

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

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

IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY LP AGAINST NORTHERN VALLEY)
COMMUNICATIONS, INC. AND CAPITAL)
TELEPHONE COMPANY)

ORDER DENYING MOTION
FOR PARTIAL SUMMARY
JUDGMENT; ORDER
GRANTING IN PART
MOTION TO COMPEL; AND
ORDER GRANTING IN PART
MOTION FOR PROTECTIVE
ORDER

TC09-098

On October 29, 2009, South Dakota Network LLC (SDN) filed with the Public Utilities Commission (Commission) a complaint against Sprint Communications LP (Sprint) for 1) failing to pay intrastate centralized equal access charges at the rates approved by the Commission; 2) failing to immediately pay undisputed portions of SDN's invoices as required by SDN's Tariff; and 3) for payment by Sprint of SDN's costs of action, reasonable attorneys fees incurred by SDN, and for twice the amount of damages sustained by SDN, if SDN is required to recover its damages by suit or on appeal. On November 24, 2009, Sprint filed a Motion to Dismiss Count III, an Answer, Affirmative Defenses, and Counterclaims, and a Third Party Complaint. On December 14, 2009, SDN replied to the counterclaim of Sprint. On December 23, 2009, SDN filed a Corrected Reply to Sprint's Counterclaim.

On January 22, 2010, Sancom, Inc. (Sancom), Northern Valley Communications, LLC (Northern Valley) and Splitrock Properties, Inc. (Splitrock) filed answers to Sprint's Third Party Complaint. On February 11, 2010, Sprint filed a Motion to Dismiss Northern Valley's Cross-Claim and a Motion to Dismiss Sancom's Cross-Claim. On February 22, 2010, SDN filed a Response to Sprint's Motion to Dismiss Count III. On February 23, 2010, the Commission granted Sprint's Motion to Dismiss Count III. On February 26, 2010, Northern Valley and Sancom filed a Consolidated Memorandum in response to Sprint's Motion to Dismiss Cross-Claims. On June 7, 2010, SDN filed a Stipulation to File and Serve Amended Complaint. On June 21, 2010, Sprint filed an Answer to SDN's Amended Complaint. On September 1, 2010, SDN filed a Motion for Summary Judgment and Memorandum in Support of Summary Judgment.

On January 19, 2011, Sprint filed a Motion Requesting a Protective Order Requiring the Parties to Comply with a Confidentiality Agreement and a Confidentiality Agreement. On February 1, 2011, Northern Valley and Sancom filed a revised Confidentiality Agreement. On February 1, 2011, the Commission granted Sprint's Motion Requesting a Protective Order Requiring the Parties to Comply with a Confidentiality Agreement. On April 12, 2011, Sprint filed a Motion Requesting Approval of First Amendment to the Confidentiality Agreement which the Commission granted on April 19, 2011. On April 21, 2011, Sprint filed a Motion Requesting Approval of Stipulation Regarding Expert Discovery and a Stipulation Regarding Expert Discovery which the Commission granted on May 3, 2011.

On May 27, 2011, Northern Valley filed a Motion to Compel. On June 7, 2011, Sancom filed to join Northern Valley's Motion to Compel. On June 8, 2011, Northern Valley and Sancom filed a Motion for Adoption of Procedural Schedule. On June 14, 2011, Sprint filed an Amended Motion to Dismiss Northern Valley's Cross-Claims and an Amended Motion to Dismiss Sancom's Cross-Claims. On July 12, 2011, Sprint filed a Motion to Resolve Discovery Dispute between Sprint and Sancom. On August 24, 2011, Sprint filed a letter stating that Sprint and Sancom had resolved the issues regarding Sprint's Motion to Resolve Discovery Dispute. On August 30, 2011, the Commission granted Sprint's Amended Motion to Dismiss Northern Valley's Cross-Claim and Sprint's Amended Motion to Dismiss Sancom's Cross-Claims. The Commission did not act on Northern Valley's Motion to Compel because Northern Valley withdrew the motion. The Commission did not act on Northern Valley and Sancom's Motion for Adoption of Procedural Schedule because the parties agreed to try and come to an agreement on a procedural schedule.

On September 7, 2011, Sprint filed a Proposed Revised Procedural Schedule wherein the only part not agreed to by all of the parties was paragraph 9. Alternative language for paragraph 9 was proposed by Sprint and by Northern Valley and Sancom. On September 9, 2011, Splitrock filed a Stipulation for Dismissal of Third Party Complaint of Sprint Communications, LP against Splitrock Properties. On September 27, 2011, the Commission approved the Stipulation for Dismissal and dismissed Sprint's Third Party Complaint filed against Splitrock. In addition, the Commission approved the Proposed Revised Procedural Schedule with the paragraph 9 language proposed by Northern Valley and Sancom.

On September 23, 2011, SDN filed an Amended Motion for Partial Summary Judgment. On October 7, 2011, Northern Valley filed a Counterclaim Against Sprint. On October 17, 2011, meeting, Sprint filed a Motion to Dismiss Northern Valley's Counterclaim. On October 27, 2011, Sprint filed a Motion to Enforce Subpoenas and Modify Procedural Schedule. On November 7, 2011, Northern Valley filed a Motion for Leave to file Counterclaims. At the Commission's November 22, 2011, meeting, Sprint requested that no action be taken on its Motion to Enforce Subpoenas and Modify Procedural Schedule. At its December 20, 2011, meeting, the Commission granted SDN's Amended Motion for Partial Summary Judgment and Northern Valley's Motion for Leave to File Counterclaims. The Commission denied Sprint's Motion to Dismiss Northern Valley's Counterclaim (Commissioner Hanson, dissenting).

On December 21, 2011, a Stipulation for Dismissal of Third Party Complaint of Sprint Communications Company, LP against Sancom, Inc. was filed. At its January 3, 2012, meeting, the Commission approved the Stipulation for Dismissal and dismissed Sprint's Third Party Complaint filed against Sancom. On February 15, 2012, Northern Valley filed a Motion to Compel against Sprint. On March 12, 2012, Sprint filed a Motion for Partial Summary Judgment. On April 12, 2012, Sprint filed a Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice. Responses and replies were filed regarding the motions.

The Commission finds that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26, 49-13, and 49-31.

At its ad hoc May 17, 2012, meeting, the Commission considered Sprint's Motion for Partial Summary Judgment, Northern Valley's Motion to Compel, and Sprint's Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice. After hearing argument from the parties, the Commission took the motions under advisement. At its May 22, 2012, meeting, the Commission ruled on the motions. The Commission voted unanimously to deny Sprint's Motion for Partial Summary Judgment. The Commission voted unanimously to grant in part and deny in part Northern Valley's Motion to Compel. The Commission voted unanimously to grant in part and deny in part Sprint's Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice.

Sprint's Motion for Partial Summary Judgment

In its Motion for Partial Summary Judgment, Sprint requested that the Commission enter a partial summary judgment that any rate set pursuant to Northern Valley's Counterclaim Count II must, as a matter of law, be based on rate of return regulation. Sprint's motion was based on the premise that Count II of Northern Valley's Counterclaim is applicable only to the extent that the Commission finds the service provided by Northern Valley is not an access service. Northern Valley opposed the motion, asserting that in order to be granted, Sprint would need to have shown, as a matter of law, that Northern Valley has provided a service that is not switched access. Further, it was Northern Valley's contention that if the Commission found the tariff did not apply, the Commission could still find that Northern Valley has provided switched access under the applicable statutes and rules. Northern Valley's Count II is styled as an alternative to its Count I in that Count II provides that if the Commission were to find that Northern Valley's tariff did not apply, the Commission could find that Northern Valley is entitled to reasonable compensation and declare a reasonable rate for the access services provided by Northern Valley, "which reasonable rate may be Northern Valley's intrastate tariffed access rate." See Northern Valley's Counterclaim Against Sprint at 6. Northern Valley also claimed that Northern Valley is not subject to rate of return regulation due to an exemption under SDCL 49-31-5.1.

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). The burden is on the moving party to clearly demonstrate "an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Luther v. City of Winner*, 2004 SD 1, ¶6, 674 NW2d 339, 343 (internal citations omitted). The evidence and the favorable inferences from that evidence are viewed in a light most favorable to the nonmoving party. *Stone v. Von Eye Farms*, 2007 SD 115, ¶6, 741 NW2d 767, 769 (internal citations omitted). The narrow issue presented by Sprint's motion was whether any rate set pursuant to Northern Valley's Counterclaim Count II must, as a matter of law, be based on rate of return regulation. Sprint stated that its motion focused on Count II and that Sprint assumed, for the purposes of its motion, that the Commission has decided, under Count I, that the disputed calls are not access. However, the Commission has not, to date, issued any ruling that Count II is applicable only to traffic that is not access traffic.¹ As previously noted, it is Northern Valley's contention that its Count II *is* applicable to access traffic. Thus, the Commission finds that Sprint has not shown, as a matter of law under Northern Valley's Count II, that if the tariff does not apply, the traffic must be subject to rate of return regulation. In other words, based on the grounds for Count II as presented by Northern Valley, which have not, to date, been narrowed by the Commission, the Commission is unable to find that, as a matter of law, rate of return regulation is the only standard that can be applied.

Northern Valley's Motion to Compel

In its motion, Northern Valley sought to compel discovery responses from Sprint. SDCL 15-6-26(b) provides, in part, as follows:

15-6-26(b). Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody,

¹ Neither has the Commission made any rulings on whether it can set a rate for a service that is not an access service.

condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

(A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy[,] limitations on the party's resources, and the importance of the issues at stake in the litigation.

For Interrogatories No. 1 and No. 2, the Commission granted the motion with modifications. As agreed to by Northern Valley, the Commission required the removal of references to "legal bases" and required that references to "all" be changed to "material." For Interrogatory No. 4 and Document Request No. 15, the Commission granted the motion to the extent that Sprint has not yet fully complied with the requests. It is the Commission's understanding that the remaining issues related to some South Dakota documents and the Commission finds those documents should be produced as they appear to fall under the scope of the requests. For Interrogatory No. 7, the Commission granted the motion with respect to the volumes of minutes as listed in subpart (a), to a limited extent. The Commission finds that Northern Valley and Sprint had agreed on the volume of minutes question as set forth in subpart (a) and, for this subpart, the only remaining issue was that Sprint state in writing that it agrees with the volumes that have been provided by Northern Valley to Sprint. Thus, the Commission granted the motion for Interrogatory 7(a) for the purpose of requiring Sprint to state in writing that Sprint agrees with the volume of traffic as provided by Northern Valley. For Interrogatory No. 7, the Commission denied the motion with respect to the remainder of the interrogatory. For Interrogatory 7(b), Northern Valley sought information relating to the amount of gross revenues Sprint received from its long distance customers that placed calls to numbers assigned to Calling Service Providers (CSPs) by Northern Valley, including information regarding unlimited long distance plans such as the average price paid and percentage of calls to CSPs. Pursuant to SDCL 15-6-26(b)(1)(A)(iii), discovery may be limited if it "is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy[,] limitations on the party's resources, and the importance of the issues at stake in the litigation." Taking into account these factors, the Commission finds that Sprint has demonstrated that the requested discovery is unduly burdensome and expensive. See Affidavit of Karine M. Hellwig (citing to burdens of effort and costs); *see also*, Confidential Affidavit of Philip R. Schenkenberg in Support of Sprint's Opposition to Northern Valley's Motion to Compel at ¶ 22 (citing amount of intrastate CSP traffic that Northern Valley has invoiced Sprint between September 2007 and February 2012).

For Interrogatory No. 8 and Documents Requests No. 26 and 35, the Commission denied the motion. These requests regard least cost routing. Sprint stated that for Document Requests No. 26 and 35, it has no documents that identify or demonstrate total call volumes or revenue numbers. See Affidavit of Bruce R. Tillotson at ¶ 10. Interrogatory No. 8 specifically requests gross revenues associated with delivering traffic on behalf of other carriers. Pursuant to SDCL 15-6-26(b)(1)(A)(iii), discovery may be limited if it "is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy[,] limitations on the party's resources, and the importance of the issues at stake in the litigation." Taking into account these factors, the Commission finds that Sprint has demonstrated that this requested discovery is unduly burdensome and expensive. See Affidavit of Bruce R. Tillotson at ¶¶ 3-8 (citing to amount of effort and difficulties in determining revenues

received); see also, Confidential Affidavit of Philip R. Schenkenberg in Support of Sprint's Opposition to Northern Valley's Motion to Compel at ¶ 22 (citing amount of intrastate CSP traffic that Northern Valley has invoiced Sprint between September 2007 and February 2012). For Interrogatory No. 9 and Documents Requests No. 23 and 36, the Commission granted the motion. The requested information regarded prices charged to other carriers for delivery of traffic to Northern Valley. The Commission finds that the requested information and document requests are proper areas for discovery. For Interrogatory No. 13, the Commission granted the motion. The Commission finds that this request regarding expert testimony is allowable and that Sprint shall be required to provide the information. However, to the extent that Sprint has not yet identified the testimony, Sprint shall be required to provide the information once it has made such identification. For Document Request No. 1, the Commission denied the motion. The Commission finds that this request for essentially all statements made by or to Sprint regarding access stimulation to any other party is unduly burdensome and expensive. See Confidential Affidavit of Sonya Thornton at ¶¶ 12-13 (citing to costs and efforts of complying with request). For Document Request No. 34, the Commission granted the motion. The Commission finds that this request is limited to current agreements with third-party entities in South Dakota and does not find it unduly burdensome.

Regarding Northern Valley's request that Sprint unredact documents, the Commission granted the request. The Commission finds that, consistent with its earlier order requiring unredacted spreadsheets, Sprint should produce the documents unredacted except for privileged information. See *Order Dismissing Third Party Complaint; Order Approving Procedural Schedule*, dated September 28, 2011. Regarding Northern Valley's request that the Commission declare that Sprint's February 13, 2012 letter to Northern Valley be declared non-confidential, the Commission denied the request at this time. The Commission notes that this request was raised in a footnote in Northern Valley's Motion to Compel and described as a tentative motion and was responded to by a footnote in Sprint's reply. The Commission finds that the tentative motion by Northern Valley and Sprint's response provided insufficient information to determine whether the information should remain confidential pursuant to ARSD 20:10:01:42 as set forth in the Confidentiality Agreement approved by the Commission in this docket. Regarding Northern Valley's request for expenses incurred in obtaining discovery, the Commission denied the request. The Commission notes that it granted the motion in part and denied the motion in part. The Commission finds that an award of expenses is not justified under the provisions of SDCL 15-6-37(a)(4).

Sprint's Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice

Sprint's Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice sought a protective order to narrow the scope of Northern Valley's topics contained in its Amended Notice of Corporate Deposition. SDCL 15-6-26(c) provides as follows:

15-6-26(c). Protective orders. Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time and place;
- (3) That the discovery may be had only by a method of discovery other than

- that selected by the party seeking discovery;
- (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
 - (5) That discovery be conducted with no one present except persons designated by the court;
 - (6) That a deposition after being sealed be opened only by order of the court;
 - (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
 - (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;
 - (9) That depositions, interrogatories, admissions, other discovery, documents, and exhibits attached to motions, or portions of such documents, be sealed unless and until opened at the direction of the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of subdivision 15-6-37(a)(4) apply to the award of expenses incurred in relation to the motion.

The Commission first notes that Northern Valley and Sprint resolved Topics 4, 23, and 26. For Topics 5, 6, and 21, the Commission denied the motion, except for what has already been agreed to by Northern Valley and Sprint. The Commission notes that the denial of the motion is not intended to undo any of the agreements that Northern Valley and Sprint have reached on these topics. For Topic 7, 10, and 25, the Commission denied the motions. The Commission finds that these topics relate generally to the routing and delivery of calls in South Dakota and the Commission finds that these are proper areas for discovery. For Topic 22, the Commission denied the motion. The Commission finds this topic is limited to studies or analyses that have already been conducted by Sprint and the Commission denies the motion for this topic. For Topic 24, the Commission granted the motion. The Commission notes that this topic regards all communications relating to access stimulation with a number of different governmental entities and finds this to be unduly burdensome. See Affidavit of William (Bret) Lawson in Support of Sprint's Motion for Protective Order Regarding Northern Valley's Notice of Corporate Deposition. For Topics 27 through 44, the Commission denied the motion for Topic 28 and granted the motion for the remaining topics. For Topic 28, the Commission finds that it has not been shown that responses to this topic will result in undue burden or expense. The remaining topics regard Sprint's revenues from various sources, costs relating to the provision of various services, average charges, and actual and projected minutes of use for calls. The Commission first notes that it appears that these topics are directed at unjust enrichment claims which Northern Valley has stated it is not asking the Commission to consider. The Commission finds that these topics are unduly burdensome or the information is not available to Sprint. See Affidavit of William (Bret) Lawson in Support of Sprint's Motion for Protective Order Regarding Northern Valley's Notice of Corporate Deposition; see *a/so* Affidavit of Bruce R. Tillotson at ¶¶ 3-9; see *a/so* Affidavit of Karine M. Hellwig at ¶¶ 4-5. Thus, the Commission granted the motion for Topics 27, and 29 through 44. For Topics 46 and 47, the Commission denied the motion. The Commission finds that Northern Valley may inquire as to affidavits that have been submitted by Sprint.

With respect to the issue regarding limiting the definition of Sprint, Sprint stated that the definition of Sprint would include dozens of Sprint's corporate affiliates. Sprint further stated that Sprint Communications Company, LP is the entity that operates as an interexchange carrier and that Sprint fully expected that the information sought by Northern Valley is within the control of Sprint Communications Company, LP. TR. at 133-134. Thus, the Commission granted the motion and limited the definition to the named party in this case, Sprint Communications Company LP. On the definition issue related to whether outside lawyers are included in the definition, Northern Valley

stated that it would limit its request to Topics 7 and 24. Since the Commission granted the motion with respect to Topic 24, the only remaining topic at issue was Topic 7. The Commission finds that, to this limited extent, it will allow the definition to include outside counsel for topic 7.

It is therefore

ORDERED, that Sprint's Motion for Partial Summary Judgment is denied; and it is further

ORDERED, that Northern Valley's Motion to Compel is granted in part and denied in part; and it is further

ORDERED, that Sprint's Motion for Protective Order Regarding Northern Valley's Corporate Deposition Notice is granted in part and denied in part.

Dated at Pierre, South Dakota, this 14th day of June, 2012.

CERTIFICATE OF SERVICE
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, electronically.
By: <u>Joy Chung</u>
Date: <u>June 14, 2012</u>
(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Chris Nelson
CHRIS NELSON, Chairman

Kristie Fiegen
KRISTIE FIEGEN, Commissioner

Gary Hanson
GARY HANSON, Commissioner