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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT  
FILED BY SOUTH DAKOTA NETWORK, LLC  
AGAINST SPRINT COMMUNICATIONS  
COMPANY, LP REGARDING FAILURE TO  
PAY INTRASTATE CENTRALIZED  
EQUAL ACCESS CHARGES AND TO  
IMMEDIATELY PAY UNDISPUTED PORTIONS  
OF SDN'S INVOICES

TC09-098

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Transcript of Proceedings  
May 17, 2012

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
CHRIS NELSON, CHAIRMAN  
KRISTIE FIEGEN, VICE CHAIRMAN  
GARY HANSON, COMMISSIONER (by telephone)

COMMISSION STAFF  
Rolayne Ailts-Wiest  
Karen Cremer  
Greg Rislov  
Demaris Axthelm

APPEARANCES  
Phil Schenkenberg, Sprint Communications  
Talbot Wieczorek, Sprint Communications  
David Carter, Northern Valley  
Jim Cremer, Northern Valley

Reported By Cheri McComsey Wittler, RPR, CRR

1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State  
3 Capitol Building, Room 413, 500 East Capitol Avenue,  
4 Pierre, South Dakota, on the 17th day of May, 2012,  
5 commencing at 9:30 a.m.

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1           CHAIRMAN NELSON: We are here today in TC09-098,  
2 and we have a number of motions that have been brought  
3 before us that we are going to hear today.

4           And here's how I would like to proceed, if it  
5 works for both sides. I'd like to take Sprint's Partial  
6 Summary Judgment Motion first. And we'll let both sides  
7 argue that, Staff weigh in if they care to, and then  
8 we'll go to our questions on that Motion and then from  
9 there proceed probably to Northern Valley's Motion and  
10 then finally come back to Sprint's Motion on the  
11 protective order and proceed in that fashion, kind of  
12 keep them in the three distinct buckets and go from  
13 there.

14           Does that work for both sides?

15           MR. SCHENKENBERG: Yes.

16           MR. CREMER: For Northern Valley that's fine.

17           CHAIRMAN NELSON: Okay. With that, I will turn  
18 it over to Sprint to proceed with their Motion for  
19 Partial Summary Judgment.

20           MR. SCHENKENBERG: Thank you, Mr. Chairman,  
21 members of the Commission. My name is Phil Schenkenberg.  
22 I'm here on behalf of Sprint. Sprint has moved for  
23 partial summary judgment, and this Motion is focused on  
24 Northern Valley's Counterclaim Count II.

25           Northern Valley's Counterclaim Count I asks the

1 Commission to declare that the calls at issue are subject  
2 to their access -- their intrastate access tariffs and  
3 their intrastate access charges.

4 Count II asks the Commission to set a rate for  
5 those calls in the event they are not subject to the  
6 access tariffs and the access charges.

7 Sprint is asking for an order at this time that  
8 if the Commission proceeds to set a rate pursuant to that  
9 Counterclaim Count II, that the Commission will do so  
10 using a rate of return methodology.

11 Northern Valley has not -- I don't think  
12 Northern Valley has taken a clear position on what  
13 methodology it claims does apply, but we believe there  
14 are really only three choices. If the Commission is  
15 going to use the tools it has at its disposal, it's  
16 either going to be a rate of return methodology, which is  
17 described and outlined in the statute, or a price  
18 regulation methodology, which is described and explained  
19 in the statute, or there is no regulation. And if there  
20 is no regulation, then there's nothing for the Commission  
21 to do and no rate to set.

22 It is appropriate at this time as we get into  
23 discovery disputes we prepare for having experts do  
24 expert reports and file testimony and have a hearing for  
25 the Commission to decide what methodology is going to

1 apply as you get to Count II in the event that you get to  
2 Count II.

3 Count II invokes SDCL 49-13-13 and asks the  
4 Commission to set a rate under that statute and also says  
5 that the Commission should declare that that rate can be  
6 the access rate, which is about 6 cents per minute.

7 The Commission previously has decided that this  
8 count would proceed. You did not grant our Motion to  
9 Dismiss so we're assuming that this claim has validity  
10 and will be considered as we proceed on this Motion.

11 We did, as required by the rules, establish  
12 undisputed facts to support our Motion for Partial  
13 Summary Judgment.

14 Number one, Sprint has to deliver these calls  
15 when these calls are made by a customer of Sprint.  
16 Sprint gets them. It is obligated under the regulatory  
17 regime to send those calls through to be delivered to  
18 Northern Valley, that the FCC has issued an order saying  
19 that.

20 Northern Valley questions whether that's true  
21 for intrastate traffic, but the FCC's order does not  
22 limit itself to intrastate traffic. It says thou shall  
23 deliver traffic. And I don't think this Commission wants  
24 us blocking calls. Nor do I think Northern Valley wants  
25 us blocking calls. We believe that fact is undisputed.

1           The second undisputed fact is that the access  
2 tariffs for the purposes of this Motion don't apply. If  
3 you get to Count II, it's because you've decided on  
4 Count I the access tariffs don't apply. So we're outside  
5 of the access tariff regime as we look at Counterclaim  
6 Count II.

7           The third undisputed fact is that this is a  
8 noncompetitive service. And we've established the facts  
9 that describe how a call gets from Sprint's network to a  
10 number served by Northern Valley. It goes through SDN.  
11 It goes through Northern Valley's facilities. And it's  
12 the only way to get a call to Northern Valley is to do  
13 business with Northern Valley, deliver the call to  
14 Northern Valley, and it goes over those essentially  
15 monopoly facilities that only Northern Valley controls.

16           And so we believe the facts established do show  
17 this is a noncompetitive service. There's no place else  
18 for us to go to get this call delivered to Northern  
19 Valley.

20           And then the fourth undisputed fact is that the  
21 costs here from the information we have are very, very,  
22 very small. That may not be a fact that is necessary for  
23 you to find undisputed for the purposes of making the  
24 legal determination and interpreting the statute and  
25 deciding you should apply rate of return regulation.

1           But it is important to know that if you've got  
2 tools that the Legislature has given you that ask you to  
3 look at cost, actual cost, the rate of return, and then  
4 in price regulation allocated cost, fully allocated cost,  
5 that based on the evidence that we have, the costs are  
6 very, very, very small compared to what the access rates  
7 are.

8           And while there isn't agreement on what those  
9 exact rates are, I think the facts do establish that the  
10 numbers are very small.

11           As I indicated, this Commission has certain  
12 tools the Legislature has given to you to set rates. And  
13 we believe the Commission is obligated to use the tools  
14 the Legislature has given it as a creature of statute,  
15 and the Supreme Court has described this as a legislative  
16 standard of guidance.

17           The Legislature gives you policy and gives you  
18 tools and asks you to use those tools to fulfill the  
19 policy goals.

20           The Legislature has said in 49-13-4 for a  
21 noncompetitive service the Commission shall use rate of  
22 return regulation when determining the charge. So that's  
23 where we start. We start with the Legislature saying if  
24 it's noncompetitive, you shall use the rate of return.

25           And Northern Valley has three arguments to get

1 out of that initial default. First Northern Valley  
2 suggests it is a competitive service or not a  
3 noncompetitive service. Apologize for the double  
4 negative. But, as I discussed, we don't believe that's a  
5 reasonable view of this service. And there certainly  
6 isn't any evidence that there are alternate providers  
7 that can deliver a call to a number that is assigned by  
8 Northern Valley to its customer.

9           Second, I think Northern Valley is suggesting  
10 that the Commission's 2010 decision to use price  
11 regulation for CLEC access charges means that this rate  
12 in this Docket would be set using price regulation. In  
13 other words, that the Commission has decided to use price  
14 regulation, which is one way for the Commission to get  
15 out of that default of using rate of return, the  
16 Commission can decide that price regulation is more  
17 appropriate.

18           And a couple of comments on that. One, it  
19 certainly wouldn't apply before 2010. Before 2010  
20 Northern Valley was using rates that were adopted through  
21 the LECA process, and that's the rate of return  
22 methodology, as I understand it.

23           And, second, 2010 the Commission decided that  
24 this -- it would use price regulation for access services  
25 described in access tariffs. They would be subject to



1 access charges determined using price regulation.

2 If we're talking about Count II, it means you've  
3 already decided in Count I that the access tariffs don't  
4 apply. If the access tariffs apply, sure, we're into  
5 your 2010 order, and price regulations would apply to  
6 those rates.

7 But if we are outside of the access tariffs and  
8 we are outside of 2010 and what you decided in that  
9 Docket doesn't apply to the new rate that has to be set  
10 for this new, slightly different service that we're  
11 talking about on the Counterclaim Count II.

12 The third way that Northern Valley tries to get  
13 out of the rate of return -- and before I end price  
14 regulation, if the Commission decides today that your  
15 decision in 2010 was a decision that you can use in this  
16 case to establish price regulation and use that  
17 methodology, then that's a decision you ought to make.  
18 We don't think it's the right one, but if you decide it,  
19 it ought to be communicated, and we ought to know for the  
20 purposes of moving forward.

21 The third way that Northern Valley's tries to  
22 get out of rate of return regulation is by arguing the  
23 exemption that is provided to it as a rural carrier by  
24 49-31-5.1. And that does say carriers are exempt from  
25 rate of return regulation and price regulation except as

1 it relates to access services that are still subject to  
2 regulation under the other rules.

3 And Northern Valley is really in a box, I think,  
4 on that argument. If they have that exemption, then  
5 there's nothing for the Commission to do. There's no  
6 rate to set. Because the Commission has no rate setting  
7 authority over this service.

8 If the Commission -- if, on the other hand, it  
9 has come to this Commission and asked the Commission to  
10 set a rate, then it has, in effect, waived the exemption,  
11 which it's entitled to do under the statute. The only  
12 way you can ask this Commission to set a rate is to waive  
13 the exemption. Once it's waived, the exemption, then you  
14 have to go back to figure out which tool can you use, and  
15 we're back to rate of return.

16 I don't think Northern Valley wants you to  
17 decide you cannot set a rate. And so it's trying to play  
18 close to that line in terms of whether or not it has or  
19 hasn't waived the exemption and what the effect of it is  
20 if they haven't waived the exemption.

21 Real briefly I want to address a procedural  
22 argument that Northern Valley has made. Northern Valley  
23 spends a big chunk of its brief arguing that the  
24 Commission can't or shouldn't decide a Partial Motion for  
25 Summary Judgment. We don't believe the case law supports

1 the position that's been taken.

2 We also think that this is different from the  
3 cases that were discussed where a party was seeking to  
4 obtain a preliminary fact determination without obtaining  
5 a final decision on a money judgment.

6 This is a declaratory ruling claim. This is not  
7 a claim for a dollar judgment. And to the extent  
8 Northern Valley has asked for a declaration that you can  
9 set a rate and that you can set it and use the access  
10 rate, it is certainly appropriate for this Commission on  
11 a Partial Motion for Summary Judgment to declare a  
12 portion -- make a declaration with respect to the relief  
13 granted.

14 And from a practical standpoint -- and all the  
15 cases support this -- if this Commission or a court can  
16 enter an order that will have an impact in terms of  
17 making the case more efficient from a discovery  
18 standpoint, we'll narrow the issues at trial, we'll keep  
19 the parties from having to put in testimony on three or  
20 four different standards, make the hearing before this  
21 Commission easier to handle and to litigate, absolutely  
22 you ought to do that in the interest of judicial  
23 efficiency.

24 I have nothing further. I'm happy to answer  
25 questions. Thank you.

1           CHAIRMAN NELSON: Thank you. Northern Valley.

2           MR. CREMER: Mr. Carter will respond for  
3 Northern Valley.

4           MR. CARTER: Good morning, members of the  
5 Commission. I'll pick up essentially where  
6 Mr. Schenkenberg left off, which is with the procedural  
7 matter, is Sprint's Motion for Partial Summary Judgment  
8 procedurally proper?

9           As Northern Valley has stated in its papers, we  
10 believe the Motion is not procedurally popular [sic].  
11 While the rules do allow for a Motion for Summary  
12 Judgment, the case law establishes that a Motion for  
13 Summary Judgment should be granted when it enters or  
14 reaches a dispositive issue, not something that reaches a  
15 step in that process.

16           So Sprint is asking you to engage in piecemeal  
17 litigation of the case to decide what standard will be  
18 applied before we have discovery, before the parties have  
19 fully briefed that, and even before Northern Valley has  
20 been able to work with expert witnesses to prepare its  
21 final position on how the rates would be calculated under  
22 Count II.

23           So under the case law it's fairly clear that a  
24 Motion for Partial Summary Judgment would be appropriate,  
25 for example, if we were reaching the entirety of the

1 count, even though damages, per se, were not being --  
2 were not able to calculate. So, for example, a court  
3 would enter a partial summary judgment on an issue of  
4 liability only then to have the trial on the issue of the  
5 damages.

6 Other parts of the Rule 56 Motion for Partial  
7 Summary Judgment are also not available and that includes  
8 Rule 56D, which talks about the ability of a court, or in  
9 this case the Commission, to enter a finding -- Findings  
10 of Fact if it has been presented with a proper Motion for  
11 Partial Summary Judgment.

12 The case law here again provides that a finding  
13 of fact under Rule 56D would not be applicable, one,  
14 because Sprint it's asking for a legal conclusion rather  
15 than a finding of fact, but also because Sprint's Motion  
16 for Partial Summary Judgment was not a proper Motion in  
17 the first instance.

18 I also just want to step back and, you know,  
19 look at Statute 49-13-13. We talked a lot about this  
20 statute at the December hearing. And what this statute  
21 asks the Commission to do is that if it determines that  
22 some practice is unjustified, and in this case either  
23 Sprint's withholding, or that the traffic isn't  
24 compensable under the tariff, it asks the Commission to  
25 do two things -- to do at least two things.

1           It first asks the Commission to determine how to  
2 classify the traffic or how to categorize the traffic and  
3 then also to set reasonable charges.

4           So inherent in Sprint's Motion is the idea that  
5 you would not only make a determination that rate of  
6 return regulation was the means by which you would  
7 determine the reasonable charges but inherent in that  
8 Motion is also a determination that you would conclude  
9 today without full evidence on this issue, that you would  
10 classify the traffic as noncompetitive or as a  
11 noncompetitive service.

12           And certainly Sprint has presented cases that  
13 make that conclusion on the federal level by the FCC that  
14 access services are noncompetitive services. But the --  
15 so we have a situation where Sprint is saying that the  
16 services are not access services, yet relies upon FCC  
17 orders that relate only to access services.

18           So we think that it is premature to reach the  
19 conclusion about how you would classify this service if  
20 you have determined that it doesn't fit within the access  
21 tariff.

22           And in particular there seems to be a  
23 disagreement among the parties about what the implication  
24 of Count II is. Northern Valley's Count II rests only on  
25 the premise that the tariff does not apply. It doesn't

1 rest on the premise that it's not an access service.

2 And the reason that this distinction is critical  
3 is because the definitions within Northern Valley's  
4 tariff about what is access service under the tariff are  
5 not the definitions found within the statute. So there  
6 is a distinction to be made and perhaps an important  
7 distinction to be made as this case proceeds about  
8 whether or not the tariff applies and if the tariff  
9 doesn't apply, what do you call the service that  
10 Northern Valley has provided.

11 We think it is perfectly appropriate and  
12 reasonable for the Commission if it were to conclude the  
13 tariff's definitions constrict its coverage of the  
14 service in some manner to, nevertheless, conclude that  
15 Northern Valley has provided an access service within the  
16 definitions of the statute.

17 In those circumstances we reassert that 49-13-13  
18 would be applicable and that the Commission's prior  
19 determinations that price regulation applies to the  
20 service would be equally applicable. In these  
21 circumstances it would be completely inappropriate in  
22 our opinion to apply rate of return regulation to  
23 Northern Valley. Again, Northern Valley is also exempt  
24 from rate of return regulation by being a small carrier.

25 So from our perspective Sprint's Motion and the

1 issues that it asks the Commission to address today are  
2 wholly premature because we have not yet reached a  
3 determination about whether or not the traffic at issue  
4 is covered by the tariff and if not, whether it may,  
5 nevertheless, be access services as defined by the  
6 statute.

7           Looking also at 49-13-13, I would submit that it  
8 doesn't appear that the Legislature intended for this  
9 Commission to make these sorts of determinations at an  
10 early stage in the case. This statute by its plain  
11 language provides that the Commission may make these  
12 determinations after a hearing has been held.

13           And so it appears to us on the plain language of  
14 the statute that the appropriate course of action is to  
15 allow discovery to be completed and for the parties to  
16 proceed then to hearing, at which time if the court finds  
17 that the tariff does not cover the traffic, it would  
18 then proceed to address the analysis set forth in  
19 49-13-13.

20           You've also heard Mr. Schenkenberg sort of  
21 acknowledge that price regulation -- and we've talked  
22 about this in our papers. Price regulation is the  
23 regulation that this Commission has determined would be  
24 the most appropriate course of action for CLEC access  
25 services.



1           So we see no basis to conclude today that price  
2 regulation would not also potentially be an appropriate  
3 methodology for the Commission to apply.

4           And I want to take just a moment. Sprint in its  
5 discussion in its papers focuses on Statute 49-31-4. And  
6 you heard Mr. Schenkenberg talk about 49-31-4 as being  
7 the statute that requires the Commission to utilize rate  
8 of return regulation when determining a charge for  
9 noncompetitive services.

10           This statute, however, has an important  
11 exception, which was not talked about in Sprint's papers  
12 or in its discussion today. Indeed, the very sentence  
13 that Sprint relies upon starts with the words "Except as  
14 provided in 49-31-4.1."

15           And when you look at 49-31-4.1, it says there  
16 that the Commission shall on its own Motion or on  
17 Petition hold a hearing and make investigations regarding  
18 the appropriate price regulation. And if during that  
19 investigation the Commission determines that a  
20 noncompetitive service would have a positive impact on a  
21 universal service and is more reasonable and fair --  
22 excuse me. If price regulation would be more reasonable  
23 and fair than rate of return regulation, that a  
24 Commission may adopt price regulation.

25           So, here again, even if we accept it as given, a

1 number of contested issues about whether or not -- what  
2 the type of service is, how to classify it. And if we  
3 were to include that as an initial matter it is a  
4 noncompetitive service, 49-31-4.1 fully empowers the  
5 Commission on its own Motion to determine that price  
6 regulation rather than rate of return regulation would be  
7 more appropriate for the service.

8           And regardless of whether or not ultimately the  
9 Commission concludes that it's not in Northern Valley's  
10 tariff and it's not an access service, there can be no  
11 dispute based on the conversation that we've had today  
12 that the service that Northern Valley intended to  
13 provide, the service that Sprint has received for all of  
14 these years, is virtually identical, if not functionally  
15 equivalent of access service.

16           So under the circumstances we think it would be  
17 completely appropriate for the Commission to exercise its  
18 own authority under the statute to determine that price  
19 regulation, rather than rate of return regulation, was  
20 appropriate. Again, we don't believe that that's a  
21 decision the Commission needs to make today. We think  
22 that that decision should be held in abeyance until we  
23 get through discovery and until we prepare for the case  
24 and present the case.

25           But I want to point out just this fundamental

1 point that even if you agreed with Sprint on every step  
2 of that process, you could still reach the conclusion  
3 under the statute that rate of return regulations should  
4 not be applied to the service and that price regulation  
5 would be the appropriate methodology for determining the  
6 rate.

7 I also want to just touch briefly on a few  
8 points that Sprint presented as undisputed facts. Sprint  
9 stated that it was undisputed that Sprint has to deliver  
10 the calls to Northern Valley's network.

11 As Northern Valley said in its papers, the  
12 opinion that Sprint relies on for this proposition is a  
13 federal opinion so I guess there's some potential room  
14 for debate about whether that is true with regard to  
15 intrastate traffic. But even if we were to conclude that  
16 as a general matter Sprint had the duty to deliver these  
17 calls, that duty applies, as I understand it, only  
18 insofar as Sprint is carrying the traffic on a retail  
19 basis.

20 But much of the traffic that Sprint delivers to  
21 Northern Valley is delivered on a wholesale basis where  
22 Sprint voluntarily enters into the market and advertises  
23 to other interexchange carriers send us your traffic.  
24 Let us deliver your traffic for you to Northern Valley.

25 Under these circumstances, we don't believe it's

1 a matter of undisputed fact that Sprint has an obligation  
2 to deliver the traffic. Rather we believe that Sprint is  
3 holding itself out as being voluntarily totalling deliver  
4 the traffic on behalf of other carriers. We think that  
5 is a fundamental key fact that should be understood at  
6 every step of the conversation today.

7 Sprint said another undisputed fact was that the  
8 access tariffs don't apply. I've addressed that issue.  
9 The point is under Count II the access tariff doesn't  
10 apply, but that doesn't mean it's not an access service  
11 based on the distinction and the definitions.

12 We think -- Sprint said it's undisputed that  
13 it's a noncompetitive service. I think you can only  
14 reach that conclusion once you've been able to categorize  
15 and process what it is that Northern Valley has been  
16 providing if it's not access service.

17 And then, finally, Sprint says it's undisputed  
18 that the calls are very, very small. We don't think this  
19 is a material fact in the consideration of the Motion for  
20 Partial Summary Judgment because the costs of Northern  
21 Valley are not dispositive of what the legal application  
22 would be.

23 But, in any event, we strongly disagree that  
24 Sprint has proven its position with regard to the cost.  
25 We think that to the extent Northern Valley's costs

1 become relevant to this proceeding there's a lot of  
2 additional material and information that would go into  
3 those calculations rather than purely the switching rate,  
4 which is what Sprint's papers relied upon.

5 With that, I would be glad to take any  
6 questions.

7 CHAIRMAN NELSON: I'm going to go to Staff. Do  
8 you have any comments, Karen?

9 MS. CREMER: Thank you.

10 This is Karen Cremer of Staff. The parties have  
11 summarized the law pertaining to the granting of the  
12 Motion for Summary Judgment, and you can read that in  
13 their briefing.

14 Staff believes that Sprint has failed to  
15 adequately show there are no material facts in dispute.  
16 And I would refer the Commission to Northern Valley's  
17 confidential response to Sprint's statement of those  
18 undisputed facts.

19 Staff believes this Motion is premature as  
20 Sprint states that it has made an important assumption as  
21 the basis of this Motion, and that is it has assumed for  
22 the purposes of this Motion that the Commission has  
23 decided under Count I that the disputed calls are not  
24 access and the Commission is now considering whether to  
25 set a rate for the disputed calls, and if so, how the

1 rate should be calculated.

2 As I said, as these assumptions appear to be the  
3 basis of Sprint's Motion, I believe that Motion is,  
4 therefore, premature. Sprint can raise these issues if  
5 and when these assumptions become facts.

6 Therefore, Staff recommends the denial of  
7 Sprint's Motion for Partial Summary Judgment.

8 CHAIRMAN NELSON: Thank you. Rebuttal from  
9 Sprint? Would you like a few minutes?

10 MR. SCHENKENBERG: Thank you, Mr. Chairman. I  
11 think at the outset I think we're in violent agreement  
12 that the Commission is going to use rate of return  
13 regulation or price regulation. I didn't hear anything  
14 from Mr. Carter suggesting there was another tool for the  
15 Commission to apply.

16 I also didn't hear him address the waiver issue  
17 or suggest that we were in that third bucket where the  
18 Commission has no rate setting authority.

19 With respect to Ms. Cremer's statement about our  
20 assumption, this is the only way you can raise a  
21 dispositive Motion on an alternative claim. In a court  
22 setting you might say I allege that there's a contract,  
23 but if there isn't a contract, then you owe me something  
24 under equitable law.

25 The other side can move to dismiss the equitable

1 claim and say let's assume there's no contract. Let's  
2 assume that we're beyond Count I and we're into Count II.  
3 Court, you can decide that if there's no contract, then  
4 there is no equitable claim because some important piece  
5 of this hasn't been met, important part of the cause of  
6 action.

7 And courts do that and they do that regularly  
8 and it's not premature to do that. It's simply a  
9 function of how you present a dispositive Motion on an  
10 alternative claim. So we respectfully disagree that that  
11 assumption should hold up the Commission's decision at  
12 this point.

13 Finally, and I don't want to belabor something  
14 that is obvious, but maybe it's only obvious to me.  
15 Mr. Chairman, if you are a customer of ABC Wireless  
16 Company -- we won't use any names. ABC Wireless Company.  
17 And I'm a customer of different -- I've got my landline  
18 provider. And I want to call you. The number that you  
19 have been assigned is a number that ABC Wireless has  
20 gotten from the number administrator. And the only way  
21 for that call to get to you if I'm going to call you is  
22 for my provider to get the call to your provider and for  
23 your provider to use that link between its network and  
24 your phone. Your phone doesn't connect to other  
25 networks. And that's the only way to get it there.

1 There aren't any other alternative providers. There  
2 isn't any place else to go.

3 And it's a functionally equivalent service to  
4 access, whether or not it's access. It's a functionally  
5 equivalent service to local traffic. When parties  
6 deliver local traffic to each other within a local  
7 calling area and there's no compensation exchanged, the  
8 same thing happens. The switch gets it and sends it down  
9 the loop.

10 And so the fact that that is functionally  
11 equivalent doesn't make it competitive and doesn't impact  
12 whether that can be charged as -- classified as access or  
13 otherwise. And I apologize for not saying that very  
14 eloquently.

15 That's all I have. Thank you.

16 CHAIRMAN NELSON: Thank you. Questions. And I  
17 might start with Rolayne. Or do you want to start with  
18 Commission questions?

19 MS. AILTS WIEST: I can start.

20 CHAIRMAN NELSON: Okay. Go ahead.

21 MS. AILTS WIEST: I'll start with Northern  
22 Valley.

23 Would it be your position that the rates that  
24 the Commission can regulate for Northern Valley are your  
25 switched access rates? For example, we can't regulate



1 your local rates, can we?

2 MR. CARTER: No, ma'am. Not to my knowledge.

3 MS. AILTS WIEST: And then --

4 MR. CARTER: Could I respond a little bit  
5 further on that because Mr. Schenkenberg did raise this  
6 point.

7 He said that -- we talked about price  
8 regulation. We talked about rate of return regulation.  
9 And we didn't address the third possibility, which is  
10 that the Commission doesn't have authority to set a  
11 rate.

12 Again, I think that that's part of why the  
13 Motion is premature because part of the step in  
14 determining whether or not the Commission can set the  
15 rate and what methodology would be most appropriate is a  
16 determination of exactly what service it is that  
17 Northern Valley's not providing if it's not an access  
18 service.

19 So I don't mean to suggest that this is a course  
20 of action that the Commission should take, but it  
21 certainly would be consistent with our Count II for the  
22 Commission to determine, for example, it's nonaccess  
23 service and that, therefore, if the Commission doesn't  
24 believe it has the authority to set the rate, to make  
25 that clear too. And then the case will go back to the

1 Federal Court, and the Federal Court will use whatever  
2 methods or means the Court has to determine whether the  
3 compensation was applicable.

4 Again, our Count II is there because it only  
5 presumes that the tariff doesn't apply and then asks the  
6 question to determine, well, if the tariff doesn't apply,  
7 then what is the service that is provided. So I think  
8 that theory at least as we sit here today there is a  
9 possibility that the Commission could determine that the  
10 service that is being provided is nonregulated and,  
11 therefore, goes back to the court. But we don't think  
12 that's where the case will ultimately be resolved or this  
13 case will ultimately be resolved.

14 MS. AILTS WIEST: So what is Northern Valley's  
15 position as to what rates the Commission could regulate  
16 of Northern Valley?

17 Are you saying we can regulate rates other than  
18 access rates given your exemption under 5.1?

19 MR. CARTER: Well, we think again if the tariff  
20 does not apply, then it is likely still access service  
21 and that that would be subject to the price regulation.

22 If it's nonaccess service, at this time we don't  
23 have a position on that issue because, again, we're  
24 still -- for us still in the early stages of getting  
25 discovery and will once we obtain discovery then be

1 finalizing our relationship with expert witnesses and  
2 presenting that full scope of our position on that  
3 issue.

4 But we think that for today's purpose and for  
5 the Motion for Partial Summary Judgment the Commission  
6 need only determine that if it's not covered by the  
7 tariff, it could still be access service and, therefore,  
8 if you reach that conclusion, it would be necessary to  
9 deny the Motion for Partial Summary Judgment.

10 MS. AILTS WIEST: I know. But you're still not  
11 answering the question. Does the Commission have any  
12 authority over your local exchange rates?

13 MR. CARTER: No. And I don't think that  
14 anyone's suggesting that this is a local exchange  
15 service.

16 MS. AILTS WIEST: No. So if a customer came to  
17 us and said pursuant to 49-13-13 we think your local  
18 exchange rate is unreasonable, your position would be the  
19 Commission does not have any jurisdiction to determine a  
20 different rate?

21 MR. CARTER: As I understand it, that's how the  
22 statute is written, yes.

23 MS. AILTS WIEST: So your understanding is the  
24 Commission has jurisdiction over your access rates.

25 MR. CARTER: That's correct.

1 MS. AILTS WIEST: But you're still claiming that  
2 we could establish -- we could find that the rate is a  
3 non -- that what you provided was a nonaccess service and  
4 that we could still determine a rate pursuant to  
5 49-13-13, even though it was not an access service?

6 MR. CARTER: I don't mean to try to dodge your  
7 question. What I'm saying is at this point in time it is  
8 not access service -- as we sit here today, I don't know  
9 what the service is.

10 We know it's not local service. We think it's  
11 access service. It looks very much like access service.  
12 And if it's not technically access service, it's probably  
13 the functionally equivalent. In those circumstances we  
14 do believe that 49-13-13 would allow the Commission to  
15 exercise jurisdiction over the traffic and determine --

16 Just in a way, if I might make an analogy, in  
17 the Iowa Utilities Board case the Iowa Utilities Board  
18 determined that the tariff did not apply. They went on  
19 to determine that the Commission should exercise  
20 authority over that traffic and they titled it "high  
21 volume access service." They invented a new terminology  
22 for the traffic.

23 I am not suggesting that that's the way this  
24 Commission should handle it, but I am suggesting that  
25 literally what Sprint is arguing that it's not access

1 service, we know it's not local service, so we don't know  
2 yet what it is.

3 And so I think that 49-13-13 could play a role  
4 in this and that we need to fully develop the record and  
5 then determine how to classify the service. I'm not  
6 trying to dodge the question. I'm saying we're not yet  
7 at the point where I can give you a definitive answer.

8 MS. AILTS WIEST: So despite the exemption in  
9 5.5, you're saying it is possible that the Commission can  
10 regulate services of Northern Valley that are not access  
11 services?

12 MR. CARTER: Again, yes. The Statute 49-13-13  
13 asks the Commission -- it believes that a practice for  
14 classification is unjust or unreasonable to determining  
15 what the classification is and then determine whether or  
16 not regulation should be applied to that.

17 And in this case it's not only Northern Valley's  
18 service and the actions of Northern Valley but we also  
19 believe that Sprint's actions are unjust and unreasonable  
20 under that statute and that through that -- through  
21 Sprint's actions and its failure to pay the Commission  
22 could determine -- could utilize 49-13-13 to determine  
23 and prescribe the just and reasonable charge.

24 MS. AILTS WIEST: Can you -- then how do you  
25 reconcile your argument that rate of return is not

1 applicable because of your exemption under 49-31-5.1?

2 MR. CARTER: Well, because in the 2010 case  
3 Northern Valley was part of the case where the Commission  
4 determined that it would apply price regulation to the  
5 access services. And so, again, if it's not access  
6 service, if I understand it the quandary we're in, which  
7 is if it's not access service, then how do we classify  
8 it, but that's exactly what 49-13-13 asks the Commission  
9 to determine is how to classify the service and then we  
10 can look at whether or not -- once we know how it was  
11 classified, what sort of price regulation would be  
12 appropriate.

13 MS. AILTS WIEST: But your argument on page 10  
14 was that it is clear that 49-31-5.1 is fatal to Sprint's  
15 Motion because it renders rate of return regulation  
16 inapplicable to Northern Valley. As an independent  
17 telephone company state law is clear that Northern Valley  
18 services are not subject to rate of return analysis.

19 That statement was not based on anything that  
20 you were arguing that you were instead subject to price  
21 regulation. You were saying you were not subject to rate  
22 of return regulation because of your exemption under  
23 5.1.

24 MR. CARTER: That's correct. I mean, again the  
25 standard for a Partial Summary Judgment Motion is whether

1 Sprint has proven as a matter of law that it's entitled  
2 to the relief that it seeks. Again I'm not trying to  
3 dodge your question, but it's not Northern Valley's  
4 obligation at this hearing today to take a definitive  
5 course of action on how the Commission will set the rate.

6 All Northern Valley has to do at this hearing  
7 today is establish that Sprint's Motion -- Sprint has not  
8 proven, as a matter of law, that the only course of  
9 action the Commission could take would be to apply a  
10 return of return regulation.

11 As Ms. Cremer said, the Motion is premature  
12 because there's a lot of steps in that process that are  
13 still left to be resolved. And I apologize that I can't  
14 give you a definitive answer on all of these questions at  
15 this point in time, but it is because we're at from our  
16 perspective the early stage of the case and so it would  
17 be premature for the Commission to determine that the  
18 only possible outcome here is to apply rate of return  
19 regulation.

20 MS. AILTS WIEST: Is it unreasonable to expect  
21 you to know if you're subject to regulation for other  
22 services other than access services?

23 MR. CARTER: Well, again, respectfully  
24 Northern Valley believes it has been providing an access  
25 service. That's why we're here scratching our heads kind

1 of wondering the same thing. If we haven't been  
2 providing access services, what have we been providing?

3 We know that Sprint sends its calls to  
4 Northern Valley's network. It utilizes all the same  
5 functions and features as Northern Valley does for all of  
6 the calls it delivers to its customers throughout the  
7 region, Aberdeen and Groton.

8 And so we believe we have been providing an  
9 access service. So it's very difficult to answer this  
10 hypothetical question because we firmly believe that for  
11 all of these years everyone knows we've been providing  
12 access service.

13 The FCC knows we've been providing access  
14 service because they just clarified the rules to make  
15 sure that we get paid for this work on a going forward  
16 basis.

17 So, again, we're in a bit of a gray area because  
18 we believe we've been providing access service. We  
19 believe it's clear under the statutes of this Commission  
20 that we've been providing an access service. And so in  
21 many ways we're engaging in an academic or theoretical  
22 exercise about what it is we have been providing if we  
23 haven't been providing access service.

24 Because as we sit here right now, we are clearly  
25 providing an access service under the statute, as we



1 understand it. And so, respectfully, I understand the  
2 frustration that you have in terms of trying to determine  
3 how this ultimately may come out, but I bring you back to  
4 the point that today the decision for the Commission is  
5 whether or not Sprint has proven, as a matter of law,  
6 that if the tariff doesn't apply, the traffic must be  
7 subject to a rate of return regulation. And we think  
8 clearly Sprint has not met that standard.

9 MS. AILTS WIEST: And part of the argument is  
10 that it has to be a nonaccess service. So it's your  
11 position that we can establish a rate for Northern Valley  
12 for a nonaccess service?

13 MR. CARTER: If the access service is the  
14 functional -- if what we have provided --

15 MS. AILTS WIEST: No. Not if the access  
16 service. For a nonaccess service.

17 MR. CARTER: Again, you can only answer that  
18 question when you classify what it is we have provided.  
19 I don't think that the Commission has general authority  
20 broadly to regulate all nonaccess services because  
21 certainly if it's a local service that would be outside  
22 of the authority.

23 But if the service we have provided is what the  
24 Iowa Utilities Board has defined as high volume access  
25 service where it says functionally equivalent, the exact

1 same service, but it happens to be going to particular  
2 customers of higher volume, then I think in those  
3 circumstances the Commission would have the authority to  
4 regulate and would do so pursuant to 49-13-13 and could  
5 provide for price regulation in that circumstance.

6 MS. AILTS WIEST: So if the Commission found  
7 that this was an access service but the tariff, you know,  
8 for whatever reason did not apply, what standard would  
9 the Commission use to determine the rate?

10 MR. CARTER: If the Commission determined that  
11 the tariff did not apply but, nevertheless, it was access  
12 service, the Commission would, in our opinion, utilize  
13 price regulation to determine the rate.

14 MS. AILTS WIEST: And so consistent with past  
15 statements, you're not asking the Commission to apply any  
16 equitable standards. It would be pricing regulation?

17 MR. CARTER: Correct, 49-13-13 says that the  
18 Commission may determine and prescribe the just and  
19 reasonable charge. Price regulation. The rules adopted  
20 for price regulation set forth five criteria that the  
21 Commission apply in determining whether the price is just  
22 and reasonable.

23 I don't think -- the language in the two  
24 statutes are nearly identical, and I believe under that  
25 standard if the Commission determined that the tariff

1 didn't apply, it would utilize those five standards set  
2 forth in price regulation to determine the appropriate  
3 rate under 49-13-13.

4 MS. AILTS WIEST: And I believe at least  
5 pursuant to the discovery you're going back to 2005; is  
6 that correct?

7 MR. CARTER: I think some of this may go back to  
8 that period of time. If I recall correctly, the  
9 withholding and the most relevant portion would be since  
10 2007.

11 MS. AILTS WIEST: And then your position is that  
12 pricing regulation would apply during those pastime  
13 periods even when you were not subject to price  
14 regulation?

15 MR. CARTER: My position is is that the -- that  
16 there is an opportunity for the Commission in 49-13-13 to  
17 determine and prescribe the just and reasonable charge  
18 and that it would be within the Commission's authority.  
19 And as you look over at 49-31-4.1, the Commission could  
20 do so on its own Motion to determine that price  
21 regulation should be applicable to that traffic.

22 MS. AILTS WIEST: But I thought you were arguing  
23 that rate of return regulation would be something that  
24 would be inapplicable to Northern Valley on page 10 of  
25 your brief.

1           Is it possible that we could also apply a rate  
2 of return regulation prior to the time we found that  
3 CLECs were subject to price regulation?

4           MR. CARTER: Again, at this point in time the  
5 Motion is whether or not Sprint has proven that rate of  
6 return regulation must apply.

7           I think that it's clear that the Commission  
8 could choose to utilize price regulation and that the  
9 exemption that applies to Northern Valley -- Northern  
10 Valley doesn't have -- as I understand the exemption that  
11 applies to Northern Valley as a small carrier, Northern  
12 Valley doesn't have to broadly waive the exemption and  
13 subject itself to rate of return regulation in order to  
14 be amenable to having price regulation applicable to its  
15 traffic. It's not --

16           As I understand the way that the exemption  
17 works, the exemption is Northern Valley's exemption, and  
18 Northern Valley may exercise that exemption to the extent  
19 that it deems appropriate. So it could say that it is  
20 minimal to having price regulation apply to its services  
21 without necessarily waiving its exemption of rate of  
22 return regulation.

23           MS. AILTS WIEST: So for an access service it's  
24 up to Northern Valley to determine whether rate of return  
25 regulation or price regulation applies to it?

1 MR. CARTER: No. Northern Valley has already  
2 agreed in the Commission's Docket that price regulation  
3 can apply to its access services. It has complied with  
4 the Commission's rules in that regard. So Northern  
5 Valley has already made itself amenable to price  
6 regulation.

7 But the exemption, as I understand it, that  
8 speaks to small carriers hasn't been waived by  
9 Northern Valley. So the Commission could apply a price  
10 regulation without requiring Northern Valley to waive the  
11 exemption that would be applicable to rate of return  
12 regulation. That's my understanding.

13 MS. AILTS WIEST: So Northern Valley could  
14 choose not to have its access services regulated by the  
15 Commission at all using 5.1?

16 MR. CARTER: Well, I definitely looked at this  
17 statute in detail. It makes quite a few  
18 cross-references. At this point in time I would have to  
19 go through an exercise of looking at all of the -- what's  
20 included and excluded. But I don't believe that under  
21 49-31-5.1 that a small carrier becomes subject to rate of  
22 return regulation.

23 MS. AILTS WIEST: So let's assume pricing  
24 regulation applies. Then Northern Valley is intending in  
25 this Docket to provide the fully allocated costs of

1 providing its service, switched access service?

2 MR. CARTER: Well, under the statute there are a  
3 number of factors that the Commission determines if it  
4 determines that it's going to apply price regulation,  
5 including whether the price is fair and reasonable, the  
6 price of alternative services, the market for the  
7 service, the affordability of the service in the market,  
8 the impact of the price, and the service on the  
9 commitment to preserve affordable universal service.

10 The Commission can also consider actual costs,  
11 and in determining the Commission shall also consider the  
12 fully allocated cost of providing the service.

13 Northern Valley has provided in the past and  
14 other situations information about its costs. This  
15 information hasn't been requested in detail by Sprint at  
16 this time. But if the Commission were to determine that  
17 price regulation was appropriate, then we would expect  
18 that it would look at all of the factors contained within  
19 the statute. And if that includes certain information  
20 about Northern Valley's costs, then we would consider  
21 that to be an appropriate part of the analysis.

22 In addition to and as well talking in the  
23 Motions to Compel, the statute specifically addresses the  
24 Commission to look at affordability of price, which also  
25 in the past has involved looking at the impact of the

1 costs on the IXCs, revenues, and its net profit. So it's  
2 really a two-sided analysis that looks at Northern  
3 Valley's costs in providing the service as well as the  
4 IXC's ability to sell that service to the public.

5 So if the Commission were to ultimately  
6 determine that price regulation -- that Northern Valley  
7 was not providing an access service and it was something  
8 equivalent to the access service and price regulation is  
9 appropriate, then certainly we would comply with the  
10 requirements of the statute.

11 MS. AILTS WIEST: And so what do you think that  
12 the time frame would be for determination of submitting a  
13 fully allocated cost of providing service?

14 Would that be during the time period in  
15 question, or would it be based on your costs of today?

16 MR. CARTER: I haven't had that conversation  
17 with the individuals that would be advising us on that.

18 MS. AILTS WIEST: And what is the actual effect  
19 of a rate established by the Commission in this  
20 proceeding?

21 I believe your Count II is a declaratory ruling  
22 request; is that correct?

23 MR. CARTER: That's correct.

24 MS. AILTS WIEST: So, first of all, are you  
25 asking the Commission to conduct essentially a rate

1 making proceeding pursuant to a declaratory ruling?

2 MR. CARTER: We're asking the Commission to  
3 exercise the authority in 49-13-13, which empowers the  
4 Commission to determine a just and reasonable rate that  
5 would be applied.

6 Once that rate has been determined, then that  
7 information in a form of declaratory judgment would be  
8 conveyed back to the Federal Court which has the counts,  
9 the actual counts for compensation still within its  
10 jurisdiction.

11 MS. AILTS WIEST: To the extent that the  
12 Commission came up with a rate pursuant to price  
13 regulation, rate of return regulation, whatever, then  
14 that would actually be essentially an advisory rate to  
15 the Federal Court which the Federal Court could consider  
16 or could not consider; correct?

17 MR. CARTER: Well, certainly I can't speak to  
18 the manner in which the court would evaluate the  
19 Commission's decision. What I can speak to is that the  
20 court specifically referred issues to the Federal  
21 Communications Commission asking them to provide this  
22 same analysis.

23 We believe in this case that the court referred  
24 those issued here to this Commission. We understand,  
25 however, that the Commission disagreed with that



1 analysis. But, nevertheless, the court appears fully  
2 inclined to take the guidance from the Commission and  
3 implement that guidance. We don't believe -- as a purely  
4 legal matter would you consider the Commission's decision  
5 perhaps advisory? Perhaps you would.

6 Do we think as a practical matter that the court  
7 would do anything other than execute the decision that --  
8 the policy decision of this Commission in trying to reach  
9 resolution of the legal issues between Northern Valley  
10 and Sprint?

11 Absolutely not. We believe the court would  
12 fully give full weight to the Commission's determination.  
13 And, indeed, what the court has repeatedly said is that  
14 it is precisely because there are certain policy  
15 considerations that are involved in these sorts of cases  
16 that is incumbent upon the court to seek the advice of  
17 this Commission and the Federal Communications Commission  
18 rather than charting her own path as to what the policy  
19 should be.

20 So we think this is perfectly consistent -- our  
21 Count II is perfectly consistent with where the court has  
22 been and what the court hopes to see is resolution of  
23 these issues coming from the Commission to her so that  
24 she can then effectuate that in a final judgment.

25 MS. AILTS WIEST: That's all I have.

1           CHAIRMAN NELSON: Questions from the Commission.  
2           Commissioner Fiegen.

3           COMMISSIONER FIEGEN: Mr. Carter, you stated in  
4 discussing a fact of Sprint about the obligation to  
5 deliver service. Could you explain that a little bit  
6 more? Because you talked about retail and wholesale.

7           MR. CARTER: Certainly.

8           COMMISSIONER FIEGEN: And that you didn't  
9 believe that Sprint had an obligation to deliver.

10          MR. CARTER: Certainly. When Sprint as an  
11 interexchange carrier holds itself out to the market as a  
12 common carrier and so it is seeking to have residential  
13 and business customers throughout the country sign up for  
14 their long distance services, we would, as a general  
15 matter, not dispute that Sprint has an obligation to  
16 deliver the traffic to phone numbers throughout the  
17 North America numbering plan where its customers desire  
18 to terminate their traffic.

19          So insofar as Sprint's customers desire to  
20 reach the conferencing services that are provided by  
21 Northern Valley's customers for their, again, what I  
22 consider retail customers, then Sprint, we do believe,  
23 has an obligation to deliver that traffic.

24          And even if Sprint didn't want to deliver the  
25 traffic, it couldn't tell its residential and business

1 customers not to make the phone calls. That situation is  
2 materially different, however, in our opinion, from a  
3 situation in which Sprint is providing these call  
4 providing services to other IXCs.

5 So, for example, when AT&T wants to deliver  
6 traffic to Northern Valley, AT&T may deliver that traffic  
7 directly to Northern Valley's exchange and to its  
8 switches. Or AT&T may look into the marketplace and  
9 determine who else is providing -- delivering traffic to  
10 Northern Valley. And if it finds another carrier that is  
11 willing to provide the traffic to Northern Valley for a  
12 lower cost, then AT&T will send its traffic to another  
13 carrier.

14 We understand -- and I don't have specifics  
15 because this is, indeed, part of what we're trying to get  
16 discovery around. But it's certainly the case that  
17 Sprint serves as a least cost provider to other carriers  
18 in certain circumstances.

19 And in those cases if Sprint is voluntarily  
20 accepting the traffic and it is not doing so under a  
21 common carrier obligation, then we don't believe that the  
22 same duty to deliver the traffic without interference  
23 would be applicable.

24 We think that that distinction is important  
25 because when you're asking questions about the revenues

1 that Sprint has received and whether Sprint should be  
2 obligated to pay for the traffic we think it's very  
3 significant if Sprint is out in the market telling other  
4 carriers please send me your traffic for Northern Valley.

5 COMMISSIONER FIEGEN: Thank you.

6 CHAIRMAN NELSON: I want to follow up on that.  
7 And so just so I'm clear, it is your position, NVC's  
8 position, that a least cost router has no duty to deliver  
9 traffic?

10 MR. CARTER: Our position is is that as a -- the  
11 duty that applies to a carrier as a common carrier;  
12 right? Which is where the duty not to interfere or block  
13 traffic originates is from the duty of a common carrier.

14 There is no obligation under law or implied as a  
15 common carrier for Sprint or any other long distance  
16 carrier to voluntarily accept another long distance  
17 carrier's traffic. They do so voluntarily. They do so  
18 under a contractual commitment to voluntarily accept that  
19 traffic, but that is not a common carrier duty.

20 And so it would be the case -- I don't know how  
21 Sprint forms those contracts; right? So those  
22 contractual provisions could allow them to block certain  
23 traffic. It could allow them to significantly raise the  
24 rates, as we understand they've done in certain  
25 circumstances in order to discourage those other carriers

1 from sending the traffic to Sprint's network.

2 Certainly if the rate is extremely high, very  
3 few carriers are going to select that as the least cost  
4 per outing option to deliver the traffic. And so we  
5 believe again the common carrier duty does not apply when  
6 you're voluntarily accepting traffic from other carriers.

7 CHAIRMAN NELSON: And so if Sprint was  
8 voluntarily accepting this third-party traffic you would  
9 have -- and it was supposed to be routed to one of your  
10 customers, you'd have no problem with them dumping it  
11 instead of delivering it?

12 MR. CARTER: Sure. Because what would happen  
13 then is the common carrier that originally accepted the  
14 traffic from that retail customer, that business  
15 customer, it would have the common carrier duty to route  
16 the traffic in a different manner.

17 So even if Sprint blocked that traffic and said  
18 don't send us your traffic, then that common carrier  
19 would deliver the traffic through another service. But  
20 what Sprint has done in certain circumstances has said  
21 send us your traffic, we'll take all the revenues, all  
22 the money you're going to pay us for that traffic, and  
23 then pay nothing to Northern Valley in exchange for  
24 advocating that traffic.

25 So in those circumstances if Sprint blocked the

1 traffic, in fact, we would probably be very happy about  
2 that because then another carrier would accept the  
3 traffic, and we would actually be paid for the work that  
4 we've done. So that would be fine.

5 CHAIRMAN NELSON: No questions for me.

6 Commissioner Hanson, any questions?

7 COMMISSIONER HANSON: No, I do not. Thank you.

8 CHAIRMAN NELSON: Okay. At this point I would  
9 probably be inclined to take this under advisement unless  
10 either of the -- my fellow Commissioners would like to  
11 make a Motion at this point.

12 COMMISSIONER HANSON: I do not have a Motion at  
13 this time.

14 CHAIRMAN NELSON: Okay. I think my intention  
15 would be to take this under advisement, but given my  
16 desire to see this thing move along, my intention would  
17 be that we will make a Motion on this particular issue on  
18 Tuesday at our regular meeting on Tuesday.

19 I wouldn't anticipate taking any additional  
20 argument at that point. And certainly wouldn't expect  
21 your presence here. I would simply see it being a  
22 Commission function at some point in our meeting on  
23 Tuesday to dispose of this particular issue.

24 We will take a 10-minute break at this point.

25 (A short recess is taken)

1           CHAIRMAN NELSON: We will proceed at this time  
2 point with Northern Valley's Motion to Compel Discovery.

3           Mr. Carter.

4           MR. CARTER: Thank you, Commissioner Nelson.

5           I will say that I think both Sprint and I  
6 thought we might have had a resolution of the prior  
7 Motion in order to delve into the Motion to Compel. I  
8 will proceed assuming that the Motion is going to be  
9 denied. I'm sure Sprint will proceed in the opposite  
10 manner.

11           In any event, I want to start by sort of talking  
12 at a high level about the revenue information from Sprint  
13 that we have sought in this case. I think that that  
14 covers a number of different topics within the Motion to  
15 Compel and can probably be most easily addressed in  
16 tandem.

17           We have questions relating to the revenue that  
18 Sprint has received for the calls delivered to Northern  
19 Valley from its retail customers, separate questions that  
20 relate to the revenue that Sprint has received with  
21 regard to its wholesale customers.

22           We think that this distinction, as I talked  
23 earlier, is important both because of the rights and  
24 responsibilities of Sprint in delivering that traffic but  
25 also because we are generally aware and Sprint's

1 declarations note that certain information may be easier  
2 to provide for its wholesale customers than with regard  
3 to the retail customers.

4 But as a general matter, we start from the  
5 proposition that SDCL 49-31-1.4 sets forth the five  
6 factors that this Commission would consider if it  
7 determines under Count II that price regulation should  
8 apply to the traffic. One of those central  
9 considerations is the affordability of the price for the  
10 service in the market it is offered.

11 In this Commission's case En Re: US West the  
12 Commission looked at, among other information, the impact  
13 that a particular rate would have on the customers,  
14 meaning I believe in this case it was long distance  
15 customers but the rate that that impact would have on  
16 those customers and their ability to remain profitable  
17 and, indeed, their net profit.

18 So when you're looking at access service or a  
19 service that is similar to access service, then the  
20 customer of that service is certainly the long distance  
21 carrier, and the ability of the long distance carrier to  
22 generate revenues and profits from delivering traffic to  
23 Northern Valley's network is one of the five  
24 considerations that the statute requires the Commission  
25 to consider.



1           So we clearly believe that under this  
2 Commission's precedent obtaining information about  
3 Sprint's revenues is relevant to Northern Valley's case.  
4 Indeed, this issue of relevancy was also recently  
5 affirmed in the Southern District of Iowa in federal  
6 litigation where the Federal Court there compelled  
7 Verizon to provide similar materials to the local  
8 exchange carriers in Iowa that were involved in that  
9 case.

10           So for us the primary issue in the Motion to  
11 Compel rests on not the question of relevancy but the  
12 question of burden. And Sprint has certainly offered  
13 some evidence about the question of burden. However,  
14 Sprint has declined what I consider to be repeated  
15 invitations to engage Northern Valley in a discussion  
16 about what relevant information it could provide without  
17 undue burden.

18           Northern Valley has been and remains open to  
19 sampling protocols, to reasonable compromises to narrow  
20 the scope of the amount of time requested with regard to  
21 this data. We would consider accepting aggregate data  
22 about usage and cost plans from unlimited long distance  
23 customers of Sprint as a whole.

24           In other cases we know that Sprint has the  
25 ability to provide carrier specific data for certain of

1 its wholesale customers. Yet -- and Sprint admits that  
2 it can do so as well here with regard to Northern Valley.  
3 If you look at the Tillotson Affidavit of paragraph 8.

4 In other cases we also know that both Qwest and  
5 Sprint utilize a third-party vendor to process and  
6 analyze call detail records. Qwest has been able to  
7 produce revenue data for its customers on a -- on a per  
8 minute plan basis as well as aggregate data for unlimited  
9 long distance subscribers.

10 And despite having initial success against  
11 Motions to Compel this sort of information, Qwest has now  
12 voluntarily provided this data in other cases because it  
13 has become clear through the course of depositions that  
14 the third-party vendor utilized by Qwest has very  
15 sophisticated databases that allow it to query these  
16 reports and produce the information without substantial  
17 burden.

18 We don't know, as I sit here today, what burden  
19 would be imposed upon Sprint. They have certainly  
20 provided information sort of cataloguing a burden, but we  
21 have significant questions about whether the burden that  
22 they represent to this Commission would be true for the  
23 most recent and relevant periods of time.

24 In other words, the databases preserve a certain  
25 amount of data for a certain period of time, and we

1 believe it to be fairly easy to run certain queries and  
2 reports based on that relevant live data.

3           If this is true, there is no basis to deny us  
4 the access to that information. If with regard to older  
5 periods of time the burden is more significant, then we  
6 believe that Sprint should be directed to engage in a  
7 good faith meet and confer with Northern Valley to  
8 determine what data is reasonably accessible and how this  
9 information can be provided.

10           Again, Northern Valley has sought repeatedly to  
11 have those conversations and to try to work with Sprint  
12 to produce relevant information about their revenues. We  
13 have not been successful in gaining that additional level  
14 of detail about what they can produce.

15           There is also a question that I think we can  
16 hold for now until we get a determination from the  
17 Commission about whether Sprint will be required to  
18 produce any revenue information. But we do have,  
19 additionally, significant questions about whether Sprint  
20 has been taking appropriate measures to preserve the data  
21 that would be relevant to these lines of questioning.

22           In particular, as I said, we as a general matter  
23 understand that it is relatively easy to produce these  
24 sorts of reports for data for, for example, the most  
25 recent six-month period of time. Northern Valley's

1 request to Sprint regarding its revenues have been  
2 outstanding in this case alone for over a year and in the  
3 federal case since sometime in 2008 or 2009.

4 In other words, Sprint has been on notice for  
5 many years now that Northern Valley wanted this sort of  
6 information and that it believed the information was  
7 relevant to the dispute. So if Sprint has failed to  
8 intervene in its data destruction practices and has  
9 allowed the data to go from active to inactive and it is  
10 as a result of that failure to intervene, that the burden  
11 that Sprint represents to the Commission has been  
12 significantly increased, then we certainly think that  
13 that is relevant to determining how much data Sprint  
14 should have to produce.

15 Courts have recognized the fact that there is an  
16 obligation for parties to intervene in their data  
17 destruction policies, specifically to prevent active data  
18 from becoming inactive if it would be relevant to the  
19 case.

20 So we think that that is a question that has yet  
21 to be fully addressed in the Motion papers, and we would  
22 hope that we would maybe get some additional insight into  
23 today.

24 Shifting gears a bit, we address Interrogatories  
25 No. 1 and 2. These are contention Interrogatories that

1 ask Sprint essentially to set forth the facts and bases  
2 for why are they withholding from Northern Valley? What  
3 is the key point of Sprint's legal argument here?

4 Sprint has agreed -- as you might have seen in  
5 the letter that we filed two days ago, Sprint has agreed  
6 to provide a witness to testify with regard to a  
7 virtually identical topic, which we certainly appreciate  
8 that agreement on Sprint's part.

9 We believe, however, that it is still  
10 appropriate for Sprint to respond to these  
11 Interrogatories in advance of the deposition so that  
12 Northern Valley has sufficient information with which to  
13 prepare for those forthcoming depositions.

14 I reached out to Mr. Schenkenberg by e-mail and  
15 agreed that Northern Valley would extend the same terms  
16 or that it was able to reach compromise with regard to  
17 the deposition topic. In other words, insofar as Sprint  
18 is concerned about the words "set forth all facts and all  
19 basis," and believes that that makes the Interrogatory  
20 overly broad unduly burdensome, Northern Valley is  
21 perfectly happy to clarify that its intent is for Sprint  
22 to set forth the key bases.

23 What are your key legal arguments and key pieces  
24 or evidence that support those arguments? And to  
25 eliminate the need -- or the perception that maybe a

1 Sprint witness would have to literally go through every  
2 document and every piece of information. That was not  
3 our intent, and we've made that clear to Sprint that we  
4 were willing to narrow that Interrogatory in the same  
5 manner that we did the deposition topic.

6 My understanding, however, is that it's Sprint's  
7 position still that they would not be willing to respond  
8 to Interrogatories No. 1 and 2. We believe that these  
9 Interrogatories are really at the heart of the case.  
10 What is Sprint's legal position, and why is it  
11 withholding the payments from Northern Valley?

12 Contention on Interrogatories of this nature are  
13 quite common, and they certainly help the parties such as  
14 us prepare for the deposition. So we would urge the  
15 Commission to compel responses to Interrogatories No. 1  
16 and 2.

17 Interrogatory No. 4 and Document Request No. 15  
18 speak to questions about Sprint's decision to voluntarily  
19 make payment to other LECs and/or reach settlement with  
20 other LECs that provide similar conference calling  
21 services.

22 Sprint has, as noted in our papers, voluntarily  
23 provided this information in the Minnesota Tekstar  
24 proceeding both in Federal Court and at the Minnesota  
25 Commission. We see, therefore, no principled reason why

1 Sprint would provide that information on a voluntary  
2 basis in those cases and then refuse to provide the  
3 information to us here in this case.

4 The information about whether Sprint voluntarily  
5 pays other local exchange carriers that serve conference  
6 calling companies is relevant to considering Sprint's  
7 basis for withholding from Northern Valley and also may  
8 speak to the issues about what is the market rate for the  
9 type of traffic that is at issue in this case.

10 Again, we would urge the Commission to compel  
11 Sprint to respond to Interrogatory No. 4 and Document  
12 Request No. 15.

13 Interrogatory No. 13 is taken verbatim from the  
14 South Dakota Rules of Civil Procedure. It is an  
15 Interrogatory question that asks Sprint to set forth  
16 basic information about its expert witnesses. Sprint has  
17 argued that Northern Valley has refused to answer similar  
18 discovery requests and, therefore, its failure to respond  
19 to the discovery request should be excused.

20 As Northern Valley made clear in its reply,  
21 however, what Sprint had done is it had set forth a  
22 document request about Northern Valley's expert witnesses  
23 where South Dakota Rules of Civil Procedure are very  
24 plain and explicit that the only information that you are  
25 able to obtain by default about an adverse party's expert

1 witnesses must be obtained by Interrogatory.

2 We literally copied the text of the  
3 Interrogatory question from the South Dakota Rules of  
4 Civil Procedure. Sprint has suggested that it's common  
5 practice, perhaps, for people not to respond to those  
6 Interrogatories until later in the case or not to respond  
7 to them at all and, rather, to file their prefiled  
8 testimony with the Commission.

9 If that's the case, then certainly that would be  
10 relevant to the Commission's decision today, but we want  
11 to point out that as the prior procedural order was set  
12 there wasn't necessarily going to be an opportunity to  
13 depose the expert witnesses after prefiled testimony had  
14 been filed in the case. And so we believe it's  
15 appropriate for these Interrogatories to be answered  
16 before prefiled testimony so that we can have that  
17 information and, as necessary, schedule depositions.

18 Northern Valley is fully willing and will  
19 certainly respond to Sprint's recently -- they recently  
20 served an Interrogatory of this nature on us, and we're  
21 certainly willing to respond in kind if the Commission  
22 agrees that Sprint should be required to respond. We  
23 haven't yet finalized our selection of expert witnesses,  
24 but as soon as we do so we would be glad to respond to a  
25 similar Interrogatory.



1 Document Request No. 1 seeks documents from  
2 Sprint that refer -- utilize the terminology that Sprint  
3 has used to characterize these cases. It's a pejorative  
4 term called traffic pumping, which you may have heard.  
5 And our document request seeks a broader production of  
6 documents than Sprint has made in this case, particularly  
7 because we do not believe that all of the relevant  
8 materials will necessarily -- will include Northern  
9 Valley by name.

10 We know from our experiences and a number of  
11 similar cases that Sprint treats its cases against those  
12 local exchange carriers that provide conference calling  
13 traffic -- treats them in a similar manner, has a team  
14 dedicated to addressing these issues. And so it is  
15 highly unlikely that every e-mail that would be a  
16 relevant exchange between that team of people would  
17 include Northern Valley by name.

18 Indeed, if we had lived by the same standard,  
19 then we would have only produced a handful of documents  
20 to Sprint that had Sprint's name in there rather than  
21 doing a full, broad search that we have done in order to  
22 make sure that we have produced all relevant documents.

23 So, again, we would ask that the Commission  
24 compel Sprint to respond to Document Request No. 1, even  
25 if that requires it to do some additional culling of its

1 electronic -- electronically sort information.

2 I've provided in one of our papers a summary of  
3 the relative burdens that the parties have incurred in  
4 this case. And I draw your attention to that only  
5 because it's -- it's on page 10. Is that our Motion to  
6 Compel?

7 I draw your attention to that only because  
8 Sprint has certainly taken a lot of opportunity and taken  
9 advantage of the fact that the South Dakota Rules don't  
10 set a maximum number of Interrogatories, for example. So  
11 Sprint has propounded some 131 Interrogatories of  
12 Northern Valley.

13 We were able to work through a few of those and  
14 reduce that down. But, as I said here, Northern Valley  
15 has responded to over 81 Interrogatories in this case.  
16 Northern Valley has produced 101,000 pages of documents  
17 to Sprint. We've also responded to a number of Requests  
18 for Admission.

19 We are here on Northern Valley's Motion to  
20 Compel, which addresses just the first 13 Interrogatories  
21 that Northern Valley has propounded on Sprint. In other  
22 words, in the entirety of this case we have not been able  
23 to get Sprint to provide substantive responses to  
24 13 Interrogatories. And so we have been unable to  
25 prepare for depositions.

1           Meanwhile, not only has Northern Valley  
2 responded to, you know, 81 Interrogatories, produced  
3 100,000 pages of documents, responded to Requests For  
4 Admission but all of Northern Valley's witnesses have  
5 already been deposed without the need to come to the  
6 Commission on a single Motion to Compel.

7           So Northern Valley has been fully forthcoming in  
8 its discovery in this case because Northern Valley  
9 believes that if the facts are known, it will be very  
10 clear to the Commission that Northern Valley's entitled  
11 to be paid for the work that it has done to Sprint's  
12 benefit.

13           But we are here on a Motion to Compel where only  
14 a limited amount of discovery has been served on Sprint  
15 and where Sprint to date has really not provided us with  
16 very much information at all about the case. Many of the  
17 documents that they have produced are documents that  
18 while may be responsive to discovery request, are  
19 otherwise publicly available. So there's very little  
20 nonpublicly available information that has been produced  
21 to Northern Valley in this case.

22           And so I think as we talk about burden and  
23 whether it's appropriate to ask Sprint to undertake  
24 additional searches for relevant or responsive  
25 information, we should understand that -- the relative

1 burdens in this case and where they are today.

2 I also want to talk just for a moment, in  
3 response to this particular document request Sprint  
4 relies on a recent order about electronic discovery that  
5 was produced or made available with regard to patent  
6 cases and suggests that this order demonstrates that  
7 their search in this case is reasonable and they should  
8 not be forced to engage in additional searches for  
9 electronic discovery.

10 I want to make some distinguishing points about  
11 that model order with regard to patent cases. First, in  
12 that order the limitation on search terms that comes into  
13 play only comes into play after all of the parties have  
14 voluntarily produced a significant amount of upfront  
15 discovery.

16 And those voluntary search terms in that model  
17 order become relevant only with regard to searches for  
18 additional e-mail traffic after there is the production  
19 on the front end of the vast majority of what that court  
20 would consider to be the relevant documents for the  
21 case. So we're talking about a different procedural  
22 posture than we are here in this case.

23 In addition, the limitation on search terms that  
24 that order proposes to be adopted in patent cases makes  
25 very clear that it is the requesting party that gets to

1 both pick the search terms and also pick the witnesses or  
2 the potential witnesses against which those search terms  
3 would be applied.

4           So if we're going to search for data,  
5 Northern Valley would have had the opportunity to pick  
6 the search terms that Sprint would apply. Northern  
7 Valley would have had the opportunity to determine which  
8 witness's data would be chosen. That is certainly not  
9 where we are today.

10           Sprint has determined unilaterally and without  
11 consultation with Northern Valley which search terms it  
12 would apply and to whom those search terms would be made  
13 available.

14           So to suggest that that order, which again is an  
15 entirely different procedural context -- the judge in  
16 that case in that order specifically recognizes that  
17 e-mail traffic has limited relevance to questions about  
18 whether a patent has been infringed because it's much  
19 more of a factual dispute about what a patent is and  
20 whether the other party has infringed it.

21           But, in any case, that's not a comparable order  
22 because the procedures that it implies would have given  
23 Northern Valley a much more active role in determining  
24 what evidence Sprint was going to search and produce.

25           Having not had that opportunity, it would be, in

1 our opinion, improper to apply that standard in this  
2 case. And so we would ask that you grant a Motion to  
3 Compel with regard to Document Request No. 1, even if it  
4 requires Sprint as to undertake an additional evaluation  
5 of electronic evidence.

6 Document Request No. 34 asks Sprint to produce  
7 information about revenue sharing agreements it may have  
8 here in the State of South Dakota. We intentionally  
9 limited the scope of this request to alleviate burden  
10 because we understand that Sprint may have a large number  
11 of revenue sharing agreements with high volume customers  
12 and other hospitals, hotels, things of that nature, but  
13 we intentionally limited the scope of this because we  
14 only need a handful of documents to make the point that  
15 Sprint itself engages in revenue sharing on a regular  
16 basis.

17 Revenue sharing, the exact behavior that Sprint  
18 contends makes Northern Valley's relationships with its  
19 high volume conference call customers problematic, is a  
20 common practice throughout the industry and, indeed, a  
21 practice Sprint itself engages in.

22 This type of information has been repeatedly  
23 produced in these cases, and, indeed, there is one case,  
24 the Verizon Opinion out of the Southern District of Iowa,  
25 where these types of materials were not compelled to be

1 processed, but that case recognizes that that very court  
2 has required similar agreements to be produced in other  
3 cases.

4           And in this particular circumstance it was not  
5 going to require the materials to be produced because the  
6 document request itself was 27 lines of the court's  
7 opinion. In other words, it was an extremely long,  
8 burdensome, and overly broad discovery request, and so  
9 the court said while this material is normally relevant  
10 and subject to discovery, I'm going to deny it in this  
11 particular circumstance because of the complexity of the  
12 discovery request.

13           That opinion is not applicable here. Northern  
14 Valley's discovery request is very straightforward and  
15 very direct about the information that it is requesting  
16 from Sprint.

17           Again, Document Request No. 34 seeks relevant  
18 information. The burden has been for Sprint to provide  
19 this information, and we would ask the Commission to  
20 compel Sprint to do so.

21           There are just a few other issues addressed by  
22 Northern Valley's Motion to Compel that I'd also touch  
23 upon. The first is redactions that Sprint has included  
24 in certain documents that have been produced to Northern  
25 Valley.

1           As the Commission knows, this issue was  
2 previously addressed here in this very case. It was  
3 addressed in the context of a protective order and in  
4 particular within a paragraph relating to Excel  
5 spreadsheets.

6           The Commission agreed with Northern Valley, as  
7 has every other court that's addressed this issue, that a  
8 party producing documents when there is a protective  
9 order in place should not make redactions based on its  
10 belief that certain material is irrelevant or not  
11 responsive. Rather, you should mark the document if you  
12 believe it is subject to the protective order as a  
13 protective order document, and you should only redact  
14 information that is privileged information, meaning  
15 information exchanged between the attorney and the  
16 client.

17           Following the Commission's decision on that  
18 issue Sprint did unredact spreadsheets and provided those  
19 to Northern Valley, and we appreciate Sprint's efforts to  
20 do that. However, Sprint has maintained that with regard  
21 to e-mails, PowerPoints, and attachments to those e-mails  
22 that are not specifically spreadsheets that it would not  
23 remove the redactions.

24           It contends that those redactions were not  
25 addressed by the Commission's order and that despite the



1 Commission's understanding and what we believe to be a  
2 parent agreement with the principal that redactions  
3 should not be entered unless it's with regard to  
4 privileged information that Sprint is, nevertheless,  
5 entitled to maintain those redactions.

6 It also seems to suggest that certain redactions  
7 were entered in the federal case and maybe the documents  
8 were more relevant to the federal case than the state PUC  
9 case. But, in any event, they are materials that have  
10 been produced in this case, that are subject to discovery  
11 and disclosure in this case.

12 And so we would ask that the Commission reaffirm  
13 its position that Sprint should not include improper  
14 redactions in materials if the documents are not subject  
15 to a privilege.

16 Finally, just very briefly on an issue that  
17 arose as we were trying to resolve some of the disputes  
18 in this case. And I think it's a relatively minor issue,  
19 but it's in our papers so I'll just address it briefly.

20 And that is Sprint had sent a letter to  
21 Northern Valley proposing some sort of compromise. And  
22 it does not contain anything that is proprietary or trade  
23 secret information. And Sprint has marked it, however,  
24 as confidential. We would ask, simply, that the  
25 Commission affirm that materials that don't contain

1 proprietary or confidential information should not be  
2 subject to the protective order and that, therefore, this  
3 document should not receive protection under the  
4 protective order.

5 CHAIRMAN NELSON: Thank you.

6 Response from Sprint.

7 MR. SCHENKENBERG: Thank you, Mr. Chairman,  
8 members of the Commission. I want to start this  
9 presentation by trying to put in perspective -- put this  
10 case in perspective and in context along with the Federal  
11 Court cases that are out there that involve some of these  
12 same issues.

13 Sprint's affirmative case against Northern  
14 Valley seeks a determination, and that's the affirmative  
15 case in this proceeding, its declaratory ruling count,  
16 third-partied in Northern Valley, seeks a determination  
17 that the relationships between Northern Valley and its  
18 CSP -- use so many acronyms. I apologize. Conference  
19 service providers, I think is how that's been defined.  
20 Conference service providers. That those relationships  
21 are not local exchange service under South Dakota Law.

22 That has an impact in the SDN, the dispute  
23 between Sprint and SDN. It has an impact on the  
24 intrastate dispute between Sprint and Northern Valley.  
25 But it also has an impact, a direct impact, on what's

1 going to happen at the FCC and/or the federal courts.

2 The Farmers analysis, which is going to look to  
3 the relationships between the local exchange carrier and  
4 its conference call companies, that arises under state  
5 law. The regulatory regime that applies to that  
6 relationship and governs those charges and will help  
7 determine whether this is a relationship consistent with  
8 law, consistent with the regulatory regime and  
9 constitutes local exchange service, that's all decided  
10 under South Dakota Law. But it impacts damages at the  
11 federal level worth tens of millions of dollars.

12 The FCC or the Federal Court are going to take  
13 this Commission's decision, we think, and use it. So  
14 that's why we've litigated the case that we have. That's  
15 why we've asked for all the important documents. That's  
16 why we deposed people we thought we needed to depose.  
17 That's why we subpoenaed CSP representatives, obtained  
18 documents, took depositions. Because these issues are  
19 worth tens of millions of dollars, and your decision on  
20 what we're doing here is important to them.

21 Northern Valley's claim, their Count II, is much  
22 more limited. It is to ask this Commission to make a  
23 decision using the tools that the Legislature has given  
24 you to decide and set a rate that's worth, in their  
25 estimation, tens of thousands of dollars. We put that

1 number in our brief and my Affidavit. If anybody doesn't  
2 know what it is, we can turn off the feed and I can say  
3 it out loud. But it's tens of thousands of dollars.

4 I assure you -- and that decision of the  
5 Commission of how you set a rate under state law for this  
6 service, whatever it's classified as, is not part of the  
7 Farmers analysis, is not going to be used to set  
8 interstate rate, is not something the FCC wants or needs  
9 or has asked for or the court.

10 I assure you Northern Valley is not seeking  
11 hundreds of thousands of pages of discovery and a week's  
12 worth of depositions to litigate a case worth [REDACTED]  
13 [REDACTED] dollars. I apologize to my client -- is that  
14 something we need to try to pull back? I apologize. I  
15 didn't mean to say that out loud.

16 MR. CARTER: I think we're fine with that.

17 MR. SCHENKENBERG: If in the event that my  
18 client scolds me, as it might, and asks that we have that  
19 part of the transcript redacted, may we do that?

20 CHAIRMAN NELSON: Yes.

21 MR. SCHENKENBERG: Apologies. I got a little  
22 excited.

23 They're not litigating this case for that amount  
24 of money. So why are they litigating this case? Are  
25 they litigating this case to make this painful for

1 Sprint? I think they'd tell you no. We hope not. Are  
2 they litigating this way in answers to discovery in order  
3 to use it in other cases for other clients? It's a fear  
4 my client has, but I expect Northern Valley would tell  
5 you no, that's not why they're doing it.

6 Why are they doing it? They're doing it so they  
7 can get the discovery and use it as part of their  
8 advocacy on the federal claims either before the FCC or  
9 the court. And if that's why they're doing this, this  
10 Commission shouldn't be in the business of ordering  
11 discovery with marginal relevance, if any, on state  
12 issues with these issues of burden when it's going to be  
13 used, if at all, by the federal authorities.

14 Northern Valley went to the Federal Court once  
15 and asked for revenue information from Qwest before the  
16 first referral and said, Court, we need revenue  
17 information from Qwest. We have an unjust enrichment  
18 claim.

19 And the court said you do have an unjust  
20 enrichment claim. It's early in litigation. This might  
21 be relevant, but the relevance is so marginal and there's  
22 burden associated with it. No, you don't get the  
23 discovery. The court then referred all the cases without  
24 allowing that discovery to happen. And so that when it  
25 gets to the FCC it will have gotten to the FCC because

1 the court decided that discovery wasn't important.

2 If the FCC thinks that discovery is important,  
3 Northern Valley is certainly able to ask the FCC to order  
4 it and Sprint, if ordered, would have to comply. But  
5 that's for the FCC to decide.

6 On the second Federal Court case, and I don't  
7 even know if you've been advised of this, the court has  
8 now referred the second Federal Court case to the FCC. I  
9 think it just happened in the last 30 days. In that  
10 briefing process the court asked for briefs on whether it  
11 should refer.

12 Northern Valley said -- and I have a copy of the  
13 brief. I can circulate it if you'd like -- "To the  
14 extent the court disagrees with Northern Valley's  
15 argument and finds that further guidance from the FCC is  
16 necessary, it should, nevertheless, allow discovery to  
17 continue before the referral."

18 So it made this pitch to the Federal Court; let  
19 us do discovery and then refer. And the court said no.  
20 The court ordered referral and did not allow discovery to  
21 go forward.

22 So this Commission ought to be fully confident  
23 that if this is information that's important to  
24 Northern Valley to litigate these federal claims, which  
25 we think makes sense because of how small the state

1 claims are, that can and will be addressed by the FCC and  
2 that's where they ought to go to get it. And I haven't  
3 even mentioned the fact that in this case the  
4 Commission -- the parties agree the Commission can't  
5 order Sprint to produce information that relates to the  
6 interstate issues. The Commission's jurisdiction is  
7 limited to the State of South Dakota and to ordering  
8 production of discovery that would be used on an  
9 interstate rate.

10 So if we have interstate revenues, I don't think  
11 Northern Valley is asking this Commission in this  
12 proceeding to order Sprint to produce interstate revenue  
13 data. It's only intrastate.

14 So even if the Commission were to accommodate  
15 Northern Valley's request and issue those orders, it's  
16 still not going to provide sufficient information to  
17 litigate interstate issues after all. We just think this  
18 is the wrong place, especially given the issues of  
19 relevance and the issues of burden.

20 There are, as we talked about, three  
21 possibilities. And we don't know what you're going to  
22 decide on what rate methodology would apply. And the  
23 revenue information that's being sought is relevant in  
24 Northern Valley's estimation to the rate setting  
25 question.

1           I believe it should be undisputed that if you  
2 utilize rate of return regulation, a customer's revenues  
3 are not relevant, are not part of that analysis.

4           If you decides there's no regulation to be had  
5 or to be made, then certainly there's no reason to allow  
6 Sprint's revenues to be produced if you're not going to  
7 proceed to set a rate because it's a deregulated  
8 nonaccess service.

9           So that leaves us with price regulation. Now  
10 price regulation is defined in 49-13-1.4. And as  
11 Mr. Carter indicated, it has, I think, five aspects to  
12 it, the most important of which is that the Commission  
13 shall consider the price for emerging competitive  
14 service, the Commission shall consider the actual cost.  
15 In determining a noncompetitive service the Commission  
16 shall also consider the fully allocated cost. And those  
17 are Northern Valley's costs.

18           The other factors to be considered whether the  
19 price is -- I'm sorry. The overall market, the price of  
20 alternative services, the affordability of the service in  
21 the market that's offered, and the impact on the  
22 commitment to preserve universal service. The only one  
23 of those Northern Valley is pointing to is the  
24 affordability context, the affordability factor.

25           We will tell you this: If you decide you're



1 going to do price regulation and Northern Valley proposes  
2 a rate under 1.4 using its fully allocated cost and we  
3 object to that rate based on affordability, we'll be  
4 subject to discovery based on our objection.

5 That's what happened in the U.S. West case that  
6 Mr. Carter talked about. That was an access rate case.  
7 And Qwest wanted a large increase in intrastate rates.  
8 And interexchange carriers put on evidence and made  
9 objections and said we're going to have rate shock, this  
10 is too high of a rate increase, you need to phase it in,  
11 but it was based on the IXC's objection and evidence.

12 Well, certainly if we raise an affordability  
13 objection in a price regulation context, we're going to  
14 have to open ourselves up based on that objection.

15 But what they're asking you to do -- and I'll  
16 give you an example Mr. Wieczorek used this morning as we  
17 were talking. Assume you were to set a per gallon of gas  
18 rate for a gas station. And the owner wants to come to  
19 you and say, well, here's what we want to do. We want to  
20 ask everybody that drives up before we fill up their tank  
21 what their income? When we know what their income is  
22 then we're going to decide what rate we want to propose.  
23 And if somebody's got a high income, we're going to  
24 propose \$9 a gallon, and if somebody's got a low income,  
25 we'll propose a lower amount.

1           That's what they're asking you to do. The idea  
2 that you in a price regulation context would start by  
3 going to one customer or two customers or 100 customers'  
4 revenue data to set a rate under price regulation, it  
5 just doesn't make any sense from a regulatory context.  
6 Not to mention the fact that they haven't asked for that  
7 which would allow them to analyze affordability. They  
8 haven't asked for costs.

9           They've asked for revenue only. The reason  
10 they've asked for revenue only is this is unjust  
11 enrichment discovery. If they really wanted to engage  
12 affordability they ask for revenue plus costs. So they  
13 can't get there anyway even if they get the discovery.

14           The relevance standard we've briefed. We think  
15 it's clear that anything they ask for -- to get what they  
16 ask for it needs to be something that is either  
17 admissible or it's a steppingstone to that which will be  
18 admissible. It helps them get something that will be  
19 used at the hearing.

20           And that's the standard that's in the rule.  
21 That's the standard that courts have used. And while  
22 this Commission has broadly allowed discovery often, it  
23 has always required that this lead to something that's  
24 going to be helpful at trial.

25           And so the revenue information we've just talked

1 about, if it can't be used to set a rate under rate of  
2 return regulation, if it can't be used to set a rate  
3 under price regulation, then it shouldn't be allowed.  
4 And even if there is some marginal relevance, some  
5 relevance, any relevance, the rules and cases tell you  
6 that if the burden outweighs the relevance, if it's out  
7 of proportion, that you should deny the discovery, and  
8 that's what courts have done.

9 And if I may, I have just a two-page -- may I  
10 hand this out. This is just quotes from the reported  
11 cases.

12 CHAIRMAN NELSON: Certainly.

13 COMMISSIONER FIEGEN: Mr. Chairman, do we have  
14 this in an e-mail that we could send to fellow  
15 Commissioner?

16 CHAIRMAN NELSON: We are working on that  
17 question. How do you intend then to enter this into  
18 evidence?

19 MR. SCHENKENBERG: These are all quotes from  
20 cases and either the quotations are in our brief or the  
21 cases are cited in our brief. I wouldn't think it would  
22 need to be entered into evidence. I can certainly E-file  
23 it, or I have it on e-mail if you'd like it e-mailed.

24 CHAIRMAN NELSON: Let me just ask, Commissioner  
25 Hanson, would you like this e-mailed to you at this

1 point?

2 COMMISSIONER HANSON: You certainly can send it  
3 to me. I wouldn't consider it urgent at this point, but  
4 I'd be interested in seeing it certainly.

5 CHAIRMAN NELSON: But we don't need to do it  
6 immediately?

7 COMMISSIONER HANSON: Correct. I do have e-mail  
8 service where I am, and I have WiFi so that's fine.

9 CHAIRMAN NELSON: Okay. Well, Mr. Schenkenberg,  
10 if you'd just make sure this gets e-mailed to  
11 Commissioner Hanson sometime today, that would be great.

12 MR. SCHENKENBERG: I will. And the reason for  
13 this is --

14 CHAIRMAN NELSON: I've just been advised that  
15 somebody on our Staff will take care of that for you.

16 MR. SCHENKENBERG: Okay. Thank you.

17 The reason for this is just this Commission  
18 doesn't deal with a lot of discovery issues. And  
19 certainly not as often as courts do, although this  
20 Commission may have a more heightened understanding of  
21 what it means to be subject of discovery after some  
22 recent events.

23 But you ought to be comfortable and confident  
24 that when courts have looked at these kinds of issues  
25 courts have said even if there is relevance, there's

1 burden, and there's so much burden compared to the  
2 marginal relevance that this discovery shouldn't be  
3 had.

4           The first case is the case I talked about out of  
5 2010, Federal District Court in South Dakota. And the  
6 court says, among other things, "At this stage the  
7 relevance of Qwest's revenues is questionable, probably  
8 marginal at best, and the effort to produce the  
9 information sought by Northern would be burdensome."  
10 Down at the bottom, "The burden and cost to produce the  
11 information is too much compared to the benefit to be  
12 derived, if any."

13           Below that, the IUB in 2008, "The board finds  
14 the Respondent's data requests are unduly burdensome.  
15 The expenditure of effort on QCC's part would be unduly  
16 burdensome for the collection of information for a  
17 marginally relevant issue."

18           There was a similar decision made by the  
19 Federal Court in the Tekstar case with respect to  
20 Sprint's revenue information and internal business  
21 practices. And I apologize. It's the MPUC case is  
22 first. The Federal District Court below it. But both of  
23 those decisions were made on very similar affidavits to  
24 what have been filed here. The information requested  
25 seeks a wide swath of information, which plaintiff fails

1 demonstrate has relevance to seek claim for defense.  
2 That's the Federal Court talking even when there was an  
3 unjust enrichment claim pending.

4           And then, finally, the Texas case we cited in  
5 our last brief, which says "The marginal benefit of such  
6 discovery into Qwest's revenues does not justify the  
7 expenditures that would be required for a case worth  
8 \$265,000."

9           We have established burden with affidavits.  
10 We've described that we don't have information as it's  
11 been requested, talked about what it would take to put it  
12 together if we were required to do so. And in response  
13 Northern Valley hasn't submitted contrary affidavits.  
14 They've made a number of statements in their briefs that  
15 aren't supported by affidavits. Mr. Carter makes more  
16 statements today. That's not evidence. That's not  
17 something this Commission can consider in weighing  
18 burden.

19           It is Northern Valley's obligation to put in  
20 affidavits to dispute burden if it wishes to do so. It  
21 hasn't done so. And statements about what has happened  
22 or hasn't happened or may have happened in other  
23 litigation that isn't supported doesn't change or undo  
24 the Affidavit testimony that Sprint has submitted.

25           I'm going to go into -- this is an awkward way

1 to do this, I understand, because we have a number of  
2 issues. But I will kind of continue through and track  
3 what Mr. Carter did in his presentation one by one if  
4 that's what you'd like me to do.

5 CHAIRMAN NELSON: We came here today  
6 understanding this was going to be awkward. Proceed.

7 MR. SCHENKENBERG: Thank you. Contention  
8 Interrogatories, Interrogatories 1 and 2, and I guess the  
9 Commission is just going to have to issue an order on  
10 this it.

11 This is, we think, Interrogatories asking us to  
12 submit our prefiled testimony in a written form before  
13 the requirement to do so has been set by the Commission.  
14 The questions are give us every reason that you have why  
15 these are not end users and why the access charges aren't  
16 due.

17 We think we've answered this. We've said the  
18 facts that we're going to rely on are facts that are  
19 within your possession that we received from you in  
20 discovery and that were received from the CSP.  
21 Contention Interrogatories are designed to get facts out  
22 in the open so there's no surprise.

23 If you have a hit-and-run case and there's a  
24 lawsuit and one party says tell me all facts that you're  
25 going to rely on to show that the driver was my client,

1 the other party is obligated to say, okay, my witness --  
2 my client will testify that that was the person driving,  
3 there were these three other witnesses, we have other  
4 documents, and you disclose that so there's no surprise.

5 What you don't have to do in contention  
6 Interrogatories is do anything more than provide the  
7 information that you have internally. And all the  
8 information that we're going to use is about Northern  
9 Valley that we received from Northern Valley. We  
10 received from their CSP.

11 So we think we've answered this by saying we're  
12 going to rely on what we got from you and what we got  
13 from the third parties and we don't have any internal  
14 analysis we're relying on. And we'll file our testimony  
15 and explain this all.

16 I will say Mr. Carter did say a couple of times  
17 in his discussion of this that what he wants to know is  
18 the key legal arguments that Sprint will be making.  
19 That's not what contention Interrogatories are about.  
20 Contention Interrogatories are to get facts on the table.  
21 We shouldn't have to be providing legal arguments. We  
22 should provide our facts, and I think we've already done  
23 that.

24 Interrogatories 4 and 15. 4 relates to other  
25 LECs to whom Sprint has paid terminating switched access.



1 We've answered this for the State of South Dakota, as I  
2 understand it's limited in this Motion. We've answered  
3 by saying we have none. We don't knowingly pay  
4 terminating access charges to LECs in South Dakota. We  
5 put in an Affidavit that said we haven't previously and  
6 don't currently do that. I'm still confused as to why  
7 this issue is still open.

8 Document Request 15 asks us about documents  
9 related to such payment of access charges. And, again,  
10 if you limit it to South Dakota, there are arguably no  
11 documents responsive to that because we've said we don't  
12 do this. Now it is true that Sprint has settled two of  
13 these cases, as you approved and affirmed the dismissals  
14 of the Sancom and Splitrock.

15 Those settlements, I don't consider them to be  
16 responsive to Request 15. Nor do I consider those  
17 settlements to be necessary to litigate this case. I  
18 don't think they should be ordered. But that's what  
19 Northern Valley is asking for. If you order them to be  
20 produced, we'll produce them. They're subject to  
21 confidentiality clauses so it would take an order. But  
22 we don't think we should have to. We don't think it  
23 leads anywhere in this case.

24 And I don't agree with Mr. Carter's statement  
25 that Sprint voluntarily produced this in Minnesota. I

1 think it was ordered to do so. It certainly was the case  
2 at the PUC.

3 Revenue analysis, call-in revenue analysis,  
4 which is within Interrogatory 7. Again, as I said, if we  
5 raise affordability, we'll be subject to discovery at  
6 that time. If the Affidavit of -- I'm sorry. I believe  
7 it's the Affidavit of Ms. Hellwig talks about what you'd  
8 have to do to pull revenue information for periods of  
9 time and identifies that we don't keep the information.  
10 We don't track the information as it's been requested.  
11 So the information is tracked in the system based on  
12 termination point, not origination point.

13 So, for example, if we went to November 1 of  
14 2010 and the question was Mr. Wieczorek is a Sprint long  
15 distance customer in South Dakota and he called one of  
16 Northern Valley's conference call lines, what's the  
17 revenue general righted by that call?

18 Sprint doesn't track the information based on  
19 who called. We don't have it. We have it by where it  
20 was sent. So first you'd have to go through and do an  
21 extraordinarily time-consuming analysis to figure out  
22 where all the calls that were terminating with that  
23 number, Northern Valley's number. You'd then have to  
24 take every one of those and track it back through records  
25 that aren't available without extraordinary expense,

1 track it back to who made those calls, limit it to  
2 South Dakota, figure out who those people were, find out  
3 what plan they were on at the time of the call, find out  
4 whether this was -- if they had 1,000 minutes with their  
5 plan, is this under the 1,000, or is it over the 1,000.  
6 It is an extraordinarily difficult thing to do, and it  
7 shouldn't be required.

8           The last thing on that point. Mr. Carter talks  
9 about "document destruction." He used that phrase. And  
10 I as somebody who is a careful litigator and does this  
11 all over the place, I'm very, very troubled by that term.

12           There isn't any document destruction. There's  
13 no evidence of document destruction. What we have is  
14 databases that are used nationwide for billions of call  
15 detail records that as a ordinary course of business get  
16 archived.

17           We negotiated this issue. Sprint negotiated  
18 this issue with Northern Valley and Qwest in the federal  
19 litigation. We have a copy of the agreement here. We  
20 attached it to Ms. Thorton's Affidavit. It's an order of  
21 the court that establishes how the parties are going to  
22 do electronic discovery: What are the rules that are  
23 going to apply? What are we going to do with databases?  
24 How are we going to interrupt our normal business  
25 practices? How are we going to do this?

1           These are parties being proactive, thinking  
2 about this, working towards a solution, filing it with  
3 the Court, getting it approved, and for Northern Valley  
4 to come here today and say somehow we haven't complied  
5 with that or we're destroying data -- if they think we're  
6 violating that ESI, electronic storage of information  
7 agreement, they ought to go back to court. Talk to the  
8 judge that entered the Order.

9           We don't agree in any way that that's what  
10 happened here. We believe we've complied with the ESI  
11 order, and that's just another reason this should be  
12 somewhere else besides this Commission.

13           Interrogatory 8, Document Request 26, 35, and 36  
14 relate to the least cost routing question. 26 and 35 we  
15 answered in Tillotson's Affidavit. Sprint has no  
16 responsive information. So there aren't any documents to  
17 produce on 26 and 35.

18           Interrogatory 8 says Set forth the gross  
19 revenues. Sprint doesn't have an answer. Sprint has put  
20 an Affidavit in. We don't keep that data. We don't have  
21 it. We don't maintain it. We don't track it. We don't  
22 know it. And when you're asked an Interrogatory and you  
23 don't know the answer, you don't have the information,  
24 and Northern Valley recognizes this, you're not required  
25 to create a study to produce the information that the

1 other side has asked for.

2 So 8 we think is answered because we don't have  
3 the information. 26 and 35 are answered because we don't  
4 have any responsive documents, which leaves 36, which  
5 relates to all documents that refer, relate to, or  
6 evidence increases in the prices charged by Sprint for  
7 least cost routing.

8 Again, you have to find relevance for this. You  
9 have to find that this is something that could be used in  
10 a price regulation case in a situation before an IXC has  
11 raised an affordability claim, and you'd have to evaluate  
12 the burden and Mr. Tillotson described again going  
13 through and pulling that information out when it's not  
14 maintained in that form.

15 Interrogatory 13 relates to expert discovery.  
16 And I guess I just disagree with Mr. Carter on what the  
17 rules provide. The rules and what you do in court is you  
18 have a day for exchanging expert reports. And expert  
19 reports would have the name, the matter, the subject of  
20 the opinion, the facts reviewed, and that would be  
21 exchanged during the discovery period.

22 We've provided the name, and we will provide the  
23 testimony when the testimony is due. And that's how  
24 these administrative proceedings work.

25 You provide an expert report in court because

1 you don't have prefiled testimony and you want to know  
2 what the expert's going to say so you can prepare your  
3 rebuttal testimony. And that's all we're asking to do.  
4 Let's set a date. Set a date for testimony. You will  
5 have our expert's testimony.

6 But the idea that we separately do an expert  
7 report months before testimony is -- especially when  
8 Northern Valley hasn't, as I understand it, had  
9 substantive discussions about what its expert testimony  
10 is at this point.

11 Document Request 1, all traffic pumping  
12 documents as written, relates nationwide, isn't limited  
13 to South Dakota. Again, as I understand it,  
14 Northern Valley understands that it's only asking this  
15 Commission to order documents relative to the State of  
16 South Dakota, although I'm not sure that's been made real  
17 clear with respect to the argument on this.

18 Again, as we said in our brief, this was a  
19 production that was done under the Federal Court's  
20 auspices consistent with what the parties agreed to in  
21 terms of designating appropriate custodians. We  
22 designated a search list that was broad enough -- one of  
23 the search terms was South Dakota. And that ought to be  
24 sufficient along with Northern Valley and Roth and  
25 Global Conference.

1           Those were the search terms that were used. And  
2 that ought to be sufficient to pull in everything that  
3 Sprint has internally related to Northern Valley. And if  
4 that's not sufficient and this discovery was done under  
5 the auspices of the Federal Court, then they ought to go  
6 back to the Federal Court.

7           Requiring Sprint to redo their production, to  
8 add custodians, to rerun documents is burdensome as  
9 established until the Affidavit. Hundreds of thousands  
10 of pages of documents to do this nationwide with respect  
11 to traffic pumping or access stimulation.

12           Every additional custodian you add is another  
13 \$20,000. We supported that with an Affidavit. And the  
14 point of the case in California that we cited was simply  
15 that courts in sophisticated electronic discovery context  
16 recognize that there are limits. And that court said  
17 under the model rule, 7 custodians, 5 custodians, that  
18 ought to be the most number of custodians that you have  
19 to do data collection. Because it's really expensive.

20           If five custodians is enough in a patent case in  
21 federal district court, the dozen or so custodians we  
22 listed shouldn't be looked at as scant as Northern Valley  
23 has with respect to our search.

24           And just to follow up on that issue of burden,  
25 the idea that somehow burden ought to be evaluated on a

1 proportional basis, that if we sent a certain number of  
2 Interrogatories to them they should send a certain number  
3 to us, isn't supported by any of the rules. It's not the  
4 law.

5           And, frankly, the reason -- perhaps we'll  
6 disagree with this. One of the reasons that we didn't  
7 end up here on a motion is because we believed we didn't  
8 impose undue burdens. We didn't ask for irrelevant  
9 information. We had 131 Interrogatories in part because  
10 about 60 of those were follow-ups.

11           We asked one Interrogatory that said identify  
12 the contracts you've had and the invoices and any bills  
13 and payments for your CSP entities, and they sent us tens  
14 of thousands of pages of documents and said, here, you  
15 find it. Oh, okay. We didn't come to the Commission.

16           And so we sent follow-up Interrogatories that  
17 said, here's what we think your contracts are for CSP  
18 number one, this date, this date, this date. Here's what  
19 we think the bills are this date, this date. And can you  
20 confirm this to be accurate. And we did it to be  
21 user-friendly. We did the work. That was about  
22 60 requests.

23           So I'm not going to apologize for sending a lot  
24 of requests when we were essentially digging through at  
25 great time and expense a data dump in order to find what



1 the information was. We did it, and that's fine. That's  
2 just part of what you do as a litigant. But the idea  
3 that that justifies discovery that isn't relevant and is  
4 burdensome doesn't have any support in law.

5 Briefly on the issue of redactions, this is an  
6 issue that was raised to the Commission as an issue  
7 related to spreadsheets. They wanted to see spreadsheets  
8 so they could put the numbers in context. We did that.  
9 We produced a lot of documents, a lot of information, and  
10 frankly a lot of information about our disputes with  
11 companies all over the country.

12 They have that. They have this in that  
13 spreadsheet form. They then came back after that and  
14 said, well, we think you need to do more even though it  
15 wasn't raised the first time. We worked with them and  
16 put together what we thought was a pretty reasonable  
17 proposal. That was in that letter that was designated  
18 confidential.

19 And the answer was absolutely no, positively  
20 not, every document has to be produced unredacted. We  
21 explained how we did this. This, again, was done per the  
22 Federal Court consistent with the electronic discovery  
23 and production.

24 And what gets redacted is information that  
25 Sprint decides is nonresponsive. It's attachments to

1 e-mails when the attachments don't have anything to do  
2 with the e-mail but the e-mail might mention it. And  
3 that kind of analysis of reviewing documents and deciding  
4 what's not responsive is done every day by parties in  
5 discovery. That's what you do.

6           You look and you honestly decide whether that is  
7 related to the request and related to the dispute. And  
8 due to a way in which the electronic discovery vendor  
9 worked, this had to be done in many cases as redactions.  
10 And it was.

11           The notion that nobody ever redacts  
12 nonprivileged information is just -- is just wrong. And  
13 I have -- and I can circulate this. It's Exhibit Q to my  
14 Affidavit. Or I can just hold it up. This is something  
15 we received in discovery in March of this year from  
16 Northern Valley, and everything is blacked out except a  
17 line item related to the CCC entity. And all the rest of  
18 this is nonprivileged, confidential information. That's  
19 what they did. That's all we've done.

20           And if the Commission desires to hold us to our  
21 agreement that we proposed in the letter that was  
22 attached to Mr. Carter's Affidavit, we'll certainly do  
23 that. But we think what we did is appropriate and a  
24 better course is to go to the Federal Court -- for them  
25 to go to the Federal Court and ask for relief there.

1           On that letter, the confidential nature of the  
2 letter, Sprint's concern was that if Sprint made an offer  
3 on this issue and tried to come halfway, that Northern  
4 Valley's counsel would take that offer separate to Iowa  
5 and use it against Sprint there. And that's what  
6 happened.

7           We heard about my conversation through other --  
8 here's what Sprint has said it was doing in South Dakota.  
9 So we designated this letter as confidential because we  
10 didn't want that to happen. It shouldn't happen. And  
11 they're asking you to take the designation off so they  
12 can go use it against Sprint in another jurisdiction when  
13 Sprint has made an effort to try to resolve a discovery  
14 dispute.

15           We think you have the authority to make that  
16 confidential under Rule 20.10.01.39, and we don't think  
17 it serves any purpose to make these kinds of meet and  
18 confer settlement discussions on discovery issues  
19 public.

20           I have nothing further. Thank you.

21           CHAIRMAN NELSON: Thank you.

22           Staff, anything to add?

23           MS. CREMER: Thank you. I'm obviously not going  
24 to argue the merits of all of those various things. I  
25 will go right to Interrogatories 1 and 2.

1           A Contention Interrogatory must explicitly seek  
2 facts, witness, and/or documents, and not contentions or  
3 legal theories or any analysis. Therefore, Staff  
4 recommends striking the language as to legal basis, as  
5 that goes to work product. So that's what I would do  
6 with those two.

7           As to Interrogatory 4, Document Request 5, and I  
8 think everyone has agreed to this, I think, limit it to  
9 the South Dakota intrastate. And I think Document  
10 Request 15 was the settlement with Santel and whoever. I  
11 would think if they didn't want to go to all the hassle  
12 of confidentiality agreements and getting those all, you  
13 could just give the number in the aggregate maybe as  
14 opposed to a separate number for each company. That  
15 would just be a suggestion.

16           Interrogatory No. 7, I think Sprint's revenues  
17 lack relevance. It's a questionable benefit versus the  
18 cost. And as I understood Northern Valley's arguments --  
19 this is the sort of information that goes to their  
20 Count II -- if the Commission needs that information  
21 later, they can get that information.

22           Interrogatory 8, the Data Request -- and I'm not  
23 clear if it's 25 or 26. It seems to have changed. But  
24 those amounts received by Sprint which the Commission  
25 considers when setting a fair and reasonable price under

1 Count II, again that all comes from page 16 of  
2 Northern Valley's reply. It appears to relate to  
3 Count II, which again I think the Commission if we get to  
4 Count II, we'll get that information at that time.

5 Interrogatory 9 with Data Request 23, no. I  
6 would say it lacks relevance, and it's burdensome.

7 Interrogatory 13, I would grant that and just  
8 tell Sprint to abide by the statute, provide it prior to  
9 the prefiled testimony being filed. And if -- I think  
10 somebody -- I think Sprint suggested the Commission can  
11 give them a date for that exchange of information. But I  
12 would do it before testimony is filed.

13 Data Request No. 1 I would deny. The relevance  
14 is questionable, marginal at best, and the effort to  
15 produce is burdensome.

16 Data Request 34 is revenue sharing. Again, I  
17 would deny for the same reasons. Relevance is lacking.  
18 And I think that's it.

19 CHAIRMAN NELSON: Thank you. Any brief rebuttal  
20 from Northern Valley?

21 MR. CARTER: Thank you. I'll try to keep this  
22 brief. I know we're trying to move along. But I think  
23 that Mr. Schenkenberg's opening comments are exactly  
24 where I want to return the Commission. He spoke at  
25 length about why this case is important and why the

1 decision this Commission will make may have significant  
2 impact not only here but at the various proceedings at  
3 the FCC and in Federal Court and how the Commission's  
4 decision here could, according to Sprint, have direct  
5 implication on whether or not Northern Valley is paid  
6 the millions of dollars to which it believes it is  
7 entitled.

8           Based on Sprint's own statements, therefore,  
9 this case has far reaching implications. And when a case  
10 of this nature has far reaching implications it's  
11 important to get full and complete discovery.

12           Sprint's idea or the notion that Northern  
13 Valley's Counterclaim II should be given less weight or  
14 should be treated differently than the manner in which  
15 Sprint's claims are treated is exactly what we urge this  
16 Commission to reject. We ask that you allow us to get  
17 full and complete discovery.

18           And we recognize, as I stated earlier, that the  
19 request with regard to Sprint's revenues have come out in  
20 a variety of different fashions. But I want to focus  
21 your attention just for one moment on something that I  
22 spoke about earlier. And Mr. Schenkenberg's handout  
23 relies quite extensively on the Northern Valley -- the  
24 Qwest decision from the Federal Court where the Federal  
25 Court did not order the production of this information at

1 that time.

2 As I stated earlier -- and Mr. Schenkenberg  
3 attempts to dismiss this because there's not an Affidavit  
4 but I think the Commission can and should consider the  
5 fact that Qwest is now voluntarily producing that  
6 information. That court, as well as a majority of other  
7 decisions on this paper, were made based solely on  
8 affidavits submitted into the record.

9 When we had an opportunity to depose Qwest  
10 individuals about what was possible it became clear that  
11 quite a bit of this information was readily producible.  
12 We believe that the same could be true here. And Sprint  
13 has not spoken even today about what it can produce  
14 without significant burden.

15 Therefore, we would urge the Commission not to  
16 deny the Motion to Compel but if it is concerned about  
17 burden, to determine that this information is relevant  
18 and then order the parties to engage in further meet and  
19 confer about how to narrow those discovery requests.

20 We don't believe that the appropriate outcome --  
21 especially when the Commission's statutes specifically  
22 directs it to consider affordability if it were to reach  
23 Count II. But we don't believe it's appropriate to give  
24 Sprint a free pass on producing information related to  
25 its revenues.

1           Northern Valley is, as I said earlier, and  
2 continues to be interested in having discussions with  
3 Sprint about what it can produce without significant  
4 burden. We are more than willing to continue to engage  
5 in those conversations if we can get from Sprint further  
6 details about what is possible.

7           Again, we know from our own experiences that  
8 certain of this information can be produced without  
9 significant burden, or we certainly believe that to be  
10 the case.

11           My only other point or note that I would make is  
12 that the document that Mr. Schenkenberg held up a few  
13 moments ago that had the significant amount of redactions  
14 on it, I want to make sure that if I'm correct, that  
15 document is Northern Valley's account ledger wherein it  
16 was submitting deposits to the bank and listed each of  
17 its retail residential business customers and the amount  
18 of money each of those customers were paying.

19           We think that is significantly different from  
20 the redactions that Sprint has made wherein you will be  
21 reading an e-mail and a line or two lines will be  
22 redacted without explanation. That certainly isn't a  
23 privileged e-mail.

24           We think that isolated, selected redactions  
25 from documents is a very different scenario than the



1 document that Mr. Schenkenberg held up, which was  
2 Northern Valley's deposits.

3           Nevertheless, if the Commission is concerned  
4 about having a fair standard, you know, we would  
5 encourage the Commission to adopt the standard that says  
6 produce the material without redaction and have the  
7 confidential designation. Northern Valley would  
8 certainly live by that, if the Commission is concerned,  
9 but we do think there's a material distinction between  
10 the types of redactions addressed by our motions.

11           With that, I'd be glad to answer any  
12 questions.

13           CHAIRMAN NELSON: Okay. Questions? Rolayne?  
14 Questions from Commissioners?

15           Commissioner Hanson, any questions?

16           COMMISSIONER HANSON: No, I do not. Thank you.

17           CHAIRMAN NELSON: Okay. I do have just a few.

18           For Sprint there was reference made to the  
19 Federal Court in Iowa that had told Verizon to provide  
20 their revenue information. Can you distinguish that from  
21 where you believe your position is?

22           MR. SCHENKENBERG: I can, Mr. Chairman. And I  
23 think we were the first ones to cite that case and bring  
24 it to the attention to the Commission. I don't have it  
25 in my hand what exhibit that was, but I think we did

1 attach it.

2 In that case the Federal Court said this is  
3 relevant to an equitable claim. This is relevant to the  
4 unjust enrichment claim that is pending in this court.

5 Verizon presented no affidavits on burden. Not  
6 one. And the court also noted that the court's  
7 considering whether the unjust enrichment claim stands,  
8 but at the present time it was standing. So because we  
9 don't have an unjust enrichment claim here and we have  
10 burden, those are the distinguishing factors.

11 CHAIRMAN NELSON: The second question, and you I  
12 think attempted to address this with Northern Valley's  
13 allegation that you allowed data to -- well, you talked  
14 about data being destroyed. But I'm more curious their  
15 contention that you've allowed data to go from active to  
16 inactive.

17 And I understand that's a normal part of it,  
18 but, you know, you've allowed that to happen knowing all  
19 along that you may be required to produce that. And now  
20 you're arguing, well, now it's inactive so, therefore,  
21 it's too difficult to produce.

22 I guess that goes back to why would you allow  
23 it to go inactive knowing that you might have to produce  
24 it? And why should we have any sympathy if it's hard to  
25 get at since you allowed that to happen?

1           MR. SCHENKENBERG: I wasn't counsel of record in  
2 the Federal Court case where the ESI, electronic storage  
3 of information, agreement was negotiated, but I've  
4 negotiated enough of those to know those are the kind of  
5 issues that are talked about and discussed.

6           And what that agreement says is we're going to  
7 designate a specific number of custodians, and we're  
8 going to do searches. And if a party at that time wanted  
9 to raise an obligation to change normal archiving,  
10 especially when you're talking about billions and  
11 billions of call detail records, that's something that's  
12 going to be raised in the process of negotiating an ESI  
13 agreement.

14           And there's a provision in there that talks  
15 about parties maintaining normal course for archival  
16 materials. There's a provision that talks about  
17 databases. The parties meeting and conferring about  
18 information in databases.

19           If this is an issue, it's an issue that ought to  
20 be addressed by the Federal Court rather than this  
21 Commission.

22           CHAIRMAN NELSON: Thank you. And I'd just like  
23 to turn to Mr. Carter on that same issue.

24           I mean, has this issue been resolved with this  
25 statement that's been prepared for the Federal Court

1 action?

2 MR. CARTER: Commissioner Nelson, I would  
3 respectfully disagree with Sprint's position on this  
4 issue. What the court entered is a stipulated joint  
5 electronic -- - protocol for electronic stored  
6 information. It was entered on October 15 of 2009.

7 In that order, first of all, this is -- there  
8 has been no Federal Court supervision, nor does this  
9 order address anything about the search terms or the  
10 search protocols. That's simply not addressed, and that  
11 was not ever seen --

12 CHAIRMAN NELSON: Well, if I might interrupt,  
13 my question gets more at the data being moved from active  
14 to inactive. That's my bigger concern here, rather than  
15 search terms.

16 MR. CARTER: Absolutely. And so I went into  
17 a -- this is a relatively straightforward documents in  
18 terms of it covers the ESI. The Order itself imposes a  
19 duty upon parties to make a good-faith and reasonable  
20 inquiry of their electronically stored information,  
21 identify, collect, and process that information.

22 The Order says not that you -- the Order says  
23 that you don't have to interrupt your routine protocol  
24 for recycling backup media. So if you have a tape that's  
25 already in the backup archives, right, then you don't

1 have to interrupt your restoration.

2 So usually you have, example, day-to-day tapes,  
3 and you may put those back into the cycle after a period  
4 of time. The Order says you don't have to interrupt the  
5 recycling of that media. It does not address the  
6 specific issue about whether or not you must interrupt  
7 the archival of information that's in an active  
8 database.

9 With regard to the production from databases, it  
10 indeed explicitly contemplates that information from  
11 proprietary databases would be produced in the course of  
12 discovery. So it's not as if we had what I was referring  
13 to earlier.

14 It's not as if we had search terms we all agreed  
15 to and specific witnesses we all agreed to and said this  
16 is the only place you must go in searching for  
17 information. Quite the opposite. The ESI protocol in  
18 this case specifically says you must go in search for  
19 proprietary databases, which is not going to be under the  
20 possession or custody of any particular individual.

21 And so the ESI imposes an affirmative duty to  
22 search through those databases to capture and collect  
23 electronic stored information that's relevant and  
24 responsive. It does say you don't have to interfere with  
25 your backup and recycling tapes, but that doesn't address

1 the question or doesn't remove what is otherwise the  
2 affirmative obligation under the law that if you have  
3 electronic information that's relative and responsive  
4 while this is active, you must search that active  
5 information to produce responsive data. The ESI protocol  
6 in this case does not suspend that obligation.

7 CHAIRMAN NELSON: Thank you. I have no further  
8 questions.

9 Commissioner Fiegen.

10 COMMISSIONER FIEGEN: Discovery is very  
11 important to all of us in making sure the case are tried  
12 properly and to make sure that our free enterprise system  
13 is protected and so are our citizens.

14 It interested me that 101,000 sheets of paper  
15 were sent in discovery. That's a lot. In fact, it  
16 sounds excessive. Tell me why 101,000 sheets of  
17 information would be sent in discovery.

18 MR. CARTER: Certainly. Thank you,  
19 Commissioner Fiegen. The simple answer to that goes back  
20 to again where Mr. Schenkenberg started his conversation.  
21 This is a very important case for Northern Valley. It  
22 has implications that extends, as he said, into the  
23 Federal Court and into the FCC.

24 And in the beginning when this case was first  
25 brought here to this Commission Northern Valley and

1 Sprint had conversations, and we each agreed that we  
2 would produce all of the relevant information necessary  
3 to litigate here at the Commission, at the FCC, and in  
4 the Federal Court.

5 We agreed, again, from the very beginning we  
6 would make a full production of interstate and intrastate  
7 information in this case so that we had a complete  
8 record.

9 Since that time Sprint has changed course.  
10 Sprint has said, oh, the Commission doesn't have  
11 authority to compel me to produce that interstate  
12 information and I no longer will willingly do so.  
13 Northern Valley has remained consistent has fully  
14 produced all the information. And so as we sit here  
15 today Sprint has, in our opinion, a complete record  
16 necessary to fully adjudicate disputes among the parties.

17 Sprint's position is different. It's trying to  
18 take a piecemeal approach. That's not relevant to the  
19 PUC. That's only relevant to the FCC. So they're trying  
20 to divide that up. It's going to ultimately cost both  
21 parties significantly more money to do so.

22 But the reason that Northern Valley has produced  
23 100,000 pages of documents is because we undertook a full  
24 production so that the case would move along and we could  
25 complete these proceedings in a timely fashion.

1           CHAIRMAN NELSON: Any further questions?  
2           Rolleyne.

3           MS. AILTS WIEST: I'll start with Northern  
4 Valley.

5                     Starting with the Nos. 1 and 2 with respect to  
6 the Contention Interrogatories, I believe Ms. Cremer  
7 stated the Commission should grant that but strike the  
8 legal basis.

9                     What was your reaction to that?

10           MR. CARTER: I don't believe that we would have  
11 an objection to that. I do want to sort of make one  
12 point that even today in this conversation it came to  
13 light I think for the first time for me that Sprint  
14 contends that the local -- the way that we provide  
15 service as a conference calling provider, whether that  
16 fits as a local exchange tariff, has relevance to the  
17 interstate issues and the larger dispute between the  
18 parties.

19                     I do think that having, again, some  
20 understanding of what is Sprint's position, how do these  
21 pieces connect, is an appropriate question to be able to  
22 ask at a deposition or an Interrogatory. It's certainly  
23 matters that have been covered in a variety of other  
24 depositions, both of our parties and other parties in  
25 these cases. But, nevertheless, if the Commission



1 determines that asking Sprint to connect those dots, so  
2 to speak, in response to a Contention Interrogatory is  
3 inappropriate, we would certainly abide by that.

4 But we would certainly ask that we at least get  
5 some information about where Sprint stands on what the  
6 relevant issues are in this case before we go to  
7 deposition.

8 MS. AILTS WIEST: And then you state all factual  
9 legal basis would you have any objection to the  
10 Commission limiting that to material or principal?

11 MR. CARTER: Absolutely not. We've already made  
12 that offer to Sprint.

13 MS. AILTS WIEST: And going on to No. 4, I  
14 believe Ms. Cremer said that it was limited to  
15 South Dakota and Sprint, I believe, stated that it had  
16 answered that for Interrogatory No. 4.

17 MR. CARTER: Well, I --

18 MS. AILTS WIEST: I'm sorry. Go ahead.

19 MR. CARTER: I was just going to say I don't  
20 believe that Sprint has answered that. As he's stated,  
21 they have reached settlements with regard to certain LECs  
22 here in South Dakota. That information has not been  
23 produced.

24 And, respectfully, we don't -- I would  
25 respectfully disagree with Ms. Cremer's suggestion that

1 an aggregate number would be an appropriate way to  
2 respond to this. Because only when we can see the  
3 aggregate number and have the information to the extent  
4 it's available about the volume of traffic associated  
5 with that aggregate number would the material be  
6 particularly useful to us.

7 So we would encourage at the minimum that the  
8 Commission order full production of those documents.

9 MS. AILTS WIEST: And so, specifically, are we  
10 talking about the Sancom and Splitrock settlement  
11 agreements?

12 MR. CARTER: That's correct. Those are the two  
13 of which we are aware.

14 MS. AILTS WIEST: For 4 and 15.

15 MR. CARTER: Correct.

16 MS. AILTS WIEST: Okay. On No. 7 I think I have  
17 a question for Sprint on No. 7. And I'm not talking  
18 about the revenue portion. I'm talking about the volumes  
19 of minutes.

20 I know in NVC's arguments that if Sprint does  
21 not know how much traffic it is disputing, how can it  
22 present it's case to calculate its damages?

23 Can you answer that?

24 MR. SCHENKENBERG: I can. Thank you. And I  
25 didn't address that in my presentation. I think the call

1 volume issue is moot.

2 We asked Northern Valley a year ago, identify  
3 all the traffic that we have sent to you that you have  
4 sent on to your CSP. Identify that for us  
5 month-by-month. And they told us, no, we won't do that.  
6 And so we didn't have the information.

7 They then asked us, and we said we don't know.  
8 We don't have the information. And as it was described  
9 by our affiant, you have to go through and pull  
10 information by terminating locations. It's  
11 extraordinarily difficult to do.

12 So when they filed their first brief lawyers  
13 were in touch, and I think I talked to Mr. Cremer and  
14 said, look, we've asked you what your number is. You're  
15 tracking this we think better than we are. We can't do  
16 it. What's the number? They've then provided it to us,  
17 and we've accepted it.

18 And that's what -- I think I addressed it in my  
19 Affidavit. So we now have agreements on what the numbers  
20 are, which is how we get to that number that we didn't  
21 speak on the record.

22 MS. AILTS WIEST: Could you respond to that?

23 MR. CARTER: Yes. We did provide sort of our  
24 breakdown of that information. And I generally  
25 understand that Sprint has accepted that. But it would

1 be good to have -- if we don't, it would be good just to  
2 have a sworn confirmation that we're all in agreement on  
3 the volume of traffic, but I think we've generally been  
4 able to work that out.

5 MS. AILTS WIEST: So with respect to No. 7 for  
6 total volumes of minutes, that is no longer at issue?

7 MR. CARTER: Again, I would -- if they put it  
8 under Interrogatory response that they agree to our  
9 numbers, if they haven't already, we would then resolve  
10 the issue.

11 MR. SCHENKENBERG: Of course.

12 MS. AILTS WIEST: Okay. So let's go to -- okay.  
13 Now we're at 8 and 26 and -- actually I have a question  
14 about this one because I was somewhat confused.

15 In your Motion to Compel, Northern Valley, with  
16 respect to which Interrogatories or document requests you  
17 were referring to, let me find that.

18 I think my issue was you have -- in your brief  
19 anyway you list No. 35 twice. And I was just trying to  
20 get some clarification on that. I think if you go to  
21 page -- if you look at page 19 and 21 of your initial  
22 Motion to Compel, in the heading you have 8, 26, 35, and  
23 36, and then you list 8, 26, and 35. Which one is  
24 actually 36?

25 And then if you look to 21, you have 9 and 23 in

1 your title, but you list 9, 23, and 35. My point is that  
2 there seems to be two 35s. So is one 36? Or am I just  
3 missing something?

4 MR. CARTER: I'm sure it's an error, and I would  
5 just have to go through the papers and confirm that.

6 Do you want me to address that maybe at a break  
7 and I'll just confirm that with you maybe at a break?

8 MS. AILTS WIEST: Oh, okay. So --

9 MR. SCHENKENBERG: If I may, I think he's got  
10 them labeled all right. I think it's the headings that  
11 are just incorrect. The E ought to be 8, 26, and 35, and  
12 F ought to be 9, 23.

13 MS. AILTS WIEST: But there's two 35s? Is that  
14 correct?

15 MR. SCHENKENBERG: The one on page 21 is 36.

16 MS. AILTS WIEST: Okay. That's what my question  
17 is.

18 MR. SCHENKENBERG: Yes. The 35 on page 21  
19 should be 36.

20 MS. AILTS WIEST: That was my confusion there.

21 I believe Sprint stated with respect to 8, 26,  
22 and 35 that it has answered those questions because it  
23 has no -- with respect to 26 and 35 it has no responsive  
24 information, and 8 it doesn't have an answer or there are  
25 no documents.

1 MR. SCHENKENBERG: 26 and 35 are Document  
2 Requests, and the answer per Mr. Tillotson is we don't  
3 have any documents. The requests say produce documents  
4 sufficient to demonstrate X, and the answer is we don't  
5 have any such documents.

6 8 is an Interrogatory that says, Set forth  
7 gross revenues, which asks to do an analysis or a study  
8 that we would have to do to answer it. 8 we think the  
9 answer is we just don't have the information in the form  
10 requested.

11 MS. AILTS WIEST: Okay. Thank you.

12 What about Sprint's contention that we can hold  
13 the question about whether to give revenue information  
14 depending -- or that's -- Sprint's contention that since  
15 they -- that revenue information wouldn't be relevant  
16 until such time as they maybe have, you know, addressed  
17 the issue in 1.4 regarding the market? They haven't  
18 objected to that?

19 MR. CARTER: Well, I think it's a question of  
20 whether the Commission desires to engage -- to  
21 potentially bifurcate the proceeding and engage through  
22 multiple rounds of discovery or whether the Commission  
23 wants to proceed through one round of discovery, complete  
24 depositions, and then go into a hearing.

25 But Sprint's suggestion would be, I think,

1 that -- put off the discovery now, go through a complete  
2 round of discovery, and then make some determinations  
3 about how to classify the traffic and whether or not the  
4 tariff applies and then only at that point in time make a  
5 determination about potentially providing a second round  
6 of discovery to get this information from Sprint.

7 I think it's a matter of -- it's certainly not a  
8 common practice for courts to do it that way. However,  
9 at the FCC they have decided to at least with regard to  
10 two cases bifurcate decisions on the issues, address  
11 certain issues first, and then have a second round.

12 So, you know, I think from our perspective the  
13 information -- or preference would be we've done full  
14 discovery. We've had all of our depositions. We would  
15 like to get full discovery from Sprint and proceed to  
16 getting this case resolved so we can get all the cases  
17 resolved rather than continuing to drag this out.

18 MS. AILTS WIEST: Though it's not necessarily  
19 just a question, maybe perhaps a burden to Sprint, I  
20 mean, to the extent that Northern Valley wants to go  
21 forward with its claim to have the commissions do some  
22 sort of a rate proceeding pursuant to 1.4 under price  
23 regulation or even rate of return regulation, Northern  
24 Valley would be under -- wouldn't Northern Valley be  
25 under the requirement to set forth the fully allocated

1 costs of providing its service?

2 MR. CARTER: Certainly the costs of providing  
3 the service are one of the factors that would be  
4 considered, right. But, again, the question is is we've  
5 been waiting for quite some time to get to the  
6 depositions of Sprint and its witnesses. So if the  
7 Commission decides to bifurcate it, I guess we could  
8 address that issue or understand it.

9 But as we sit here today, we're preparing this  
10 case for the depositions of Sprint and believe that we  
11 should be entitled to this discovery before we get to  
12 those depositions so that we can then work with our  
13 expert witnesses to prepare our entire analysis with  
14 regard to Count II.

15 MS. AILTS WIEST: Could Sprint address that  
16 issue at all? Or your contention that you would wait  
17 until you've perhaps made some sort of claim on the  
18 affordability factor before the revenues would even be  
19 discoverable?

20 MR. SCHENKENBERG: Yeah. That is our contention  
21 or claim, that this information has to be relevant to be  
22 discoverable. It has to lead to admissible evidence. We  
23 only get to this issue of whether revenue information is  
24 potentially relevant if we're in price regulation, which  
25 is something you haven't decided yet.



1           If you decide that, the statute -- I believe the  
2 statute gives you a number of criteria. But, as you  
3 said, it imposes on the Applicant, the provider, the  
4 obligation to establish a rate, propose a rate. And that  
5 rate's going to be generated based on cost subject to  
6 additional considerations.

7           And as a potential customer if Sprint raises a  
8 defense of affordability, now there's a defense. Now  
9 there's a defense for discovery to be relevant. But at  
10 this point we haven't made any affordability assertion or  
11 defense. It's just not part of this case and I suspect  
12 never will be.

13           I think it's highly unlikely if we go down the  
14 price regulations path, that Sprint would make an  
15 affordability challenge to a rate that was proposed.

16           MS. AILTS WIEST: I was just questioning -- I  
17 know the procedural schedule is no longer valid, but it's  
18 my understanding is this scheduled for the end of August  
19 now?

20           MR. CARTER: That's correct.

21           MS. AILTS WIEST: And the parties are prepared  
22 to go forward?

23           MR. CARTER: I think that largely it depends on  
24 how the outcome of the proceeding goes today. Once we  
25 know how much discovery we're going to get, it will

1 determine how much additional time we need to complete  
2 discovery in the process.

3 I would like to respond for just a moment to  
4 Mr. Schenkenberg's comment. I don't read 49-31-1.4 to  
5 make it an election of the parties to determine whether  
6 or not affordability is an issue the Commission should  
7 consider.

8 The statute, I think, in fact, uses the word  
9 "shall," which Sprint's brief points out is usually a  
10 command. And the command in this statute says the  
11 Commission must consider these factors, and one of the  
12 factors is affordability.

13 So I don't necessarily agree with the premise  
14 that this information would only be relevant if Sprint  
15 elected to make it relevant. I believe the statute makes  
16 this information relevant and the statute compels us to  
17 look at each of those factors and we should be entitled  
18 to do that as part of preparing our case for the  
19 hearing.

20 MS. AILTS WIEST: I think that's all I have.

21 CHAIRMAN NELSON: Any further questions from  
22 Commissioners?

23 Seeing none, debating on how we ought to move  
24 forward at this point. Based on the amount of time  
25 consumed in these first two issues, I'm thinking that the

1 third issue is going to also consume a fair amount of  
2 time, even though we've gone through --

3 Well, let me ask this. I mean, how much of the  
4 argument that you've made on this last issue is going to  
5 carry forward to the last issue?

6 MR. CARTER: From my perspective a number of the  
7 topics for the deposition overlap. And so if you  
8 determine we're entitled to certain information with  
9 regard to Interrogatories and Document Requests, it would  
10 seem the arguments flow through to the particular  
11 deposition topics. So I think my perspective is is that  
12 our discussion could be quite limited.

13 CHAIRMAN NELSON: Well, I would agree with that.  
14 But I don't want to foreclose you all from being able to  
15 make your arguments.

16 Mr. Schenkenberg, what are you thinking?

17 MR. SCHENKENBERG: Mr. Chair, members of the  
18 Commission, I go would concur. I think there's a lot of  
19 overlap. I think we can judge the Commission's mood and  
20 body language and not speak when we shouldn't speak too  
21 much. And, frankly, we can talk an awful lot. I would  
22 think it might make sense to take all of these under  
23 advisement since you took --

24 CHAIRMAN NELSON: And that is, I think, our  
25 intention, unless -- yes. I'm seeing another

1 Commissioner shake her head yes. I think that would be  
2 our intention, yes.

3 MR. SCHENKENBERG: I apologize. My mic. wasn't  
4 on. But we will be brief.

5 CHAIRMAN NELSON: Okay. Commissioner Hanson, I  
6 don't know if you are aware of this, but your phone  
7 bridge is going to end at 12:45. And so if we go past  
8 that, we're going to have to take just a little bit of a  
9 break to get you a phone bridge.

10 But, Cheri, I'm guessing you're going to want a  
11 little bit of a break now; correct?

12 (Discussion off the record)

13 CHAIRMAN NELSON: Let's move ahead. Sprint's  
14 Motion For Protective Order relating to some depositions.  
15 Mr. Schenkenberg.

16 MR. SCHENKENBERG: Thank you, Mr. Chairman,  
17 members of the Commission. Sprint's moved for a  
18 protective order to limit the scope of discovery topics.  
19 They would have to be covered by a corporate witness.

20 There are, number one -- again, this is limited  
21 to South Dakota, and I'm not sure that that came out  
22 clearly in the briefing. But the conversations that we  
23 have had is that Mr. Carter recognizes, again, that  
24 there's a limitation on the Commission's ability to order  
25 interstate material.

1           We've resolved a number of things, a number of  
2 topics. We've resolved topic 4. We've resolved topics 5  
3 and 6, and I believe we've resolved topics 5, 6, and 21.  
4 I'll talk about those in a second. Topic 26 is resolved.  
5 And we've resolved topic 23. Just short of this hearing  
6 I advised Mr. Carter that we withdraw our objection to  
7 topic 23.

8           Big picture, again, courts deal with this more  
9 often than commissions. The obligations imposed on  
10 someone that has been assigned the obligation to testify  
11 for the company are pretty significant. You have to go  
12 out and determine what the company knows on those topics.  
13 You have to do your homework.

14           You have to prepare, and if you are assigned the  
15 task of providing testimony on all of the CLEC  
16 applications that this Commission has adjudicated over  
17 the last 10 years, it would be a lot of work. You'd have  
18 to go -- even if you weren't personally involved it  
19 doesn't excuse your lack of knowledge. You'd have to go  
20 look at the documents, look at the files, talk to the  
21 people, and be prepared to answer questions under oath  
22 and talk for the company.

23           This is a very significant obligation. And what  
24 we're trying to do is have those obligations be  
25 undertaken by somebody only with respect to topics that

1 matter in this litigation. That are going --

2 CHAIRMAN NELSON: Commissioner Hanson, we're  
3 hearing your voice. We're no longer hearing your voice.

4 COMMISSIONER HANSON: Okay. Can you hear me  
5 now?

6 CHAIRMAN NELSON: I can hear you now.

7 COMMISSIONER HANSON: All right. Thank you.  
8 I'll put you back on mute.

9 CHAIRMAN NELSON: Okay. Go ahead,  
10 Mr. Schenkenberg.

11 MR. SCHENKENBERG: So we're trying to have these  
12 depositions be focused on things which matter and will  
13 matter at the hearing in this case. We've talked about  
14 revenue. I don't need to talk about revenue anymore.

15 There are a significant number of topics,  
16 including everything that we've called the unjust  
17 enrichment topics, that to the extent revenue information  
18 is not allowed, not relevant, or the marginal relevance  
19 exceeds the benefit in this case, or, for example, if you  
20 decide that this comes in only if we raise an  
21 affordability defense, then those topics should be  
22 stricken.

23 We didn't in our affidavits identify a number of  
24 hours that it would take witnesses to prep on this. It's  
25 awfully hard to do. Again, in my example, if you were

1 told you have to testify on a topic I described, I don't  
2 know how you calculate how many hours you'd have to take  
3 to read all the documents and prepare yourself to testify  
4 knowledgeably on behalf of the entity you're  
5 representing.

6 We did try to give you some estimates. Our  
7 witness anticipates oftentimes in prepping a day or two  
8 for every topic depending on how extensive the topics  
9 are. This is something that our witnesses take very  
10 seriously.

11 Topic 7 -- and I don't want to go through all of  
12 these one by one, but as you look at topic 7, which is  
13 communications with other long distance carriers, what  
14 communications have Sprint's internal -- its lawyers and  
15 its outside counsel had with long distance carriers with  
16 South Dakota access stimulation activities?

17 Again, you have to ask yourself why is that  
18 relevant? Is this important to a tariff claim? No. Is  
19 it important to at the timing rates? No. If so, why are  
20 we asking the witness to do the kind of work necessary to  
21 provide testimony on that topic?

22 There are a number of topics that in their reply  
23 brief Northern Valley says are important for mitigation  
24 of damages. They haven't raised a mitigation of damages  
25 defense. There isn't anything in the pleadings that

1 makes that important. And so that argument that  
2 mitigation of damages is something that has to be  
3 inquired in discovery isn't supported by the pleadings.

4 Topic 23 I indicated we will withdraw our  
5 objection and produce a witness on that.

6 Topic 24, communications with regulators. How  
7 have Sprint's internal and external folks talked with  
8 agencies, the Congress, et cetera, over the years about  
9 access pumping? Again, I certainly hope you don't want  
10 testimony at hearing about what Sprint's been telling  
11 members of Congress since 1996 -- 2006 about access  
12 stimulation.

13 Topic 25 relates to least cost routing, which we  
14 talked about. Again, these agreements are only important  
15 if there's revenue information to be obtained. I address  
16 topics 27 to 44, which were previously called in the  
17 first notice we received, provisional topics related to  
18 Northern Valley unjust enrichment claim. That's what  
19 they're designed to obtain, and that simply isn't  
20 something that's fair game in this proceeding.

21 And then, finally, topics 46 and 47 are focused  
22 on affidavits of Mr. Hellwig and Mr. Tillotson, which  
23 we've already talked about today. And I guess our  
24 position is if they wanted to challenge the facts in  
25 those affidavits, they should have asked for discovery



1 before briefing the Motion to Compel. They should have  
2 asked for discovery, put off this hearing, done a  
3 deposition, and we could have vetted all of that and got  
4 it out in the open.

5 And not having done that, by the time you get to  
6 this Motion you will decide if you either or don't agree  
7 with those affidavits and those topics will be moot.

8 I have nothing further.

9 CHAIRMAN NELSON: Thank you.

10 Mr. Carter.

11 MR. CARTER: Yes. I'll address just briefly the  
12 issue of a burden that Sprint raises.

13 I think that the context of this proceeding and  
14 the fact that these sorts of cases have been going on  
15 since 2007 should weigh in your consideration of the  
16 relative burden that it would take for Sprint's witnesses  
17 to be prepared.

18 I'm assuming that most, if not all, of the  
19 witnesses have already been deposed on these virtually  
20 identical topics and other cases. So the amount of  
21 additional work that would be required to be prepared is  
22 probably not that significant.

23 In addition, I think that, as we stated in our  
24 papers, we had to put in a number of deposition topics  
25 because we have virtually no responsive information to

1 Interrogatories and a lot of open Document Requests. So  
2 if we had information in the Interrogatories in the way  
3 that is not normal course when you prepare for  
4 depositions, the amount of work that it would take for  
5 the witnesses to be prepared would have already been  
6 front loaded in preparing responses to those  
7 Interrogatories.

8           So we think a lot of the work should flow  
9 through, you know, granting the Motion to Compel on  
10 Interrogatories and Document Requests that will then  
11 mitigate the burden with regard to preparing witnesses  
12 for the deposition.

13           Mr. Schenkenberg talks about a number of the  
14 topics. Again, whether Sprint -- we talked about whether  
15 Sprint went out and told other IXCs please bring me your  
16 traffic so I can deliver it to you at Northern Valley  
17 and/or whether Sprint declined to take traffic to  
18 Northern Valley. We believe that that information is  
19 relevant, and we certainly talked about it in our brief  
20 as a mitigation of damages defense because we think that  
21 Sprint can't go hold itself out to voluntarily accept the  
22 traffic and then claim that it's been damaged by doing  
23 so.

24           I did look. A number of states do not require a  
25 party to affirmatively plead a mitigation of damages

1 defense. It's an implied defense. However, it does  
2 appear in South Dakota that the defense should be pled.  
3 So if that's of concern to the Commission, we can either  
4 file an amended answer and add that affirmative defense,  
5 or as common practice at the hearing, the court can  
6 simply determine that the defense has been raised and  
7 litigated and, therefore, it be subject in the case.

8 But, in any event, since we haven't had  
9 discovery yet, there is no basis to deny discovery  
10 purely because that hasn't been pled. If it's a  
11 procedural matter to add it, we would certainly be glad  
12 to do so.

13 And then we have talked about the issues of the  
14 data archival and whether or not the affidavits that have  
15 been submitted to support the burden are presenting a  
16 full picture. It's an issue that we want to cover at the  
17 deposition and we should be able to cover at the  
18 deposition regardless of how the Commission ultimately  
19 determines -- or what it ultimately does with regard to  
20 the motions we hear today.

21 The issue of how a party conducts discovery and  
22 whether it satisfies its electronic discovery obligation  
23 is a common topic in litigation. There's no reason to  
24 deny us having the witness prepared to answer those  
25 questions.

1           I also noted in our brief that a number of -- so  
2 from the first time that we served our Notice of  
3 Deposition to the Amended Notice of Deposition that's  
4 actually at issue in the hearing today we did add a  
5 number of additional topics because we wanted to be sure  
6 that when we came to that hearing -- to that deposition  
7 that the discussion that we continued to have about what  
8 Sprint does not regularly do or the documents it does not  
9 regularly maintain would no longer be a barrier to us  
10 actually understanding what it is that Sprint could  
11 produce or what it could develop with minimal burden.

12           So we want to be sure that a witness is prepared  
13 to talk about those issues. And if the Commission  
14 ultimately determines that it would be beneficial or  
15 preferable to us to address those questions and ask those  
16 before it makes a final decision on how much of the  
17 information Sprint will need to produce, and that's  
18 certainly one course of action the Commission could take  
19 today.

20           In other words, it could determine that the  
21 information is relevant but just as the court, the  
22 Federal Court did, defer a final determination of how  
23 much of that information would need to be produced until  
24 we have additional discovery.

25           But, in any event, we do believe that it should

1 be incumbent upon Sprint if they won't do so voluntarily  
2 to do so through the deposition process of having a  
3 witness prepared to tell us what information they could  
4 reasonably produce.

5 We have found, as I said, that could be  
6 extremely enlightening with regard to carriers who  
7 utilize the exact same third-party vendor.

8 Thank you.

9 CHAIRMAN NELSON: Thank you.

10 Ms. Cremer.

11 MS. CREMER: Is topic 1 resolved or not? And  
12 that's just the one that has to do with Sprint being  
13 defined too broadly.

14 MR. CARTER: No. In fact, Mr. Schenkenberg  
15 didn't address that issue. The definition of Sprint has  
16 been limited, I believe, insofar as it relates to  
17 attorneys being included within the definition.

18 We agreed that only with limited exception of  
19 two topics that would naturally involve attorneys  
20 communicating with IXCs or with the FCC that the outside  
21 attorneys would be part of the definition. Otherwise,  
22 the definition only included inside attorneys.

23 And that was based on the understanding that an  
24 in-house attorney could easily engage in nonprivileged,  
25 relevant communications. So I believe we reached a

1 consensus on that issue around the attorneys.

2 The issue with regard to the definition of  
3 whether or not it's proper to define Sprint to include  
4 affiliated entities, so not just Sprint Communications  
5 Company, LP but affiliated agencies, that issue I do  
6 believe is still outstanding. And Northern Valley's  
7 position on that is the case law supports -- including  
8 case law from the Federal Court here in South Dakota,  
9 supports the proposition that if a named party has access  
10 to the information, even though it may technically be  
11 housed with an affiliated or a parent or subsidiary, if  
12 it can access and obtain that information, it has an  
13 obligation to do so in preparing for a 30(b)(6)  
14 deposition.

15 So we would encourage the Commission to deny  
16 the Motion For Protective Order with regard to modifying  
17 the definition that Sprint set forth in the papers.

18 MR. SCHENKENBERG: On attorneys, Mr. Carter, is  
19 correct the definition is written to include outside  
20 attorneys. Northern Valley has said it will modify that  
21 so that it seeks outside attorney communications only on  
22 topics 7 and 24?

23 MR. CARTER: That sounds right.

24 MR. SCHENKENBERG: Which we still object to. We  
25 don't think my communications with anyone should be the

1 subject of a deposition given by a Sprint corporate  
2 witness.

3 MS. AILTS WIEST: I'm sorry. Could you repeat  
4 that. You're still objecting to which part?

5 MR. SCHENKENBERG: Well, topic 7 says -- and  
6 let's talk about topic 24. 7 and 24 have the same issue.

7 24 says a witness should be prepared to speak to  
8 all communications between Sprint and any employee or  
9 representative of the U.S. House of Representatives, the  
10 Senate, the FCC, the South Dakota Legislature, et cetera,  
11 South Dakota Public Utilities Commission regarding any  
12 calling service provider or any activity that Sprint  
13 refers to as traffic pumping or access pumping.

14 Sprint in that topic is defined as Sprint's  
15 business people, inside lawyers, outside lawyers, and  
16 every -- of the hundreds of affiliates of the named  
17 entity here. We object to that.

18 In particular, we don't want a witness to have  
19 to be prepped on what I told you today, which technically  
20 would be within the scope of the topic if you left it as  
21 is because I'm saying things to you about Northern  
22 Valley.

23 The other topics besides 7 and 24 Mr. Carter  
24 agrees don't extend to outside counsel. So I think the  
25 question on 7 and 24 is do they extend to outside counsel

1 or not?

2 I guess the first question is do we have to  
3 answer it all? And, if so, do they extend to outside  
4 counsel, and also do they extend to all of Sprint's  
5 affiliates.

6 MR. CARTER: If I might respond very briefly to  
7 that, Northern Valley propounded a document request very  
8 similar to this. And if I remember correctly, at least  
9 in one proceeding Sprint has propounded the exact same  
10 document request.

11 Sprint has produced to us a number of documents  
12 written to members of the United States Congress, members  
13 of the South Dakota Legislature where they make certain  
14 statements about these cases and certain representations  
15 about these case, and some of those documents are  
16 authored by their outside counsel.

17 We believe that it is appropriate for us to be  
18 able to question them about the representations they've  
19 made to decision-making bodies about these types of cases  
20 and in particular when they relate to Northern Valley.

21 We certainly don't intend and I understand in  
22 one way Sprint's concern about the level of burden. On  
23 the other hand, you know, it's certainly not our  
24 intention to spend our deposition of Sprint's witnesses  
25 asking Sprint's witnesses about what Mr. Schenkenberg



1 said here today.

2 We want witnesses that are prepared to talk  
3 about the documents that Sprint has produced in this case  
4 that they've already conceded are relevant because  
5 they've already produced them without objection. So we  
6 need to be able to depose individuals about that without  
7 having to go and seek out each of the attorneys or  
8 individuals who may have authored that document.

9 Thank you.

10 MS. CREMER: Okay. As to topic 1, I would limit  
11 the definition to the party that NVC sued, which is  
12 Sprint Communications Company, LP. I have no clue about  
13 the outside attorneys. I'm not touching that one.

14 Topics 5, 6, and 21, I would allow NVC to  
15 inquire as to what, if anything, characteristics mean.

16 Topics 7 and 10, I would deny, and I have a very  
17 limited knowledge of mitigation but for I thought it was  
18 only used in tort and breach of contract actions. So I'm  
19 not sure why we would ever go to mitigation or why we'd  
20 need to go there. If I didn't say 10, that includes 7  
21 and 10.

22 Topic 22, deny. And my note says if the  
23 Commission requires this information for its decision  
24 under Count II, it will get it at that time. I am  
25 assuming that has something to do with it. I can't

1 recall what anybody's arguments are anymore.

2           Conversations with the Government, deny.  
3 Relevance is questionable. Least cost routing, I would  
4 deny. Again, relevancy.

5           Topics 27 through 44, the financial impact on  
6 Sprint, Sprint's revenues, I would deny. Relevance is  
7 questionable, marginal at best. Burdensome to produce.

8           And 46 and 47, deny if the Commission determines  
9 there is no relevance. I think that goes to Mr. -- or to  
10 Sprint's argument that they made earlier. I would agree  
11 with him on that.

12           And that's all I have. I think I addressed all  
13 of those topics.

14           CHAIRMAN NELSON: I'm just a little confused.  
15 Let's just look at 27 through 44. You said you would  
16 deny Sprint's Motion for a protective order?

17           MS. CREMER: Oh, you're right. Well, let me  
18 look. Hang on.

19           MR. SCHENKENBERG: I was going to ask that  
20 question. I think she was meaning deny discovery, not  
21 deny the Motion.

22           MS. CREMER: Yes. I'm sorry. Yes.

23           CHAIRMAN NELSON: Okay. Now I'm on track.

24           Questions from the Commission. My one question  
25 has already been asked.

1 MS. AILTS WIEST: I have a question. On a  
2 definition of Sprint.

3 I'm trying to understand what other affiliates  
4 we're even referring to. I mean, I did review those  
5 cases that were cited by the parties. It appeared in  
6 most of those cases anyway that at least there was an  
7 identification of what subsidiaries or affiliates were  
8 being referenced. And I didn't see this.

9 And Sprint states that it can include dozens of  
10 Sprint's corporation affiliates. How do we make this --  
11 I don't even know who we are referring to.

12 MR. CARTER: Sure. Frankly, I think that's kind  
13 of Northern Valley's point, which is we believe that the  
14 discovery we're seeking is largely encompassed within  
15 Sprint Communication Company, LP, the party in this case.

16 And so insofar as our discovery is relevant,  
17 however, we don't believe that Sprint should be able to  
18 utilize internal distinction, affiliates, or, no, that's  
19 the parent company that has that data.

20 For example, we don't know who has the contract  
21 with a third-party vendor and maintains the CVR records;  
22 right? We don't believe Sprint should be able to avoid  
23 discovery based on a pure technical matter that is not  
24 within Sprint Communications Company, LP.

25 So I don't know, and, in fact, I think the

1 question might be better directed to Mr. Schenkenberg.  
2 What discovery have we sought that he believes would not  
3 be within the custody or control of Sprint Communications  
4 Company, LP, and why is Sprint so insistent on avoiding a  
5 definition that brings those affiliates in?

6 We don't believe it materially increases any of  
7 the work that Sprint would have to do because we think  
8 that all of the data is probably contained within the  
9 entity that is actually in this litigation.

10 But it is Sprint who has sought a protective  
11 order to exclude affiliate from the course of discovery.  
12 We assume that there's a reason that they want to avoid  
13 having affiliates in there. And we are concerned that  
14 the reason is then they will use it as a technical reason  
15 to not provide information that they otherwise would have  
16 at their disposal.

17 MS. AILTS WIEST: Can you address that,  
18 Mr. Schenkenberg?

19 MR. SCHENKENBERG: I can. Are we about to  
20 lose Commission --

21 CHAIRMAN NELSON: We've got 15 minutes of grace.  
22 Until 1 o'clock.

23 MS. AXTHELM: We maybe have until 2:00. I hate  
24 to say it.

25 CHAIRMAN NELSON: Don't say that. No, no, no.

1 That would be out of order.

2 Mr. Schenkenberg, go ahead.

3 MR. SCHENKENBERG: Sprint Communications  
4 Company, LP is the entity that operates as a long  
5 distance carrier, an IXC. Nationwide there's only one  
6 entity that does that. There may be a different entity  
7 for the state of Virginia because of some special  
8 incorporation rules. But outside of Virginia, that is  
9 the only entity that operates as an interexchange  
10 carrier.

11 The concern is Sprint operates as a wireless  
12 carrier. During some period of time covered in the  
13 definitions Sprint had local exchange entities that I  
14 think were spun off with maybe a few-month overlap  
15 between the timing that they're seeking to have us  
16 testify about covered.

17 This is a dispute between an interexchange  
18 carrier and a local exchange carrier. And what our  
19 concern is is we're not going to have to tell somebody  
20 you've got to go figure out in all these various business  
21 units what might be -- what facts they might have with  
22 respect to any of these 47 topics that have to be  
23 responded to.

24 I fully expect that the information that is  
25 being sought is going to be within the care, custody, and

1 control of the long distance unit because that's where  
2 this dispute comes from. If there were three other  
3 entities that provided -- I'll give you another example.

4 There are a half dozen or 10 wireless entities  
5 that provide service. I could see a suit against a  
6 wireless company saying provide this entity for the  
7 wireless affiliates, and that might make sense based on  
8 the cases Ms. Wiest was talking about. But here we've  
9 only got the one long distance company.

10 MS. AILTS WIEST: So you don't anticipate during  
11 those corporate depositions that the witness or witnesses  
12 will state that specific information to the extent  
13 allowed by Commission is within the control of the  
14 corporate affiliate subsidiary?

15 MR. SCHENKENBERG: I don't. I don't.

16 MS. AILTS WIEST: Okay. Thank you.

17 CHAIRMAN NELSON: Any further questions from  
18 Commissioners?

19 Okay. Seeing and hearing none, I guess my  
20 intention would be for us to hold this under advisement  
21 and we have a very long agenda for our Tuesday meeting  
22 and my intention I think would be to take this as the  
23 very first issue.

24 And, again, I'm not looking for any argument.  
25 Frankly, won't even open it up for any further argument

1 at that time. I would simply foresee that the  
2 Commissioners, somebody will come with a Motion, and  
3 we'll wrestle with it from there.

4 But I think we'll probably take that first on  
5 the agenda to get it out of the way. Possible there  
6 could be questions? It is possible there could be  
7 questions.

8 I'm thinking we might know that by Monday, and  
9 we could maybe just communicate whether or not you need  
10 to be on the line or just listening. Unless you all want  
11 to be on the line just in case.

12 MR. CREMER: We certainly can be.

13 MR. SCHENKENBERG: I'm landing -- I'm flying and  
14 landing at about 8:30 Central. If I know ahead of time  
15 that I'm going to need to be somewhere quiet and on the  
16 phone, I can be, but otherwise I may not be.

17 CHAIRMAN NELSON: Well, we'll put it this way.  
18 You're certainly welcome to be on the line. And if we  
19 know that we're going to have some questions for you,  
20 we'll let you know that. Okay.

21 At this point, I mean, I appreciate the input of  
22 both sides today. You've cleared up some things in my  
23 mind. And so at this point I don't know that I'm going  
24 to have any questions for you. But others may.

25 Anything else for the good of the order?

1           Seeing none, is there a motion to adjourn?

2           COMMISSIONER FIEGEN: Move to adjourn.

3           CHAIRMAN NELSON: Motion to adjourn. All those  
4 in favor will vote aye.

5           Commissioner Hanson.

6           COMMISSIONER HANSON: Aye.

7           CHAIRMAN NELSON: Commissioner Fiegen.

8           COMMISSIONER FIEGEN: Fiegen votes aye.

9           CHAIRMAN NELSON: And Commissioner Nelson votes  
10 aye. We are adjourned.

11           (The proceeding is concluded at 12:50 p.m.)

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1 STATE OF SOUTH DAKOTA )

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 17th day of May,  
11 2012, and that the attached is a true and correct  
12 transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 31st day of  
14 May, 2012.

15

16

17

18 Cheri McComsey Wittler,  
19 Notary Public and  
20 Registered Professional Reporter  
21 Certified Realtime Reporter

21

22

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24

25

<b>\$</b>	<p><b>21</b> [6] - 108:21, 108:25, 109:15, 109:18, 117:3, 129:14</p> <p><b>22</b> [1] - 129:22</p> <p><b>23</b> [7] - 93:5, 108:25, 109:1, 109:12, 117:5, 117:7, 120:4</p> <p><b>24</b> [7] - 120:6, 126:22, 127:6, 127:7, 127:23, 127:25</p> <p><b>25</b> [2] - 92:23, 120:13</p> <p><b>26</b> [13] - 84:13, 84:14, 84:17, 85:3, 92:23, 108:13, 108:22, 108:23, 109:11, 109:21, 109:23, 110:1, 117:4</p> <p><b>27</b> [4] - 63:6, 120:16, 130:5, 130:15</p> <p><b>2:00</b> [1] - 132:23</p>	<p>34:17, 35:3, 35:16, 40:3</p> <p><b>49-13-4</b> [1] - 7:20</p> <p><b>49-31-1.4</b> [2] - 48:5, 114:4</p> <p><b>49-31-4</b> [2] - 17:5, 17:6</p> <p><b>49-31-4.1</b> [4] - 17:14, 17:15, 18:4, 35:19</p> <p><b>49-31-5.1</b> [4] - 9:24, 30:1, 30:14, 37:21</p>	<b>A</b>	<p>126:12, 127:13</p> <p><b>ACCESS</b> [1] - 1:6</p> <p><b>accessible</b> [1] - 51:8</p> <p><b>accommodate</b> [1] - 71:14</p> <p><b>according</b> [1] - 94:4</p> <p><b>account</b> [1] - 96:15</p> <p><b>accurate</b> [1] - 88:20</p> <p><b>acknowledge</b> [1] - 16:21</p> <p><b>acronyms</b> [1] - 66:18</p> <p><b>action</b> [8] - 16:14, 16:24, 23:6, 25:20, 31:5, 31:9, 100:1, 124:18</p> <p><b>actions</b> [4] - 29:18, 29:19, 29:21, 129:18</p> <p><b>active</b> [8] - 52:9, 52:17, 61:23, 98:15, 100:13, 101:7, 102:4</p> <p><b>activities</b> [1] - 119:16</p> <p><b>activity</b> [1] - 127:12</p> <p><b>actual</b> [5] - 7:3, 38:10, 39:18, 40:9, 72:14</p> <p><b>add</b> [6] - 87:8, 87:12, 91:22, 123:4, 123:11, 124:4</p> <p><b>addition</b> [3] - 38:22, 60:23, 121:23</p> <p><b>additional</b> [15] - 21:2, 46:19, 51:13, 52:22, 57:25, 59:24, 60:8, 60:18, 62:4, 87:12, 113:6, 114:1, 121:21, 124:5, 124:24</p> <p><b>additionally</b> [1] - 51:19</p> <p><b>address</b> [21] - 10:21, 16:1, 16:18, 22:16, 25:9, 52:24, 65:19, 98:12, 100:9, 101:5, 101:25, 106:25, 109:6, 111:10, 112:8, 112:15, 120:15, 121:11, 124:15, 125:15, 132:17</p> <p><b>addressed</b> [15] - 20:8, 47:15, 52:21, 63:21, 64:2, 64:3, 64:7, 64:25, 71:1, 97:10, 99:20, 100:10, 107:18, 110:16, 130:12</p> <p><b>addresses</b> [2] - 38:23, 58:20</p> <p><b>addressing</b> [1] - 57:14</p> <p><b>adequately</b> [1] - 21:15</p> <p><b>adjourn</b> [3] - 136:1,</p>
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