

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC 09-098

IN THE MATTER OF THE COMPLAINT)
OF SOUTH DAKOTA NETWORK, LLC,)
AGAINST SPRINT COMMUNICATIONS)
COMPANY LP)

**MEMORANDUM IN SUPPORT OF
SPRINT COMMUNICATIONS COMPANY L.P.'S
MOTION TO DISMISS NORTHERN VALLEY'S CROSS-CLAIM**

Sprint Communications Company L.P. ("Sprint") respectfully submits this memorandum in support of its motion to dismiss the Cross-claim filed by Northern Valley Communications, L.L.C. ("Northern Valley").

ARGUMENT

South Dakota Network, LLC ("SDN") initiated this action, alleging that Sprint is liable for intrastate switched access charges billed to it by SDN. As more fully explained in its Answer and Counterclaim, Sprint denies all liability to SDN and demands a refund of amounts it overpaid between 2007 and 2009. In addition to filing its Answer and Counterclaim, Sprint filed a Third Party Complaint against Northern Valley, seeking declaratory relief from the South Dakota Public Utilities Commission (the "Commission") that Northern Valley cannot assess intrastate switched access charges for calls to Call Connection Companies. *See* Sprint's Third Party Complaint.

Sprint specifically limited the demand in its Third Party Complaint against Northern Valley to declaratory relief because Northern Valley and Sprint are presently parties to litigation in the United States District Court for the District of South Dakota, Docket No. 1:08-CV-01003-KES (the "Litigation"). In the Litigation, Northern Valley has demanded money damages from Sprint for failing to pay intrastate switched access charges for calls to Call Connection

Companies, and Sprint has counterclaimed to recover amounts improperly billed by and paid to Northern Valley for calls to Call Connection Companies. A copy of Northern Valley's Complaint and Sprint's Counterclaim are attached as Exhibits A and B respectively.

Because the parties have asserted claims for damages in the Litigation, SDCL 49-13-1.1 prevents the parties from seeking a damages award from the Commission. SDCL 49-13-1.1 provides:

49-13-1.1. Complaint to commission or suit by private person—Election of remedies. Any person claiming to be damaged by any telecommunications company or motor carrier may make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time.

Northern Valley's Cross-claim seeks to recover the very same damages it is seeking to recover in the Litigation. *Compare* Northern Valley Complaint ¶¶ 11-14 (Ex. A) (seeking monetary damages for alleged failure to pay intrastate access charges) *with* Northern Valley Cross-claim ¶¶ 9-13 (seeking monetary damages for alleged failure to pay intrastate access charges).

The South Dakota Supreme Court has recognized that SDCL 49-13-1.1 limits a party's ability to present claims before the Commission when those claims have been already asserted in another venue. *See State v. Public Utilities Comm'n of South Dakota*, 381 N.W.2d 226, 230 (S.D. 1986) (upholding the lower court's decision to deny a party's petition to intervene in commission proceedings when the party had elected to pursue its remedy in circuit court, citing to SDCL 49-3-23 (the predecessor statute to 49-13-1.1)). The same result is required in this case.

For the above reasons, the Commission should grant Sprint's motion to dismiss Northern Valley's Cross-claim for those damages which it is currently seeking in federal court.

Dated: February 11, 2010

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FILED
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[Signature]
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

* * * * *

SANCOM, INC., a South Dakota
Corporation,

Plaintiff,

vs.

SPRINT COMMUNICATIONS COMPANY,
LIMITED PARTNERSHIP
a Delaware partnership,

Defendants.

Civ. 07-4107

COMPLAINT

* * * * *

Plaintiff, Sancom, Inc., by and through its counsel, and for its Complaint against the Defendant, states and alleges as follows:

NATURE OF THE CASE

1. Plaintiff brings this action against Defendant to recover on an account for failure of Defendant to pay to Plaintiff the amounts required by federal and state tariffs to be paid for the provisioning of originating and terminating telephone access services.

THE PARTIES

2. Plaintiff, Sancom, Inc., is a corporation organized and existing under the laws of South Dakota, with its principal place of business in Mitchell, South Dakota.
3. Upon information and belief, Defendant, Sprint Communications Company, limited partnership, is organized and existing under the laws of the State of Delaware.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §1332. There is diversity jurisdiction because the Plaintiff is a corporation organized and existing under the laws of the State of South Dakota and the defendant is a partnership that is organized and has its principal places of business in a state other than South Dakota. More than \$75,000.00 is at issue, exclusive of interest and costs.

EXHIBIT A

5. Venue is proper pursuant to 28 U.S.C. § 1391(a) (2) and (3).

FACTUAL ALLEGATIONS

6. The Plaintiff is a competitive local exchange carrier ("CLEC") which provides telephone and other services through wires to the homes and businesses of its customers. Plaintiff also provides originating and terminating access services to long distance companies, which allow the long distance companies to transmit long distance calls even though they do not own or lease the telephone lines that connect to the users' telephones.
7. Defendant is an inter-exchange (i.e., long distance) carrier who provides long distance service.
8. Defendant utilized the originating and terminating services provided by Plaintiff.
9. Since May 1, 2007, Plaintiff billed Defendant on a monthly basis, for use of its service in accordance with the applicable rates set forth in its tariffs filed with the Federal Communications Commission ("FCC") and the South Dakota Public Utilities Commission ("Commission"). Attached hereto as **Exhibit 1** are the monthly invoices showing a balance due as of July 1, 2007 in the sum of **\$417,366.40**.
10. Defendant has failed and refused and continues to fail and refuse, to pay the invoices although demand for said payments has been made by Plaintiff. As a result of such failure, Defendant is indebted to Plaintiff in the sum of **\$417,366.40**.

COUNT 1 BREACH OF CONTRACT

11. Plaintiff re-alleges paragraphs 1 through 10 above and incorporates them as if set forth fully herein.
 12. Pursuant to state and federal regulations, the Plaintiff has filed tariffs with both the Commission and the FCC, which tariffs have the force and effect of law, the terms of which constitute valid and binding contracts.
 13. Plaintiff has invoiced Defendant pursuant to rates as set forth in their respective federal and state tariffs as outlined above.
 14. Defendant failed and refused to pay those amounts invoiced to it by the Plaintiff, thus constituting a breach of the applicable tariffs and therefore a breach of contract.
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COUNT II
BREACH OF IMPLIED CONTRACT RESULTING FROM
VIOLATION OF TARIFFS

15. Plaintiff re-alleges paragraphs 1 through 10 above and incorporates them as if set forth fully herein.
16. The Plaintiff has validly filed tariffs with both the FCC and the Commission in accordance with the Federal Communications Act and applicable South Dakota law.
17. Plaintiff has supplied services and submitted invoices to Defendant pursuant to its filed tariffs for services provided, which constitutes an implied contract.
18. Defendant has failed and refused and continues to fail and refuse to pay the invoices. Defendant's actions constitute a material uncured breach of the tariff and of the implied contract among the parties resulting from the filed tariffs.

COUNT III
UNJUST ENRICHMENT

19. Plaintiff re-alleges Paragraphs 1 through 10 above and incorporates them as if set forth fully herein.
20. Plaintiff originated and terminated long distance calls for Defendant. This conferred a benefit upon Defendant because Defendant was able to collect from its customers for providing long distance service. Defendant has not paid Plaintiff for providing such services.
21. It would be inequitable for Defendant to retain the benefit of the services provided by Plaintiff without properly compensating Plaintiff for the value of the services provided.
22. Pursuant to the equitable doctrines of quantum meruit and unjust enrichment, Plaintiff is entitled to payment from Defendant for the amount of the invoices.

WHEREFORE, Plaintiff request judgment against Defendant as follows:

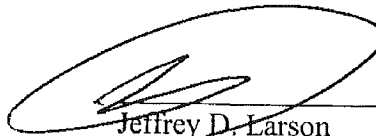
1. For the sum of **\$417,366.40** and any unpaid amounts to date of trial.
 2. For pre-judgment interest, post-judgment interest, and the costs of this action.
 3. For such other and further relief as the Court deems just and equitable.
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JURY DEMAND

Plaintiff demands a trial by jury of all issues triable of right by jury.

Dated at Woonsocket, South Dakota, this 30th day of July, 2007.

LARSON AND NIPE



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

SANCOM, INC., a South Dakota
Corporation,

Plaintiff,

vs.

SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP, a
Delaware partnership,

Defendant.

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CIV. 07-4107

**DEFENDANT'S ANSWER AND
COUNTERCLAIM**

Comes now the Defendant Sprint Communications Company Limited Partnership and for its Answer to the Plaintiff's Complaint states and alleges as follows:

1. As to Paragraph 1, it is admitted only that Plaintiffs have brought an action making the allegations stated. The allegations, however, are denied.
2. Paragraph 2 is admitted.
3. Paragraph 3 is admitted.
4. As to Paragraph 4, it is admitted that the Court has jurisdiction of the Plaintiff's Complaint pursuant to 28 USC § 1332 as there is diversity between the Plaintiff and Defendant and the Plaintiff's claimed damages are allegedly in excess of \$75,000.
5. As to Paragraph 5, this is a legal conclusion to which no response is required.
6. Paragraph 6 is admitted.
7. Paragraph 7 is admitted.
8. As to Paragraph 8, it is denied that the bills at issue here are based on originating and terminating access service.

9. As to Paragraph 9, it is admitted only that Defendant Sprint Communications Company Limited Partnership has received various invoices from Plaintiff. It is denied that Defendant Sprint Communications Company Limited Partnership utilized the originating and terminating access services that were invoiced. The remainder of Paragraph 9, therefore, is denied.
10. As to Paragraph 10, it is admitted only that Defendant Sprint Communications Company Limited Partnership has not paid for services it did not utilize. The remainder of Paragraph 10 is denied.

COUNT I – BREACH OF CONTRACT

11. Defendant Sprint Communications Company Limited Partnership realleges Paragraphs 1-11 above as if set forth in full herein.
12. As to Paragraph 12, it is admitted that Plaintiff has filed tariffs with the Federal Communications Commission and/or the South Dakota Public Utilities Commission. The remainder of Paragraph 12 is a legal conclusion to which no response is required..
13. As to Paragraph 13, it is admitted only that Defendant Sprint Communications Company Limited Partnership received various invoices from Plaintiff. The remainder of Paragraph 13 is denied.
14. As to Paragraph 14, it is admitted only that Defendant Sprint Communications Company Limited Partnership has not paid for services it did not utilize. The remainder of Paragraph 14 is denied

COUNT 2 – BREACH OF IMPLIED CONTRACT RESULTING FROM VIOLATION OF TARIFFS

15. Defendant Sprint Communications Company Limited Partnership realleges Paragraphs 1-15 above as if set forth in full herein.
16. As to Paragraph 16, it is admitted only that Plaintiff filed tariffs with the Federal Communications Commission and/or the South Dakota Public Utilities Commission. The remainder of Paragraph 16 is a legal conclusion to which no response is required. ..
17. As to Paragraph 17, it is admitted only that Defendant Sprint Communications Company Limited Partnership received various invoices from Plaintiff. The remainder of Paragraph 17 is denied.
18. As to Paragraph 18, it is admitted only that Defendant Sprint Communications Company Limited Partnership has not paid for services it did not utilize. The remainder of Paragraph 18 is denied

COUNT 3 – UNJUST ENRICHMENT

19. Defendant Sprint Communications Company Limited Partnership realleges Paragraphs 1-19 above as if set forth in full herein.
20. Paragraphs 20, 21, and 22 of Plaintiff's Complaint are denied.

AFFIRMATIVE DEFENSES

21. Plaintiff's Complaint fails to state a claim upon which relief may be granted.
22. Plaintiff's claims are barred because it did not provide the tariffed services for which it is attempting to charge.
23. Plaintiff's claims are barred by its inequitable conduct and unclean hands and by the fact that an award of damages would unjustly enrich plaintiff.
24. Plaintiff's claims are barred because Sprint's conduct was based on justification or excuse.

WHEREFORE Defendant Sprint Communications Company Limited Partnership requests that the Plaintiff's Complaint be dismissed, with the Defendant to recover its costs, disbursements, and attorneys fees if available, and that the Court award such other relief as is just.

Counterclaim

Sprint Communications Company Limited Partnership ("Sprint"), by and through its attorneys, submits its counterclaim against Plaintiff/Counterclaim Defendant Sancom, Inc. ("Sancom" or "Counterclaim Defendant"), and alleges as follows:

INTRODUCTION

1. Sprint provides wireline long-distance telecommunications services to its customers around the country. To provide these long-distance services to its customers, Sprint frequently must make use of other telecommunications carriers' services, and interconnect with

other carriers' phone lines. For example, when a Sprint customer in Virginia places a call to someone in South Dakota, Sprint must use the facilities of the local phone company to deliver the call to the called party.¹ Because it must purchase use of these local facilities, Sprint is not only a provider of telecommunications services, but also a customer of local telecommunications carriers. This counterclaim challenges a scam by Sancom, a local phone company in Mitchell, South Dakota, and its business partners pursuant to which Sancom has billed (and continue to bill) millions of dollars of unauthorized and illegal charges to Sprint allegedly in its role as a customer of the local phone companies.

2. This case involves two types of companies that have conspired together to generate the charges at issue. Sancom is the first type of company, a local exchange carrier ("LEC") that delivers calls to local customers. Sancom has conspired with a second type of company ("Call Connection Company") that has established free or nearly free conference-calling, chat-line, or similar services that callers throughout the United States use to connect to other callers. Sancom and the Call Connection Companies collectively are engaged in unlawful schemes to bill Sprint (along with other carriers) for charges Sprint neither expressly nor implicitly agreed to pay because the charges are not authorized under applicable tariffs. The scam, which is commonly referred to as "traffic-pumping," has two components.

3. First, in contrast to LECs in other parts of the country that often charge considerably less than a penny per minute for similar access services, Sancom charges very high rates – approximately 3.94 cents per minute – to long-distance carriers to "terminate" interstate calls to the local carrier's customers (and more than 12 cents per minute for intrastate

¹ There is an exception when the call is to a Sprint wireless customer, but that exception is not relevant here.

termination). This is approximately seven times as much as the .55 cents per minute charged by Qwest, the LEC with which Sancom competes.²

4. Second, Sancom has partnered with unscrupulous businesses that offer some other kind of phone service, such as chat lines or conference calling. Under these schemes, the businesses obtain phone numbers from Sancom. The businesses then advertise that they are offering their services to the public for “free” or nearly for free. When consumers call the advertised phone number to make their “free” or nearly free calls, these calls then are routed through the facilities of Sancom. As a result of the scheme of Sancom and these Call Connection Companies, huge numbers of calls between individuals throughout the country are pumped through Sancom’s “local” switches. If it is Sprint’s long-distance customers who are making these conference or chat line calls, Sancom then bills Sprint the inflated “terminating” access charges to deliver its traffic to the conference or chat line platform, or other service, even though none of the parties who are communicating resides in the territory of Sancom. Sancom bills so much in inflated “terminating access” charges that it is able to kick back a substantial portion of the monies received to its unscrupulous business partners, which in turn enables the latter to offer the service to the public “for free” or nearly for free. Even after payment of the kickback, Sancom profits wildly from this illegal scam.

5. As a direct result, Sprint has been billed for millions of dollars of unlawful charges, charges that Sancom has no legal basis to collect for carrying this type of call traffic.

² Sancom is a competing local exchange carrier (“CLEC”), which competes for customers in the same territory as Qwest, an incumbent local exchange carrier (“ILEC”). Unlike in most businesses, the fact that Sancom has higher access charges than Qwest does not disadvantage it, because the customers deciding whether to purchase service from Sancom or Qwest do not pay those access charges. Rather, it is the long distance providers that pay those charges, and they have no choice but to transmit calls over the facilities of the provider chosen by the local customers. As explained below, in the scam at issue, Sancom is actually attempting to use its higher access charges as an advantage by kicking back some of those charges to certain

Sprint therefore asks for an injunction shutting down the illegal arrangements Sancom has entered with these scam businesses, a declaratory ruling that the joint conduct of Sancom and these businesses is illegal, and damages to cover all charges Sprint paid out pursuant to this scam before Sprint identified it and stopped paying the illegal and unauthorized bills, as well as any charges Sprint may have continued to pay because of an inability to identify all traffic associated with the scam.

PARTIES

6. Sprint Communications Company Limited Partnership is a Delaware limited partnership with its principal place of business at 2001 Edmund Halley Drive, Reston, Virginia 20191. Sprint and its affiliates provide an array of telecommunications services in South Dakota and throughout the country. At all relevant times, Sprint has been qualified and registered to do business in South Dakota.

7. Sancom, Inc. is a South Dakota local exchange carrier that has its principal place of business in Mitchell, South Dakota.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), because Sprint's claims arise under the federal Communication Act. Sprint is authorized to bring suit in federal court for damages caused by violations of the Communication Act under 47 U.S.C. § 207. This Court also has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 (diversity jurisdiction), because the parties' citizenship is diverse and the amount in controversy exceeds \$75,000. Further, this Court has jurisdiction over Sprint's request for declaratory relief pursuant to 28 U.S.C. §§ 2201

businesses to induce them to partner with it to inflate traffic through Sancom's territory.

and 2202. Finally, the Court has jurisdiction over the pendant state law claims pursuant to 28 U.S.C. § 1367.

9. This Court has personal jurisdiction over Sancom because it is located in South Dakota, regularly solicits business in South Dakota, and/or derives substantial revenue from activities in South Dakota.

10. To the extent that this Court finds that venue is proper in this district regarding the claims in Sancom's Complaint, then venue is proper for these counterclaims under 28 U.S.C. § 1391(a).

BACKGROUND

A. Sprint's Services

11. Sprint is a telecommunications carrier offering long-distance wireline services to its customers around the country. Long-distance calls are those that are made from one local calling area to another. For example, in a typical situation (unlike in this case), a long-distance call may be made from a Sprint customer in Virginia to a called party, or "end user," in South Dakota. Sprint generally owns the facilities over which the call travels between the local calling area of the calling customer and the local calling area of the called customer (or it enters arrangements with other carriers to route the calls over their facilities).

12. As a general matter, Sprint does not own the facilities within a local calling area over which the call travels its last leg to the called customer's premises. The facilities used to complete the last leg of these calls are typically provided by the called party's own local exchange carrier ("LEC").³ Because Sprint does not generally own the facilities that physically

³ For those calls made to a Sprint Nextel wireless or local customer, Sprint can deliver the traffic directly and does not need to deliver the call via a LEC.

connect to end users, it must pay local carriers for access to them. The charge that Sprint pays for access to the called party is known as a “terminating access” charge because the call “terminates” with the party that is called. In this way, Sprint is a customer of the local exchange carriers – it is purchasing the local exchange carriers’ “terminating access service” in order to enable its customers to complete long distance calls to their final destination, that is, to the premises of the called party.

13. Generally speaking, Sprint (like other long-distance carriers) purchases terminating access service in one of two ways. First, it may have a contract with a particular local exchange carrier that governs the terms of termination. Second (as is the case with Sancom), it may purchase the service under a tariff published by the local carrier that contains charges for terminating access (along with other offered services). Pursuant to the terms of that tariff, Sprint and other long-distance carriers have purchased access services under the tariff whenever they hand off a call to the local carrier that meets the tariff’s definitions of “terminating access” service. Because LECs have an effective monopoly over local telephone service in their service areas, the long distance carriers often have no choice but to purchase the service defined in the tariff when the calls are made from one of their customers to an end user in the calling area of the local exchange carrier. *See In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 30 (2001). For that reason, among others, tariffs are construed narrowly – only services expressly set out in the tariff are “deemed” to be purchased. *See In re Theodore Allen Commc’ns, Inc. v. MCI Telecomms. Corp.*, 12 F.C.C.R. 6623, ¶ 22 (1997).

B. Counterclaim Defendant's Scheme

14. In this case, Sancom has billed Sprint for services it asserts that Sprint has purchased under Sancom's tariffs. But a tariff that actually authorized the kind of scams that Sancom has engaged in would not pass legal muster, and Sancom has not, in fact, included these scam services within its schedule of tariffed charges. As a result, Sancom has billed Sprint for services that are *not* authorized in its tariffs. Sancom has no right to bill Sprint such bogus charges.

15. Specifically, Sancom has devised a scheme artificially to inflate call volumes in Sancom's local calling area in order to bill Sprint inflated rates for what Sancom wrongly characterized as tariffed "terminating access" service. But under this scheme, Sprint is *not* connecting a call with a called party in South Dakota that is a customer of Sancom. Instead, Sancom's scheme with its Call Connection partners involves advertising "conference call," "chat line," or similar services that allow callers, who typically do not reside in South Dakota, to talk to one another.

16. Callers throughout the nation access these services by dialing a ten-digit phone number with a South Dakota area code. To Sprint, each call appears to be an ordinary long-distance call to a called party in South Dakota. Sprint thus carries the traffic close to the location of the South Dakota number. At that point, Sprint (either directly or indirectly) transfers the call to Sancom for "termination."⁴

17. If a Sprint customer were calling one of the residences or businesses that purchase local phone service from Sancom, Sprint would be purchasing a typical "terminating access" service, and would be paying the local carrier's terminating access charge under the

⁴ The South Dakota phone number belongs to Sancom and is assigned by Sancom to the call connection service. The phone number is in the familiar area code plus seven digits format

tariff. And in fact, Sprint has paid these terminating access charges in the past when the service provided was the true terminating access to an “end user,” *i.e.* a residential or business customer that resided in the LEC’s territory. But that is not what happens in this traffic pumping scheme. Instead, with these calls, the LEC transfers the call not to an end user customer, but to a Call Connection Company that is jointly engaged in this scam.

18. These business partners are not “customers” of Sancom as that term is used in the local phone companies’ tariffs or in common parlance. When netted out, the Call Connection Companies do not pay money to Sancom for any “service” as would be the case in a true customer relationship. Instead, they actually *receive* money in the form of kickbacks from Sancom for their participation in this illegal scheme.

19. Moreover, the calling parties are not making terminating calls to these Call Connection Companies, but are seeking to talk to other parties almost always outside of the service territory of Sancom. The Call Connection Companies are simply connecting the calls, and the calls do not actually “terminate” in the local South Dakota exchange. Instead, the calls flow to those participating in the conference call or chat line and who could be located anywhere in the nation or even in another country. Thus, unlike the typical scenario where a caller makes a long-distance call to a person in South Dakota and Sprint pays Sancom to “terminate” the call, Sprint is merely delivering the call to an *intermediate* point – delivering the call to Sancom who then delivers the call to the conference call or chat line provider, who in turn connects callers who are geographically dispersed.

20. Sprint has not expressly agreed to pay terminating access charges for this service. Nor can it be deemed to have agreed to pay for this service. The service is not a terminating access service as defined in Sancom’s tariffs. Consequently, Sancom has no right to bill Sprint

(otherwise known as NPA-NXX-XXXX).

for this “service.” Nonetheless, Sancom has been unlawfully billing Sprint “terminating access” charges for these calls, even though the calls do not terminate in the local exchange, and even though the persons connected on the calls are not “end user customers” of Sancom, as is required under the tariffs’ definition of terminating access service.

21. The advantage to Sancom and its partners from this scam stems from the fact that Sancom has set its terminating access rates at high levels. Indeed, the bogus terminating access charges are high enough that the Call Connection Companies are able to offer their services to calling parties for no cost, or nearly no cost – the calling party generally need only pay normal long-distance charges to set up a call. And for customers who have long distance calling plans that do not charge per minute, the calling party does not pay anything for the call at all. Of course, these caller connection services are not actually “free” – they are directly and unreasonably subsidized by long distance carriers such as Sprint who are being charged high “terminating access” rates. They are thus being subsidized by all long distance carriers’ customers throughout the country, including those who never use the Call Connection Companies’ services.

22. As a result of the “free” or nearly free service offered by the Call Connection Companies, traffic volumes with Sancom have skyrocketed. Sancom’s bills to Sprint averaged less than \$30,000 per month for all of 2005 -- and even those bills could well have resulted in part from traffic pumping. Traffic began increasing in 2006, however, and then skyrocketed in late 2006 and 2007. In August 2007, Sancom billed Sprint \$198, 289.14 in access charges -- an increase of more than six times from 2005 billing. This dramatic increase in traffic can be traced almost entirely to Sancom’s “traffic-pumping” scam.

23. The scam here is one of a number of similar scams recently perpetrated by certain rural LECs and their call connection partners. Several suits involving similar scams are pending in Iowa, for example. *See, e.g., Sprint Communications Co., L. P. v. Superior Telephone Cooperative*, No. 4:07-cv-00194 (S.D. Iowa); *Qwest Communications Corp. v. Superior Telephone Cooperative*, No. 4:07-cv-0078 (S.D. Iowa), *AT&T Corp. v. Superior Telephone Cooperative*, No.4:07-cv-0043 (S.D. Iowa); *AT&T Corp. v. Reasnor Telephone Co., LLC*, No. 4:07-cv-00117 (S.D. Iowa). There are also two similar suits pending in South Dakota. *See Northern Valley Communications, LLC v. MCI Communications Services, Inc., d/b/a Verizon Business Services*, No. Div. 07-1016 (D.S.D.); *Sancom, Inc. v. MCI Communications Services, Inc., d/b/a Verizon Business Services*, No. 07-4106 (D.S.D.). The FCC has questioned the legality of such scams. It is presently investigating the rates associated with similar scams for certain specific LECs that filed new tariffs in June of 2007. *Order Designating Issues for Investigation*, WC Docket No. 07-184 (rel. Aug. 24, 2007). But this FCC investigation is not evaluating the retroactive legality of the scams themselves as perpetrated by LECs that tariffed their rates prior to June 2007.

24. As a result of the proliferation of scams similar to that of Sancom, Sprint began monitoring increases in traffic. Sprint noticed the spike in billing by Sancom. In May 2007, it began disputing Sancom's access bills. Sancom inquired as to the reason for the dispute and threatened that in the absence of payment, it would cut off Sprint's ability to send traffic to or through Sancom's area. This result would have been perfectly acceptable to Sprint, which has no wish to send traffic to Sancom given the existence of the current scam but which cannot on its own block traffic to Sancom under existing rules. But Sancom did not block Sprint's traffic. Presumably, the value of Sprint's traffic to Sancom was so high that Sancom wanted Sprint to

continue to send traffic (which it had no choice but to send) even if Sancom had to sue to collect the money and even though Sancom had at best a small chance in prevailing in the suit. After Sprint informed Sancom as to why it was withholding payment, Sancom brought the current suit. In reality, however, it is Sancom that owes Sprint a refund, since Sprint had already paid Sancom hundreds of thousands if not millions of dollars in access charges for traffic stemming from Sancom's scam before it came to realize the existence of the scam.

C. The Tariffs

25. There are many problems with the scheme devised by Sancom and the Call Connection Companies. Foremost among them is that Sancom cannot lawfully charge Sprint for a terminating access service under its filed tariffs.

26. The services that Sancom offers related to handling calls from customers in other states are set forth in interstate tariffs filed with the Federal Communications Commission (FCC), and the services that Sancom offers related to handling in-state calls are set forth in intrastate tariffs filed with the South Dakota Public Utilities Commission (PUC). The tariffs describe the services that Sancom offers to all of their customers, including customers such as Sprint that purchase access services from Sancom. The tariffs also set the rates charged for those services. Under Section 203 of the Federal Communications Act, 47 U.S.C. § 203, carriers subject to tariffing requirements cannot charge customers for services not specified in their interstate tariffs, and cannot charge rates other than those set out in those tariffs. *See American Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Further, because carriers set the terms of their tariffs unilaterally, it is well settled that any ambiguity in the terms of a tariff must be strictly construed against the carrier that drafted it and in favor of customers. *See*

In re Theodore Allen Commc 'ns, Inc. v. MCI Telecomms. Corp., 12 F.C.C.R. 6623, ¶ 22 (1997).

Similar rules govern the intrastate tariffs.

27. Sancom's tariffs here are written to describe – and authorize billing of terminating access charges for the typical call where an interexchange carrier like Sprint delivers a call to Sancom for the call to be terminated to the local end-user customer of Sancom. However, as explained above, the so-called “service” that Sancom is providing to Sprint is not terminating access to Sancom's end users. Thus, unsurprisingly, the tariffs do not authorize terminating access charges for Sancom merely transiting calls to the Call Connection Companies, who then actually connect the callers.

28. First, Sancom is not providing a “switched access” service or “terminating access” service under the tariff. Sancom's tariffs define “Switched Access Service” as service that “provides for the ability to . . . terminate calls from a customer designated premises to an end user's premises” *See* Sancom, Inc. Federal Tariff § 6.1, relevant sections attached as Exhibit A; Sancom, Inc. South Dakota Tariff, § 6.1 (relevant sections attached as Exhibit B). Terminating access requires actual completion of the telephone call to the end of the call. But instead of terminating the calls to the Call Connection Companies, Sancom transfers the calls to the Call Connection Companies, which utilize their own conference call, chat line, or other similar service to route and/or connect calls themselves. Thus, the calls do not “terminate” with the Call Connection Companies. Further, many of these calls are not connected through to end-users located in Sancom's South Dakota service territories at all. In no sense is Sancom providing “switched access” or “terminating access” under the tariffs.

29. Second, Sancom is not connecting calls to “end users,” as is required under its tariffs to lawfully bill for terminating access charges. The definition of “Switched Access

Service” in the state and federal tariffs (§ 6.1) states that such service “provides a two-point communications path between a customer designated premises and an end user’s premises,” and that “Switched Access Service provides for the ability to . . . terminate calls from a customer designated premises to an end user’s premises” The tariffs define an “End User” as “any customer of an interstate or foreign telecommunications service that is not a carrier.” *See* Federal Tariff § 2.6 (relevant sections attached as Exhibit A), South Dakota Tariff § 2.6 (relevant sections attached as Exhibit B). Therefore, Sancom must deliver the calls to “end users,” and “End Users” under the tariffs do not include other carriers. However, the Call Connection Companies are performing a common carrier function when routing and connecting calls to their conference call, chat line and similar services. In this sense, they are wholly unlike a typical Sancom end-user, a person, family, or business actually located in South Dakota that subscribes to Sancom’s local phone service in order to make and receive calls. Sancom has no basis for billing Sprint access charges for transferring calls to these entities that are not “End Users” under the tariff.

30. Third, the Call Connection partners are not “Customers” of Sancom, as is required under the tariffs for Sancom to lawfully bill for these access charges. As explained above, the tariff terms state that an “End User” must be a “customer.” “Customer” is defined as an entity “which subscribes to the services offered under this tariff.” Federal Tariff § 2.6; South Dakota Tariff § 2.6. The Call Connection Companies are not actually paying for local phone services from Sancom at all. On the contrary, Sancom *is making net payments to the Call Connection Partners*. Further, on information and belief, the Call Connection Companies are merely co-locating equipment at Sancom’s network facilities (or nearby facilities) in order to accept the call traffic transferred by Sancom – meaning that the Call Connection Companies are neither

customers nor end users under the terms of the tariff. Finally, the relationship between Sancom and the Call Connection Companies is more akin to that of joint venturers or business partners than to a carrier and its customer. Sancom and the Call Connection Companies are jointly acting to stimulate traffic in an effort to obtain revenue that they plan to share.

31. For all of these reasons, Sancom's access charges to Sprint for traffic to the Call Connection Companies are not authorized by their tariffs.

32. In turn, the Call Connection Companies are not entitled to the kickbacks they reap from artificially inflating traffic to their "free" services. Their business models are premised on advertising a "free" call connection service to users of their services to artificially generate high call volume, and receiving payments based on unlawfully billed terminating access charges in return. Their operations – and profit – are entirely subsidized by the windfall they unlawfully receive from the payments made by long-distance carriers such as Sprint to Sancom.

COUNT ONE

(Breach of Federal Tariff Obligation and Communications Act)

33. Sprint repeats and realleges each and every allegation contained in paragraphs 1 through 32 of its Counterclaim as if fully set forth herein.

34. Sancom has billed and has collected a substantial portion of millions of dollars in charges denominated as "terminating access" charges based on transiting interstate long-distance calls from Sprint to entities that provide conference call, chat line and/or similar services that enable callers to connect to each other. Sancom had no basis in its federal tariffs for collecting these charges.

35. The collection of charges for interstate services not set out in Sancom's interstate tariffs violates 47 U.S.C. § 203. Sprint is authorized to bring suit for damages for this conduct in this Court pursuant to 47 U.S.C. § 207.

36. Sprint is entitled to reasonable damages in the amount of the unauthorized access charges paid to Sancom under Sancom's federal tariffs, plus reasonable costs and attorneys' fees, pursuant to 47 U.S.C. §§ 206, 207. Sprint will establish the amount of damages at trial.

37. Sprint is also entitled to an order enjoining Sancom from assessing charges on Sprint pursuant to their unlawful scheme when such charges are not expressly authorized by Sancom's tariffs. 28 U.S.C. §§ 2201, 2202.

38. Sprint is further entitled to a declaratory judgment and declaration of rights establishing that Sancom has no right to charge or collect access charges based on transiting interstate long-distance calls from Sprint to entities that provide conference call, chat line, international call, or similar services that enable callers to connect to each other. 28 U.S.C. §§ 2201, 2202.

COUNT TWO

(Breach of State Tariff Obligation and Communications Act)

39. Sprint repeats and realleges each and every allegation contained in paragraphs 1 through 38 of its Counterclaim as if fully set forth herein.

40. Sancom has billed and in some cases collected charges denominated as "terminating access" charges based on transiting intrastate long-distance calls from Sprint to entities that provide conference call, chat line, and/or similar services that enable callers to connect to each other. Sancom had no basis in its state tariffs for collecting these charges.

41. The collection of charges for intrastate services not set out in Sancom's intrastate tariffs violates state law. Sprint is authorized to bring suit for damages for this conduct in this Court pursuant to 28 U.S.C. § 1367.

42. Sprint is entitled to reasonable damages in the amount of the unauthorized access charges paid to Sancom under Sancom's state tariffs, plus reasonable costs and attorneys' fees. Sprint will establish the amount of damages at trial.

43. Sprint is further entitled to an order enjoining Sancom from assessing charges on Sprint pursuant to its unlawful scheme when such charges are not expressly authorized by Sancom's tariffs.

44. Sprint is further entitled to a declaratory judgment and declaration of rights establishing that Sancom has and had no right to charge or collect access charges based on transiting intrastate long-distance calls from Sprint to entities that provide conference call, chat line, international call, or similar services that enable callers to connect to each other.

COUNT THREE

(Unjust Enrichment)

45. Sprint repeats and realleges each and every allegation contained in paragraphs 1 through 44 of its Counterclaim as if fully set forth herein.

46. Sancom, through its wrongful, improper, unjust, and unfair conduct has reaped substantial and unconscionable profits from Sprint by charging Sprint for services for which Sprint has not agreed to pay and that are not in Sancom's tariffs. As such, Sprint has conferred a benefit on Sancom, and Sancom has received monies to which it is not entitled.

47. In equity and good conscience, it would be unjust for Sancom to enrich itself at the expense of Sprint. Among other reasons, Sancom had no lawful authority to collect those

charges from Sprint. Sancom's unlawful conduct will continue unless the prayer for relief is granted.

48. Sprint has been damaged by the actions of Sancom and is entitled to damages and restitution in the amount to be determined at trial, plus interest, attorneys' fees, and costs, and all available declaratory and injunctive relief.

COUNT FOUR

(Negligent Misrepresentation)

49. Sprint repeats and realleges each and every allegation contained in paragraphs 1 through 48 of its Counterclaim as if fully set forth herein.

50. Sancom has supplied false information in invoices sent to Sprint claiming Sprint allegedly owes Sancom for services that Sancom did not provide to Sprint.

51. Sancom supplied this information in the course of a transaction in which Sancom had a financial interest.

52. Sancom was negligent in obtaining or communicating the information.

53. Sancom supplied the information intending or knowing that Sprint would rely on the information.

54. Sprint acted reasonably in detrimentally relying on Sancom's representations and paying Sancom for services which Sancom did not provide to Sprint.

55. The tortious actions of Sancom have injured Sprint. Sprint is entitled to reasonable damages in an amount to be proven at trial.

COUNT FIVE

(Civil Conspiracy)

56. Sprint repeats and realleges each and every allegation contained in paragraphs 1 through 55 of its Counterclaim as if fully set forth herein.

57. On information and belief, Sancom and one or more of the Call Connection Companies agreed to an illicit arrangement or arrangement as follows: (a) the Call Connection Companies would place a “gateway” to connect calls in or near Sancom’s service territory; (b) Sancom would assign one or more telephone numbers to the Call Connection Companies; (c) Sancom would bill Sprint for terminating access charges on long distance calls that were routed through the Call Connection Companies; (d) the Call Connection Companies would market services designed to increase volumes of traffic routed through Sancom’s serving area; and (e) Sancom would share with the Call Connection Companies a portion of the monies billed to or received from Sprint.

58. As explained above, Sancom’s conduct in billing Sprint for terminating access services for these calls violates the terms of Sancom’s federal and state access tariffs, as well as federal and state law. Further, the conduct of Sancom and the Call Connection Companies has intentionally caused Sancom and these companies to be in wrongful possession and control of monies that rightfully belong to Sprint, contrary to Sprint’s possessory right thereto.

59. The agreements reached between Sancom and one or more of the Call Connection Companies constitute agreements to take unlawful actions. The agreements between Sancom and one or more of the Call Connection Companies constitute a civil conspiracy or conspiracies, and Sancom and the Call Connection Companies are liable for the harm caused by the unlawful acts taken in furtherance of the conspiracy. These acts include the advertising of the free

conference calling services, the provision of kickbacks, and the billing of access charges on traffic for which no access charges were due.

60. The unlawful actions taken during and in furtherance of the lawful agreements between Sancom and one or more of the Call Connection Companies have injured Sprint. Sprint is entitled to reasonable damages in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, for the reasons stated above, Sprint requests that judgment be entered in its favor and against Sancom on each and all of its claims, including damages in an amount to be proven at trial, plus interest on that amount, reasonable costs and attorneys' fees, appropriate declaratory and injunctive relief, and any such other and further relief that the Court may deem just and equitable under the circumstances.

Dated at Sioux Falls, South Dakota, this 10th day of September, 2007.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

/s/ Cheryle Wiedmeier Gering

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant, hereby certifies that a true and correct copy of the foregoing "Answer and Counterclaim" was served by e-mail and by mail upon:

Jeffrey D. Larson
Larson and Nipe
P.O. Box 277
Woonsocket, SD 57385-0277
Attorneys for Plaintiff

on this 10th day of September, 2007.

/s/ Cheryle Wiedmeier Gering

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