley anticipates that a proposed procedural schedule will soon be finalized. However, early in that process and consistently since that time, the parties have agreed that it is in their best interest to

avoid duplicative discovery and to seek discovery that would be relevant to both the intrastate and interstate issues. For example, although Northern Valley does not intend to suggest that this language is final, a recent proposed order forwarded by Sprint's counsel included the following provision and similar language has been included in drafts circulated by the parties over the past several months:

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

With that background, and feeling compelled to move this case forward towards resolution, on March 21, 2011, Northern Valley served its first document requests and first interrogatories on Sprint. *See* Exhibits 1 and 2. Among the discovery sought by Northern Valley is information relevant to determining the compensation that Northern Valley would be entitled to if Northern Valley's tariff does not apply to the traffic at issue and a reasonable rate for such compensation. Although the present motion only seeks resolution of the threshold issue of whether Sprint can refuse to answer Northern Valley's discovery requests if the request in any way relates to Northern Valley's unjust enrichment claim, as explained below, the individual discovery requests by Northern Valley appropriately seek information related to the three referred issues.

Sprint responded on April 21, 2011, and then served amended responses on April 29, 2011. Sprint's discovery responses assert two general objections (one of which contains a

footnote) that are inappropriate. Specifically, Sprint stated in response to Northern Valley's interrogatories in its April 29, 2011, amended answers:

> 2. Sprint objects to the Interrogatories to the extent that they seek discovery of information that is outside the scope of the referral to the Commission by the United States District Court for the District of South Dakota, including, but not limited to: (1) Sprint's alleged liability for interstate access charges assessed by Northern Valley pursuant to its Tariff No. 3, which became effective in July 2010; and (2) Northern Valley's unjust enrichment claim, which was not referred by the District Court.[FN1]
>
> [FN1: Sprint and Northern Valley have reached an understanding (but which has not yet been finally agreed to) that discovery in this case will encompass matters within the scope of the Federal District Court's referral to the FCC, and Sprint's productions in response to these requests will honor that understanding.]
>
> 3. Sprint objects to the Interrogatories to the extent they seek discovery of information related to Northern Valley's unjust enrichment claim in this case, which is the subject of a pending motion to dismiss, and which Northern Valley previously indicated it would withdraw.

See Exhibit 3 (Sprint confidential information is redacted from this document). Sprint's amended answers to Northern Valley's document requests contained similar objections. *See* Exhibit 4. Relying on these objections, Sprint provided a substantive response to a single interrogatory, refusing to substantively respond to any of the other interrogatories. Sprint's discovery responses provide no information to Northern Valley that would help it undertake and prepare an analysis regarding an appropriate rate for the access services that it has provided if it is ultimately determined that Northern Valley's tariff does not apply to the disputed traffic.

IX. Efforts to Resolve the Current Discovery Dispute

In response to Sprint's invalid general objections, Northern Valley sent a letter to Sprint on April 25, 2011, which specifically challenged the two objections as threshold problems with Sprint's discovery responses. *See* Exhibit 5. Without waiving any right to object to Sprint's other or future discovery deficiencies, Northern Valley challenged Sprint's threshold claims about the scope of what the PUC was deciding and Sprint's various claims about what the parties

had agreed to. As detailed in Northern Valley's letter, the federal court referred issues to the PUC that are directly parallel to Northern Valley's unjust enrichment claim. Thus, it is no objection to discovery that an "issue" was referred, but a "claim" was not. Northern Valley rebutted any notion that Sprint could refuse substantive discovery responses because the response might relate to Northern Valley's unjust enrichment claim.

Following Northern Valley's letter, counsel for both parties communicated via email in an attempt to resolve Sprint's discovery deficiencies. *See* Exs. 6, 7, and 8. Counsel for Northern Valley endeavored for many weeks to hold a telephonic meet and confer about Sprint's discovery responses. *See* Ex. 7 (reflecting that counsel for Northern Valley, David Carter, requested a time for a call, but Phil Schenkenberg, counsel for Sprint states they have not set a time for a call between the parties). Sprint's counsel ultimately responded:

> In case I wasn't clear enough, I think you are right - there isn't anything else for us to talk about substantively. We have a dispute about whether the unjust enrichment discovery is discoverable. You will file a motion to compel. We will oppose it.

See Ex. 8.

Sprint offers a variety of shifting excuses for why it would not respond fully to Northern Valley's discovery, none of which are valid. Sprint claimed that the PUC wasn't aware of the federal court's referral of the issues identified above for intrastate traffic, and asked Northern Valley to provide authority for the relevancy of the information sought. *See* Ex. 6. Northern Valley pointed out that a procedural schedule or a motion to compel would inform the PUC of the federal court referral and, although it did not need to do so, Northern Valley provided legal authority further supporting the relevancy of its discovery requests. *See id.*

Northern Valley also pointed out that Sprint's claims that the PUC is without authority to decide what is relevant for the FCC referral are disingenuous because Northern Valley is asking

the PUC to decide what is relevant for *its decision* on the three referred issues. *See id*. And, because the issues are identical, the parties have agreed to handle discovery in a coordinated fashion. The parties have also agreed that it is impractical to separate interstate discovery from intrastate discovery. Thus, the PUC's decision on relevancy would then be informative with regard to interstate matters. Although Northern Valley and Sprint had agreed that they would engage in discovery at the PUC that would encompass both interstate traffic and intrastate traffic, Sprint now attempts to drawn an artificial line in order to avoid any discovery.

Counsel for Northern Valley have not been able to resolve this threshold relevancy issue with counsel for Sprint, and Northern Valley is without relevant discovery necessary to resolve the issues referred by the federal court to the PUC. Thus, Northern Valley reluctantly requests the PUC's intervention in this threshold discovery issue.

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 NW2d 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 NW2d 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.

ARGUMENT

I. The Information and Materials Requested By Northern Valley Are Relevant And Necessary To This Proceeding

Sprint refuses to fulfill its basic discovery obligations "to the extent [Northern Valley's discovery requests] seek discovery of information related to Northern Valley's unjust enrichment claim in this case…." Relying on this objection, Sprint has only substantively answered one of Northern Valley's interrogatories. The discovery sought by Northern Valley, however, is relevant to the issues *in this proceeding* that were referred to the PUC by the federal court, regardless of the fact that the federal court may ultimately use the PUC's analysis and rely on that discovery to resolve Northern Valley's unjust enrichment claim.

The parties sought referral of the same issues to the PUC regarding intrastate traffic that were referred to the FCC for interstate traffic. The federal court agreed and referred those same issues to the PUC for resolution. The federal court referred the three issues to obtain guidance from the PUC that it could apply to the pending claims in the federal case, including an unjust enrichment claim. Namely, two of the issues that the federal court asked the FCC and PUC to resolve were:

> (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.

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

These referred issues are parallel to issues that would need to be decided in an unjust enrichment claim. Thus, if Sprint's objections were allowed to stand, it would completely foreclose Northern Valley's ability to obtain discovery necessary in this proceeding (which, of course, will ultimately help to resolve the claims in the federal case). Like the second referred issue, issues necessarily evaluated in an unjust enrichment claim include whether a party is entitled to compensation even though no written contract exists between the parties.[3] *See, e.g., Mack v. Mack*, 613 NW2d 64, 69 (S.D. 2000) (quotation omitted) ("Unjust enrichment is an equitable doctrine. It occurs when one confers a benefit upon another who accepts or acquiesces in that benefit, making it inequitable to retain that benefit without paying.").

The third referred issue would determine the compensation due Northern Valley, if any, if Northern Valley's tariff does not apply. This issue similarly, therefore, relates to the resolution of Northern Valley's unjust enrichment claim: "When unjust enrichment is found, the law implies a contract, which requires the defendant to compensate the plaintiff for the value of the benefit

[3] Tariffs are treated like contracts under the law. *Northern Valley Communications, LLC v. Qwest Communications Corp.*, 659 F.Supp.2d 1062, 1064 (D.S.D. 2009).

conferred." *Id*. Thus, Sprint's general objection to discovery related to Northern Valley's unjust enrichment claim has the practical effect of denying Northern Valley discovery on the referred issues as well.

Sprint is relying on semantics – trying to make a distinction between "claims" and "issues" – to evade its basic discovery responsibilities. Sprint agreed with Northern Valley to refer the same issues to the PUC for resolution that court had agreed were appropriate for referral to the FCC. Northern Valley drafted those issues in the first instance, pressed for the referral to the FCC over Sprint's objections, and always intended for them to parallel Northern Valley's claims in the federal case. Thus, the referred issues necessarily embrace Northern Valley's alternative claim for an unjust enrichment theory of recovery, even though the court retain ultimately jurisdiction to resolve the unjust enrichment claim by entry for an award of money damages. This way the federal court would have guidance from both the FCC and the PUC on interstate and intrastate issues respectively and then could use that guidance to fully adjudicate the parties' claims. This is how a primary jurisdiction referral works: "a primary jurisdiction referral does not refer entire claims to the FCC. Rather, such a referral seeks the FCC's guidance on issues within its expertise. Thus, while the FCC's response to the classification of services issue may implicate Splitrock's state-law breach of implied contract and unjust enrichment claims, the fact that these claims have been dismissed does not bar the court from referring this issue." *Splitrock Properties, Inc. v. Qwest Communications Corp.*, Civ. No. 08-4172-KES, 2010 WL 2867126, *9 (D.S.D. July 20, 2010). Thus, by arguing that it will not provide discovery on an "unjust enrichment claim," Sprint inappropriately forecloses any discovery on the actual issues referred that relate to that claim.

Thus, even if Northern Valley's discovery requests could be construed as related to an unjust enrichment claim, those same discovery requests are seeking information relevant to a resolution of the referred issues. 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." DCL 15-6-26(b)(1) (emphasis added). Analyzing the same discovery rule in the federal context, the Supreme Court has said, "The 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 matter 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). Thus, Sprint cannot unilaterally limit Northern Valley's discovery request to only the "claims" at issue the proceeding. Especially in light of the referral of specific issues to the PUC by the federal court. Sprint's position would nullify the court's referral of issues two and three because Northern Valley would never be able to obtain discovery to fully prepare its case on those issues.

At this time, Northern Valley is asking the PUC to resolve this threshold issue of relevancy and not yet moving on specific discovery requests, because it is clear that Sprint will need to redo virtually all of its discovery responses when the PUC strikes these meritless general objections. Nevertheless, it should be noted that Northern Valley's interrogatories and document requests are appropriately tailored towards resolving the referred issues in this proceeding. For example, Northern Valley seeks information on Sprint's revenues related to the traffic at issue, but Sprint has refused to provide that information relying on its general objection to providing discovery related to an unjust enrichment claim. See Ex. 3, Resp. to Interrogatory No. 7 at p. 7.

The information sought by Northern Valley about Sprint's revenue is relevant because the FCC has recognized that payment for the use of the LEC's network, like Northern Valley, 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, 13198 (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). Thus, Sprint's charges to its own customers and revenues obtained are relevant to a determination of the value of Northern Valley's services provided to Sprint. Sprint's revenues will reflect whether Sprint has received a valuable service from Northern Valley that Sprint has made money from or if Sprint has lost money as the result of Northern Valley's services. Courts have also consistently 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).

To resolve the issues referred to the PUC, the PUC may need to determine if Northern Valley is entitled to compensation in the unlikely event that it is determined that Northern Valley's tariff does not apply. Those issues are pending before the PUC as a result of the federal court's referral of these issues to the PUC for intrastate traffic, and the federal court has expressly

asked the PUC to apply its expertise to that question. Sprint's unilateral refusal to produce discovery solely because it might relate to an unjust enrichment claim is prejudicial and hinders Northern Valley's ability to get a timely resolution to these questions and to the collect the millions of dollars in payments that Sprint has withheld from Northern Valley for many years now. The PUC should therefore expeditiously resolve this threshold issue of relevancy in favor of Northern Valley and order Sprint to respond promptly to Northern Valley's discovery requests.

II. Northern Valley Should Be Awarded Its Fees For The Preparation And Prosecution Of This Motion To Compel Discovery

Finally, Northern Valley hereby requests an award of fees to compensate for the costs associated with the preparation and prosecution of this motion to compel discovery. SDCL § 15-6-37(a)(4) permits the PUC to award "reasonable expenses incurred in obtaining the order [granting a motion to compel], including attorneys' fees…." "A trial court has broad discretion in imposing sanctions under SDCL 15-6-37(a)." *Widdoss v. Donahue*, 331 NW2d 831, 835 (S.D. 1983) (citing Wright & Miller, Federal Practice & Procedure, § 2284).

Sprint has failed to discharge its threshold discovery obligations in good faith, causing unnecessary delay and expense. Sprint cannot demonstrate that its actions were substantially justified or that other circumstances make an award of expenses unjust. *See* SDCL § 15-6-37(a)(4)(A). As explained above, Sprint's discovery positions have no support in the law. As a result, the PUC should award fees to compensate for Northern Valley's expenses and attorneys' fees in preparing this motion. Northern Valley will prepare and submit an affidavit and supporting documentation detailing the fees incurred within 20 days of entry of the PUC's order.

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.

Dated: May 27, 2011

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