BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

Northern Valley Communications, LLC ("Northern Valley") and Sancom, Inc. ("Sancom") (collectively, "Third-Party Defendants"), by counsel, respectfully submit this Memorandum in Response to Sprint Communication Company LP's ("Sprint") Motion to Dismiss Cross-Claims ("Motion"). Ignoring the plain language of the statute upon which it seeks to rely, Sprint contends that Northern Valley and Sancom are prohibited from maintaining cross-claims for damages against Sprint because the parties have claims for damages pending against one another in federal court, but that Sprint is nevertheless entitled to retain its claim for declaratory relief against Third-Party Defendants. Sprint's interpretation of the statute is as baseless as its contention that it is entitled to free terminating access from South Dakota Network and Third-Party Defendants merely because calls are terminated to conference call providers.

For the reasons articulated more fully herein, the South Dakota Public Utilities Commission ("Commission") should delay consideration of Sprint's Motion to Dismiss until the United States District Court for the District of South Dakota addresses Northern Valley's and Sancom's Motions for Primary Jurisdiction Referral, which motions request a referral of issues to

this Commission, or, in the alternative, declare that SDCL 49-13-1.1 bars any party that has a made a claim for damages in court, including Sprint, from simultaneously pursuing *any* relief (for declaratory ruling or damages) from the Commission. In the event the Commission pursues the later course of action, it should dismiss Northern Valley and Sancom from the pending proceeding.

BACKGROUND

Sancom filed a Complaint in the United States District Court for the District of South Dakota on August 1, 2007. *See Sancom, Inc. v. Sprint Commc'ns Co., LP,* 07-cv-4107-KES (D.S.D.). Northern Valley filed a Complaint in the United States District Court for the District of South Dakota on February 7, 2008. *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., LP,* 08-cv-1003-KES (D.S.D.). At present there are no less than 25 other collection actions and complaints pending in federal courts nationwide relating to the same fundamental dispute — attempts by LECs to collect payment of access charges for terminating calls to conference and chat-line operators in the face of IXC refusals to pay, assertedly justified by allegations of "access stimulation" by the LECs.

Litigation has proceeded in state regulatory commissions as well. On September 21, 2009, the Iowa Utilities Board ("IUB") issued a Final Order in a two-year-long proceeding brought by three IXCs, including Sprint, which addressed issues relating to the termination of conference and chat-line traffic. The IUB decided those questions in favor of the IXCs. That IUB order was appealed to the United States District Court for the Northern District of Iowa, however, and the magistrate judge issued a Temporary Restraining Order prohibiting enforcement of the IUB order on November 17,

2009.[1] The IUB order is now also subject to multiple petitions for rehearing by the IUB and state court appeals.

All of these disputes reflect identical issues: long-distance carriers refusing to pay access charges billed by LECs pursuant to filed tariffs for calls made to conference operators and chat-line service providers in rural areas. The IXCs assert common legal defenses, like Sprint does here, alleging, for example, that the calls did not "terminate" at the conference bridge, or that the conference operators were not "end users" or that the calls do not constitute "access traffic." Similarly, the IXCs assert, as Sprint does here, that revenue sharing between the LEC and the conference operator or common ownership between the LEC and the conference operator is forbidden.

A. 25 Other Pending Federal Court Cases Involve Identical Issues.

As stated above, litigation has proliferated in the federal courts. A list of cases pending in federal courts across the United States of which Third-Party Defendants are aware is provided below:

1. Southern District of Iowa

(1) *AT&T Corp. v Superior Tel. Coop., et al.*, No. 4:07-cv-00043;

(2) *Qwest Commc'ns Corp. v. Superior Tel. Coop., et al.*, No. 4:07-cv-00078;[2]

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[1] The IUB subsequently modified its Order in response to the arguments pressed by Great Lakes Communication, a local exchange carrier, that the IUB had exceeded the scope of its delegated authority. Because of revisions made to its Final Order and the IUB's affirmative representations to the Northern District of Iowa that it would be addressing the petitions for rehearing, the Temporary Restraining Order was allowed to expire. The IUB continues to have several motions for rehearing pending and the case challenging the lawfulness of the IUB's order remains pending in the Northern District of Iowa. *See Great Lakes Commc'ns Corp. v. Iowa Utils. Bd., et al*., No. 09-cv-4085 (N.D. Iowa).

[2] *Farmers and Merchants Mutual Telephone Co. of Wayland, Iowa v. Qwest Communications Corp.*, 3:09-cv-00058 (S.D. Iowa) and *Searsboro Telephone Co., Inc and Lynnville Telephone Co., Inc. v. Qwest Communications Co., LLC,* No. 4:09-cv-00308 (S.D. Iowa) have been consolidated into this case.

(3) *Sprint Commc'ns Co., L.P. v. Superior Tel. Coop.*, No. 4:07-cv-00194;

(4) *Aventure Commc'ns Tech., LLC v. Sprint Commc'ns Co.*, et al., No. 4:08-cv-00005;

(5) *Spencer Municipal Commc'ns Util. v. Global Crossing Telecomms. Inc.*, No. 4:09-cv-00029;

(6) *Farmers and Merchants Mut. Tel. Co. of Wayland, Iowa, et al. v. MCI Commc'ns Servs., Inc.*, No. 3:09-cv-00055;

(7) *West Liberty Tel. Co. v. MCI Commc'ns Servs., Inc.*, No. 3:09-cv-00056;

(8) *MCI Commc'ns Servs. v. Farmers and Merchants Mut. Tel. Co. of Wayland, Iowa, et al.*, No. 3:09-cv-00059;

(9) *Interstate 35 Tel. Co. v. MCI Commc'ns Servs., Inc*., No. 4:09-cv-00213.

2. Northern District of Iowa

(10) *Aventure Commc'ns Tech. LLC v. MCI Commc'ns Servs., Inc.*, No. 5:07-cv-04095;

(11) *Great Lakes Commc'ns Corp. v. Global Crossing Telecomms., Inc.*, No. 5:09-cv-4056;

(12) *Great Lakes Commc'ns Corp. v. Level 3 Commc'ns*, No. 5:09-cv-04090.

3. District of South Dakota

(13) *Northern Valley Commc'ns L.L.C. and Sancom, Inc. v. MCI Commc'ns Servs., Inc. d/b/a Verizon Bus. Servs.*, No. 1:07-cv-01016 (consolidated with No. 1:07-cv-04106);

(14) *Sancom, Inc. v. Qwest Commc'ns Corp.*, No. 4:07-cv-04147;

(15) *Sancom, Inc. v. Sprint Commc'ns Co.*, LP, No. 4:07-cv-04107;

(16) *Splitrock Props. Inc. v. Qwest Commc'ns Corp.*, No. 4:08-cv-04172;

(17) *Sancom, Inc. v. AT&T Corp.*, No. 4:08-cv-04211;

(18) *Northern Valley Commc'ns L.L.C. v. AT&T Corp.*, No. 1:09-cv-01003;

(19) *Northern Valley Commc'ns L.L.C. v. Qwest Commc'ns Corp.*, No. 1:09-cv-01004;

(20) *Splitrock Props. Inc. v. Sprint Commc'ns Corp., LP*, No. 4:09-cv-04075.

4. District of Minnesota

(21) *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, No. 0:08-cv-1130 (stayed pending referral to the FCC);

(22) *Qwest Commc'ns Co., LLC v. Tekstar Commc'ns, Inc., et al.*, 0:10-cv-00490.

5. Southern District of New York

(23) *Aventure Commc'n Tech. LLC v. AT&T Corp.*, No. 1:07-cv-01780.

(24) *All American Tel. Co., Inc., et al. v. AT&T Inc.*, No. 1:07-cv-00861.

6. Western District of Kentucky

(25) *Bluegrass Tel. Co. Inc. v. Qwest Commc'ns Co., LLC*, 4:09-cv-0070-JHM.

B. The Pendency of Identical Issues Before Multiple Federal District Courts Has Resulted in Inconsistent Decisions.

As could be expected with so many different federal lawsuits pending in so many jurisdictions and before so many different judges, courts have already issued inconsistent rulings in determining how to handle the cases before them. Of particular relevance here, courts have disagreed about whether parties are entitled to maintain claims for alternative relief under the doctrine of unjust enrichment in the face of the filed-rate doctrine.

In one case, the Court dismissed a CLEC's unjust enrichment claim. *See Sancom, Inc. v. Qwest Commc'ns Corp.*, 643 F. Supp. 2d 1117, 1126 (D.S.D. 2009) (dismissing the unjust enrichment claim, in part, because, "[i]f Sancom were to prevail on its claim that Qwest would be

unjustly enriched if it were allowed to retain the benefit of these services without compensating Sancom, the court would be required to determine the value of the services rendered.")

In other cases alleging similar facts, however, courts have determined that unjust enrichment and *quantum meruit* claims can be maintained as an alternative theory of recovery. *See, e.g., Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.,* No. Civ. 09-1004, 2009 WL 3164856 at *8 (D.S.D. Sept. 25, 2009) (Kornmann, J.) ("Where, as here, it is alleged that the charges as set out in Northern Valley's tariff do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.") (*citing Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)); *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, No. 08-cv-1130, 2009 WL 2155930, at *3 (D. Minn. July 15, 2009) ("In the absence of clarity regarding how those services are classified and regulated, it would be premature to address application of the filed rate doctrine to Tekstar's claim of quantum meruit.") (*citing Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654-57 (3d Cir. 2003)).

C. The FCC Has Released A Second Order on Reconsideration in *Farmers and Merchants*, But The Decision is Neither Final Nor Dispositive of the Outcome in This Case.

On November 25, 2009, the Federal Communications Commission ("FCC") released a Second Order on Reconsideration in *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, 24 FCC Rcd. 14801 (Rel. Nov. 25, 2009) ("*Farmers and Merchants II*"). In its first order in that case, the FCC "reject[ed] Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers." *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Memorandum Opinion & Order, 22 FCC Rcd. 17973, ¶ 38 (2007) (internal citations omitted) ("*Farmers and Merchants I*"). In *Farmers and Merchants II*, more than two years after the initial opinion, a newly-constituted FCC reversed this conclusion. The question whether conference call companies made net

payments now appears to be a key part of the FCC's analysis regarding the application of Farmers' tariff to conference calling traffic. *See Farmers and Merchants II*, ¶ 12 (the tariffs were inapplicable in part because "nothing in the contracts [between Farmers and the conference calling companies] suggests that the conference calling companies would subscribe to any tariffed Farmers' service ***or pay Farmers for their connections*** to the interexchange network, as would ordinary end-user customers under the tariff.") (emphasis added) (footnotes omitted).

The FCC went on to conclude in *Farmers and Merchants II* that "the evidence of the parties' actual course of dealing demonstrates that there was no purchase of [Farmers'] tariffed services," and that "based upon the totality of the circumstances and facts of this case . . . the conference calling companies do not constitute 'end users' within the meaning of the tariff provisions at issue." *Id.* ¶ 25.[3] (emphasis added) As a result, the FCC has now decided that it will award damages to Qwest, in an amount to be determined at a future proceeding. *Id.* at 1 ("Qwest may file a supplemental complaint for damages within sixty days of the release of this order.") (footnotes omitted).

Despite its untimely new opinion (styled as a "reconsideration"[4]), the FCC did get one

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[3] That the FCC's ***fact-specific determination*** regarding the applicability of Farmers and Merchant's tariff turned, in large part, on Farmers and Merchants' practice of backdating certain documents indicates that its analysis is not dispositive of Northern Valley's or Sancom's claims that their tariffs apply. Neither Northern Valley nor Sancom has or is alleged to have backdated any document, rendering the FCC's new reversal of *Farmers and Merchants I* inapposite to the question of whether the Third-Party Defendants' access tariffs govern the traffic in dispute. Moreover, the Third-Party Defendants note that, pursuant to FCC rules, *Farmers and Merchants II* is subject to a further petition for reconsideration and, as such, the FCC's Second Order on Reconsideration is not a final nonappealable order. *See* 47 CFR 1.106(k)(3) ("Any order disposing of a petition for reconsideration which reverses or modifies the original order is subject to the same provisions with respect to reconsideration as the original order."). A number of grounds exist that would warrant a reconsideration of *Farmers and Merchants II* and a petition for further reconsideration was timely filed.

[4] 47 U.S.C. § 405 required the FCC to complete its reconsideration within 90-days after

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

> This is not to say that Farmers is precluded from receiving any compensation at all for the services that it has provided to Qwest. *See, e.g., New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133 ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that the customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff.") *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claims for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

Farmers and Merchants II, at n.96. Accordingly, the FCC has made clear that the services provided by Third-Party Defendants in delivering calls from the IXCs' customer to conference

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Qwest filed its petition and, as such, *Farmers and Merchants II* was issued approximately a year and a half after the FCC lost jurisdiction to reconsider tariff-related issues. *See* 47 U.S.C. § 405(b)(1) ("Within 90 days after receiving a petition for reconsideration of an order . . . concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition."). Moreover, it is doubtful that *Farmers and Merchants II* can properly be termed a "reconsideration" in the first instance because the new opinion was decided by a Commission comprised of five Commissioners, a majority of which (3 of the 5) were new and took no part in deciding the initial opinion nor in deciding to accept Qwest's petition for reconsideration.

calling providers are compensable, whether tariffed or not.

D. Northern Valley Requests, and Sprint Opposes, A Primary Jurisdiction Referral.

The FCC's new opinion in *Farmers and Merchants II* not only appears to conflict with long-standing legal analysis and implements a complex fact-specific legal regime, it also leaves many unanswered policy questions. Chief among those questions are whether the distinctions between Incumbent LECs (such as Farmers and Merchants) and Competitive LECs subject to permissible detariffing (such as Northern Valley), have bearing on the relevant legal analysis. For these reasons, it became evident that a referral of issues to the agencies primarily charged with making policy determinations (namely, the FCC and this Commission), would be necessary to enable the Court to adjudicate the parties' outstanding dispute. Accordingly, on December 14, 2009, Northern Valley asked the Court to grant a primary jurisdiction referral with regard to the following issues:

1. Whether Northern Valley Communications, LLC ("Northern Valley") is entitled to collect interstate switched access charges it has billed to Sprint Communications Company Limited Partnership ("Sprint") pursuant to Northern Valley's interstate access tariff for calls to numbers assigned to conference calling companies, chat line providers, and other similar entities.

2. In the event that calls placed by Sprint's customers are delivered to conference call companies and other similar entities served by Northern Valley do not qualify as switched exchange access service under Northern Valley's federal access service tariff, determination of (1) the proper legal classification of those telecommunications services, (2) whether Northern Valley is entitled to compensation for those services.

3. In the event that the services provided by Northern Valley to Sprint do not qualify as switched access service under Northern Valley's federal access service tariff, but Northern Valley is nevertheless entitled to compensation for those services, determination of a reasonable rate for those services.

See, e.g., Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., LP, 08-cv-1003-KES, Memorandum in Support of Northern Valley Communications LLC's Motion to Stay Case for Purpose of Referral of Issues to Federal Communications Commissions at 15 (D.S.D. Dec. 14, 2009) (attached hereto as Ex. A).

Despite having already filed its Third-Party Complaints against Northern Valley and Sancom in this proceeding asking for a declaratory ruling with regard to *the exact same traffic at issue in the federal litigation,* Sprint opposed the motions for primary jurisdiction referral. *See, e.g., Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., LP*, 08-cv-1003-KES, Sprint's Resistance to Northern Valley's Motion to Stay Case for Purpose of Referral of Issues to Federal Communications Commissions (D.S.D. Jan. 20, 2010) (attached hereto as Ex. B).[5]

ARGUMENT

I. THE COMMISSION SHOULD DELAY CONSIDERATION OF THE MOTION TO DISMISS UNTIL THE FEDERAL COURT ACTS ON THE PENDING MOTION FOR PRIMARY JURISDICTION REFERRAL.

As discussed above, Sprint and the Third-Party Defendants are parties to litigation in the United States District Court for the District of South Dakota in which *all* parties are pursuing claims for damages flowing from the provision of access services to Sprint with regard to Sprint's customers utilization of conference calling services located in South Dakota. There is no dispute that allegations made in this proceeding involve the same traffic as the federal litigation. *See, e.g.,* Sprint's Memorandum in Support of Motion to Dismiss Northern Valley's Cross-Claim

[5] In its Reply Brief, Northern Valley made clear that it supported a referral of issues to this Commission, as well as to the FCC. *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., LP*, 08-cv-1003-KES, Northern Valley Communications, LLC's and Sancom, Inc.'s Consolidated Reply Brief in Support of Motions for Primary Jurisdiction Referral at 22-26 (D.S.D. Jan. 28, 2010) (attached hereto as Ex. C) ("the SDPUC, not the Iowa Board, has jurisdiction to evaluate, in the first instance, the delicate policy considerations associated with the applicability of the CLECs' intrastate tariffs to conference call customers.").

at 2 ("Northern Valley's Cross-claim seeks to recover the very same damages it is seeking to recover in the Litigation."). Accordingly, and as explained in more detail below, SDCL 49-13.1.1 prohibits any party to those actions from "mak[ing] complaint to the Commission." SDCL 49-13.1.1. Thus, the Commission currently lacks jurisdiction to adjudicate the issues between Third-Party Defendants and Sprint and, if it chooses to proceed, must limit its analysis and the application of its opinion to the specific question of whether Sprint must compensate South Dakota Network ("SDN") pursuant to the terms of SDN's tariff.

The Third-Party Defendants recognize, however, that Sprint hopes to obtain an order from this Commission that speaks more broadly (or that Sprint will argue speaks more broadly) than the confined analysis of the applicability of SDN's tariff to the disputed traffic. And, Northern Valley and Sancom agree that this Commission is best suited to weigh the various policy considerations that will be implicated by any such proceeding. Accordingly, rather than taking immediate action on Sprint's Motion (and striking Sprint's third-party claim), the Third-Party Defendants submit that the Commission should hold the case in abeyance until such time as the Court has rendered a decision on the pending motions for referral. Whereupon, if the motion is granted, the Commission would be vested with jurisdiction to review the issues and determine the policy questions related to the case consistent with the referral from the Court.[6]

II. IF THE COMMISSION TAKES ACTION ON THE MOTION TO DISMISS, IT MUST DISMISS SPRINT'S THIRD PARTY COMPLAINTS AGAINT NORTHERN VALLEY AND SANCOM.

In the event that Commission determines it appropriate to take immediate action on the

[6] If the referral motion is granted, the Commission will also have other parties, namely Qwest Communications Corp. and AT&T Corp., which will likely be part of the proceedings based on their involvement in identical litigation also pending before the federal court. A consolidated proceeding will conserve the Commission's resource and promote uniformity of outcomes.

pending Motions, it is clear that it must dismiss Sprint's third party complaints against Northern Valley and Sancom. Despite Sprint's contentions to the contrary, there is no basis in the statute to distinguish between complaints to the Commission for damages and complaints for declaratory judgment.

Though not explicitly addressed by Sprint's Motion, SDCL 49-13-1.1 mirrors the "election of remedies" statute in federal communications law in all relevant respects. As such, decisions interpreting its federal counterpart provide significant guidance with regard to the appropriate interpretation of South Dakota's statute.

The state statute provides as follows:

> Any person claiming to be damaged by any telecommunications company or motor carrier *may either 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,*[7] *but no person may pursue both remedies at the same time.*

SDCL 49-13-1.1 (emphasis added).

The federal statute provides as follows:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter *may either make complaint to the Commission* as hereinafter provided for, *or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.*

47 U.S.C. § 207 (emphasis added).

Accordingly, under either statute, a party may either (1) make complaint to the commission or (2) bring suit in court for the recovery of damages, but not both. Notably, a

[7] By using the language "court of competent jurisdiction" the state statute is broader that the federal statute which directs claims to be filed in federal district court. There can be no dispute that the United States District Court for the District of South Dakota is a court of competent jurisdiction for the purposes of application of the statute.

consideration of whether the relief sought includes a request for damages is only relevant with regard to suits brought in court. When a complaint is made to the Commission, on the other hand, there is no basis in the text of the statute to distinguish between complaints for damages and complaints for declaratory judgment.

This particular issue was recently addressed in the context of a federal court case regarding the applicability of a tariff to calls destined to conference calling services and involving Sprint. Interestingly enough, however, Sprint does not make reference to this case in its papers before the Commission, because, in that case, it was Sprint who successfully argued that a complaint for declaratory ruling to the Commission and a complaint for damages in federal court could not co-exist. The federal court in *Beehive Telephone Co., Inc. v. Sprint Communications Co., LP*, 2:08-cv-00380, concluded that:

> Beehive's claim that it did not make an election under § 207 because it only sought declaratory relief in its informal complaint with the FCC is unpersuasive. Beehive offers no judicial precedent in support of this assertion, nor has the court found any. Furthermore, this assertion is inconsistent with the plain meaning of the statute. . . . The statute does not require a person to request damages at the FCC, and this court will not read such a requirement into it. If a party could avoid the election of remedies provision in § 207 simply by styling its FCC complaint as one for declaratory relief, § 207 would be rendered meaningless. Parties could always pursue simultaneous actions at the FCC and in court by styling the FCC action as a declaratory action on the same issues raised in court. In light of the plain meaning of the statute, the court find Beehive's argument without merit.

Beehive Tel. Co., Inc. v. Sprint Commc'ns Co., LP, 2:08-cv-00380, Memorandum Opinion and Order, at 4 (D. Utah Oct. 13, 2009) (attached hereto as Ex. D).

Indeed, the Court's analysis closely reflects the arguments asserted by Sprint in that litigation. Sprint argued that a claim for declaratory relief before the administrative agency was sufficient to trigger the "election of remedies" provision of the statute:

> In its FCC filings, Beehive offered only a single reason why it believed it was entitled to bring its claim both at the FCC and in federal court despite the constraints of section 207: ***that its FCC complaint did not seek damages as a remedy. But section 207 applies even if the relief sought at the FCC does not include damages***. Section 207 provides parties a choice between bringing a complaint at the FCC or bringing a damages action in court. ***Nowhere does section 207 require that the FCC complaint include a request for damages for section 207 to apply.*** Indeed, the Second Circuit has squarely held that a court claim should be dismissed even when *no* relief was requested in the party's informal complaint at the FCC.
>
> Moreover, Beehive's effort to avoid the strictures of section 207 on the basis that it did not seek damages at the FCC is particularly unjustified here because Beehive did effectively request damages at the FCC. In its informal complaint, Beehive sought a declaratory judgment that Sprint "is obligated to pay Beehive's billed access charges and late payment penalties." Beehive plainly sought an order from the FCC for the exact relief that it now claims in this federal court case. In any event, as long as the claims in the FCC and court proceedings arise from the same "nexus" of facts – and here they indisputably do – Beehive's claim is barred.

See Beehive Tel. Co., Inc. v. Sprint Commc'ns Co., LP, 2:08-cv-00380, Sprint's Memorandum in Support of Its Motion to Dismiss Beehive's Complaint Pursuant to Rule 12(b)(1) at 7-8 (D. Utah July 31, 2009) (citations omitted) (attached hereto as Ex. E).[8]

Application of the *Beehive* court's analysis and the virtually identical language of SDCL 49-13-1.1 yields only one conclusion: Sprint was never entitled to bring Northern Valley or Sancom into this litigation through its third party complaint and is not entitled to maintain its complaint against them now. The fact that Sprint "limited the demand in its Third Party

[8] As Sprint explains in its Reply Brief, the only precursor to application of the election of remedies statute is a determination that there is a "factual nexus" between the court action and the complaint to the Commission. *See Beehive Tel. Co., Inc. v. Sprint Commc'ns Co., LP*, 2:08-cv-00380, Sprint's Reply in Support of Its Motion to Dismiss Beehive's Complaint Pursuant to Rule 12(b)(1) (D. Utah Sept. 21, 2009) (attached hereto as Ex. F). Sprint has already conceded that the required "factual nexus" exists by filing its Motions to Dismiss against Northern Valley and Sancom.

Complaint against [Third-Party Defendants] to declaratory relief," Sprint Motions at 1, does nothing to change this conclusion. Accordingly, Sprint's third party complaint must be dismissed if Northern Valley's and Sancom's Motions for Primary Jurisdiction Referral are not granted by the federal court.

CONCLUSION

For the foregoing reasons, Northern Valley and Sancom respectfully request that the Commission delay consideration of Sprint's Motions to Dismiss until the United States District Court for the District of South Dakota addresses the pending motions for primary jurisdiction referral. In the alternative, the Commission should enforce the plain language of SDCL 49-13-1.1 by finding that Sprint has violated the statute by bringing its third party claim against Northern Valley and Sancom and by dismissing Northern Valley and Sancom from the proceedings.

Dated this 26th day of February 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certified that a true and correct copy of the foregoing was served electronically on the 26th day of February 2010 upon the following:

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Exhibit A

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

NORTHERN VALLEY COMMUNICATIONS, L.L.C., **Plaintiff,** **Counter Defendant,** **v.** **SPRINT COMMUNICATIONS COMPANY, LIMITED PARTNERSHIP,** **Defendant,** **Third-Party Plaintiff,** **Counter Defendant,** **Counter Claimant,** **v.** **GLOBAL CONFERENCE PARTNERS,** **Third-Party Defendant,** **Counter Claimant.**	**Civ. 1:08-cv-01003-KES**

MEMORANDUM IN SUPPORT OF NORTHERN VALLEY COMMUNICATIONS, L.L.C.'S MOTION TO STAY CASE FOR PURPOSE OF REFERRAL OF ISSUES TO FEDERAL COMMUNICATIONS COMMISSION

Plaintiff Northern Valley Communications, L.L.C. ("Northern Valley") pursuant to the primary jurisdiction doctrine, hereby moves that the case be stayed and that certain issues be referred to the Federal Communications Commission ("FCC") for resolution.

In its November 25, 2009 Second Order on Reconsideration,[1] the Federal Communications Commission has made clear that Interexchange Carriers ("IXCs"), such as Defendant Sprint Communications Company Limited Partnership ("Sprint"), must compensate

[1] *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Second Order on Reconsideration, FCC 09-103 (Nov. 25, 2009) ("*Farmers and Merchants II*") (attached hereto as Ex. A).

Local Exchange Carriers ("LECs"), such as Northern Valley, for the use of their networks in delivering traffic to conference call providers, whether the traffic is governed by tariff or otherwise. Referral to the FCC will promote the interests of justice, judicial economy, and the uniformity of decision-making in this segment of the telecommunications industry.

I. BACKGROUND

Plaintiff filed the Complaint in this case on February 7, 2008. At present there are nearly 24 other collection actions and complaints pending in federal courts nationwide. All of these actions relate to the same fundamental dispute — attempts by LECs to collect payment of access charges for terminating calls to conference and chat-line operators in the face of IXC refusals to pay, assertedly justified by allegations of "access stimulation" by the LECs.

Litigation has proceeded in state regulatory commissions as well. On September 21, 2009, the Iowa Utilities Board ("IUB") issued a Final Order in a two-year-long proceeding brought by three IXCs, including Sprint, which addressed issues relating to the termination of conference and chat-line traffic. The IUB decided those questions in favor of the IXCs. That IUB order was appealed to the United States District Court for the Northern District of Iowa, however, and the magistrate judge issued a temporary restraining order prohibiting enforcement of the IUB order on November 17, 2009.[2] The IUB order is now also subject to multiple petitions for rehearing by the IUB and state court appeals.

[2] The IUB subsequently modified its Order in response to the arguments pressed by Great Lakes Communication, a local exchange carrier, that the IUB had exceeded the scope of its delegated authority. Because of revisions made to its Final Order and the IUB's affirmative representations to the Northern District of Iowa that it would be addressing the petitions for rehearing, the Temporary Restraining Order was allowed to expire. The IUB continues to have several motions for rehearing pending and the case challenging the lawfulness of the IUB's order remains pending in the Northern District of Iowa. *See Great Lakes Commc'ns Corp. v. Iowa Utils. Bd., et al.*, No. 09-cv-4085 (N.D. Iowa).

All of these disputes reflect identical issues: long-distance carriers refusing to pay access charges billed by LECs pursuant to FCC-filed tariffs for calls made to conference operators and chat-line service providers in rural areas. The IXCs assert common legal defenses, like Sprint does here, alleging, for example, that the calls did not "terminate" at the conference bridge, or that the conference operators were not "end users" or that the calls do not constitute "access traffic." Similarly, the IXCs assert, as Sprint does here, that revenue sharing between the LEC and the conference operator or common ownership between the LEC and the conference operator is forbidden.

A. Nearly 25 Other Pending Federal Court Cases Involve Identical Issues

As stated above, litigation has proliferated in the federal courts since this action was filed, all involving the IXCs' self-help refusals to pay access charges. A list of the other cases pending in federal courts across the United States of which Plaintiff is aware is provided below:

1. Southern District of Iowa

(1) *AT&T Corp. v Superior Tel. Coop., et al.*, No. 4:07-cv-00043;

(2) *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, No. 4:07-cv-00078;[3]

(3) *Sprint Commc'ns Co., L.P. v. Superior Tel. Coop., et al.*, No. 4:07-cv-00194;

(4) *Aventure Commc'ns Tech. LLC v. Sprint Commc'ns Co.*, No. 08-cv-00005;

(5) *Spencer Municipal Commc'ns Util. v. Global Crossing Telecomms. Inc.*, No. 09-cv-00029;

(6) *Farmers & Merchants v. MCI Commc'ns Servs.*, No. 09-cv-00055;

(7) *West Liberty Tel. Co. v. MCI Commc'ns Servs.*, No. 09-cv-00056;

[3] *Farmers and Merchants Mutual Telephone Co. of Wayland, Iowa v. Qwest Communications Corp.*, 3:09-cv-00058 (S.D. Iowa) and *Searsboro Telephone Co., Inc and Lynnville Telephone Co., Inc. v. Qwest Communications Co., LLC,* No. 4:09-cv-00308 (S.D. Iowa) have been consolidated into this case.

(8) *MCI Commc'ns Servs. v. Farmers & Merchants*, No. 09-cv-00059;

(9) *Interstate 35 Tel. Co. v. MCI Commc'ns Servs.*, No. 09-cv-00213.

2. Northern District of Iowa

(10) *Aventure Commc'ns Tech. LLC v. MCI Commc'ns Servs., Inc.*, No. 5:07-cv-04095;

(11) *Great Lakes Commc'ns Corp. v. Global Crossing Telecomms., Inc.*, No. 09-cv-4056;

(12) *Great Lakes Commc'ns Corp. v. Level 3 Commc'ns*, No. 09-cv-00888.

3. District of South Dakota

(13) *Northern Valley Commc'ns L.L.C. and Sancom, Inc. v. MCI Commc'ns Servs., Inc. d/b/a Verizon Bus. Servs.*, No. 1:07-cv-01016 (consolidated with No. 1:07-cv-04106);

(14) *Sancom, Inc. v. Qwest Commc'ns Corp.*, No. 4:07-cv-04147;

(15) *Sancom v. Sprint Commc'ns Co.*, No. 07-cv-4107;

(16) *Splitrock Props. Inc. v. Qwest Commc'ns Corp.*, No. 08-cv-04172;

(17) *Sancom, Inc. v. AT&T Corp.*, No. 4:08-cv-04211;

(18) *Northern Valley Commc'ns L.L.C. v. AT&T Corp.*, No. 1:09-cv-01003;

(19) *Northern Valley Commc'ns L.L.C. v. Qwest Commc'ns Corp.*, No. 1:09-cv-01004;

(20) *Splitrock Props. Inc. v. Sprint Commc'ns Corp.*, No. 09-cv-04075.

4. District of Minnesota

(21) *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, No. 08-cv-1130 (stayed pending referral to the FCC).

5. Southern District of New York

(22) *Aventure Commc'ns Tech. LLC v. AT&T Corp.*, No. 07-cv-01780.

(23) *All American Tel. Co., Inc., et al. v. AT&T Corp.*, No. 07-cv-00861.

6. Western District of Kentucky

(24) *Bluegrass Tel. Co. Inc. v. Qwest Commc'ns Co., LLC*, 09-cv-0070-JHM.

B. <u>The Pendency of Identical Issues Before Multiple Federal District Courts Has Already Resulted In Inconsistent Decisions</u>

As could be expected with so many different federal lawsuits pending in so many jurisdictions and before so many different judges, courts have already issued inconsistent rulings in determining how to handle the cases before them. Of particular relevance here, courts have disagreed about whether parties are entitled to maintain claims for alternative relief under the doctrine of unjust enrichment in the face of the filed-rate doctrine.

In one case, the Court dismissed a CLEC's unjust enrichment claim. *See Sancom, Inc. v. Qwest Commc'ns Corp.*, 643 F. Supp. 2d 1117, 1126 (D.S.D. 2009) (dismissing the unjust enrichment claim, in part, because, "[i]f Sancom were to prevail on its claim that Qwest would be unjustly enriched if it were allowed to retain the benefit of these services without compensating Sancom, the court would be required to determine the value of the services rendered.")

In other cases alleging similar facts, however, Courts have determined that unjust enrichment and *quantum meruit* claims can be maintained as an alternative theory of recovery. *See, e.g., Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, No. Civ. 09-1004, 2009 WL 3164856 at *8 (D.S.D. Sept. 25, 2009) (Kornmann, J.) ("Where, as here, it is alleged that the charges as set out in Northern Valley's tariff do not apply to the type of traffic at issue in this case, the filed rate doctrine would not apply to defeat Northern Valley's unjust enrichment claim.") (*citing Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006)); *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, No. 08-cv-1130, 2009 WL 2155930, at *3 (D. Minn. July 15, 2009) ("In the absence of clarity regarding how those services are classified and regulated, it would be

premature to address application of the filed tariff doctrine to Tekstar's claim of quantum meruit.") (citing *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654-57 (3d Cir. 2003)).

C. The FCC Has Released A Second Order on Reconsideration in *Farmers and Merchants*, But The Decision Is Neither Final Nor Dispositive of the Outcome In This Case

On November 25, 2009, the FCC released *Farmers and Merchants II*. In its first order in that case, the FCC "reject[ed] Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers." *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Memorandum Opinion & Order, 22 FCC Rcd. 17973, ¶ 38 (2007) ("*Farmers and Merchants I*"). In *Farmers and Merchants II*, more than two years after the initial opinion, a newly-constituted FCC reversed this conclusion. The question whether conference call companies made net payments now appears to be a key part of the Commission's analysis regarding the application of Farmers' tariff to conference calling traffic. *See Farmers and Merchants II*, ¶ 12 (the tariffs were inapplicable in part because "nothing in the contracts [between Farmers and the conference calling companies] suggests that the conference calling companies would subscribe to any tariffed Farmers' service ***or pay Farmers for their connections*** to the interexchange network, as would ordinary end-user customers under the tariff.") (emphasis added).

The FCC went on to conclude in *Farmers and Merchants II* that "the ***evidence*** of the parties' actual course of dealing demonstrates that there was no purchase of [Farmers'] tariffed services," and that "based upon the totality of the circumstances and ***facts of this case*** . . . the conference calling companies do not constitute 'end users' within the meaning of the tariff provisions at issue." *Id.* ¶ 25.[4] (emphasis added) As a result, the FCC has now decided that it

[4] That the FCC's ***fact-specific determination*** regarding the applicability of Farmers and Merchant's tariff turned, in large part, on Farmers and Merchants' practice of backdating certain

will award damages to Qwest, in an amount to be determined at a future proceeding. *Id.* at 1 ("Qwest may file a supplemental complaint for damages within sixty days of the release of this order.").

Despite its untimely new opinion (styled as a "reconsideration"[5]), the FCC did get one part of its analysis correct. Namely, it expressly rejected any suggestion that IXCs are entitled to take access services for free merely upon a conclusion that the specific services at issues did not squarely meet the terms of the LEC's tariff. As the FCC held:

> This is not to say that Farmers is precluded from receiving any compensation at all for the services that it has provided to Qwest. *See, e.g., New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133 ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by

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documents indicates that its analysis is not dispositive of Northern Valley's claim that its tariff applies. Northern Valley has not nor is alleged to have backdated any document, rendering the FCC's new reversal of *Farmers and Merchants I* inapposite to the question whether Northern Valley's access tariff governs to the traffic in dispute. Moreover, Northern Valley notes that, pursuant to FCC rules, *Farmers and Merchants II* is subject to a further petition for reconsideration and, as such, the FCC's Second Order on Reconsideration is not a final nonappealable order. *See* 47 CFR 1.106(k)(3) ("Any order disposing of a petition for reconsideration which reverses or modifies the original order is subject to the same provisions with respect to reconsideration as the original order."). A number of grounds exist that would warrant a reconsideration of *Farmers and Merchants II* and Northern Valley expects that such a petition will be timely filed.

[5] 47 U.S.C. § 405 required the FCC to complete its reconsideration within 90-days after Qwest filed its petition and, as such, *Farmers and Merchants II* was issued approximately a year and a half after the FCC lost jurisdiction to reconsider tariff-related issues. *See* 47 U.S.C. § 405(b)(1) ("Within 90 days after receiving a petition for reconsideration of an order . . . concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition."). Moreover, it is doubtful that *Farmers and Merchants II* can properly be termed a "reconsideration" in the first instance because the new opinion was decided by a Commission comprised of five Commissioners, a majority of which (3 of the 5) were new and took no part in deciding the initial opinion nor in deciding to accept Qwest's petition for reconsideration.

> a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that the customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff.") *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claims for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

Farmers and Merchants II, at n.96. Accordingly, the FCC has made clear that the services provided by LECs in delivering calls from the IXCs' customer to conference calling providers are compensable, whether tariffed or not. The FCC has also made clear that it is capable of and willing to establish a reasonable rate for the traffic, in the event that the services are found not to be covered by a carrier's tariff.

II. STANDARDS OF REVIEW

A. Primary Jurisdiction Doctrine

"'Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making.'" *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1097-98 (W.D. Mo. 2001) (*quoting Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998)). "The doctrine allows a district court to refer a matter to the appropriate administrative agency for ruling in the first instance, even when the matter is initially cognizable by the district court." *Access Telecomms.*, 137 F.3d at 608 (*citing Iowa Beef Processors, Inc. v. Illinois Cent. Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir.1982)). Ultimately, the doctrine of primary jurisdiction "is concerned with promoting proper relationships between

the courts and administrative agencies charged with particular regulatory duties." *Sprint Spectrum L.P.*, 168 F. Supp. 2d at 1097 (*quoting U.S. v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956)).

In determining whether to apply the doctrine, the Court examines each case to determine "'whether the reasons for the doctrine are present and whether applying the doctrine will aid the purposes for which the doctrine was created.'" *Id.* (*citing U.S. v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984)). Courts will apply the doctrine "to obtain the benefit of an agency's expertise and experience," and "to promote uniformity and consistency within the particular field of regulation." *Access Telecomms.*, 137 F.3d at 608 (*citing Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976)). Thus courts generally ask two questions: (1) whether the issues raised in a case "have been placed within the special competence of an administrative body" and whether "a case poses the possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy." *Sprint Spectrum L.P. v. AT&T Corp.*, 168 F. Supp. 2d at 1098.

III. ARGUMENT

A. A Primary Jurisdiction Referral of Specific Questions to the FCC Would Be Appropriate

In evaluating requests for primary jurisdiction referral, courts generally ask two questions: (1) whether the issues raised in a case "have been placed within the special competence of an administrative body;" and (2) whether "a case poses the possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy." *Sprint Spectrum L.P.*, at 1098. Both of these questions counsel in favor of referring issues in the pending case to the FCC for consideration.

1. The Issues In This Case Have Been Placed Within The Special Competence of the FCC

First, the issues in this case have been placed within the special competence of the FCC. Under the Communications Act, the FCC has jurisdiction over all interstate and international communications. 47 U.S.C. § 151. In undertaking its responsibilities, the FCC has promulgated various regulations specific to interstate access charges. *See* 47 C.F.R. §§ 69.1 – 69.731. And as part of the regulatory framework to implement the Communications Act, the FCC created NECA and has the oversight authority over NECA and the NECA tariff. 47 C.F.R. §§ 69.601(a) and 69.603(a). Moreover, the FCC promulgated the CLEC Access Charge Reform Orders that govern the rates that CLECs, including rural CLECs like Northern Valley, may charge for access services. *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, 16 FCC Rcd. 9923 (Apr. 27, 2001) ("*Seventh Report and Order*"); *Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, FCC 04-110, 19 FCC Rcd. 9108 (May 18, 2004). In these Orders, the FCC established the rural CLEC exemption to its CLEC benchmark rules and discussed further factors that are relevant to determining a reasonable rate for rural CLEC access traffic.

Indeed, Courts have concluded that the FCC is specially positioned to determine reasonable rates for access traffic. Specifically, courts have concluded that the rates that should be set for claims for recovery pursuant to *quantum meruit* and implied contract are matters best evaluated by the FCC. *See Sprint Spectrum L.P.*, at 1100 (referring to the FCC that question of a reasonable rate under the theory of *quantum meruit* and an implied contract and concluding that a "determination as to the reasonableness of the rates for Sprint's services that AT&T has utilized" is "a fact that must be proven and one which the FCC is in a better position than the

Court to evaluate.");[6] s*ee also Business Telecom, Inc.*, 16 FCC Rcd. at 12325, ¶ 25 ("In fact, courts are 'particularly deferential' when reviewing the Commission's evaluation of rates, because such agency action is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise.'") (citations omitted).

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[6] In its response to this primary jurisdiction referral, the FCC suggested that the court should determine in the first instance whether or not an implied contract existed for the payment of access charges for calls delivered from an IXC to a commercial mobile radio service ("CMRS") provider's network. *See Petitions of Sprint PCS & AT&T Corp.*, 17 FCC Rcd. 13192, 13198 & ¶ 13, 2002 WL 1438578. In requesting that the court determine whether an implied contract existed, however, the FCC expressly noted that the regulatory regime under which calls to mobile telephone (CMRS) services are governed has never been the same "calling party's network pays (CPNP) compensation regime as wireline LECs." *Id.* ¶ 14. The FCC continued that, "[u]nder a CPNP regime, LECs are compensated for terminating calls by the carrier of the customer that originates the call, not by the customer receiving the call" and contrasted that arrangement with the mobile telephone market where "since the advent of commercial wireless service, and continuing today, CMRS carriers have charged their end users both to make and to receive calls." *Id.* (citations omitted). The FCC also suggested that, in the absence of an implied contract, relief pursuant to the theory of unjust enrichment was unlikely to be appropriate for calls delivered a CMRS provider's network (as compared to a LEC's wireline network). *Id.* ¶ 15 ("Because both carriers charge their customers for the services they provide, it does not necessarily follow that IXCs receive a windfall situation where no compensation is paid for ***access services provided by a CMRS carrier***. Nor do we believe that terminating access charges to CMRS carriers are necessarily imputed to IXCs' retail rates.") (emphasis added).

Accordingly, Northern Valley asserts that the FCC's hesitancy in *Sprint Spectrum* to establish a rate in the absence of a prior determination that an implied contract existed is inapplicable here. Here, the Court should not hesitate to order the FCC to establish a reasonable rate for purposes of Northern Valley's unjust enrichment count because, unlike in *Sprint Spectrum, LP*, it is clear that Sprint would be unjustly enriched if it were permitted to retain Northern Valley's services without being required to compensate Northern Valley for the use of its network, because both carriers are operating under the traditional CPNP compensation regime applicable to wireline carriers. Moreover, asking the FCC to establish such a rate would not preclude a determination that Northern Valley's tariff was, in fact, applicable (a threshold matter that the FCC would be asked to address) or a subsequent determination by the Court that an implied contract existed (such that Northern Valley was entitled to receive its tariffed-rate for the services that it provided). Indeed, the FCC's analysis in *Farmers and Merchants II* suggests that it is the appropriate agency to first pass on the question of whether Northern Valley's tariff is applicable and, moreover, underscores the importance of ensuring that a rate is set for Northern Valley's traffic even if the tariff does not apply. Otherwise, the IXCs would "***receive a windfall*** [if] no compensation is paid" because "terminating access charges to [Local Exchange] carriers are ***necessarily imputed*** to IXCs' retail rates." *Id.* (emphasis added).

Moreover, in the instance case, Plaintiffs' interstate access tariffs are derived in significant part from the NECA tariff. Accordingly, to the extent that the case will require interpretation of specific terms in Plaintiffs' access tariff – such as "end user," "premises," "customer," and "subscribes" – such interpretation may have impact on other users of the NECA and on other litigation. The FCC is well suited to evaluate the meaning of these tariff provisions and the policy considerations that flow from the Commission's permissive detariffing regime for CLECs. *See, e.g., Seventh Report and Order*, 16 FCC Rcd. 9923, ¶ 82 & n.160 (establishing benchmark rates that can be tariffed by CLECs and implementing mandatory detariffing for rates ***above*** the rural benchmark; also noting that, "[a]s modified by the Hyperion Order, our tariff rules currently subject CLECs to permissive detariffing and set no pre-determined limits on the level of charges that CLECs may establish by tariff. We note that the law is somewhat unclear on which section of the Act requires or permits the filing of interstate access tariffs.") (citations omitted); *see also Northern Valley Commc'ns, LLC v. Qwest Commc'ns*, 2009 WL 3164856 at *8 (". . .it is not yet absolutely clear to this Court whether the filed rate doctrine is applicable, given the 1996 Act's 'detariffing' policy.").

2. This Case Poses the Possibility of Inconsistent Outcomes Between Courts and the Agency.

The second question that Eighth Circuit courts ask when deciding a primary jurisdiction referral is whether "a case poses the possibility of inconsistent outcomes between courts and the agency on issues of regulatory policy." *Sprint Spectrum L.P.*, at 1098. With no less than 25 cases pending in various federal courts around the country and before the FCC, there is an obvious risk of inconsistent rulings. The *Tekstar* court has already noted this likelihood and has thus referred a similar case to the FCC, finding that "the ***potential for inconsistent or contradictory rulings is great*** in this case because the FCC currently has under consideration

several different matters that address the same or similar issues." *Tekstar*, 2009 WL 2155930, at *2 (emphasis added).

In this case, the potential for inconsistent rulings is great not only because of the inconsistent adjudication of motions to dismiss claims for unjust enrichment, but also because of the potential misapplication of the FCC's *Farmers and Merchants II* decision. Certain IXCs have already indicated their intent to overreach by attempting to use *Farmers and Merchants II* to obtain summary judgment against CLECs. However, to enable any IXC to have summary judgment based on the FCC's *Farmers and Merchants II* would ignore: (1) the fact-specific inquiry undertaken by the FCC in reaching its initial and revised opinions; (2) the fact that *Farmers and Merchants II* is itself subject to potential applications for further reconsideration and thus not final; (3) the express language in the Second Order on Reconsideration precluding IXCs from receiving a windfall as a result of a determination that a LEC's tariff does not apply; and (4) the important distinctions between the rights and responsibilities of ILECs and CLECs, specifically including the reasonableness of rates that CLECs can assess for switched access services and whether a CLEC ***must*** (vs. may) file a tariff in order to lawfully assess access charges for the use of its network.

Similarly, it would be inappropriate to assume that courts could merely await the FCC's damages assessment in *Farmers and Merchants II* and then apply a proportional rate for the disputed traffic in cases, such as the one at bar, involving CLECs. *See, e.g.*, *Business Telecom, Inc.*, 16 FCC Rcd. at 12321, ¶ 18 ("First, the Commission has interpreted the Telecommunications Act of 1996 as directing the Commission to refrain – whenever possible – from applying to CLECs the legacy, cost-based regulations long applicable to the access services of ILECs. . . . Consequently, the Commission has chosen not to apply the historical ILEC rules and regulations

to CLECs.") (citations omitted); *id.* ¶ 27 ("the competing ILEC rate is only ***one of several factors***" that the FCC uses in determining a reasonable rate for CLEC access services) (emphasis added).

3. A Referral of Discrete But Crucial Questions Will Ensure the Most Efficient Resolution of This Case and Therefore Is in the Interest of All Parties and the Court

The Court should refer the specific issues identified by Northern Valley to the FCC for resolution because it is likely to be more efficient than proceeding with the case given the current unsettled legal morass. No one has greater interest in an expeditious resolution of this matter than Plaintiff; it is Plaintiff, after all, who is not being paid for the services that they have provided and continue to provide to Sprint every day. However, Plaintiffs also want to ensure that a just and fair resolution is reached.

Plaintiffs do not anticipate that there will be undue delay in the resolution of these legal issues at the FCC.[7] Inconsistent rulings from federal courts, the Iowa Utilities Board, and primary jurisdiction referral in the *Tekstar* case, all have created a challenging legal minefield with important practical and policy implications. Accordingly, judicial resources will be conserved by asking the FCC to provide responses to the discrete questions proposed by Plaintiff and, at the same, a referral will allow the FCC to fulfill its policy function by ensuring consistency across the various cases.

[7] Notably, based on the FCC's prohibition against directly accepting collection actions, it is absolutely necessary for CLECs, such as Northern Valley, to initiate these actions in federal court and then ask the Court to seek the FCC's input through the primary jurisdiction referral. This differs from an IXCs ability to bring a tariff challenge, pursuant to 47 U.S.C. § 208, directly to the FCC in the manner that Qwest challenged Farmers and Merchant's tariff. In other words, Northern Valley's only avenue to request the FCC to consider the application of its tariff is through this federal court proceeding because it could not have asked the FCC to consider the matter directly.

IV. THE COURT SHOULD REQUEST THAT THE FCC RESPOND TO THE REFERRED QUESTIONS WITHIN SIX MONTHS

The FCC's expertise will enable a fair resolution of the instant dispute and because there exists a substantial likelihood of inconsistent judgments in the various cases pending before the federal courts involving the IXCs' refusal to pay for access charges, the grounds for a primary jurisdiction referral have been met. Accordingly, Northern Valley respectfully urges the Court to refer the following questions to the FCC for its resolution:

1. Whether Northern Valley Communications, LLC ("Northern Valley") is entitled to collect interstate switched access charges it has billed to Sprint Communications Company Limited Partnership ("Sprint") pursuant to Northern Valley's interstate access tariff for calls to numbers assigned to conference calling companies, chat line providers, and other similar entities.

2. In the event that calls placed by Sprint's customers are delivered to conference call companies and other similar entities served by Northern Valley do not qualify as switched exchange access service under Northern Valley's federal access service tariff, determination of (1) the proper legal classification of those telecommunications services, (2) whether Northern Valley is entitled to compensation for those services.

3. In the event that the services provided by Northern Valley to Sprint do not qualify as switched access service under Northern Valley's federal access service tariff, but Northern Valley is nevertheless entitled to compensation for those services, determination of a reasonable rate for those services.

Northern Valley further requests that the Court direct the FCC to decide these referred questions on a timely basis not to exceed six months. *See, e.g., Advamtel, LLC v. Sprint Commc'ns Co., LP*, 125 F. Supp. 2d 800, 807 (E.D. Va. 2001) (referring issues to FCC with a deadline for resolution of six months). Plaintiff also requests that the Court order the FCC to provide a status report to the Court at the end of three months.

V. CONCLUSION

For the foregoing reasons, Northern Valley respectfully moves this Court to refer specific issues to the FCC pursuant to the doctrine of primary jurisdiction. Northern Valley further

moves the Court to stay this case during the pendency of the referral to the FCC.

Dated: December 14, 2009 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2009, a true and correct copy of **Memorandum in Support of Northern Valley Communications, L.L.C.'s Motion to Stay Case for Purpose of Referral of Issues to Federal Communications Commission** and all accompanying materials was served upon all parties to the above cause by depositing same in the U.S. Mail, postage pre-paid, to their respective addresses disclosed on the pleadings or, in the event the party is represented by counsel, to their counsel; or notice of the filing of this instrument was sent by email, via CM/ECF, to all parties on the service list who have registered to receive service by email over CM/ECF.

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Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	**File No. EB-07-MD-001**
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

SECOND ORDER ON RECONSIDERATION

Adopted: November 24, 2009 **Released: November 25, 2009**

By the Commission:

I. INTRODUCTION

1. In this Order, we reconsider our October 2, 2007 Order in this case,[1] and grant Counts II and III of the formal complaint that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] We find that the evidence brought to light by Qwest's Petition for Reconsideration[3] warrants a change of our earlier ruling and compels the conclusion that Farmers violated sections 203(c) and 201(b) of the Act.[4] Farmers, accordingly, is liable to Qwest for damages suffered as a result of Farmers' violations. Qwest elected in its Complaint to have the amount of any damages determined in a separate proceeding;[5] Qwest may file a supplemental complaint for damages within sixty days of the release of this

[1] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co*., Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("October 2 Order").

[2] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[3] Qwest Communication Corp.'s Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Petition for Reconsideration").

[4] 47 U.S.C. §§ 203(c), 201(b). Section 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 203(c). Section 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

[5] Complaint at 27, ¶ 59.

order.[6]

II. BACKGROUND[7]

2. Qwest is an interexchange carrier, serving customers throughout the United States.[8] Farmers is the incumbent local exchange carrier in Wayland, Iowa, serving approximately 800 access lines for local residents.[9] Farmers provides local exchange and exchange access services.[10] Qwest purchases tariffed access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[11]

3. In 2005 and 2006, Farmers entered into a number of commercial arrangements with conference calling companies for the purpose of increasing its interstate switched access traffic and revenues.[12] Under the agreements, conference calling companies sent their traffic to numbers located in Farmers' exchange and, in return, Farmers paid the companies money or other consideration.[13] The agreements resulted in a substantial increase in the number of calls bound for Farmers' exchange.[14] As a result, the amounts of Farmers' monthly bills to Qwest for terminating access charges rose precipitously.[15]

4. Qwest filed a Complaint with the Commission on May 2, 2007, alleging that Farmers had violated section 201(b) of the Act by earning an excessive rate of return on switched access services (Count I).[16] In the October 2 Order, we found that Farmers' agreements with the conference calling companies, which were entered into contemporaneously with Farmers' exit from the traffic-sensitive cost and revenue pool administered by the National Exchange Carrier Association ("NECA"), resulted in Farmers vastly exceeding the prescribed rate of return in violation of section 201(b) of the Act.[17] The October 2 Order further found that Farmers' tariff had "deemed lawful" status,[18] however, and accordingly held that Qwest could not recover damages from Farmers.[19]

5. The Complaint also alleged that Farmers' imposition of interstate access charges

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[6] *See* 47 C.F.R. § 1.722(e).

[7] This Order contains an abbreviated background section. A full recitation of the facts appears in paragraphs 3 through 13 of the October 2 Order, which we incorporate by reference. October 2 Order, 22 FCC Rcd at 17974-77, ¶¶ 3-13.

[8] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[9] Joint Statement at 1-2, ¶ 4.

[10] Joint Statement at 2, ¶ 5.

[11] Joint Statement at 1-2, ¶ 4.

[12] Joint Statement at 4, ¶ 13.

[13] Joint Statement at 4, ¶ 13.

[14] Joint Statement at 4, ¶¶ 12-13.

[15] Complaint at 13-14, ¶ 22.

[16] Complaint at 20-22, ¶¶ 37-41.

[17] October 2 Order, 22 FCC Rcd at 17974-76, ¶¶ 4-11, 25. *See* October 2 Order, 22 FCC Rcd at 17974-75, ¶¶ 4-6 for a more detailed discussion of the relevant rate of return regulations.

[18] *See* 47 U.S.C. § 204(a)(3).

[19] October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 26-27.

was inconsistent with its tariff (Counts II and III).[20] Specifically, Qwest argued that the tariff did not allow Farmers to assess terminating access charges on calls to the conference calling companies because the service provided did not constitute switched access as defined in Farmers' tariff.[21] The tariff then in effect provided that switched access service allows the customer "to originate calls from an end user's premises to a customer designated premises" and "to terminate calls from a customer designated premises to an end user's premises."[22] The tariff defined an "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and a "customer" as any entity that "subscribes to the services offered under this tariff."[23] Qwest asserted that the conference calling companies were not Farmers' customers, because they did not pay Farmers for any services offered under Farmers' tariff.[24] Thus, Qwest argued, delivering calls to the conference calling companies did not constitute terminating access service for which Qwest could be billed.[25] Farmers responded that the conference calling companies were end users because they purchased interstate End User Access Service from Farmers' tariff and paid the federal subscriber line charge ("SLC").[26]

6. The October 2 Order denied Counts II and III of the Complaint. Citing Farmers' representations that the conference calling companies purchased tariffed access service and paid the SLC,[27] the October 2 Order found that the conference calling companies were Farmers' customers and, therefore, "end users," as defined in the tariff.[28] Accordingly, because the conference calling companies were determined to be end users based upon these facts, the October 2 Order further concluded that Farmers had imposed access charges on Qwest in accordance with Farmers' tariff.[29]

7. On November 1, 2007, Qwest filed the Petition for Reconsideration and a Motion to Compel Production of Documents,[30] arguing that newly-available information called into question the veracity of Farmers' evidence that the conference calling companies were customers of its tariffed service.[31] In particular, Qwest argued that Farmers had back-dated contracts and invoices to make it *appear* that the conference calling companies had been purchasing tariffed

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[20] October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 38-39.

[21] October 2 Order, 22 FCC Rcd at 17985-87, ¶¶ 30, 35.

[22] Farmers' tariff incorporates National Exchange Carrier Association Tariff F.C.C. No. 5 ("NECA Tariff" or "Farmers' FCC Tariff") terms with respect to switched access services. *See* Complaint, Exhibit 9, Kiesling Associates LLP Tariff F.C.C. No. 1 ("Kiesling Tariff") at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 7, NECA Tariff at § 6.1.

[23] Response to Enforcement Bureau Request for Additional Briefing, File No. EB-07-MD-001 (Aug. 1, 2008) ("Qwest Additional Briefing Response"), Appendix, NECA Tariff at 2.6 (pp. 2-65.1, 2-68).

[24] October 2 Order, 22 FCC Rcd at 17985, ¶ 37.

[25] *See* October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 35-38.

[26] *See* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[27] October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[28] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38.

[29] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38. The October 2 Order also rejected Qwest's argument that Farmers had improperly imposed terminating access charges for traffic that it did not terminate. *See* October 2 Order, 22 FCC Rcd at 17985-86, ¶¶ 31-34. Qwest does not challenge that determination in its Petition for Reconsideration.

[30] Motion to Compel Production of Documents, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Motion to Compel").

[31] Petition for Reconsideration at 9.

services.[32] Qwest asked the Commission to reconsider the October 2 Order and find that the conference calling companies were not customers under Farmers' tariff, but rather were "business partners working together with Farmers in its deliberate scheme to manipulate the Commission's rules and exceed the authorized rate of return."[33]

8. On January 29, 2008, we granted the Petition for Reconsideration in part by initiating additional proceedings that would allow us to rule on the merits of Qwest's arguments concerning the newly-identified evidence.[34] We found that the questions raised about the integrity of our process, and about the reliability of Farmers' representations, warranted additional discovery.[35] We therefore granted Qwest's Motion to Compel, and directed Farmers to produce certain documents that had been submitted in a proceeding before the Iowa Utilities Board.[36] We also permitted Qwest to supplement its Petition for Reconsideration at the conclusion of the additional discovery.[37]

9. Qwest filed its Second Supplement to Petition for Partial Reconsideration on May 29, 2008.[38] In that filing, Qwest offered evidence that the conference calling companies had never, in fact, taken tariffed services from Farmers.[39] According to Qwest, once Farmers' activities came under legal scrutiny:

> Farmers realized that it would not be entitled to the access revenues that its plan was designed to generate unless it could persuade the Commission that the [conference calling companies] were its customers under tariff. It thus undertook to fabricate evidence of a tariffed customer-carrier relationship that did not in fact exist, sending back-dated bills to the [conference calling companies] and executing contract "addenda" purporting to have taken effect months or years earlier. Farmers then selectively submitted some of these documents into the record in this proceeding without any indication that they had not been issued contemporaneously with the provision of service, while withholding other contemporaneous documents that showed the nature of the fabrication.[40]

The new evidence produced in this proceeding substantiates Qwest's allegations.

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[32] Petition for Reconsideration at 9-13.

[33] Petition for Reconsideration at 2, 9, 13-14.

[34] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Order on Reconsideration, 23 FCC Rcd at 1617, ¶ 6 ("Order on Reconsideration").

[35] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11.

[36] Order on Reconsideration, 23 FCC Rcd at 1618-20, ¶¶ 8, 11. A related case was initiated before the Iowa Utilities Board. *See Qwest v. Superior Telephone Cooperative, et al.*, Docket No. FCU-07-2 (Complaint filed Feb. 20, 2007).

[37] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11. Additional discovery was ordered by letter ruling dated March 7, 2008. Letter from Lisa B. Griffin, Deputy Chief, MDRD, EB, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (rel. Mar. 7, 2008).

[38] Second Supplement to Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed May 29, 2008) ("Second Supplement").

[39] Second Supplement at 4-15.

[40] Second Supplement at 2.

III. DISCUSSION

New Evidence Demonstrates that the Conference Calling Companies Were Not End Users Under Farmers' Switched Access Service Tariff, and thus Farmers Was Not Entitled to Charge Qwest Tariffed Switched Access Rates.

10. The central question in this reconsideration proceeding is whether the conference calling companies were "end users" within the meaning of the switched access provisions of Farmers' tariff. The answer to that inquiry is key because it, in turn, determines whether the service that Farmers provided to Qwest was tariffed switched access service for which Farmers could charge tariffed rates. Under Farmers' tariff:

- Switched access service allows a customer "to originate calls from an *end user's* premises to a customer designated premises" and "to terminate calls from a customer designated premises to an *end user's* premises."[41]
- An "*end user*" is "any *customer* of an interstate or foreign telecommunications service that is not a carrier."[42]
- A "*customer*" is any entity that "subscribes to the *services offered under this tariff*."[43]

The tariff's definition of the term "customer" is critical to our analysis because a person or entity is not an "end user" unless the person or entity is also a "customer." The tariff requires that to be a customer, the person or entity must subscribe to the services offered under the tariff. In this case, the record demonstrates that the conference calling companies did not subscribe, nor did they seek to subscribe, to the services offered under the tariff. To the contrary, the evidence demonstrates that the conference call companies and Farmers expressly structured their telecommunications service contracts ***to avoid*** strict adherence to the terms of Farmers' filed tariff. Therefore, we conclude that these companies were neither "customers" nor "end users" within the meaning of the tariff.[44] Thus, Farmers was not entitled to charge Qwest switched access charges under the terms of Farmers' tariff.[45]

11. The October 2 Order's finding that the conference calling companies were "end users" was based entirely on Farmers' then-uncontested averment that the companies "subscribed to Farmers' interstate service, specifically, interstate End User Access Service, and were billed the federal subscriber line charge."[46] However, new evidence that Farmers previously withheld contradicts that claim and demonstrates that the conference calling companies and Farmers

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[41] NECA Tariff at § 6.1 (emphasis added).

[42] NECA Tariff at § 2.6 (emphasis added).

[43] *Id.* (emphasis added).

[44] Consequently, Farmers' reliance on the October 2 Order's description of "free subscriptions," October 2 Order, 22 FCC Rcd at 17987, ¶ 38, is unavailing, because we find that the conference calling companies did not subscribe to a service offered under Farmers' interstate tariff.

[45] *Cf. Qwest Commc'n Corp. v. Superior Tel. Coop.*, Final Order, Docket No. FCU-07-2 (Iowa Util. Bd. issued Sept. 21, 2009) at 34 (finding that "free calling service companies" ("FCSCs") were not end users of rural LECs for purposes of intrastate access tariffs, because the FCSCs "did not subscribe to the [LECs'] access or local service tariffs and the FCSCs did not expect to pay for and did not pay for any of the [LECs'] local exchange service offerings").

[46] Answer at vii; *see* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

structured their business arrangements pursuant to contracts and not the terms and conditions set forth in the tariff. As a result, the parties failed to establish a carrier/customer relationship under the terms of the tariff.

12. Nothing in the contracts between the conference calling companies and Farmers, or in the parties' business dealings, suggests that the conference calling companies were customers as defined under Farmers' tariff. Under the contracts, the conference calling companies established a free service accessed via toll calls placed over long-distance networks and delivered to the conference calling companies over Farmers' network.[47] In return, Farmers agreed to provide a host of services to support the conference calling companies' business venture, and significantly, to pay the conference calling companies a per-minute fee for the traffic generated through their mutual relationship.[48] Further, nothing in the contracts suggests that the conference calling companies would subscribe to any tariffed Farmers' service or pay Farmers for their connections to the interexchange network, as would ordinary end-user customers under the tariff.[49]

13. Moreover, Farmers provided connections to the conference calling companies in a manner that differed from those made available to customers of its tariffed service. For example, Farmers provided the conference calling companies with high-capacity DS3 trunks that fed into trunk-side connections, to a brand new "soft switch" that Farmers purchased specifically to handle traffic bound for the conference calling companies rather than the Nortel DMS-10 circuit switch used to serve all of Farmer's other customers.[50] That soft-switch was connected directly to the conference calling companies' conference bridges, which were located in Farmers' end office.[51]

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[47] *See* Deposition of Rex McGuire in Iowa Utilities Board Docket No. FCU-07-2 (Jan. 11, 2008) (submitted into EB-07-MD-001 record on Apr. 10, 2008) ("McGuire Deposition") at 27.

[48] Farmers provided all inbound and outbound telephone lines and services, collocation space, rack space, digital subscriber line services and other dedicated Internet access, electrical power, fire protection, generator and/or battery backup, switch technician labor, switch programming, and dedicated DS3 trunks to its switches. Farmers also incurred the costs associated with installation charges, monthly recurring charges, and referral message fees. *See* Farmers Documents 0654, 0660, 0662, 0666-67, and 0673; McGuire Deposition at 239-40. Farmers agreed to pay the companies a fee for both inbound as well as outbound traffic. *See* McGuire Deposition at 196-98; Farmers' Documents 0650, 0654, 0656, 0661-62, 0668, and 0674.

[49] *See* discussion *infra* at paragraph 19. In fact, one agreement expressly states that there would be no charge for *any* of the services that Farmers provided the conference calling company. [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company.] The newly presented evidence of back-dated documents, including invoices and contract "addenda," has changed our understanding of the dealings between the parties and causes us to revise the Commission's earlier conclusion that "The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users." October 2 Order, 22 FCC Rcd at 17988, ¶ 38. To the contrary, the flow of money between these parties is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to Farmers, not payments that flow in the reverse direction.

[50] McGuire Deposition at 99-107. Farmers also purchased a new stand-by generator to accommodate the increased traffic Farmers handled as a result of its business relationships with the conference calling companies. McGuire Deposition at 102. The total cost for all of the additional equipment provided by Farmers to support this business relationship was approximately $430,000. McGuire Deposition at 107. Prior to this litigation, Farmers did not bill the conference calling companies for any of this equipment, facilities, power, or services that it provided. McGuire Deposition at 124, 171, 206, 219-20.

[51] McGuire Deposition at 30-33, 49-50.

14. Additionally, Farmers' agreements with the conference calling companies did not resemble traditional agreements for the provision of its tariffed switched access services. For example, the first agreement between Farmers and a conference calling company expressly stated that Farmers was *prohibited* from providing the services involved to any competitor.[52] Such an exclusivity clause is antithetical to the notion of tariffed service.[53] Although Farmers later entered into contracts with three conference calling companies that it considered not to be competitors of the first conference calling company,[54] Farmers nonetheless turned away other companies with which it could have entered into service arrangements.[55] Moreover, each of the contracts that Farmers did sign contained unique terms not available under its tariff, further supporting our conclusion that the parties never established a carrier/customer relationship under the terms of the filed tariff. For example, while each agreement required Farmers to pay the conference calling companies a given sum per minute of traffic that Farmers delivered, that figure differed among the companies.[56] Further, the contracts obligated each conference calling company to generate different amounts of traffic.[57] In addition, the duration of the contracts varied, as did the notice periods for cancellation of service during the contracts' terms.[58] Before each of the contracts was signed, the Farmers board of directors had to approve its particular terms,[59] and the provisions of the agreements were kept confidential.[60]

15. The conclusion that the conference calling companies were not customers within the meaning of the tariff language at issue here is further bolstered by the parties' actions in implementing their agreements. Stated simply, the parties in no way behaved as if they were operating under tariff until *after* Farmers became embroiled in litigation over the traffic stimulation plan. Even then, the parties' conduct belies the conclusion that Farmers was providing the services offered under its tariff to the conference calling companies.

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[52] Farmers Document No. F0666. Farmers subsequently attempted to renegotiate the exclusivity clause, but the company involved refused to do so. [Redacted confidential information regarding communications between Farmers and a conference calling company regarding the exclusivity terms in the parties' agreement.]

[53] "Only common carrier services can be tariffed." *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 313-14, ¶ 244 (1982). One of the hallmarks of a common carrier service is that the carrier offering the service "holds [itself] out to serve indifferently all potential users." *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 96 S. Ct. 2203 (1976)); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). In other words, the carrier does not make individualized decisions regarding "whether and on what terms to deal." *NARUC I*, 525 F.2d at 641. *See also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78 ¶¶ 785-86 (1997) (subsequent history omitted). We note that Farmers and the conference calling providers appear to have deliberately structured their relationships in a manner that is contrary to a traditional tariff offering.

[54] McGuire Deposition at 139.

[55] [Redacted confidential information regarding Farmers' decision not to implement agreements with certain conference calling companies.]

[56] [Redacted confidential information regarding the volume commitments agreed to by conference calling companies and the amounts Farmers agreed to pay each for their volume commitments.]

[57] [Redacted confidential information regarding the volume commitments made by conference calling companies.]

[58] [Redacted confidential information regarding the cancellation notice terms in Farmers' contracts with various conference calling companies.]

[59] *See* Second Supplement at 20 (citing McGuire Deposition at 191-92). *See* McGuire Deposition at 59.

[60] Farmers Document Nos. 0649, 0661, 0667, and 0674.

16. Qwest has convincingly demonstrated that Farmers never intended to treat the conference calling companies as customers of any of Farmers' tariffed services. When it began conducting business with the conference calling companies, Farmers did not enter their account information into its customer billing systems in accordance with its standard business practices for tariffed services.[61] Thus, contrary to Farmers' representation in the underlying proceeding, its regular business records did not indicate that the companies were purchasing the End User Access Service offered in Farmer's tariff.[62] And, despite the tariff requirement that Farmers bill and collect on a monthly basis for tariffed services,[63] Farmers did not contemporaneously bill the conference calling companies for any services that it provided them, including the outbound traffic generated by them.[64] Indeed, Farmers took no steps to bill the conference calling companies until shortly before discovery was due in the underlying proceeding in this case. [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][65]

17. Faced with this (previously undisclosed) proof that it issued backdated bills on the eve of submitting its answer and supporting documents in this case, Farmers asserts that such backdating is merely standard practice and that it issued backdated invoices at that point "in order to comply with [its] interstate End User Access Service tariff, section 69.104 of the Commission's rules, and the filed rate doctrine."[66] But this assertion is unpersuasive given Farmers' conduct throughout its business relationships with the conference calling companies. [Redacted confidential information regarding Farmers' business dealings with a conference calling company.][67] This conduct is inconsistent with the provision of tariffed services, and further evidences Farmers' and conference calling companies' apparent intent from the very beginning to operate in a manner that did not comport with Farmers' tariffed services offering.[68]

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[61] [Redacted confidential deposition citations.]

[62] Answer at vii, 27; Answer Exhibit B, Declaration of Rex McGuire at 3, ¶ 6.

[63] Farmers' Iowa Tariff, Part II, Section K.1.b (Mar. 17, 2006). *See also* Farmers' FCC Tariff at § 2.4.1 (B)(1).

[64] [Redacted confidential deposition citations.] There is no evidence in the record that Farmers provided free outbound calling services to anyone other than the free conferencing companies who purportedly received the same tariffed services from Farmers.

[65] [Redacted confidential deposition citations.] Regarding late charges, [Redacted confidential information. *See* accompanying text.] Regarding collection efforts, *see* Second Supplement Opposition at 18; Responses to Qwest's Interrogatories, File No. EB-07-MD-001 (filed Apr. 7, 2008) ("Farmers' Interrogatory Responses") at 3, 4, 6, and 8 ("Farmers has not attempted to collect unpaid revenues owed to Farmers by any of the conference calling companies").

[66] Farmers' Interrogatory Responses at 2-8. Farmers' reliance upon FCC 96-430, a sealed, unreleased Commission order does not justify its efforts to backbill the conference calling companies. *See* Second Supplement Opposition at 21-22. Contrary to Farmers' contention, moreover, the Commission has not established specific standards regarding the justness and reasonableness of carrier backbilling practices. *See* Opposition to Petition for Reconsideration at 18-19; Second Supplement Opposition at 17. Rather, the Commission determines the justness and reasonableness of a carrier's backbilling practices based upon a review of the specific circumstances on a case-by-case basis. *Kenneth E. Brooten vs. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13350, ¶ 13 (Com. Car. Bur. 1997); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552, ¶ 19 (Com. Car. Bur. 1989). There is no question that the facts relating to Farmers' back billing are very different from the facts that gave rise to the Commission orders relied upon by Farmers.

[67] [Redacted confidential information. *See* accompanying text.]

[68] [Redacted confidential information regarding Farmers' expectations from its business arrangements with the conference calling companies.]

The evidence overwhelmingly demonstrates that Farmers willingly incurred all of the expenses associated with providing the underlying services to the conference calling companies, including the payment of a fee to these companies, in exchange for these companies directing the "free service" they offered to the public to Farmers' exchange.

18. In addition, [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][69] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.],[70] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][71] These actions persuade us that Farmers had no intention of operating in accordance with its tariff, at tariffed rates, in its dealings with the conference calling companies. In the midst of litigation, Farmers generated backdated invoices to create the appearance of compliance with its tariff provisions.

19. Similarly, after litigation commenced, [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies.][72] [Redacted confidential information regarding Farmers' efforts to backdate and amends its agreements with the conference calling companies.][73] Again, however, we are unconvinced that these contract amendments were mere clarifications of the parties' original intent.[74]

20. Instead, it appears that Farmers undertook to persuade the conference calling companies to sign the contract amendments as part of its litigation strategy. [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][75] [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][76] Moreover, the manner in which Farmers unsuccessfully attempted to clarify its agreement with [Redacted confidential information regarding the identity of a conference calling company.] resembled more of a negotiation than simply the documentation of a pre-existing understanding between them.[77] Perhaps most telling, even the contract amendments did not change the way in which Farmers conducted business with the conference calling companies – [Redacted confidential information regarding Farmers' communications with the conference calling companies.][78] Farmers' after-the-fact attempt to document a different business relationship with the conference calling companies is not sufficient

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[69] Second Supplement at 13.

[70] [Redacted confidential information. *See* accompanying text.]

[71] *See* Second Supplement at 13.

[72] Second Supplement Opposition at 22.

[73] *See* Petition for Reconsideration Opposition at 19; Second Supplement Opposition at 17, 22-23. [Redacted confidential information. *See* accompanying text.]

[74] [Redacted confidential information. *See* accompanying text.] Nor has Farmers provided any evidence that the contract addenda reflected the actual understanding of the conference calling companies' relationship with Farmers.

[75] Second Supplement Opposition at 17. *See* McGuire Deposition at 266-71 (acknowledging Farmers' efforts to obtain signed addendum prior to its attorney's meeting with the FCC).

[76] [Redacted confidential information. *See* accompanying text.]

[77] [Redacted confidential information. *See* accompanying text.]

[78] McGuire Deposition at 133.

to counter the evidence of how they actually conducted business.

21. Despite this extensive evidence, Farmers argues that the application of the "filed rate doctrine" to the relationship between itself and the conference calling providers compels a finding that the service it provided to the conference calling companies was pursuant to its tariff and, as a result, we should impute the status of tariffed "customers" to the conference calling companies even if they were taking services under terms that were wholly outside the scope of the tariff.[79] We disagree. The purpose of the filed rate doctrine is to prevent unreasonable and unjust discrimination among similarly-situated customers of a particular common carrier's service, and to ensure that carriers impose like charges for like services.[80] But here, the facts developed on reconsideration show a purposeful deviation from the tariff's terms that allowed the conference calling companies to reap benefits from a free service offered only to them, which thereby enabled Farmers to dramatically increase its access charge billing to Qwest. These facts make apparent that Farmers and the conference calling companies never established - - and in fact purposefully avoided - - a "customer" relationship cognizable under the tariff.

22. Therefore the filed rate doctrine offers Farmers no refuge in its dispute with Qwest and cannot rescue Farmers from its decision to circumvent the tariff.[81] The record demonstrates that the service that the conferencing companies received under their unique arrangement with Farmers bore little resemblance to the services described in the tariff.[82] Because the conference calling companies did not subscribe to the services offered under Farmers' filed tariff, they were not "customers" or "end users."[83] In turn, the service Farmers

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[79] Farmers and Merchants Mutual Telephone Company Opposition to Petition for Reconsideration, File No. EB-07-MD-001 (filed Nov. 13, 2007) at 16-17 ("Petition for Reconsideration Opposition"); Second Supplement Opposition at 16.

[80] For a general description of the filed rate doctrine *see, e.g.*, *AT&T Co. v. Central Office Tel., Inc*., 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, Memorandum Opinion and Order, 23 FCC Rcd 6371, 6388, ¶ 31 (2008). We decline to formally resolve the issue of the application of the filed rate doctrine between Farmers and the conference calling providers because it does not affect the outcome of this case, for the reasons described below. Moreover, binding a third party such as Qwest by the application of the filed rate doctrine between Farmers and the conference calling providers would in no way advance the purpose of the filed rate doctrine.

[81] The facts on reconsideration, as noted, show that the service Farmers provided to the conference calling companies did not conform to Farmers' filed tariff and thus did not create a "customer" relationship under that tariff. Therefore, even if the filed rate doctrine applies between those companies (a question we do not resolve today), the doctrine would not retroactively render the conference calling companies "customers" within the meaning of the tariff because the parties operated outside the tariff's purview. *See Nordlicht v. New York Telephone Co.*, 617 F. Supp. 200, 227-28 (S.D.N.Y. 1985) *aff'd*, 799 F.2d 859 (2d Cir. 1986) *cert. denied*, 479 U.S. 1055 (1987) (observing, in dicta, that "[t]he filed tariff doctrine is designed to protect utilities charging filed rates for lawfully provided service. It is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate [that he should not have had to pay] or which otherwise exacts payment by fraud. There is nothing in the policy underpinnings of the doctrine which would cause it to protect a defendant which unlawfully exacts payment, even at a lawful rate.").

[82] *See supra* paras. 12-14.

[83] Farmers' tariff defines "customer" as any entity that "subscribes to the *services offered under this tariff*." NECA Tariff §2.6; see also supra, §[10] (providing relevant tariff definitions). Farmers conveniently ignores this critical definition when arguing for an overbroad definition of "end user." *See* Farmers and Merchants Mutual Tel. Co. Opposition to Second Supplement to Qwest's Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed June 12, 2008), at 18. Moreover, although we find the definitions of "customer" and "end user" as used in the filed tariff to be unambiguous, we note that "it is well established that any ambiguity in a tariff is interpreted against the party filing the tariff." *Halprin, Temple, Goodman & Sugrue v. MCI*, Order on Reconsideration, 14 FCC Rcd 21092, 21100, ¶ 19 n. 50

(continued …)

provided to Qwest for calls of the conference calling companies was not "switched access service" as defined in the tariff. We therefore find that the filed rate doctrine does not require Farmers to charge Qwest its tariffed switched access charges, nor does it require Qwest to pay Farmers such charges, for terminating the conference calling companies' calls.

23. Farmers also argues that it *could* properly charge Qwest for switched access under its tariff even if the conference calling companies were not end users.[84] We disagree. As explained above, section 6.1 of Farmers' tariff establishes that Switched Access Service is used to terminate traffic to end users:

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path *between a customer designated premises and an end user's premises*.[85]

Farmers argues that, notwithstanding this provision, "[t]here are hundreds of pages in the Kiesling and NECA tariffs that must be construed as a whole to determine the terms and conditions that apply to the provision of 'exchange access.'"[86] Farmers, however, identifies "only a few examples."[87] In particular, Farmers points to NECA tariff sections 6.1.1(A) (Terminating Calling), 6.1.3(A) (Tandem Switched Transport and Local Transport), and 6.1.3(B)(1) (Local Switching), as describing particular access services without specific reference to "end users." Each of these provisions, however, is a subsection of section 6.1, which limits the scope of the tariff to traffic transmitted to end users. It is a well settled rule that "[t]ariffs are to be interpreted according to the reasonable construction of their language."[88] Under such a rule of construction, if a service does not constitute "switched access" within the meaning of tariff section 6.1, then it cannot constitute "switched access" within the meaning of a subordinate subsection. The tariff itself confirms that this is the proper reading. In describing the tariff section numbering system, the "Tariff Users Guide" section[89] of NECA Tariff FCC No. 5 states that "[a]n alpha-numeric numbering plan is used to number tariff regulations and rates. Each level is subordinate to and

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(Continued from previous page)
(1999) (citing *The Associated Press Request for Declaratory Ruling*, File No. TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, ¶ 11 (1979) (quoting *Commodity News Services v. Western Union*, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960)). Thus, construing the language in the filed tariff against Farmers, we find that Farmers has not demonstrated that the conference calling companies, in this instance, constitute customers or end users under its filed tariff.

[84] Second Supplement Opposition at 4-10. Because Farmers raised new arguments in this filing, Commission staff permitted Qwest to file a response. Email from Suzanne Tetreault, Special Counsel, EB, MDRD, FCC, to David Solomon, Russell Hanser, Counsel for Qwest, and James U. Troup, Tony S. Lee, Counsel for Farmers, File No. EB-07-MD-001 (dated July 23, 2008). *See* Qwest Additional Briefing Response. On August 7, 2008, Farmers filed a Motion for Leave to File a Surreply, with a copy of its Surreply attached. Motion for Leave to File Surreply, File No. EB-07-MD-001 (filed Aug. 7, 2008). That motion is granted.

[85] NECA Tariff, § 6.1 (emphasis added).

[86] Second Supplement Opposition at 6.

[87] Second Supplement Opposition at 6-10.

[88] *See Commodity News Services, Inc. v. Western Union Telegraph Co.*, Initial Decision, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960).

[89] Under Commission rules, a carrier may include a tariff user's guide explaining how to use its tariff. 47 C.F.R. § 61.54(e).

dependent on its next higher level."[90] Thus, section 6.1's limitations on the scope of "switched access" must be read into the subsections cited by Farmers, even if not repeated in each of those subsections.

24. Farmers also turns to the Act and Commission rules to bolster its theory of what constitutes switched access under its tariff.[91] Farmers argues that the service it provided Qwest constitutes "switched access" within the meaning of the Act and Commission rules, even if the conference calling companies are not end users.[92] Farmers then asserts that the scope of its tariff "should be construed consistently with the definition of 'exchange access' under federal law."[93] The fact remains, however, that the relevant tariff defines switched access service as providing a communications path *to an end user*.[94] Whether or not this definition is narrower than that used for purposes of the Act and Commission rules, it is nonetheless the definition to which Farmers is bound for purposes of determining whether its charges are in compliance with its tariff.[95] We will not expand the term "switched access" as used in the tariff before us to encompass more than the tariff itself delineates. The unusual facts of this case (*i.e.*, the relationship between Farmers and the conference calling companies) do not alter the fact that Farmers is bound by the terms of its tariff.[96]

25. In sum, Farmers sought to organize its business relationship with the conference calling companies through individualized contracts that involved an exchange of services and business relationship quite distinct from Farmers' tariffed switched access service. And Farmers did not offer the same terms of service to others that requested it. Notwithstanding the back-dated contract amendments that Farmers cites as evidence of the parties' intent that the conference calling companies would purchase service under Farmers' tariff, we find that the evidence of the parties' actual course of dealing demonstrates that there was no purchase of tariffed services. Farmers has not offered any explanation as to why it failed to enter the

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[90] NECA Tariff at 30 (emphasis added).

[91] Second Supplement Opposition at 6-10.

[92] Second Supplement Opposition at 10.

[93] Second Supplement Opposition at 6-7.

[94] *See* n.85 *supra*.

[95] Farmers also asserts that the tariff cannot be read to limit the definition of "end users" to purchasers of tariffed services because it has purportedly used that term in a contrary manner in other parts of the tariff. Second Supplement Opposition at 11. This does not, however, overcome the explicit tariff definition of "end user" as an entity that subscribes to services under Farmers' tariff.

[96] This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g.*, *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp*., Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claim for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

conference calling companies into its customer systems in the normal course of its business. Nor does it offer any persuasive explanation as to why it failed to bill the conference calling companies and collect payment as required under its tariff over its two year relationship with them. The facts that Farmers sent no bills until shortly before the first round of discovery in this case, and then sent no further bills until the Commission ordered additional discovery, constitute very strong evidence that Farmers neither believed that it was providing, nor intended to provide, tariffed services to the conference calling companies. Accordingly, based upon the totality of the circumstances and facts of this case, we conclude that the conference calling companies do not constitute "end users" within the meaning of the tariff provisions at issue.[97]

26. Because we find that the conference calling companies were not "end users" within the meaning of Farmers' tariff, Farmers' transport of traffic to them did not constitute "switched access" under the tariff. We therefore conclude that Farmers' practice of charging Qwest tariffed switched access rates for its termination of traffic from the conference calling companies is unjust and unreasonable in violation of section 201(b) of the Act.[98]

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Qwest's Petition for Partial Reconsideration IS GRANTED IN PART to the extent indicated herein.

28. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Counts II and III of the Complaint ARE GRANTED to the extent indicated herein.

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[97] We note, moreover, that if Farmers had been providing interstate end-user telecommunications services to Qwest or the conference calling companies, then Farmers should have timely reported revenues from those end-user services and paid universal service contributions based on them. 47 C.F.R. § 54.706. [Redacted confidential information regarding Farmers' Form 499 filings.]

[98] As Qwest points out, in a factually similar case involving calls to a chat line, the Commission held that a sham arrangement "designed solely to extract inflated access charges from IXC's" constituted an unreasonable practice in connection with access service that violated section 201(b) of the Act. *Total Telecomms. Servs., Inc., and Atlas Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5733, ¶ 16 (2001), *aff'd in relevant part*, 317 F.3d 227 (D.C. Cir. 2003). Here it also appears that Farmers sought to inflate the access charges to Qwest by paying the conference calling companies for their traffic, rather than charging them for those minutes as the tariff requires. We also uphold the Commission's previous finding that Farmers earned an excessive rate of return. *See* October 2 Order, 22 FCC Rcd at 17980-83. Although the October 2 Order held that Farmers had violated section 201(b) of the Act by virtue of its overearnings, the Commission nevertheless ruled that Qwest could not recover damages because the Farmers tariff at issue was "deemed lawful" pursuant to section 204(a)(3) of the Act. 47 U.S.C. § 204(a)(3); October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 25-27. In its Petition for Reconsideration, Qwest also asked the Commission to rule that Farmers' tariff was not deemed lawful in light of what Qwest refers to as "Farmers' furtive manipulation designed to conceal its rate of return violation." We note that our earlier finding that Farmers' tariff was deemed lawful does not preclude Qwest from collecting damages based on the conclusions in this Order. The tariffed rates are deemed lawful only to the extent that the tariff actually applies, and we have now determined that the tariff *does not apply* to the services that Farmers provided to Qwest with respect to traffic destined for the conference calling providers. Accordingly, it is not necessary to resolve that portion of Qwest's Petition for Reconsideration that asks us to reconsider whether the tariff was deemed lawful.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Farmers' Motion for Leave to File Surreply is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Exhibit B

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

* *

NORTHERN VALLEY COMMUNICATIONS, LLC, a South Dakota Limited Liability Company,

Plaintiff and Counterclaim Defendant,

vs.

SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, a Delaware partnership,

Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff,

vs.

GLOBAL CONFERENCE PARTNERS, LLC,

Third-Party Defendant.

CIV. 08-1003-KES

DEFENDANT AND COUNTERCLAIM PLAINTIFF'S RESISTANCE TO NORTHERN VALLEY'S MOTION TO STAY CASE FOR PURPOSE OF REFERRAL OF ISSUES TO THE FEDERAL COMMUNICATIONS COMMISSION

* *

Comes now the Defendant and Counterclaim Plaintiff Sprint Communication Company Limited Partnership ("Sprint") and submits this brief in resistance to Northern Valley Communications, Inc.'s ("Northern Valley") Motion to Stay Case for Purpose of Referral of Issues to the Federal Communications Commission ("FCC") (Doc. No. 92).

More than twenty two months after filing its complaint against Sprint in this action, and just as discovery is set to ramp up following the entry of a protective order, Northern Valley now asks this Court to stay its action against Sprint and refer certain issues to the FCC. It offers no explanation for this sudden change in course now, when

other traffic-pumping litigation has been ongoing in court for years. The only plausible new explanation for referral – and one reason Sprint opposes referral – is that the FCC's recent order on reconsideration in *Farmers*[1] means that Northern Valley will almost certainly lose its tariff claims so long as the facts of its traffic-pumping scheme are disclosed in discovery and understood. There is a far greater likelihood that these facts will be discovered in court proceedings than in FCC proceedings, where discovery procedures are more limited. Northern Valley's efforts at procedural gamesmanship, seeking to refer issues related to its own claims to the FCC more than two years after bringing its action in court, must be rejected.

I. The Presumption Is Against Referral.

While there is "no fixed formula" for invoking primary jurisdiction, courts should ordinarily be "reluctant . . . to invoke the doctrine because added expense and undue delay may result." *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998); *accord Alpharma, Inc. v. Pennfield Oil Co.*, 411 F.3d 934, 938 (8th Cir. 2005); *United States v. McDonnell Douglas Corp*., 751 F.2d 220, 224 (8th Cir. 1984). In every case, courts "must weigh the benefits of obtaining the agency's aid against the need to resolve the litigation expeditiously and may defer only if the benefits of agency review exceed the costs imposed on the parties." *Wagner & Brown v. ANR Pipeline Co*., 837 F.2d 199, 201 (5th Cir. 1988). The benefits will not generally exceed the costs in cases involving straightforward questions of tariff interpretation as opposed to complex policy questions. Indeed, factors bearing on primary jurisdiction include whether the case

[1] *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co.*, Second Order on Reconsideration, FCC 09-103, 48 Commc'ns Reg. (P&F) 1314 (Nov. 25, 2009) ("*Farmers III*").

involves technical or policy considerations within the agency's particular expertise and the need for "uniformity and consistency within the particular field of regulation." *Access*, 137 F.3d at 608; *see also Nat'l Commc'ns Ass'n v. Am. Tel. & Tel. Corp*. 46 F.3d 220, 222 (2d Cir. 1995). Thus, courts generally refer issues only when there is "an issue of first impression" or "a particularly complicated issue that Congress has committed to a regulatory agency." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008).

Moreover, the presumption against a primary jurisdiction referral is particularly strong before there has been factual development in a case. Only "[w]here the issues raised by a complaint *necessarily* implicate policy concerns requiring application of the primary jurisdiction doctrine," may "a federal court . . . suspend its resolution of those issues in favor of their referral to the governing agency." *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1088 (9th Cir. 2006) (emphasis added).

II. Northern Valley's Motion Is Barred By Threshold Objections.

A. Northern Valley Has Lost Key Motions That Dictate The Result Here.

As a preliminary matter, Northern Valley's primary jurisdiction motion should be rejected because it is inconsistent with earlier decisions by this Court. First, while Northern Valley here argues for referral based on the purported need to establish a rate for the call traffic at issue here, Northern Valley fails to note a prior decision that rejected a motion that Global Conference Partners made to refer Verizon's counterclaims in a similar traffic-pumping case involving Northern Valley. *Northern Valley Communications v. MCI Communications Services*, No. 07-cv-01016-KES, Doc. No. 76, at 21 (D.S.D. June 26, 2008). Similarly, in Sancom's case against Sprint, after Sancom argued that Sprint's counterclaims should be referred if they were not dismissed, *see* Sancom Brief in Support of Motion to Dismiss at 17-20, *Sancom, Inc v. Sprint*

Communications Company, No. 07-cv-04107-KES, Doc. No. 13 (D.S.D. Oct. 2, 2007), Judge Piersol denied the motion. *See* Memorandum Opinion and Order, *Sancom, Inc v. Sprint Communications Company*, No. 07-cv-04107-KES, Doc. No. 64 (D.S.D. March 24, 2009).

These same decisions are fully applicable here. And Northern Valley does not explain why these prior decisions should be reconsidered under this Court's standards, *see, e.g.*, *United States v. Hazelrigg*, No. 08-cr-50062-04-KES, 2009 WL 3617562, at *1 (D.S.D. Oct. 29, 2009) (noting that pretrial matters may be reconsidered only "where it has been shown that the ruling is clearly erroneous or contrary to law"). Northern Valley also fails to explain what could justify a referral of any issues in this case now that would not also have justified a referral immediately after Northern Valley filed its complaint; yet Northern Valley failed to ask for a referral in this case before now. Northern Valley points to a number of other pending cases raising similar issues under other carriers' tariffs, which it claims raise issues of "inconsistent rulings." But some of those (including the *Farmers* case) were pending before this case began – that fact has not changed recently. Moreover, from the very time it filed its complaint, Northern Valley asserted state law claims as an alternative theory to attempt to collect a rate from Sprint for the call traffic in dispute that was other than the tariffed rate.

All that has changed is that after the *Farmers III Order*, Northern Valley now understands that it is exceedingly unlikely to prevail on its tariff claim if this case proceeds in court and there is full discovery. It has therefore asked for referral even of the tariff issue in the hope that it can prevail at the FCC, where discovery is quite circumscribed by hiding the facts of its relationship with conference call and chat line

companies ("CCCs"). *See* 47 CFR § 1.729 (providing for discovery procedures that, for example, include only 10 interrogatories and do not automatically include depositions).

The dangers of referral are apparent from *Farmers* itself. There, based on the evidence obtained in discovery at the FCC, the FCC initially concluded that Farmers *was* providing a tariffed access service. Only because Qwest obtained information in other proceedings that contradicted evidence before the FCC did the FCC ultimately receive an accurate understanding of the facts and conclude that Farmers was not providing an access service. Northern Valley may hope that referral in this case will lead to a decision like the initial decision in *Farmers*, finding the existence of a tariffed service based on a misunderstanding of the facts. But that is hardly an argument in favor of referral. To the contrary, the prior decisions rejecting referral, and Northern Valley's failure even to ask for referral of issues related to its own claims until now, counsel against referral based upon Northern Valley's present motion.

There is another decision made by this Court that also precludes referral. In a parallel traffic pumping case, this Court has already decided that Sancom has no viable claims outside of its tariff, that the unjust enrichment and quantum meruit claims of Sancom and Qwest must be dismissed as inconsistent with the filed tariff doctrine, thus eliminating any "rate" questions that could form the basis of a referral. *Sancom, Inc. v. Qwest Commc'ns Corp.*, 643 F.Supp.2d 1117, 1125, No. Civ. 07-4147-KES, Doc. No. 137, at 10 (D.S.D. June 19, 2009); *Splitrock Properties, Inc. v. Qwest Commc'ns Corp.*, No. Civ. 08-4172, Doc. No. 28, at 3 (D.S.D. Aug. 28, 2009) (reaching similar result as to

Splitrock's claims).[2] While this Court has not yet issued a ruling on Sprint's similar motion to dismiss these claims in the present case, there is no possible reason that the results in the cases should differ. The fact that Judge Kornmann reached a different result in Qwest's case against Northern Valley is irrelevant; that decision has no collateral estoppel effect on Sprint, which was not a party, does not change the result already reached by this Court in the Sancom and Splitrock cases, and does not undermine the core reasoning of this Court in those decisions.

Sancom has asked for reconsideration of this Court's decision dismissing its unjust enrichment claim against Qwest in Civ. 07-4147. In doing so, Sancom argues that in footnote 96 of *Farmers III*, the FCC held that a service is not free simply because it is not in a tariff. Mem. in Support of Mot. for Recon. (Doc. #207), No. Civ. 07-4147-KES (D.S.D.) at 8-9. But Sancom already made the same argument to this Court, relying on the *New Valley* decision, the same one that *Farmers III* cites in footnote 96. And this Court already found that argument to be inapposite to the question of the viability of an unjust enrichment claim. As this Court explained, "[n]or should the court consider Sancom's claim that the FCC has held that a service is not free simply because it is not in a tariff. This argument is inapposite to the court's analysis of whether the filed rate doctrine bars Sancom's claim for unjust enrichment." *Sancom*, 643 F.Supp.2d at 1126

[2] Qwest moved to dismiss Sancom's unjust enrichment claim and three other state law claims. It did not move to dismiss a separate claim alleging Qwest "breach of implied contract resulting from violation of tariffs," which appears to turn on the question of whether Sancom complied with the terms of its tariff. 643 F.Supp.2d at 1123. To the extent that Northern Valley's implied contract claim is something other than the equivalent of its tariff claim, it is not viable for the same reasons as the other state law claims. The Court's analysis dismissing the unjust enrichment claim made clear that LECs may not recover on a quantum meruit claim as an alternative to recovery under the tariff, pursuant to to the filed tariff doctrine. *See id.* at 1125-26.

n.5.[3] Nothing has changed since, making reconsideration inappropriate. *Gateway, Inc. v. Compaion Prod., Inc.*, 2003 WL 23532885, *2 (D.S.D. Dec. 19, 2003).

For that reason, and for others discussed below, Sancom should not prevail on its reconsideration motion. And unless this Court grants that motion, Northern Valley has no claims that even potentially could require setting of a rate. Thus, for now, there is no basis for a referral on the "rate" issue.

B. Northern Valley's Motion Relies On Arguments That Are Premature To Address.

Northern Valley's current request also relies on arguments that are premature for the Court to consider. As explained, there have been no developments that would potentially justify referral now that would not also have justified referral at the beginning of this case. In that sense, Northern Valley's motion is too late. But it is also too early, because the developments that even potentially could raise issues justifying referral of the questions Northern Valley has raised have not yet occurred. Indeed, each of the questions on which Northern Valley requests referral is premature.

Northern Valley first asks for referral of the question whether it is providing service under its tariffs. It does so despite previously having asked for dismissal of Sprint's counterclaims on the basis that the FCC's prior decisions in *Farmers* made clear that the tariff issues could be resolved against Sprint as a matter of law. Now that it has been proved wrong, and the FCC has dealt a devastating blow to its tariff claim, Northern Valley has reversed course, arguing the tariff issues require agency expertise. But prior to discovery, there is no way to know whether there are any complex tariff questions that

[3] The court referred to FCC holdings without specifically referencing *New Valley*, but the holding referred to is the same one Northern Valley cites here.

must be resolved in this case, that require agency expertise, and that were not already addressed in *Farmers III*. Before discovery, there is no way to know whether there are *any* differences from *Farmers III*. Because the issues raised by the complaint do not "*necessarily* implicate policy concerns requiring application of the primary jurisdiction doctrine," referral is inappropriate. *Davel Commc'ns*, 460 F.3d at 1088. As the D.C. District Court has explained, where discovery can crystallize litigated issues, the case should remain in court for discovery to proceed, and it has declined to refer cases in such circumstances. *See APCC Services, Inc. v. WorldCom, Inc.*, 305 F.Supp.2d 1, 20-21 (D.D.C. 2001); *United States v. AT&T Co.*, 461 F.Supp.1314 (D.D.C. 1978).[4] Northern Valley's request for referral of the tariff issue is therefore premature.

The additional questions on which Northern Valley has asked for a referral are also premature. Northern Valley asks for referral of questions concerning whether it is entitled to collect anything from Sprint if it is providing a non-tariffed service, and if so, what the rate would be. But even if this Court were for some reason to reconsider its holding that non-tariff claims are barred, which it should not do as discussed further below, referral would be inappropriate at this stage of the proceedings before it is clear that the rate questions will have to be answered.

The questions of whether Northern Valley is entitled to collect for a non-tariffed service and the rate at which it could collect only become relevant after this Court has evaluated -- and rejected -- Northern Valley's claim that it is entitled to collect under its

[4] It has explained that "in the event that it *should subsequently appear after the issues have been crystallized*" that referral is necessary, it will reevaluate referral at that time. *AT&T*, 461 F.Supp. at 1329. Other courts have reached similar conclusions. *See, e.g.*, *Sinclair Television Group, Inc. v. Mediacom Communications Corp.*, No. Civ. CCB-07-1001, 2008 WL 276533 (D. Md. Jan. 29, 2008).

tariff. Even at that point, for Northern Valley to collect an alternate rate under its state law theories, it would have to show that it had established the elements of those claims. For example, to establish its unjust enrichment claim, Northern Valley would have to show that Sprint accepted or acquiesced in the benefit, *Sancom*, 643 F. Supp. 2d 1117, and an implied contract claim also requires a showing of the meeting of the minds, which Northern Valley could not show here given that Sprint had no choice but to send the traffic. *Cf. Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, __ F.Supp.2d __, 2009 WL 3164856, at *9 (D.S.D. Sept. 25, 2009) (Kornmann, J.) (refusing to dismiss Northern Valley's non-tariff claims but stating that "[t]here may be serious doubts as to whether Northern Valley could ever prove the element of inequity"). Northern Valley would also have to show that its claims were not barred by the filed tariff doctrine. It would make no sense for this Court to refer to the FCC the question of what a reasonable rate would be unless it has first determined that such a question is relevant. Nor, for the same reasons, is it likely the FCC would consider the questions at this point.

III. Referral Is Not Justified For Any Of The Questions Referenced By Northern Valley.

Northern Valley is also wrong on the merits of its argument for referral even if now were the time to evaluate the issue. None of the questions that it asks be referred justify referral. The tariff and preemption questions are not ones that require agency expertise. And the rate question does not justify referral, because there is no need for a determination of a reasonable rate.

A. Referral Is Not Appropriate To Decide Claims Under The Tariff.

Northern Valley's argument for a primary jurisdiction referral focuses almost exclusively on the FCC's expertise in evaluating rates. But the first question that

Northern Valley asks to be referred to the FCC is whether it is entitled to collect the amount it has billed to Sprint pursuant to its tariffs. That claim does not require any assessment of rates. It requires an assessment of whether Northern Valley is providing an access service under its tariff. That question is almost certain to be a straightforward one after discovery given the FCC's recent *Farmers III Order*.

While there are some instances in which tariff interpretation will require agency expertise and referral is appropriate, courts often resolve questions whether particular charges were authorized by a tariff and do so even if other portions of the case are referred. *Advamtel, LLC v. AT&T Corp.*, 105 F.Supp.2d 507, 511 (E.D. Va. 2000). *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002). That is because enforcement of a tariff has similarities to contract interpretation and thus differs from a challenge to the reasonableness of a tariff. *Advamtel*, 105 F.Supp.2d at 511; *see also Access*, 137 F.3d at 608. In fact, this Court recently interpreted some of the same tariff terms at issue here. *See Alliance Communications Cooperative, Inc. v. Golden West Telecommunications Cooperative, Inc.*, Civ. No. 06-4221-KES, __ F.Supp.2d __, 2009 WL 3233711 (D.S.D. Sept. 29, 2009). While another district court in *Tekstar Communications, Inc. v. Sprint Communications Co. L.P.*, No. Civ. 08-1130, 2009 WL 2155930, at *3 (D. Minn. July 15, 2009), directed a primary jurisdiction referral of tariff issues, that decision was made after discovery was nearly concluded and prior to the FCC's *Farmers III* Order. Once an agency has provided sufficient guidance on an issue, there is no need for referral. *See, e.g., United States v. Great Northern Ry. Co.*, 337 F.2d 243, 247-48 (8th Cir. 1964).

In the *Farmers III* order the FCC interpreted a tariff with the very same definition of switched access service as exists in Northern Valley's tariff. After concluding the key tariff terms were "unambiguous," the FCC concluded that an access service is only provided if traffic terminates to an end user, which must be a customer that purchases service under the access tariff. *Farmers III*, ¶¶ 24-26. The FCC determined on facts similar to those that Sprint has alleged exist here that Farmers was not providing an access service, because the conference call and chat line providers were not end user customers.

The FCC reached this conclusion for a number of reasons. As Northern Valley notes, "a key part of the Commission's analysis" is whether "conference call companies made net payments" to the LEC, here Northern Valley. Mem. at 6. But assessing whether conference call companies made net payments to Northern Valley is a simple factual question that does not require FCC expertise. That is so with respect to application of the FCC's conclusions more generally. Moreover, Northern Valley makes virtually no attempt to show the facts here differ in some important way from those in *Farmers* and that evaluation of any such factual distinction will require application of additional agency expertise.[5] So while Northern Valley is correct that *Farmers III* requires a fact-specific inquiry, it fails to explain why anything about that inquiry will require agency expertise in this case.

[5] Northern Valley argues in a footnote that the FCC's determination turned in part on the fact that Farmers had previously backdated certain documents. Northern Valley Mem. at 7 n. 4. But while backdated documents misled the FCC in its initial order into finding a customer relationship, the revelation that the documents had been backdated merely made apparent that no such relationship existed -- that the conference calling companies were not paying for local service from Farmers but rather were receiving net payments from them. Moreover, absent discovery, there is no way even to know whether backdating has occurred here.

Moreover, now that the FCC has established the general framework to resolve the question of whether an access service has been provided, the fact-specific nature of individual cases hurts Northern Valley's arguments. Northern Valley notes the existence of twenty-four similar cases. Referring all of those cases to the FCC would flood the FCC with cases, almost certainly resulting in vast delays. But resolving the tariff claims in court does not pose any significant risks of inconsistent results, since any different results in applying the *Farmers III* decision will be based on differences in facts in individual cases. Indeed, this Court previously rejected a motion to refer Verizon's counterclaims on the basis that "the guidance provided by the FCC in *Farmers* will minimize the risk of inconsistent rulings when this court has a developed record before it." *Northern Valley Communications v. MCI Communications Services*, No. 07-cv-01016-KES, Doc. No. 76, at 21 (D.S.D. June 26, 2008). That is even more clearly true now that the ruling has been announced.

Northern Valley also argues that *Farmers III* is subject to reconsideration and appeal. It is not clear how that helps Northern Valley's argument for referral, since for now, referral will result in the FCC's application of *Farmers III*. Of course, in the very unlikely event that *Farmers III* was reversed, the law to be applied would change. But that would require reevaluation of this case regardless of whether the case remains pending in this Court or issues have been referred. Northern Valley fails to offer any explanation of how referral of the tariff question at this stage would benefit this litigation.

B. The Question of Whether Northern Valley's State Law Claims Are Barred Should Not Be Referred.

The second question on which Northern Valley asks for a referral is the proper "classification" of calls to CCCs if they are not covered by Northern Valley's tariff and

whether Northern Valley is entitled to compensation for those services. Northern Valley offers no explanation of how the "classification" of the call traffic matters for purposes of deciding any potential compensation to Northern Valley. As for the question of whether Northern Valley is entitled to compensation for routing calls to its CCC business partners, that question has both a state law component – whether the elements of Northern Valley's state law claims have been met – and a federal law component, whether Northern Valley's state law claims are barred by the filed tariff doctrine.

The FCC has no jurisdiction to answer the state law question. And, with respect to the federal question, this Court has already provided an answer: Northern Valley's unjust enrichment and quantum meruit claims must be dismissed as inconsistent with the filed tariff doctrine. *Supra* at pp. 5-6. Thus, as noted at the outset, for now, there is no possible basis for a referral on the "rate" issue.

Moreover, Northern Valley does not point to any case where the question of whether a state law claim was barred by the filed rate doctrine was referred to the FCC and the FCC then decided the question. In contrast, courts routinely decide the statutory question of whether the filed rate doctrine bars state law claims, as is apparent from the multitude of cases this Court cited in its filed tariff decisions. Indeed, in response to Sprint's motion for dismissal of its state law claims, and Qwest's similar motion, Northern Valley did not even ask for referral of the question of whether those claims were barred by the filed rate doctrine.

The decisions of other courts in this Circuit cited by Northern Valley do not bear on the decision of the referral issue. While Judge Kornmann did reach a different result than this Court on the state law claims, he also suggested that Northern Valley might well

be unable to establish the prerequisites of such a claim. *Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, __ F.Supp.2d __, 2009 WL 3164856, at *9 (D.S.D. Sept. 25, 2009). And to the extent any inconsistency remains at the end of the cases, the vehicle for resolution is appeal to the Eighth Circuit, not referral to the FCC. Moreover, while the court in *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co. L.P.*, 2009 WL 2155930, at *3, referred to the FCC the question of whether Tekstar could recover compensation if its tariffs did not cover its traffic-pumping activities, it is not at all clear that the FCC will decide this question, rather than sending it back to the court. To repeat, Northern Valley does not point to any instances where the FCC decided such a question on a referral. And if the FCC does decide the question in *Tekstar*, the court can evaluate whether that impacts the court's view without any need for a separate referral.

C. The Question Of What Rate Is Reasonable Does Not Have To Be Decided At All.

The third question on which Northern Valley asks for a referral is what the reasonable rate would be for its services if they are not tariffed services. Sprint agrees that evaluating rates is an agency function. But that does not require referral. As a preliminary matter, as explained at the outset, Northern Valley's request for a referral of this rate question is premature. Even were this Court to reconsider its conclusion that Northern Valley's non-tariff claims are barred, the question of a reasonable rate would become relevant only after it has been established that Northern Valley is not providing a tariffed service, and only if it were then established that the factual predicates for Northern Valley's non-tariff claims have been met, and that such claims are not preempted. Referral now would make no sense and would likely result in the FCC refusing to answer the referred questions.

But even aside from the timing, referral of the "reasonable rate" question is unwarranted, because this case will never require establishment of a reasonable rate. If Northern Valley has not provided a tariffed service (and it has not), it is entitled to nothing, as this Court has already explained at great length in granting Qwest's motion to dismiss the state law claims of Sancom and Splitrock.

1. *Farmers III* Footnote 96 Is Inapposite To State Law Claims Brought In Court.

Northern Valley's argument that it is entitled to collect for a non-tariffed service is based almost entirely on a single footnote, footnote 96, in the FCC's recent *Farmers III Order*, at the end of an order that found that Farmers was not entitled to collect under its tariff. But even if that footnote meant what Northern Valley says, and it does not, *see infra* pp. 20-23, it would not enable Northern Valley to recover on its non-tariff claims brought in this Court. *Farmers* was an action brought against a LEC at the FCC seeking damages related to amounts the LEC had already collected. It has no bearing on whether Northern Valley can collect in court under state law for non-tariffed services for which long-distance carriers have refused to pay. Northern Valley clearly cannot.

This Court already correctly found inapposite the identical argument Northern Valley now makes based on the *Farmers III* footnote but previously made based on *New Valley*. *See supra* p. 6 . This Court was right to do so. First, with the exception of its tariff claim, Northern Valley's claims are state law claims. But the rates a carrier is permitted to charge are controlled by federal law, not state law. It is the federal standard of "reasonableness" in Section 201 of the Communications Act, as interpreted by the FCC, not the damages standards of state unjust enrichment or implied contract law, that controls rates. Northern Valley implicitly acknowledges as much in asking for referral of

the rate question to the FCC and relying on footnote 96 of *Farmers III*. But Northern Valley's only claims to a rate outside the tariff are state law claims. Those claims are preempted.[6]

Second, Northern Valley's claim for a "reasonable" rate fails because a court has no authority to set rates. To be sure, as Northern Valley argues and as this Court previously noted, Northern Valley was required to bring its collection action in court rather than at the FCC. Northern Valley Mem. at 14 n.7; *Northern Valley Communications v. MCI Communications Services*, No. 07-cv-01016-KES, Doc. No. 76, at 21 (D.S.D. June 26, 2008) (rejecting a motion to refer Verizon's counterclaims to the FCC in part on the basis that "*the court* must rule on plaintiffs' collection action ") (emphasis added).[7] But this just shows why this Court was correct in holding that state law claims such as Northern Valley's are not viable. The Supreme Court has made clear that dismissal, rather than referral, is required where a plaintiff asks for referral of issues related to its own claims in circumstances where the court cannot establish the reasonable rate requested but the claim could not have been brought at the agency in the first

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[6] *See, e.g., Boomer v. AT&T Corp.*, 309 F.3d 404, 418 (7th Cir. 2002) (finding that even in a fully detariffed environment where tariffs were not even permitted, state law challenges to communications contract were preempted because Section 201 "demonstrate[es] Congress's intent that federal law govern the validity of the terms and conditions of long-distance service contracts."); *Dreamscape Design, Inc. v. Affinity Network, Inc.*, 414 F.3d 665, 674-75 (7th Cir. 2005) (same); *In re Policy and Rules Concernign the Interstate, Interexchange Marketplace, Order on Reconsideration*, 12 FCC Rcd. 15,015, 15,057 ¶ 77 (1997) (in fully detariffed environment, state law governs issues of contract formation but "Communications Act continues to govern determinations as to whether rates, terms and conditions of interstate. . . services are just and reasonable, and are not unjustly or unreasonably discriminatory."). Certainly, state law has no applicability to rates in an environment like that here, where tariffing is permissible and Northern Valley has chosen to file a tariff.

[7] *See also Qwest Services Corp. v. FCC*, 509 F.3d 531,537 (D.C. Cir. 2007); *AT&T Co. v. The Peoples Network, Inc.*, 1993 WL 248165 (D.N.J. 1993); *U.S. Telepacific v. Tel-America*, 19 FCC Rcd 24552, 24555 (2004).

instance. *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951).

Northern Valley's unjust enrichment claims and implied-in-fact contract claims are at their core claims to an alternative "reasonable" rate, which would require a determination of "the value of the services rendered" in the past. *Sancom*, 643 F.Supp.2d at 1126. But it is a bedrock principle of communications law that courts cannot establish rates. As the Supreme Court explained in considering a statute analogous to the Communications Act,

> the [reasonableness] prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce. Petitioner. . . .cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

Montana-Dakota Utilities Co., 341 U.S. at 251.[8] Indeed, this Court dismissed Sancom's similar state law claims against Qwest on the basis that the purpose of the filed tariff doctrine is to preserve the agency's authority to determine the reasonableness of rates,

[8] The Court further explained that "[t]o reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller.'" 341 U.S. at 257. *See also City of Minneapolis v. Rand*, 285 F. 818, 821 (8th Cir. 1923) ("Rate making is no function of the courts"); *Montgomery v. Chicago, B.&Q.R. Co.*, 228 F. 616, 619 (8th Cir. 1915) ("Courts have no power to fix rates or establish practices and cannot interfere with those fixed and established by the Commission except in cases where the orders are void"); *Brooklyn Union Gas Co. v. Transcontinental Gas Pipe Line Corp.*, 201 F.Supp.673, 678-79 (S.D. Tex. 1960) ("courts do not have the authority to establish rates").

and to make sure that regulated entities charge only rates that have been filed, and to prevent discrimination. *See, e.g., Sancom*, 643 F.Supp.2d at 1126.

Northern Valley itself appears to agree with this, arguing that it is for just such reasons that this Court must refer the rate issue to the FCC. But that is no answer at all. The limitations of the Communications Act and filed tariff doctrine cannot be avoided through the simple vehicle of referral. Otherwise, rather than dismissing damages claims that required assessments of rates, courts in filed tariff cases would have referred the damages questions to the FCC. But that is not what courts have done. In *Arkansas Louisiana Gas*, for example, plaintiffs requested damages that amounted to "nothing less than the award of a retroactive rate increase based on speculation about what the Commission might have done had it been faced with the facts of this case." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981). The Supreme Court did not refer the case to the FCC to see what rate it would have set. Rather, it found the claims barred by the filed tariff doctrine. *See also infra* n. 10 (cases dismissing claims based on filed tariff doctrine). Referral was not a solution to the filed tariff problem because, among other reasons, the claims that were brought were not ones over which the agency would have had jurisdiction.

Similarly, Northern Valley's claims to an alternative rate are not ones over which the FCC would have jurisdiction. Northern Valley's claims to an alternative rate are state law claims that have damages standards that are not equivalent to the federal standard for reasonable rates and that the FCC has no jurisdiction to decide. Northern Valley's claims also constitute collection actions by a carrier against a customer, which Northern Valley acknowledges, "it could not have asked the FCC to consider . . . **directly**." Mem. at 14 n.

7 (emphasis added). But the fact that Northern Valley could not have brought its claims directly at the FCC precludes it from obtaining relief in court on claims that require FCC action to decide, as the Supreme Court has explained:

> we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. But the fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order ***indirectly*** to obtain Commission action which Congress did not allow to be taken directly.

Montana-Dakota Utilities, 341 U.S. at 254 (emphasis added). But it is exactly such indirect FCC action that Northern Valley seeks. Mem. at 14 n.7.

Northern Valley's request for a primary jurisdiction referral of the ostensible rate issue fails for one final reason as well. Even if the FCC had jurisdiction to resolve the type of alternative claims Northern Valley has brought, collection claims predicated on state law, the FCC has no power to grant the relief Northern Valley seeks: retroactive establishment of a reasonable rate. Thus, the Supreme Court observed of the Federal Power Commission in interpreting an analogous statute, that it "has no power to alter a rate retroactively. When the Commission finds a rate unreasonable, it 'shall determine the just and reasonable rate. . . to be *thereafter* observed and in force.'" *Arkansas Louisiana Gas Co.*, 453 U.S. at 578 (footnote omitted; citation omitted; ellipsis in original). In applying this rule in the communications context, the Eighth Circuit explained that, "[t]he rule against retroactive ratemaking prohibits a commission from prescribing rates to recoup a utility's past losses for transactions that have already taken place." *Qwest Corp. v. Koppendrayer*, 436 F.3d 859, 863 (8th Cir. 2006); *see also Pacific Gas and Electric Co. v. FERC*, 373 F.3d 1315, 1319-20 (D.C. Cir. 2004); *Illinois*

Bell Tel. Co. v. FCC, 966 F.2d 1478, 1482 (D.C. Cir. 1992); *In re ACC Long Distance Corp. v. Yankee Microwave, Inc.*, 8 FCC Rcd 85, 87, ¶ 10 (1993). Referring the "rate" issue to the FCC thus would serve no purpose for the additional reason that the FCC could not impose such rates.

2. *Farmers III* Does Not Require a Reduction in Damages Even For Federal Claims Brought Against a LEC At The FCC.

Even for claims brought against a LEC at the FCC to recover amounts already paid, footnote 96 does not mean that the LEC is entitled to compensation. In footnote 96, the FCC merely said that in the initial phase of the proceeding it was not resolving the question of Qwest's damages; it was not yet "say[ing] that Farmers is precluded from receiving any compensation at all." *Id.* It is ironic that Northern Valley relies on footnote 96 as the basis of its motion given that it simultaneously argues that the whole *Farmers III Order* is not final because it *potentially* could be reconsidered or appealed. But footnote 96 is the one part of the Order in which the FCC made clear it was simply pushing the damages question into a subsequent phase in the proceeding.

In that phase, once it focuses on the non-tariff issues, the FCC will likely make clear that Qwest is entitled to a full refund. Any other result would be inconsistent with the Communications Act. Farmers, an incumbent local exchange carrier, is precluded by Section 203(c) of the Communications Act from charging any amount other than what it has tariffed. Section 203 requires carriers to file tariffs, and Section 203(c) states that "no carrier shall . . . charge, demand, collect , or receive a greater or less or different compensation for such communication, or for any service in connection therewith,

between the points named in any such schedule than the charges specified in the schedule then in effect." There is nothing that creates an exception to that clear mandate.[9]

Thus, this Court has quoted the Eighth Circuit for the proposition that "the terms of the federal tariff are considered to be the law and to therefore *conclusively and exclusively* enumerate the rights and liabilities as between the carrier and the customer." *Sancom*, 643 F.Supp.2d at 1124 (quoting *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006) (quotation marks omitted; emphasis added)). Indeed, in *Iowa Network Services*, the court held that, even thought the service in question was *not* yet encompassed in a filed contract or tariff, because the "the regulatory process *contemplates* that an express contract will ultimately result," the service in question was one expected to be contained in agreements filed with state commissions and subject to regulatory oversight. 466 F.3d at 1098. Similarly, in *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 681 (8th Cir. 2009), the Eighth Circuit explained that "[t]he services that Firstcom claims it was entitled to were *not covered* by the parties' interconnection agreements, and, *for this reason*, recovery is precluded by the filed rate doctrine." (emphasis added).

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[9] Northern Valley may argue that Section 203 does not apply, because CLEC access charges have been permissively detariffed. But that argument is one this Court has already rejected, explaining that a tariff governs the relationship once it has been filed, and, in any case, the alternative to a filed tariff is a negotiated contract, which Northern Valley does not allege exists. 643 F.Supp.2d at 1124; *see also Freedom Ring Commc'ns., LLC v. AT&T Corp.*, 229 F.Supp.2d 67, 70 (D.N.H. 2002); *In re Access Charge Reform (Eighth Report and Order)*, 19 FCC Rcd 9108 ¶ 4 (2004) (explaining that in some instances where their rates are above a certain benchmark, CLECs *cannot* file tariffs but in these instances the rates "may be imposed only pursuant to a negotiated agreement."). Nothing in *Farmers* bears on this Court's conclusion that a tariff controls in a permissive detariffing environment once it has been filed, since *Farmers* is a case about an incumbent local exchange carrier, which is indisputably subject to the tariff requirement. Moreover, if the service here is not an access service at all, Northern Valley does not show it has been even permissively detariffed.

Indeed, Supreme Court precedent makes clear the fallacy of Northern Valley's argument that the filed tariff doctrine has no relevance to non-tariffed services. *See Am. Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 221-26 (1998). *Central Office* involved a promise to provide what was in effect a different service than that which was tariffed – an expedited service with different billing arrangements. But the Supreme Court held that the filed tariff doctrine barred claims to enforce those non-tariffed promises. *Id.* at 224-26. As this Court recognized, *Sancom*, 643 F.Supp.2d at 1126, and as other courts have repeatedly recognized, a carrier cannot avoid the strictures of the filed tariff doctrine by failing to include a service in its tariff.[10]

In support of the *possibility* that Qwest might not be able to collect in damages 100 percent of what it had paid Farmers, the FCC cited its prior decision in *New Valley*. *Farmers III*, ¶ 24 n. 96. *New Valley*, which was never evaluated on appeal, concerned an inadvertent drafting error that led to failure to include a particular service in a tariff. It is thus very different from the circumstances here, or in *Farmers III*, where as the FCC

[10] *See, e.g., MCI Worldcom Network Servs., Inc. v. Paetec Commc'ns, Inc.*, No. Civ. 04-1479, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005) (explaining that "Paetec has a strict obligation to specify its services and rates in its tariffs, and any claim that would allow Paetec to charge MCI outside the tariff is prohibited by the filed tariff doctrine."), *aff'd MCI Worldcom Network Servs., Inc. v. Paetec Commc'ns*, 204 F. App'x 271, 272 (4th Cir. 2006) (affirming on the basis of "the reasoning of the district court."); *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1193 (10th Cir. 2007) ("Because [a carrier] failed to file []rates" for its cellular operations, which was required under state law, the carrier is "precluded from receiving terminating access charges for cellular calls until such tariffs are properly filed") (internal quotation marks omitted); *Americana Expressways Inc. v. Am. Pac. Wood Prods., Inc. (In re Americana Expressways Inc.)*, 133 F.3d 752, 758 (10th Cir. 1997) (a carrier "with no filed rate" has "no basis for an undercharge suit" because it failed to comply with tariffing rules); *Hypercube LLC v. Comtel Telcom Assets LP*, No. Civ. 3:08-CV-2298, 2009 WL 3075208, at *4 (N.D. Tex. Sept. 25, 2009) (a carrier "cannot – as a matter of law" recover fees when it has no tariff of its own on file); *Marcus v. AT&T Corp.*, 138 F.3d 46, 60-62, 64 (2d Cir. 1998) (dismissal of unjust enrichment based on the defendant charging the plaintiff the defendant's filed rates).

found, the entire scheme was a sham arrangement designed to inflate access charges. *Farmers III*, ¶ 26 n.98.[11] There is thus nothing in *New Valley* or *Farmers III* that establishes that Northern Valley can receive compensation for a non-tariffed service in contravention of the requirements of Section 203 and the filed tariff doctrine. In any case, as discussed above, this Court already correctly held *New Valley* inapposite to the question of whether Northern Valley can collect a non-tariffed rate in this Court. But absent that, there is no basis for referral of the "rate" question to the FCC.

IV. There Are Other Strong Factors Counseling Against A Referral.

There are additional reasons for this Court to reject a primary jurisdiction referral as well. As explained above, referral to the agency will almost certainly cause substantial delay in resolving this case, including Sprint's counterclaims. *See National Commc'ns Ass'n*, 46 F.3d at 225 ("[a]gency decisionmaking takes a long time and the delay imposes enormous costs on individuals, society, and the legal system") (internal quotation marks omitted). It has taken the FCC years to resolve similar complaints filed against other LECs for similar schemes, including the more than two years it has taken the FCC to partially resolve *Farmers*, and the many years it took to resolve previous very narrow challenges to other traffic pumping schemes, *see, e.g., AT&T Corp. v. Jefferson Tel. Co.*,

[11] The D.C. Circuit has questioned the appropriateness of an award of compensation on a non-tariffed service in the context of a sham arrangement. *AT&T Corp. v. FCC*, 317 F.3d 237, 239 (D.C. Cir. 2003). In finding the arrangement in *Farmers III* to be a sham, the FCC cited *Total Telecommunications Services, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, ¶ 16, 16 FCC Rcd 5726, 5733 (2001) a case in which the FCC found that a local exchange carrier ("LEC") set up a sham entity to allow collection of higher access charges. In *Total*, the FCC nonetheless did find that the LEC could collect some amount under the tariff that would have applied if the sham entity did not exist. *Id*. at 5742-43. However, the D.C. Circuit subsequently *reversed and remanded* that portion of the FCC's decision and ordered "the Commission to consider AT&T's argument that Total did not provide access service." *AT&T Corp. v. FCC*, 317 F.3d at 239. (The case settled without resolution of that issue.)

Memorandum Opinion and Order, 16 FCC Rcd 16130, 16130 ¶ 2 n.5, ¶ 16 (2002) (more than four years); *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041, 4041 ¶ 1 n.1 (2002) (over *five years*), *Total Telecomms. Servs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5743-44 ¶¶ 39-40 (2001) (over four years). There is no reason to think that this pattern will change now. Moreover, to avoid any risk of the inconsistent outcomes that Northern Valley is concerned with would require referral of each of the 24 outstanding cases to the FCC, which would almost certainly result in huge delay, as the fact-specific decisions Northern Valley emphasizes, were made.

In addition, more extensive discovery is available in court than would be available at the FCC, as noted at the outset. Proceeding with discovery in court will enable this Court to better determine whether a referral is warranted and on what issues, as well as providing information that could be useful if there were any referral. Because discovery can help crystallize issues, this case should remain in court. *See supra* p. 8.

Finally, granting Northern Valley's referral motion would result in issues in only *some* of the pending cases being referred to the FCC. Splitrock has not asked for referral of its cases against Sprint and Qwest, for example; nor has there been any referral request of the CCC cases against Verizon, meaning these cases will remain in court regardless. Denying Northern Valley's motion and keeping the matter in this Court is thus the most efficient venue in which to proceed.

CONCLUSION

For the foregoing reasons, Northern Valley's motion to stay and refer should be denied.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7.1(B)(1) because this brief contains 8,345 words according to the word processing system used to prepare the brief.

Respectfully submitted this 20th day of January, 2010.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Defendant Sprint Communications Company, L.P., hereby certifies that a true and correct copy of the foregoing "Defendant and Counterclaim Plaintiff's Resistance to Northern Valley's Motion to Stay Case for Purpose of Referral of Issues to the Federal Communications Commission" was served by electronic service from the Court upon:

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on this 20th day of January, 2010.

/s/ Cheryle Wiedmeier Gering
Electronically Filed

Exhibit C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA

NORTHERN VALLEY COMMUNICATIONS, L.L.C.,	*	
Plaintiff and Counterclaim Defendant,	*	
v.	*	
SPRINT COMMUNICATIONS COMPANY, LP,	*	CIV. 08-1003-KES
Defendant, Counterclaimant, and Third-Party Plaintiff,	*	
v.	*	
GLOBAL CONFERENCE PARTNERS,	*	
Third-Party Defendant.	*	
NORTHERN VALLEY COMMUNICATIONS, L.L.C.,	*	
Plaintiff and Counterclaim Defendant,	*	
v.	*	
QWEST COMMUNICATIONS CORPORATION,	*	CIV. 09-1004-CBK
Defendant, Counterclaimant, and Third-Party Plaintiff,	*	
v.	*	
GLOBAL CONFERENCE PARTNERS,	*	
Third-Party Defendant.	*	

NORTHERN VALLEY COMMUNICATIONS, L.L.C.,	*	
Plaintiff and Counterclaim Defendant,	*	
v.	*	CIV. 09-1003-CBK
AT&T CORP.,	*	
Defendant and Counterclaimant.	*	
SANCOM, INC.,	*	
Plaintiff and Counterclaim Defendant,	*	
v.	*	
QWEST COMMUNICATIONS CORPORATION,	*	CIV. 07-4147-KES
Defendant, Counterclaimant, and Third-Party Plaintiff,	*	
v.	*	
FREE CONFERENCING CORPORATION,	*	
Third-Party Defendant.	*	
SANCOM, INC,	*	
Plaintiff and Counterclaim Defendant,	*	
v.	*	CIV. 09-1003-KES
AT&T CORP.,	*	
Defendant and Counterclaimant.	*	

SANCOM, INC.	*	
	*	
Plaintiff and Counterclaim Defendant,	*	
	*	
v.	*	
	*	
SPRINT COMMUNICATIONS COMPANY, LP,	*	CIV. 07-4107-KES
	*	
Defendant, Counterclaimant, and Third-Party Plaintiff,	*	
	*	
v.	*	
	*	
FREE CONFERENCING CORPORATION OF AMERICA, and	*	
	*	
TELEJUNCTIONS, LLC,	*	
	*	
Third-Party Defendants.	*	

NORTHERN VALLEY COMMUNICATIONS, L.L.C.'S AND SANCOM INC.'S CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTIONS FOR PRIMARY JURISDICTION REFERRAL AND SANCOM'S REPLY BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Plaintiffs, Northern Valley Communications, L.L.C. ("Northern Valley") and Sancom, Inc. ("Sancom") (collectively, "Plaintiffs" or "CLECs"), by counsel, and pursuant to LR 7.1(B), hereby file this consolidated reply brief in support of the Motions to Stay Cases for Purposes of Referral of Issues to Federal Communications Commission filed on December 14, 2009 ("Motions").[1]

[1] *See Northern Valley Commc'ns, L.L.C. v. Sprint Commc'ns Co, LP*, Civ. 08-1003-KES (Dkt. 91 - 92); *Northern Valley Commc'ns, L.L.C. v. Qwest Commc'ns Corp.*, Civ. 09-1004-CBK (Dkt. 96 – 97); *Northern Valley Commc'ns, L.L.C. v. AT&T Corp.*, Civ. 09-1003-CBK (Dkt. 71 – 72); *Sancom, Inc. v. Sprint Commc'ns Co, LP*, Civ. 07-4107-KES (Dkt. 97 – 98); *Sancom, Inc. v. Qwest Commc'ns Corp.*, Civ. 07-4147-KES (Dkt. 205 and 207); *Sancom, Inc. v. AT&T Corp.*, Civ. 09-1003-KES (Dkt. 74 -75).

This brief shall also serve as Sancom's Reply Brief in Support of its Motion for Reconsideration filed as part of its Motion to Stay.[2] Oral argument has been requested on each of the motions.[3] And, in this regard, Plaintiffs respectfully submit that a consolidated oral argument involving all parties would promote efficiency for the Court and the parties.

INTRODUCTION

Long-distance carriers Qwest Communications Corp. ("Qwest"), Sprint Communications Co., L.P. ("Sprint"), and AT&T Corp. ("AT&T") (collectively "IXCs") vociferously argue that orders released by a state-utility commission that has no jurisdiction whatsoever over these proceedings (namely, the *Iowa* Utilities Board) and a Federal Communications Commission ("FCC") order in a case-specific adjudication involving an *Incumbent* Local Exchange Carrier (as compared to the *Competitive* Local Exchange Carriers or "CLECs" in these cases), provides the Court with all the guidance necessary to adjudicate these matters. From these two non-controlling decisions, the IXCs will argue that the Court should declare that Northern Valley and Sancom are entitled to no compensation for the valuable services that they have provided to the IXCs over a period of many years. Though the IXCs lob relentless attacks at Northern Valley and Sancom's request for a primary jurisdiction referral to the FCC, contending that referral

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The Defendants, long-distance companies Qwest, Sprint, and AT&T, each filed opposition briefs, after a court-approved extension of time, on January 20, 2010. *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co, LP,* Civ. 08-1003-KES (Dkt. 102); *Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, Civ. 09-1004-KES (Dkt. 111); *Northern Valley Commc'ns, LLC v. AT&T Corp.*, Civ. 09-1003-CBK (Dkt. 82); *Sancom, Inc. v. Sprint Commc'ns Co, LP,* Civ. 07-4107-KES (Dkt. 108); *Sancom, Inc. v. Qwest Commc'ns Corp.*, Civ. 07-4147-KES (Dkt. 212); *Sancom, Inc. v. AT&T Corp.*, Civ. 09-1003-KES (Dkt. 84).

[2] *Sancom, Inc. v. Qwest Commc'ns Corp.*, Civ. 07-4147-KES (Dkt. 205 and 207).

[3] *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co, LP*, Civ. 08-1003-KES (Dkt. 93); *Northern Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, Civ. 09-1004-KES (Dkt. 98); *Northern Valley Commc'ns, LLC v. AT&T Corp.*, Civ. 09-1003-CBK (Dkt. 73); *Sancom, Inc. v. Sprint Commc'ns Co, LP*, Civ. 07-4107-KES (Dkt. 102); *Sancom, Inc. v. Qwest Commc'ns Corp.*, Civ. 07-4147-KES (Dkt. 209); *Sancom, Inc. v. AT&T Corp.*, Civ. 09-1003-KES (Dkt. 79).

would be everything from unnecessary to untimely to unlawful, each of the IXCs' arguments fail to establish that this Court should simply ignore the FCC's edict that traffic terminated to conference call providers is compensable, either pursuant to tariff or otherwise.

In fact, every court to recently consider this precise issue, including the Southern District of New York which, on the day prior to the IXCs' filing of opposition briefs, released an order referring a number of issues to the FCC in a nearly identical case, has agreed that a primary jurisdiction referral is appropriate to ensure uniformity of outcomes and to enable the FCC to clarify its intent. Respectfully, this Court should join its brethren from the District of Minnesota and the Southern District of New York in rejecting the IXCs' efforts to elevate form over substance and their collective efforts to evade a just and reasonable outcome by granting the primary jurisdiction referral.

ARGUMENT

I. SANCOM AND NORTHERN VALLEY'S POSITIONS REGARDING PRIMARY JURISDICTION REFERRAL AND THE APPLICATION OF *FARMERS AND MERCHANTS* ARE ENTIRELY LOGICAL AND CONSISTENT

In their opposition briefs, the IXCs contend that Plaintiffs are acting arbitrarily by asking for a referral of issues to the FCC at this stage of the case and in light of the FCC's Second Order on Reconsideration in *Farmers and Merchants*.[4] *See*, *e.g.*, *Northern Valley v. Sprint*, Civ. 08-1003, Sprint Opp. (Dkt. 102) at 1 (suggesting that Northern Valley has made a "sudden change in course") and *id.* at 7 (arguing that "Northern Valley's motion is too late. But it is also too early. . . ."); *Sancom v. Qwest*, Civ. 07-4147, Qwest Opp. (Dkt. 212) at 1 ("Sancom abruptly changes course. . ."). Contrary to these colorful characterizations and the IXCs' attempts to ignore what can only be described as a significant disruption of the Commission's settled precedent

[4] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Docket EB-07-MD-001, Second Order on Reconsideration (rel. Nov. 25, 2009) ("*Farmers and Merchants II*").

effectuated through *Farmers and Merchants II*, the CLECs' position with regard to the need for FCC guidance is logical, reasoned, and principled.[5]

A. *Farmers and Merchants I* Provided Clear and Certain Law; The Court Needed No Further Guidance to Implement the Standards Employed by the Commission.

The IXCs are correct that the CLECs have generally asserted that, under the FCC's original determination in *Farmers and Merchants I*,[6] a referral to the FCC under the doctrine of primary jurisdiction was unnecessary. Indeed, both Sancom and Northern Valley have asserted that judgment as a matter of law in their favor was appropriate in light of *Farmers and Merchants I*. That position is fully supported by the FCC's analysis in its original decision wherein it clearly and unequivocally rejected Qwest's assertion that a conference call provider did not subscribe to local exchange service unless it made a net payment of money to the LEC. Indeed, the FCC held that payment of money to LECs by conference call providers was ***irrelevant*** to determining whether Qwest was liable for amounts billed pursuant to the tariff.[7]

Having rejected Qwest's argument, the FCC had given clear guidance to the Courts and preserved the integrity of the filed rate doctrine. Accordingly, for more than two years following the release of *Farmers and Merchants I*, no further guidance was necessary or could be gained

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[5] This is not to suggest that *Farmers and Merchants II* is a final binding order or settled law. Quite to the contrary, *Farmers and Merchants II* is presently subject to a motion for reconsideration and is invalid for a number of reasons, as addressed in Sancom and Northern Valley's opening briefs.

[6] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Docket EB-07-MD-001, FCC 07-175, 22 FCC Rcd. 17973 (Rel. Oct. 2, 2007) ("*Farmers and Merchants I*").

[7] *Id.* ¶¶ 37-38 ("We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff. . . . We reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to Farmers. The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus ***irrelevant*** to their status as end users.") (emphasis added).

by referral to the FCC. IXCs were required to pay for the terminating access services, pursuant to the LECs tariffs, and thus the distinctions between ILECs (which **must** file tariffs) and CLECs (which **may** file tariffs) were simply not implicated.

B. *Farmers and Merchants II* Swerves from Prior Precedent and Implements a Fact-Intensive Analysis Without Providing Clear Guidance on Which Issues Are Dispositive; The FCC Has Not Provided Sufficient Guidance to Enable Court Action.

Plaintiffs now urge the Court to refer several crucial questions to the FCC in light of *Farmers and Merchants II*, because the FCC's new decision compels a different course of action. In *Farmers and Merchants II*, the FCC reversed course and determined that a number of Farmers' practices were relevant to its new determination that Farmers had not provided switched access service pursuant to its tariff. Among the facts on which the FCC relied, apparently to very different degrees, are:

- Conference call providers were not initially billed the federal subscriber line charge;
- Farmers paid the conference call providers a per-minute fee for the traffic;
- Conference calling companies did not pay Farmers for their connections to the interexchange network;
- Farmers provided high-capacity DS3 trunks;
- Farmers purchased a new "soft switch" rather than using their existing Nortel DMS-10 circuit switch;
- The Farmers agreement with conference call providers included an exclusivity clause limiting Farmers' ability to serve other conference call companies;
- Farmers did not enter conference calling companies into their customer billing system; and
- Farmers did not bill the conference calling companies on a monthly basis.

The FCC's analysis, however, fails to articulate which of the facts identified above were conclusive, and how those facts should be prioritized in relation to one another. Moreover, and

notably, the FCC did not declare that conference call providers could not be end users under the terms of a LEC's tariff or that such arrangements were otherwise unlawful. But the parameters of end user status, vis-à-vis the FCC tariffs, are now far from certain. Accordingly, the FCC has created a new fact-specific regime, but failed to provide clarity regarding how to effectuate its intent.

As one court recently found in ordering a primary jurisdiction referral to the FCC on a factually similar case, the FCC's new ruling creates more, not less, uncertainty. As Judge Pauley wrote in *All American Tel. Co. v. AT&T, Inc.*:

> **This area of telecommunication regulation is in dynamic flux** – recently, the FCC reversed its own decision in one case, and the Iowa Utilities Board issued a ruling potentially contrary to FCC decisions on where calls terminate. **Thus, these issues, which are important to this case, are ripe for determination and clarification by the regulatory agency.**

All American Tel. Co. v. AT&T, Inc., No. 07-cv-861, Primary Jurisdiction Referral Order (Dkt. 88) at 3 (S.D.N.Y. Jan. 19, 2010), (emphasis added) (attached hereto as Ex. A). As such, the FCC's new decision serves only to underscore the appropriateness of the CLECs' request for primary jurisdiction referral at this stage of the cases.

Moreover, the FCC's latest opinion is not likely to survive judicial review because, *inter alia*, it flies in the face of the FCC's statutory deadline for resolving any tariff-interpretation dispute. *See* 47 U.S.C. § 208(b) (requiring the FCC to issue orders on investigations regarding "the lawfulness of a charge … within 5 months after the date on which the complaint was filed"); 47 U.S.C. § 405(b) (requiring the FCC to grant or deny petitions for reconsideration of orders issued that conclude an investigation under § 208(b) within 90 days of receiving the petition for reconsideration). Congress established those deadlines to ensure that the carrier and customer

alike knew what the proper charges were. Thus, not only is the *Farmers and Merchants II* flawed as a matter of pure logic,[8] the FCC's attempt to rewrite its tariff-interpretation policy came far too late for Congress's deadline.

For these reasons, after the Congressionally-mandated period for reconsideration expired, Plaintiffs relied on *Farmers and Merchants I* as settled and controlling law in this case and consistently opposed any request, in any court, to stay or to remand any claim, issue, or question to the FCC. However, now that the FCC has attempted to take further action and replaced its earlier "plain language" interpretation with an analysis that is "freighted with intricate issues of communications policy," *All American Tel.*, No. 07-cv-861, Order (Dkt. 88) at 2, primary jurisdiction referral is appropriate.

C. The FCC Has Not Provided Guidance Regarding the Interplay Between its CLEC Detariffing Policy and the Availability of State Implied Contract and Unjust Enrichment Causes of Action.

The IXCs' opposition briefs evidence an irreconcilable difference of opinion regarding the FCC's role in determining whether state quasi-contractual claims are available to CLECs, such as Northern Valley and Sancom. For example, Qwest argues in its brief that the FCC has, by implication, precluded the availability of quasi-contractual claims. It argues that the FCC's occasional use of the word "negotiated" in the Seventh Report and Order necessarily and unequivocally means that the FCC intended to preclude recovery pursuant to implied contract or based on the theory of unjust enrichment. *See*, *e.g*, *Sancom v. Qwest*, Civ. 07-4147, Qwest Opp.

[8] Indeed, Magistrate Judge Zoss in the Northern District of Iowa made this exact point, noting that it would be "highly unlikely that the new evidence [produced by Farmers] will change the FCC's ruling with regard to whether or not conference calling companies can be 'end users' under the applicable tariffs. The FCC's analysis of the issue would remain valid even if the agency finds Farmers fraudulently backdated its contracts." *Great Lakes Commc'ns Corp., et al. v. Iowa Utils. Bd., et al.*, No. 09-cv-4085 Report & Recommendation on Plaintiffs' Motion For Preliminary Injunction, at 25 (N.D. Iowa Nov. 17, 2009) (Dkt. 68)

Brief (Dkt. 212) at 12 ("In addition, even if Sancom had not filed an access tariff, a CLEC cannot obtain compensation for access services other than by tariff or by ***negotiated*** contract. The FCC did not leave open any other means or classification for CLECs (such as implying in fact or in law an agreement to pay access rates.)") (emphasis in original).[9]

Sprint, on the other hand, argues that "Northern Valley's claims to an alternative rate are not ones over which the FCC would have jurisdiction. Northern Valley's claims to an alternative rate are state law claims that have damages standards that are not equivalent to the federal standard for reasonable rates and that the FCC has no jurisdiction to decide." *Northern Valley v. Sprint*, Civ. 08-1003, Sprint Opp. (Dkt. 102) at 18. These two positions are directly at odds: either the FCC has the authority to decide whether alternative state law claims are available, or it has no authority to restrict the availability of these alternative theories of recovery. Further, either a LEC can lodge a claim for recovery of access charges as a matter of quasi-contract or it cannot. Qwest and Sprint directly contravene each other on these crucial questions.

In any event, both Sprint and Qwest's arguments fail to establish that primary jurisdiction referral is inappropriate. First, the FCC's *Seventh Report and Order*[10] relied upon by Qwest in no way compels the conclusion that the occasional use of the word "negotiated" means that the IXCs are *ipso facto* entitled to the free use of a CLEC's network if its tariff does not apply to the

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[9] It should be noted that Qwest's reliance on FCC's *Seventh Report and Order* for the proposition that a CLEC can only obtain compensation for access services via tariff or negotiated contract is entirely misplaced. The plain language of the *Seventh Report and Order* cited by Qwest relates only to situations in which a *non-rural* CLEC sought to charge a rate *higher* than the competing incumbent LEC. Thus, this portion of the *Seventh Report and Order* on its face is inapplicable to *rural* CLECs and, in any event, does not demonstrate that the FCC undertook a reasoned analysis regarding the ability of a CLEC to receive compensation based on quasi-contractual theories for rates set at or below the FCC's benchmark.

[10] *In re Access Charge Reform, Seventh Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 96-262, 16 FCC Rcd. 9923 (Apr. 27, 2001) ("*Seventh Report and Order*").

services provided. As the Court stated in *Northern Valley Communications, LLC v. Qwest Communications*, No. Civ. 09-1004, 2009 WL 3164856 at *8 (D.S.D. Sept. 25, 2009), "it is not yet absolutely clear . . . whether the filed rate doctrine is applicable, given the 1996 Act's 'detariffing' policy." Accordingly, rather than accepting the invitation to merely apply part of the FCC's determination in *Farmers and Merchants II* to CLECs (while ignoring footnote 96), the CLECs respectfully submit that the FCC should be given the opportunity to clarify how its various statements should be harmonized to give effect to the pro-competition, detariffing policies flowing from the 1996 Telecommunications Act.

Moreover, because the Court will retain jurisdiction over the case, should the FCC ultimately decline to draw final conclusions regarding whether an implied contract, in fact, existed, it may nevertheless provide useful guidance to the Court in determining how to evaluate the various issues in light of the distinctions between ILECs and CLECs and clarifying that implied contracts are an acceptable basis for recovery of CLEC access charges. Indeed, as the FCC expressly noted in its *Sprint PCS* Order, in a detariffed environment, "the law recognizes - ***as has the Commission*** - that an agreement may exist even absent an express contract." *In re Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, 13198 (July 3, 2002) (footnotes omitted) (emphasis added).[11] Accordingly, allowing the FCC to consider how its CLEC detariffing policy

[11] In this regard, Plaintiffs acknowledge the remote possibility that the FCC may require a bifurcation of the referral issues such that it would first decide whether the tariff is applicable and, to the extent that it is not, the Commission may provide clarification that alternative theories of recovery are available to CLECs. Thereafter, the Court may be called upon to establish that an implied contract existed or that recovery pursuant to unjust enrichment is appropriate. After such a conclusion, nothing in *Sprint PCS* suggests that the FCC would be unwilling or unable to establish an appropriate rate for the traffic in the way that it will decide the rate for Farmers traffic in the forthcoming bifurcated proceeding in *Farmers and Merchants*. The CLECs believe (and the *Tekstar and All American* courts seem to agree) that the FCC is capable of deciding the

impacts the availability of alternative theories of recovery will promote a uniform resolution of the instant disputes making primary jurisdiction particularly appropriate.

D. The FCC Can Provide Guidance on the Calculation of Damages Just as It Will in the Next Phase of the *Farmers and Merchants* Case.

Qwest also argues that resolution of the appropriate rate of compensation for calls to conference call providers in the absence of an applicable tariff rate are barred by a prohibition against retroactive ratemaking. And though Qwest unpersuasively tries to dismiss footnote 96 of *Farmers and Merchants II* as "*dicta*," its position and this entire line of argument is meritless. *See Sancom v. Qwest*, Civ. No. 07-4147, Qwest Opp. (Dkt. 212) at 14. The FCC could not have been clearer in stating that no LEC must provide terminating access for free, regardless of the terms of its tariff, and

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whole range of issues proposed by Northern Valley and Sancom for referral. Regardless of the process, however, the fact remains that the FCC has an important policy role to play and that the ability to reach a just outcome exists. This, above all other factors, should be the guiding force behind the Court's analysis of the Motions.

Indeed, as Qwest and AT&T correctly point out, a Court can make multiple primary jurisdiction referrals as the case progresses and as it decides that the FCC's expertise is necessary to reach a just resolution of a particular issue. *See Northern Valley v. Qwest*, No. Civ. 09-1004, Qwest Opp. (Dkt. 111) at 10 & n.6 (arguing that the *All American* court's primary jurisdiction referral was distinguishable because "the court there had previously determined that another claim in that case . . . should be referred to the FCC, and in its most recent ruling, the court found that to be an important factor in deciding to refer the remaining issues in the first instance."); *Northern Valley v. AT&T*, No. Civ. 09-1003, AT&T Opp. (Dkt. 82) at 9 & n.18 (also arguing that the *All American* court's primary jurisdiction referral was distinguishable because "the court there had previously determined that another claim in that case . . . should be referred to the FCC, and in its most recent ruling, the court recognized that there may be substantial efficiencies gained from referring the other issues."). To the extent that the IXCs are merely suggesting that the issues should be bifurcated (such as the bifurcation that Qwest requested in *Farmers and Merchants*) or that the specific questions proposed by the Plaintiffs should be modified, Plaintiffs stand ready to discuss alternatives and to work toward a suitable compromise.

it will resolve this rate issue in the next phase of the *Farmers* case which the recent order expressly has prescribed.[12]

In fact, in the *All American* case, AT&T filed a formal complaint at the FCC in order to effectuate that Court's initial primary jurisdiction referral. When AT&T filed its formal complaint against the *All American* plaintiffs with the FCC, it stated: "AT&T requests that the Commission determine AT&T's damages in a separate and subsequent proceeding." *All American Tel. Co. v. AT&T, Inc.*, Formal Complaint of AT&T Corp., File No. EB-09-MD-010, at 3 (attached hereto as Ex. B). In so doing, AT&T put the question of rates directly before the FCC and has asked the FCC to initiate exactly the same proceeding that the FCC will use to determine what rate applies in the *Farmers and Merchants* case. By making such a request, AT&T has also conceded that the FCC is the appropriate ratemaking authority, and has expressly put the issue of rates for calls destined to conference call providers before the FCC.

Similarly, by having the IXC (AT&T) file the formal complaint in response to the primary jurisdiction referral, the *All American* court left no doubt that the FCC would have the jurisdiction – the exact same jurisdiction it will use in evaluating Qwest's damages in *Farmers and Merchants* – to evaluate the appropriate rate for the traffic terminated to conference call providers (should the tariffs not apply). This Court could follow the same course of action and avoid any concerns expressed by Qwest that the proscription against retroactive ratemaking would be violated.

Moreover, and as fully articulated in the CLECs opening briefs, courts have concluded that the FCC is specially positioned to determine reasonable rates for access traffic. Specifically, courts have concluded that the rates that should be set for claims for recovery pursuant to

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[12] *Farmers and Merchants II*, ¶ 1 ("Qwest elected in its Complaint to have the amount of any damages determined in a separate proceeding; Qwest may file a supplemental complaint for damages within sixty days of the release of this order.") (footnotes omitted).

quantum meruit and implied contract are matters best evaluated by the FCC.[13] As a result, referral to the FCC is the best use of the Court's authority and resources in this instance.

II. THE PRIMARY JURISDICTION DOCTRINE IS NOT LIMITED TO "TECHNICAL" ISSUES AND DOES NOT IMPLICATE SECTION 207 OF THE ACT

In an effort to avoid a primary jurisdiction referral, the IXCs contend that referral is inappropriate because the questions that would be referred are not "technical" enough to warrant referral and that section 207 of the Act bars referral in circumstances where a party has already brought a claim to federal court. These arguments are flatly wrong and must be rejected.

A. AT&T's Suggestion That Primary Jurisdiction Referrals Must Be Limited to "Technical Issues" Is Incorrect.

AT&T contends that the motions for primary jurisdiction referral should be denied on the ground that the interpretation of the tariff will not require the court to consider "technical" terms. *See generally Northern Valley v. AT&T*, No. Civ. 09-1003, AT&T Opp. (Dkt. 82) at 10-12. AT&T's argument fails for three independent reasons. First, AT&T's argument is without merit because the primary jurisdiction doctrine is not as constricted as AT&T implies. Rather, primary jurisdiction referral is appropriate when it will enable the court "to obtain the benefit of an

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[13] *See Sprint Spectrum, L.P. v. AT&T Corp.*, 168 F. Supp. 2d 1095, 1099-1100 (W.D. Mo. 2001) (referring to the FCC that question of a reasonable rate under the theory of quantum meruit and an implied contract and concluding that a "determination as to the reasonableness of the rates for Sprint's services that AT&T has utilized" is a "fact that must be proven and one which the FCC is in a better position than the Court to evaluate."); *see also AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd. 12312, 12325, ¶ 25 (2001) ("In fact, courts are 'particularly deferential' when reviewing the Commission's evaluation of rates, because such agency action is far from an exact science and involves 'policy determinations in which the agency is acknowledged to have expertise.'") (citations omitted); *see also New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd. 5128, 5133, ¶ 12 ("the Commission has previously held, at least where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered, that a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate. A complainant in a section 208 proceeding has the burden of demonstrating that the challenged rate is unlawful and, if damages are sought, what a lawful rate would have been.") (footnotes omitted).

agency's expertise and experience," or "promote uniformity and consistency within the particular field of regulation." *Access Telecomms. v. Southwestern Bell Tel. Co.*, 137 F.3d 605, 608 (8th Cir. 1998). Perhaps Qwest said it best in a recent filing with the Northern District of Iowa wherein Qwest sought a primary jurisdiction referral regarding the interpretation of an access tariff with regard to conference call traffic:

> The primary jurisdiction doctrine applies 'to claims properly cognizable in court that contain some issue within the special competence of an administrative agency.' *Reiter v. Cooper*, 507 U.S. 258, 268 (1993). It is concerned with 'promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties,' *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956), and a primary jurisdiction referral is warranted 'whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.' *Western Pacific*, 352 U.S. at 64.
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> Faced with matters such as those presented here, ***involving the interpretation and application of tariffs to specific facts, the Supreme Court and the Eighth Circuit have routinely deferred to the primary jurisdiction of expert agencies.*** *See, e.g., Western Pacific*, 352 U.S. at 66-67; *Access Telecommunications v. Southwestern Bell Telephone Co.*, 137 F.3d 605, 609 (8th Cir. 1998). Unsurprisingly, other Circuits have reached the same conclusion in similar cases involving application of the Communications Act and FCC rules. *See, e.g., Clark v. Time Warner Cable*, 523 F.3d 1110 (9th Cir. 2008); *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225 (10th Cir. 2007); *Ellis v. Tribune Television Co.*, 443 F.3d 71 (2nd Cir. 2006).

Great Lakes Commc'ns Corp., et al., v. Iowa Utils. Bd., et al., No. 09-cv-4085, Qwest's Motion to Amend Memorandum in Support of Motion to Dismiss or In the Alternative Transfer, at 8-9 (N.D. Iowa Nov. 11, 2009) (Dkt. 45) (emphasis added) (attached hereto as Ex. C). Accordingly, this Court should conclude, as Qwest has, that the FCC is best positioned to apply the CLECs' tariffs to the specific facts of the case and enter a primary jurisdiction referral.

Second, the tariff analysis *does* require the consideration of "technical" terms. A non-

technical interpretation of the tariff would have been the analysis undertaken by the FCC in *Farmers and Merchants I* where the FCC interpreted the word "subscribe" based on Webster's New Collegiate Dictionary to mean "to enter one's name for a publication or service" and thus concluded that the conference call providers had "subscribed" to Farmers service and further held that free subscription was quite common. *See Farmers and Merchants I*, ¶ 38.

However, AT&T contends that rather than following the plain language, that this Court should actually apply the FCC's decision in *Farmers and Merchants II*, which provides for a new analysis that appears to read into the word "subscribe" some technical consideration of how and why money was exchanged — a consideration that is not apparent based on the plain language of the tariff. Accordingly, if as AT&T suggests, the Court should undertake only a plain language analysis as compared to a "technical" one, then such a position would compel an outcome in line with *Farmers and Merchants I*, not the *Farmers and Merchants II* decision that AT&T now argues is controlling. AT&T simply cannot have it both ways.

Finally, the interpretation of the words "end user," "customer," "subscribes," and "premises," are not the only function that the FCC will be asked to perform during the pendency of the primary jurisdiction referral. Rather, as discussed above, the FCC may be asked to analyze and clarify its intent regarding the interplay between the CLEC detariffing policy and alternative means of recovery. Further, the FCC may be asked to evaluate a reasonable rate for the traffic at issue, in the event that the CLECs' tariffs are found to be applicable. Accordingly, AT&T's "technical" argument must fail, because the referral already contemplates asking the FCC's guidance about "technical" terminology.

In sum, even if the primary jurisdiction doctrine did only apply to "technical" matters, which it does not, the confusion and policy-laden choices that *Farmers and Merchants II* has

injected into the meaning of otherwise plain language, the complexity of the telecommunications networks involved in the disputed traffic, and need for uniformity render these cases a perfect example of ones in which the primary jurisdiction doctrine should be invoked.

B. Invoking the Primary Jurisdiction Doctrine Does Not Implicate, Let Alone Violate, Section 207 of the Act.

Qwest also argues that the CLECs' motions for primary jurisdiction referral should be denied because such a referral would violate 47 U.S.C. § 207, which provides that a complainant may bring a case either to the FCC or to a federal court, but not both. Qwest's position fundamentally misunderstands both legal concepts. The primary jurisdiction doctrine is a jurisprudential tool that assists courts in deciding complex matters but does not strip or in any way affect their jurisdiction to hear a case.[14] Section 207, by contrast, is jurisdictional; it is a federal statute that limits the reach of Article III courts based on the actions of a claimant, and not a court.[15] Qwest errs in commingling the two concepts or in suggesting that one has any affect on the other.

Further, if Qwest's position is taken to its logical conclusion, it would mean that the use of primary jurisdiction was barred in its entirety with regard to telecommunications cases by the

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[14] *See, e.g., Pharm. Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J. concurring) ("the legal doctrine of 'primary jurisdiction' permits a court itself to 'refer' a question to the Secretary. That doctrine seeks to produce better informed and uniform legal rulings by allowing courts to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime. 'No fixed formula exists' for the doctrine's application. Rather, the question in each instance is whether a case raises 'issues of fact not within the conventional experience of judges,' but within the purview of an agency's responsibilities; whether the 'limited functions of review by the judiciary are more rationally exercised, by preliminary resort' to an agency 'better equipped than courts' to resolve an issue in the first instance; or, in a word, whether preliminary reference of issues to the agency will promote that proper working relationship between court and agency that the primary jurisdiction doctrine seeks to facilitate.") (internal citations omitted).

[15] *See, e.g., Mexiport, Inc. v. Frontier Commc'ns Servs., Inc.*, 253 F.3d 573, 575 (11th Cir. 2001); *Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001).

enactment of 47 U.S.C. § 207. Indeed, if section 207 actually meant what Qwest contends, then the opportunity to refer issues to the FCC for guidance would have ceased to exist because the doctrine only comes into play ***after*** a case has been filed in court in the first place.

The Common Carrier Bureau, now known as the Wireline Competition Bureau, has previously considered and explicitly rejected Qwest's position. In fact, in a case where a party initiated a separate complaint before the FCC prior to the federal court even deciding the primary jurisdiction referral request, the Bureau found that section 207 was not a bar:

> Although the instant complaint was filed in anticipation of a court order apparently yet to be issued as of the time the complaint was filed and, thus, may have been premature, we believe that the better course to follow is to address the merits of the issues raised by the amended complaint at this time. To insist on a dismissal of the complaint as premature . . . would appear to elevate form over substance. We perceive no jurisdictional bar to a plaintiff filing suit initially in court and having the court hold the case until the plaintiff obtains an administrative determination of the legal issues of the lawsuit which are within an administrative agency's special competence and experience. Indeed, the primary jurisdiction doctrine requires that such technical questions be considered preliminarily by the Commission in the interest of uniform and expert administration of the regulatory scheme laid down by the Act.
>
> . . . The decisive question under Section 207, in our view, is not whether [plaintiff's] commencement of its suit was, of itself, a conclusive election, but whether different remedies are so inconsistent that the mere assertion of one by judicial proceedings necessarily results in the loss of the other, as a matter of substantive law or fairness. Since [plaintiff] does not seek double recovery of damages, we find that its requests for other relief addressed to the court are not so inconsistent and repugnant vis-à-vis similar but somewhat different relief it seeks from the Commission that we find them to be mutually exclusive or necessarily barred under the provision of Section 207.

Fair Mount Tel. Co., Inc. v. Southern Bell Tel. & Tel., 53 R.R.2d 639, ¶¶ 11-12 (FCC Com. Car. Bur. 1983) (internal citations omitted) (attached hereto as Ex. D).

Indeed, in order to argue its illogical position, Qwest has attempted to first re-characterize the CLECs' referral requests as a request to refer *claims*, rather than *issues*, to the FCC. But, this characterization is unwarranted. The CLECs' motions do not ask for entire claims to be referred, but rather asks for the FCC to decide issues that will enable the Court, which will retain jurisdiction over the case, to better decide how judgment should be entered on the various counts and how to calculate damages without violating the scriptures of the filed tariff doctrine. There is absolutely no support for Qwest's contention that a primary jurisdiction referral, such as that requested by the CLECs, violates or in any way implicates section 207 and, as such, Qwest's argument must be rejected.

III. REFERRING DISCRETE ISSUES TO THE FCC UNDER THE PRIMARY JURISDICTION DOCTRINE WILL NOT HINDER THE PARTIES' OR THE COURT'S ABILITY TO OBTAIN RELEVANT FACTS

The IXCs argue that Northern Valley and Sancom's motions should be denied because the FCC's discovery procedures are less fulsome than that of the federal courts and that, as a result, the truth will not come to light if discovery is conducted pursuant to FCC procedures. *See, e.g., Northern Valley v. Qwest*, No. Civ. 09-1004, Qwest Opp. (Dkt. 111) at 22 ("The Court should not presume that Qwest would obtain similar discovery in a proceeding before the FCC. The FCC's complaint procedures contemplate only limited discovery, and do not allow any discovery as of right.") (citing 47 C.F.R. § 1.729). Once again, the IXCs' argument tries to prove too much but, in the end, fails to demonstrate that referral is inappropriate.

Notably, the plain language of the very provision of the FCC's rules that Qwest relies upon demonstrates that discovery is available to litigants before the FCC. Notably, FCC Rule 1.729 provides in relevant part:

> (a) . . . a complainant may file with the Commission and serve on a defendant, concurrently with its complaint, a request for up to ten written interrogatories. A defendant may file with the Commission

> and serve on a complainant, during the period starting with the service of the complaint and ending with the service of its answer, a request for up to ten written interrogatories. A complainant may file with the Commission and serve on a defendant, within three calendar days of service of the defendant's answer, a request for up to five written interrogatories. . . . This procedure may not be employed for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry related to the material facts in dispute in the pending proceeding.
>
> * * *
>
> (d) Commission staff will consider the requests for interrogatories, . . . at the initial status conference, as provided for in § 1.733(a)(5), and at that time determine the interrogatories, if any, to which parties shall respond, and set the schedule of such response.
>
> * * *
>
> (h) The Commission may allow additional discovery, including, but not limited to, document production, depositions and/or additional interrogatories. . . .

47 C.F.R. § 1.729.

Thus, contrary to the IXCs' suggestions, the FCC rules permit substantial discovery. Nothing would suggest that the FCC's decision to police the parties' discovery practices more closely than the federal rules might require somehow denies the IXCs due process or precludes a party from bringing the various facts to light, so long as the party is not propounding discovery "for the purpose of delay, harassment or obtaining information that is beyond the scope of permissible inquiry[.]" 47 C.F.R. § 1.729(a). Moreover, the IXCs ignore the fact that the FCC's formal complaint process provides that all "[f]acts must be supported by relevant documentation or affidavit" at the time the complaint is filed. 47 C.F.R. § 1.720(c). And both the complainant and the defendant are required to file an information designation as part of the complaint or answer. By way of example, 47 C.F.R. § 1.724 provides in relevant part:

> (f) The answer shall include an information designation containing:

> (1) The name, address, and position of each individual believed to have firsthand knowledge of the facts . . .;
>
> (2) A description of all documents, data compilations and tangible things . . . . Such description shall include for each document:
>
> > (i) The date it was prepared, mailed, transmitted, or otherwise disseminated;
> >
> > (ii) The author, preparer, or other source;
> >
> > (iii) The recipient(s) or intended recipient(s);
> >
> > (iv) Its physical location; and
> >
> > (v) A description of its relevance to the matters in dispute.
>
> (3) A complete description of the manner in which the defendant identified all persons with information and designated all documents, data compilations and tangible things as being relevant to the dispute. . .;
>
> (g) The answer shall attach copies of all affidavits, documents, data compilations and tangible things in the defendant's possession, custody, or control, upon which the defendant relies or intends to rely to support the facts alleged and legal arguments made in the answer.

Accordingly, there can be no serious doubt that the FCC's procedures provide for significant amounts of discovery and, indeed, require the immediate production of many of the most relevant pieces of information from the very beginning of the case.

But further, and as discussed in more detail below, Plaintiffs agree with AT&T that a simultaneous referral to the South Dakota Public Utilities Commission ("SDPUC") is appropriate to address the intrastate issues pending in the present cases. Under the SDPUC procedures, the parties are entitled to discovery of right in a manner consistent with discovery in the state courts of South Dakota. *See* ARSD 20:10:01:22.01 ("Discovery -- Order to compel. **A party may obtain discovery from another party without commission approval.** The commission at its

discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be **in the same manner as in the circuit courts** of this state.") (emphasis added). Under South Dakota state law, a party may serve an *unlimited* number of interrogatories and document requests. *See* SDCL 15-6-33(a) and SDCL 15-6-34(b).

Finally, it should not be ignored that Plaintiffs have requested a referral of *issues* to the FCC, not a referral of the entire case. As such, the court will retain jurisdiction over the case and, in the unlikely event that the IXCs feel that they are unable to obtain sufficient discovery from Plaintiffs or third-parties, the Court may intervene.[16]

For these reasons, there can be no serious question that a referral of issues by the Court to the FCC and SDPUC will not prevent the IXCs from obtaining more than ample discovery. The IXCs' objections to the requested referral thus are meritless and the Motions should be granted.

IV. THE IOWA UTILITIES BOARD'S ORDER HAS NO BEARING ON THE OUTCOME OF THIS CASE; HOWEVER, PLAINTIFFS AGREE WITH THE IXCS' SUGGESTION TO REFER INTRASTATE ISSUES IN THIS CASE TO THE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION SIMULTANEOUSLY WITH THE FCC REFERRAL

Just as the FCC is now the proper tribunal for several questions of interstate regulation in this case, due to the uncertainty caused by *Farmers and Merchants II*, so too is the SDPUC the proper tribunal for the intrastate questions underlying this case. The IXCs themselves have suggested a SDPUC referral. *See, e.g., Northern Valley v. AT&T*, No. 09-1003, AT&T Opp. (Dkt. 82) at 4 & n.6. Plaintiffs disagree, however, that the decision of another state's public

[16] Plaintiffs note that they have already provided responses to a significant number of interrogatories and document requests propounded by Defendants and Sancom has previously provide full discovery responses and documents to Qwest, which have now been provided to Sprint pursuant to subpoena. Northern Valley and numerous third parties are preparing to begin the production of documentary evidence.

utilities commission — the Iowa Utilities Board ("IUB") — can have extraterritorial application to this case, and thus the IXCs' attempt to enforce or rely upon the IUB's order should be rejected.

Each of the IXCs rely upon the September 21, 2009 IUB Order as persuasive, or perhaps even dispositive, of the issues in these cases. That reliance, however, is misplaced. First, as noted in the CLECs' opening briefs, the IUB order is not final and is currently under reconsideration. Second, the IUB has no jurisdiction over the issues in these cases, including the limited quantity of intrastate calls involved in these proceedings. Third, and as addressed in more detail below, the IUB's order contravenes federal precedent, including a number of issues addressed by the FCC in *Farmers and Merchants II*. Finally, given the significant number of policy determinations involved in adjudicating these cases, it is the SDPUC that should address the application of the intrastate tariff issues. For this reason, the CLECs agree with AT&T and Sprint that certain discrete issues of intrastate regulation should be addressed, in the first instance, by the SDPUC.

A. The IUB Order Offers No Binding Authority for Interpreting Sancom's and Northern Valley's Tariff.

The IXCs are wrong to argue that referral to the FCC is unnecessary in light of the Iowa Utilities Board ("IUB") ruling in *Qwest Commnc'ns Corp. v. Superior Tel. Coop.*, Final Order, Docket FCU-07-02 (Iowa Utils. Bd. Sep. 21, 2009) ("*IUB Final Order*"). *See, e.g., Northern Valley v. AT&T*, No. 09-1003, AT&T Opp. (Dkt. 82) at 11 ("Further, to the extent there was any doubt about the Court's ability to interpret and apply the relevant tariff terms, they have been resolved by the FCC's decision in *Farmers [II]* and the IUB's Final Order."). That order determined whether IXCs in Iowa must pay intrastate access charges for calls made to conference call providers under Iowa law; it cannot be applied to an evaluation of either interstate or intrastate access charges in

South Dakota. Moreover, the IUB order is invalid in several respects, because it contradicts several core findings of the FCC's *Farmers and Merchants II* decision to which the Board should have deferred.

First, the IUB ruled in conflict with *Farmers and Merchants II* that traffic to conference call providers was not compensable at all, and that Qwest was entitled to a full refund of all amounts previously paid for the termination of intrastate calls to these customers. *IUB Order* at 54. The FCC has stated clearly that Farmers is not "precluded from receiving any compensation at all for the services it has provided to Qwest." *Farmers II*, n.96. The FCC cited prior FCC precedent holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed." *Id*. (citing *America's Choice Commc'ns, Inc. v. LCI Int'l Telecom Corp.*, 11 FCC Rcd. 22494, 22504, ¶ 24 (1996)). Thus, with respect to interstate traffic, calls to conference call providers that are not subject to interstate access tariffs are nevertheless compensable as a matter of federal law at a just and reasonable rate.

Second, the IUB ruled that the sharing of revenues derived from *intrastate* access charges for calls to conference call providers was unreasonable under state law. *IUB Order* at 58-59. In contrast, the FCC has ruled several times that sharing of *interstate* access revenues for calls to conference call providers — like the calls in these cases — was not unlawful. *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001); *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, 17 FCC Rcd. 4041 (2002); *AT&T Corp. v. Beehive Tel. Co.*, 17 FCC Rcd. 11641 (2002). The *Farmers II* ruling is fully consistent with those decisions.

Third, the IUB ruled that calls to conference call providers did not "terminate" to end users under the terms of the intrastate tariffs of the LECs. *IUB Order* at 37-39. The FCC, however,

concluded in *Farmers and Merchants I* that such calls *do* terminate at the conference bridge[17] and it did not disturb this finding in *Farmers and Merchants II*. Indeed, the FCC ruled that a finding that calls to conference call providers *do not* terminate must be rejected because it "leads to anomalous results." *Farmers and Merchants I* ¶ 33. This ruling by the FCC makes it doubtful that the inconsistent finding by the IUB will withstand judicial scrutiny.[18] The release of *Farmers and Merchants II* heightens the inconsistencies between the *IUB Final Order* and the federal law and precedent established by the FCC. These inconsistencies should be resolved in the first instance by the FCC, and referral to the FCC is warranted under the doctrine of primary jurisdiction.

B. Evaluation of the Intrastate Issues Should Be Referred to the SDPUC.

AT&T points out in its brief that certain counts of the CLECs' complaints "allege[] a collection action under NVC's intrastate tariff in South Dakota. . . . [I]f [the CLECs'] arguments in favor of referral were true, then they would seem to apply with equal force to [the CLECs'] state law collection claim[s]. . . . Thus, if the Court grants the referral motion as to the first issue requested by [the CLECs], then it seems likely that it would also need to refer the issues in [the intrastate tariff claims] to the South Dakota Public Utilities Commission." *See, e.g., Northern Valley v. AT&T*, No. 09-1003, AT&T Opp. (Dkt. 82) at 4 & n.6. The CLECs (and, as explained more fully below, Sprint) agree with AT&T's position and, accordingly, hereby incorporate AT&T's suggested referral into its motion.

Indeed, as explained above, the SDPUC, not the Iowa Board, has jurisdiction to evaluate, in the first instance, the delicate policy considerations associated with the applicability of the

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17 *See Farmers and Merchants I*, 22 FCC Rcd. at 17985, ¶¶ 32-33.

18 The *IUB Order* is the subject to three separate petitions for judicial review under state and federal law. *Great Lakes Commc'ns, Inc. v. Iowa Utils. Bd.*, No. 09-4085-DEO (N.D. Iowa); *Farmers Tel. Co. of Riceville, IA et al. v. Iowa Utils. Bd.*, No. CV7993 (Iowa Dist. Ct. Polk County); *Reasnor Tel. Co., LLC v. Iowa Utils. Bd.*, No. CV7988 (Iowa Dist. Ct. Polk County).

CLECs' intrastate tariffs to conference call customers. And, as the FCC's reversal makes clear, there are a number of different ways to evaluate those policy determinations, such that it cannot and should not be assumed that the issues considered by the IUB or FCC will be outcome determinative of the SDPUC's consideration.

Further, this additional referral will not impose unnecessary delay or burden. Sprint, Northern Valley, and Sancom are already parties to a proceeding before the SDPUC wherein Sprint has asked the SDPUC to make a declaration regarding the applicability of Northern Valley's and Sancom's tariffs to ***exactly the same intrastate traffic at issue*** in this litigation. *See In re the Complaint of South Dakota Network, LLC Against Sprint Communication LP*, Sprint Communication Company LP's Third Party Complaint, No. TC 09-098, ¶ 20 (S.D. P.U.C. Nov. 23, 2009) ("Sprint is entitled to a declaration pursuant to ARSD 20:10:01:34 and SDCL 21-24-1 that Sancom . . . [and] Northern Valley . . . cannot assess intrastate switched access charges for calls to Call Connection Companies, and that Sprint has no access charge liability for such calls on and after June 2007, and/or that their actions constitute and (*sic*) unjust or unreasonable practice.") (attached hereto as Ex. E).[19] Thus, Sprint has already conceded the SDPUC should weigh in on the intrastate issues pending before this Court and the SDPUC's declaration on those issues would be applicable to all of the cases. Accordingly, the Court should refer issues to the SDPUC in order to promote uniformity of outcomes and to ensure that the Commission's policy-making authority is respected.

[19] Northern Valley and Sancom filed their Answers in the case on January 22, 2010. The answers are attached as Exhibits F and G, respectively. They note that Sprint could have resolved its dispute with South Dakota Network without unnecessarily multiplying the proceedings by making Northern Valley and Sancom parties to that action. However, having chosen to do so, Sprint should not now be heard to complain about the Plaintiffs' request to have the issues referred to the SDPUC.

V. SANCOM'S MOTION FOR RECONSIDERATION SHOULD BE GRANTED

Qwest opposes Sancom's motion for reconsideration asking the Court to reinstate its unjust enrichment claim. *See Sancom v. Qwest*, No. 07-4147, Qwest Opp. (Dkt. 212) at 21-24. In opposing Sancom's motion for reconsideration, Qwest relies on the wrong rule and inapposite cases to contend that reconsideration is unwarranted. Qwest appears to argue that the Court should decide the motion for reconsideration pursuant to the standards set forth in Fed. R. Civ. P. 60(b) and seeks to rely upon Chief Judge Schreier's opinion in *Gateway, Inc. v. Companion Products, Inc.*, No. Civ. 01-4096-KES, 2003 WL 23532885, at *2 (D.S.D. Dec. 19, 2003). *Id.* at 21.

However, both Rule 60(b) and *Gateway* are inapposite; they address motions for reconsideration filed after the court had entered a ***final*** judgment. *See Fed. R. Civ. P.* 60(b) ("On motion and just terms, the court may relieve a party or its legal representative from a ***final judgment, order, or proceeding***. . . ") (emphasis added); *Gateway*, 2003 WL 23532885, at *2 ("The court issued a judgment against CPI on August 19, 2003. CPI requested reconsideration on October 15, 2003. CPI's motion does not specify the rule under which it was filed. Because it exceeds the ten-day time limit imposed by Rule 59(e), the court will consider CPI's motion under Rule 60(b)."); *id.* ("Rule 60(b) allows a party to seek relief from a final judgment or order if the party can prove mistake, inadvertence, surprise, excusable neglect, or other reasons.") (internal citations omitted). In this regard, Qwest's reliance on *Gateway* to support the proposition that "it appears the Eighth Circuit applied Rule 60(b) to motions to reconsider ***non-final*** orders after ten days" is plainly wrong and a distortion of the plain language of *Gateway*.

Similarly, Qwest contends that the Eighth Circuit "stated that Rule 60(b) is the standard for motions to reconsider any non-final orders. . . .," but dismisses the Eighth Circuit's statement in *Auto Services Co., Inc. v. KPMG, LLP*, 537 F.3d 853, 855 (8th Cir. 2008) as "*dicta*." *See*

Sancom v. Qwest, No. 07-4147, Qwest Opp. (Dkt. 212) at 21-24 (citing *Elder-Keep v. Aksamit*, 460 F.3d 979, 984-85 (8th Cir. 2006)). Qwest seems to dismiss anything contrary to its positions in this case as mere "*dicta*."[20] But the Eighth Circuit meant what it said in *Auto Services*: a Court may "exercise its **general discretionary authority** to review and revise its interlocutory rulings prior to the entry of final judgment." 537 F.3d at 857 (emphasis added).

In any event, it is undeniable that a Court may revise its interlocutory orders based on an intervening change in law or to avoid manifest injustice. *See, e.g., Hans v. Tharaldson*, 601 F. Supp. 2d 1139, 1143 (D.N.D. 2009). Since the Court issued its July 2009 decision dismissing Sancom's unjust enrichment claim, the FCC has made clear that it a telecommunications carrier is entitled to be compensated when it terminates interexchange traffic for the benefit of an IXC customer, regardless of the terms of its tariff. Thus, the federal agency having jurisdiction and expertise over the matter has enunciated a controlling federal policy that the traffic in this case is compensable, and federal courts should defer to this decision. *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.").

In addition, based on the potential for inconsistent outcomes, reconsideration is necessary to avoid manifest injustice. Reinstating Sancom's unjust enrichment claim would prevent a windfall to Qwest by ensuring that it does not receive free access to Sancom's network. Moreover, this course of action would avoid the discriminatory (or, as Qwest describes it "unfair") outcome whereby Qwest receives free terminating access service while Sprint and

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[20] *See infra* at Section I, D, discussing Qwest's conclusion that footnote 96 of *Farmers and Merchants II* is "*dicta.*"

AT&T are required to pay for exactly the same services provided by exactly the same parties. Accordingly, Sancom respectfully requests that the Court grant the motion for reconsideration.

CONCLUSION

For the foregoing reasons, and those articulated in Sancom's and Northern Valley's opening briefs, Sancom's motion for reconsideration and the motions for primary jurisdiction referral should be granted. In addition to referring issues to the Federal Communications Commission, the Court should also refer issues regarding intrastate access charges to the South Dakota Public Utilities Commission.

Dated: January 28, 2010

Respectfully submitted,

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CERTICICATION REGARDING WORD COUNT

Pursuant to LR 7.1(B)(1), the undersigned attorneys hereby certify that the brief complies with the rules requiring briefs in excess of 25 pages not to exceed 12,000 words unless prior approval has been obtained by the court. Pursuant to the word count of the word-processing system used to prepare the brief, this brief contains 9,576 words.

By: */s/* Jeffrey D. Larson By: */s/* James M. Cremer

CERTIFICATE OF SERVICE

The undersigned herby certifies that on January 28, 2010, the foregoing **Northern Valley and Sancom's Consolidated Reply Brief in Support of Motions for Primary Jurisdiction Referral and Sancom's Reply Brief in Support of Motion for Reconsideration** was electronically filed with the Court and served upon all counsel of record listed below through the CM/ECF system.

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Exhibit D

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah corporation, and BEEHIVE TELEPHONE CO. OF NEVADA, INC., a Nevada corporation, Plaintiffs, v. SPRINT COMMUNICATIONS COMPANY, L.P., a Delaware limited partnership, Defendant.	**MEMORANDUM OPINION AND ORDER** Case No. 2:08-CV-00380 Judge Dee Benson

This matter is before the court on defendant Sprint Communications Company L.P.'s motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, to dismiss this action for lack of subject matter jurisdiction. (Dkt. No. 25.) A hearing on the motion was held on October 6, 2009. At the hearing, Sprint was represented by Marc A. Goldman and Paul C. Drecksel. Plaintiffs, Beehive Telephone Co., Inc. and Beehive Telephone Co. of Nevada, Inc. (collectively "Beehive") were represented by Alan L. Smith. At the conclusion of the hearing the court announced that it was inclined to grant Sprint's motion. Now, consistent with that preliminary view, and having taken the motion under advisement, the court has further considered the law and facts relating to the motion and renders the following Memorandum Opinion and Order.

Background

Beehive is an incumbent local exchange carrier ("ILEC") as defined by § 251(h)(1) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 251(h)(1). Sprint is a long-distance or interexchange carrier ("IXC") that owns and controls a nationwide network. As a

general matter, Sprint does not own local facilities that physically connect to Sprint's local phone customers in Beehive's service area. Therefore, Sprint purchases "access services" from Beehive to obtain access to local customers. Beginning in October 2007, Sprint began withholding payment from Beehive for access services because Sprint believed Beehive was engaged in traffic pumping schemes with various companies to collect unlawful charges.[1]

On March 21, 2008, pursuant to section 1.716 of the Federal Communications Commission's ("FCC") rules, 47 C.F.R. § 1.716, Beehive filed an "informal complaint" at the FCC against Sprint. (*See* Goldman Decl. in Support of Mot. to Dismiss Ex. 1 at 4.) Beehive requested that the FCC investigate Sprint's practice of refusing to pay Beehive billed access charges as a form of "self help" in connection with its claim that the charges were the product of traffic pumping. (*See id.*) Furthermore, Beehive requested a declaratory ruling from the FCC that Sprint violated §201(b) of the Act and was "obligated to pay Beehive's billed access charges and late payment penalties." (*See id.*)

With Beehive's informal complaint still before the FCC, Beehive filed a complaint in this court seeking damages. In the complaint, Beehive stated that its action was based on Sprint's ongoing refusal to pay Beehive charges for access services used by Sprint's customers. (*See* Compl. ¶ 6.) Beehive also stated that it was authorized by § 207 of the Act to seek a judgment from this court for the amount due and owing from Sprint. (*See* Compl. ¶ 17.)

Subsequently, the FCC entertained Beehive's informal complaint, but made no ruling. (*See* Goldman Decl. in Support of Mot. to Dismiss Ex. 4 at 59.) Instead, the FCC recommended

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[1]Sprint's alleged "traffic pumping" is essentially a scheme where an ILEC partners with other entities to artificially inflate call traffic in order to increase access service charges.

no further action and notified Beehive that it was permitted to file a formal complaint if unsatisfied by the FCC's disposition of the informal complaint. (*See id.*)

On July 31, 2009, Sprint filed a motion to dismiss claiming that § 207 contains an election of remedies provision which barred Beehive from filing a subsequent claim for relief in this court. Beehive asserts that § 207 does not bar Beehive from proceeding before this court for essentially two reasons.[2] First, Beehive argues that § 207 only operates as a bar where a party seeks damages before both the FCC and in court. Second, Beehive argues that § 207 does not bar the present action because the FCC lacked jurisdiction to hear Beehive's complaint.

Discussion

The United States Court of Appeals for the Tenth Circuit has recognized that § 207 is a clear "election-of remedies provision." *See TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007). Section 207 provides that:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may *either* make complaint to the Commission as hereinafter provided for, *or* may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction, but *such person shall not have the right to pursue both such remedies.*

47 U.S.C. § 207 (emphasis added). This court concurs with the Fifth Circuit in that "the language of the statute is unambiguous: A complainant can file a complaint either with the FCC or in federal district court, but not in both." *See Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th

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[2]Beehive also argued that it did not make an election under § 207 because it named the wrong party in its FCC informal complaint. Beehive named Sprint Nextel Corporation in its informal complaint with the FCC as opposed to the named defendant Sprint Communications Company L.P. Despite the difference in name, the record is clear that the appropriate party received notice of Beehive's FCC complaint and responded with a vigorous defense. It would be form over substance to conclude that by designating Sprint Nextel Corporation instead of Sprint Communications Company Beehive could escape the jurisdictional bar of § 207.

Cir. 1997). Moreover, courts have consistently held that filing an informal complaint at the FCC precludes a party from filing suit in federal court on claims arising from the same issues. *See Premiere Network Servs., Inc. v. SBC Commnc'ns, Inc.*, 440 F.3d 683, 687-88 (5th Cir. 2006) (dismissing federal claims under § 207 with issues raised in FCC informal complaint); *Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001) (concluding that a party that has filed an informal complaint with the FCC may not also sue in district court); *Mexiport, Inc. v. Frontier Commnc'ns Servs., Inc.*, 253 F.3d 573, 575 (11th Cir. 2001) (holding that appellant could not file in federal court after having filed an informal complaint with the FCC). In the instant case, it is clear that Beehive filed complaints at the FCC and in this court based on the same issues, Sprint's refusal to pay access service charges.

1. Request for Declaratory Relief

Beehive's claim that it did not make an election under § 207 because it only sought declaratory relief in its informal complaint with the FCC is unpersuasive. Beehive offers no judicial precedent in support of this assertion, nor has the court found any. Furthermore, this assertion is inconsistent with the plain meaning of the statute. Statutory interpretation begins with an analysis of the plain language. *See United States v. Saenz-Gomez*, 472 F.3d 791, 793 (10th Cir. 2007) (*citing United States v. Jackson*, 248 F.3d 1028, 1030 (10th Cir. 2001), *cert denied* 534 U.S. 929 (2001)). If the statute's text evinces an unmistakable plain meaning, the analysis ordinarily ends. *Id.* The statutory language of § 207 provides in pertinent part that a person "may either make complaint to the Commission . . . or may bring suit for the recovery of the damages . . . in any district court." 47 U.S.C. § 207. The statute does not require a person to request damages at the FCC, and this court will not read such a requirement into it. If a party could avoid the election of remedies provision in § 207 simply by styling its FCC complaint as one for declaratory

relief, § 207 would be rendered meaningless. Parties could always pursue simultaneous actions at the FCC and in court by styling the FCC action as a declaratory action on the same issues raised in court. In light of the plain meaning of the statute, the court finds Beehive's argument without merit.

2. FCC's Lack of Jurisdiction

Beehive's second argument is that Beehive never made an "election" within the meaning of § 207 because the FCC was without jurisdiction over its complaint. This is a remarkable assertion from a party who repeatedly and categorically argued in its FCC complaint that the FCC possessed jurisdiction to resolve its claim against Sprint. Furthermore, the FCC never ruled on the issue of jurisdiction and actually even suggested that it has jurisdiction when it invited Beehive to file a formal complaint. Regardless, there is nothing in the record to suggest that the FCC determined that it lacked jurisdiction over Beehive's complaint against Sprint. As a result, it would be inappropriate and premature for this court to consider how the FCC's possible lack of jurisdiction over a claim may affect the operation of § 207 in the instant case.

Conclusion

For the foregoing reasons, the court finds that § 207 bars Beehive from proceeding with its claim in this court. Accordingly, Sprint's motion to dismiss is granted.[3] Beehive's complaint is dismissed without prejudice, each party to bear its own costs.

IT IS SO ORDERED.

DATED this 13th day of October, 2009.

Dee Benson
United States District Judge

[3]This order is subject to Beehive's counsel having the right to file a motion for leave to amend complaint asserting an alternative jurisdictional basis by October 21, 2009.

Exhibit E

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah corporation, and BEEHIVE TELEPHONE CO. OF NEVADA, INC., a Nevada corporation, Plaintiffs, v. SPRINT COMMUNICATIONS COMPANY L.P., a Delaware limited partnership, Defendant, v. ALL AMERICAN TELEPHONE CO., INC., a Nevada corporation, Third-Party Defendant.	**SPRINT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS BEEHIVE'S COMPLAINT PURSUANT TO RULE 12(b)(1)** Case No. 2:08-cv-00380 Hon. Dee Benson

Sprint Communications Company L.P. ("Sprint") submits the following memorandum in support of its motion to dismiss the claim of Beehive Telephone Co., Inc. and Beehive Telephone Co. of Nevada, Inc. (collectively, "Beehive") for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1).

Beehive's claim is jurisdictionally barred by section 207 of the Communications Act, 47 U.S.C. § 207, because Beehive has already brought its claim for relief on the same issue before the Federal Communications Commission ("FCC") and is therefore foreclosed from doing so here. Section 207 permits a party to bring an action under the Communications Act either at the FCC or in federal court, but forbids the party from proceeding in both forums. In this case, Beehive initially filed its claims at the FCC. Then, seeking a second bite at the apple, Beehive filed claims in this court based on the same facts and seeking effectively the same relief. The FCC has since declined to take action on Beehive's informal complaint. Under the plain language of section 207, Beehive has elected its remedies with the FCC, and this Court lacks subject matter jurisdiction over Beehive's federal claim. Beehive's complaint must therefore be dismissed.

BACKGROUND

As discussed in greater detail in the briefing on Beehive's motion for partial summary judgment, this case concerns Beehive's unlawful charges to Sprint for calls directed to companies providing conference call, chat line, or similar services that permit callers to talk to each other (call connection companies, or "CCCs"). Counterclaims ¶ 2. This scheme is known as "traffic-pumping." In the current arrangement, the calls are routed first to Beehive's business partner All American Telephone Co., Inc. ("All American") to route to the CCCs. In any event,

Beehive is not providing a service for which it is authorized to charge Sprint under Beehive's tariffs. *Id.* ¶¶ 4-7. Thus, beginning in October 2007, Sprint began withholding payment to Beehive for these unlawful charges. Complaint ¶ 13.

On March 21, 2008, pursuant to section 1.716 of the FCC's rules, 47 C.F.R. § 1.716, Beehive filed an "informal complaint" at the FCC against Sprint for withholding payment. *See* Declaration of Marc A. Goldman in Support of Motion to Dismiss, dated July 31, 2009 ("Goldman Decl.") Ex. 1. Beehive alleged that Sprint violated 47 U.S.C. § 201(b) by withholding payment on the disputed charges for calls to CCCs. *Id.* at 1. Beehive requested "a declaratory ruling that Sprint has violated § 201(b) of the Communications Act of 1934, as amended ("Act"), and is obligated to pay Beehive's billed access charges and late payment penalties." *Id.*; *see also id.* at 8 (requesting that FCC "issue an order . . . declaring that Sprint is obligated to pay Beehive's billed access charges and late payment penalties").

In its informal complaint, Beehive explained the bases of its claim for relief: that Sprint purportedly had no legal basis for withholding payment on traffic-pumping claims under the terms of Beehive's tariff, that Sprint failed to properly dispute the charges under the tariff, and that Sprint was not entitled to exercise self-help under sections 201(b) and 203 of the Communications Act and the FCC's precedents. *Id.* at 3-4, 6-8. Beehive also foreshadowed the possibility that it would file a separate court action based on the same facts. *Id.* at 6 (asserting that Beehive could file a "subsequent court action for damages."). Beehive attempted to justify its plan to seek relief in a second forum despite the strict statutory limit of section 207 by drawing a dubious distinction between its FCC complaint seeking a "declaratory" order that

Sprint pay the withheld charges and a separate suit seeking damages for the same withheld charges. *Id.*

Sprint filed its response on April 30, 2008, arguing, among other things, that section 201(b) does not encompass claims by a carrier such as Beehive against its customer (which is Sprint in this call arrangement), Goldman Decl. Ex. 2 at 2, and that the FCC did not have jurisdiction to hear claims by a carrier against its customer, *id.* at 4-6. Sprint also noted that Beehive's claims in court might be foreclosed by the filing of the FCC informal complaint. *Id.* at 7, n.11. In its reply, Beehive strongly disputed Sprint's arguments, contending that "the Commission unquestionably has jurisdiction to interpret the provisions of the NECA tariff and determine whether Sprint Nextel has acted lawfully." Goldman Ex. 3 at 3.

On May 13, 2008, Beehive filed its present complaint in federal court. Beehive's complaint in this matter is based on the same issue it raised in its FCC complaint: "Sprint's ongoing refusal to pay Beehive the lawful tariffed charges for switched access services used by Sprint's customers . . . ." Complaint ¶ 6. Beehive's complaint contains a single cause of action alleging that Sprint could not withhold payment under the terms of Beehive's filed federal tariff, *id.* ¶¶ 11-16, seeks damages for unpaid charges, and seeks Beehive's charges going forward, *id.* at 5.

On June 10, 2008, the Market Disputes Resolution Bureau of the FCC decided it was "not recommending further action on the informal complaint" without further elaboration for the basis of its disposition, including any of the specific issues raised by the parties.. Goldman Ex. 4 at 1. However, the Division notified Beehive that it was permitted to file a formal complaint if unsatisfied by the FCC's disposition of its informal complaint. *Id.* The Division also noted

(without deciding) that a federal court case on the same issues as the informal complaint might be barred by section 207. *Id.*

On July 1, 2009, Beehive filed the pending motion for summary judgment in this case. Beehive's memorandum in support of that motion not only corroborates that Beehive is seeking the same relief here as in the FCC informal complaint proceedings, but it repeats many of the arguments made in the informal FCC complaint. Indeed, entire portions of Beehive's summary judgment memorandum are lifted nearly verbatim from Beehive's FCC informal complaint. *See, e.g.,* Ex. 1 at 1-3; Mem. at 6-8.

LEGAL STANDARD

In considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, a movant may go "beyond the allegations in the complaint and challenges the facts upon which subject matter jurisdiction depends, and "[i]In such a situation, the court must look beyond the complaint and has wide discretion to allow documentary . . . evidence." *Paper, Allied-Industrial, Chem. & Energy Workers Int'l Union v. Continental Carbon Co.*, 428 F.3d 1285, 1292 (10th Cir. 2005). Defenses challenging the court's jurisdiction may be raised at any time. *Baca v. King*, 92 F.3d 1031, 1034 (10th Cir. 1996).

ARGUMENT

By filing an informal complaint at the FCC, Beehive has elected its remedies, and is barred from bringing a claim on the same facts in federal court. Section 207 provides that

> [a]ny person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

47 U.S.C. § 207. Under this provision, which the Tenth Circuit has held is a clear "election-of-remedies" provision, a litigant cannot bring a claim in federal court that has been brought at the FCC even if the complaint has been dismissed at the FCC: "[O]nce an election is made by either filing a complaint with the FCC or filing a complaint in federal court, a party may not thereafter file a complaint on the same issues in the alternative forum, regardless of the status of the complaint." *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007) (quoting *Premiere Network Servs., Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 688 (5th Cir. 2006)).

Courts have consistently held that filing an informal complaint at the FCC bars any further action in federal court on claims arising from the same issues. *See Premiere Network*, 440 F.3d at 688-89 (dismissing federal claims under § 207 with nexus to issues raised in FCC informal complaint, even though FCC complaint was dismissed); *Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 190 (2d Cir.2001) (per curiam) (litigant could not file in federal court after having filed informal complaint on same issue with FCC); *Mexiport, Inc. v. Frontier Commc'ns Servs., Inc.*, 253 F.3d 573 (11th Cir.2001) (per curiam) (same); *Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th Cir. 1997) (same); *Cincinnati Bell Tel. Co. v. Allnet Commc'n Servs., Inc.*, 17 F.3d 921, 923 (6th Cir.1994) (party barred from raising counterclaim on same subject as previous FCC complaint). Indeed, in *Premiere Network*, the court held that even a plaintiff's *voluntary* dismissal of its FCC action did not save the plaintiff's Communications Act claim in federal court because the Communications Act claim had a nexus with issues raised in the FCC complaint. 440 F.3d at 689. In this case, Beehive did not voluntarily dismiss its informal complaint; the FCC declined to take further action on it. And Beehive's court claim raises the very same issue as its FCC complaint: Beehive's disagreement with Sprint's failure to pay

disputed charges related to Beehive's traffic-pumping scheme. Beehive's claim is therefore clearly barred.

Indeed, Beehive itself recognized that it was pursuing a strategy designed to enable Beehive to seek relief on the same claim in multiple forums. Beehive indicated in its informal complaint that it intended to file this separate court action based on the same factual allegations. *See* Ex. 1 at 6. In fact, as a thin excuse for invoking the FCC's jurisdiction when it intended to file in court, Beehive argued that it risked a primary jurisdiction referral of any claim brought in court to the FCC, and urged the FCC to instead "exercise its primary jurisdiction to obviate the need for a primary jurisdiction referral." *Id.* Beehive's actions were a transparent attempt to get two bites at the apple. If the FCC proceeding was going well, it would continue there; but, if it appeared to be going badly, Beehive would instead turn to the court. But this type of strategic gamesmanship is exactly what section 207 forbids. *See Premiere Network*, 440 F.3d at 688-89 (section 207 "avoids giving a complaining party several bites at the apple through dismissal and re-filing of complaints, thereby upholding judicial efficiency and fairness to responding parties").

In its FCC filings, Beehive offered only a single reason why it believed it was entitled to bring its claim both at the FCC and in federal court despite the constraints of section 207: that its FCC complaint did not seek damages as a remedy. But section 207 applies even if the relief sought at the FCC does not include damages. Section 207 provides parties a choice between bringing a complaint at the FCC or bringing a damages action in court. *See* 47 U.S.C. § 207 (party "may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages . . . in any district court of the United States of competent

jurisdiction"). Nowhere does section 207 require that the *FCC complaint* include a request for damages for section 207 to apply. Indeed, the Second Circuit has squarely held that a court claim should be dismissed even when *no* relief was requested in the party's informal complaint at the FCC. *Digitel*, 239 F.3d at 191 n.5.

Moreover, Beehive's effort to avoid the strictures of section 207 on the basis that it did not seek damages at the FCC is particularly unjustified here because Beehive did effectively request damages at the FCC. In its informal complaint, Beehive sought a declaratory judgment that Sprint "is obligated to pay Beehive's billed access charges and late payment penalties." Ex. 1 at 1. Beehive plainly sought an order from the FCC for the exact relief that it now claims in this federal court case. In any event, as long as the claims in the FCC and court proceedings arise from the same "nexus" of facts – and here they indisputably do – Beehive's claim is barred. *See Premiere Network*, 440 F.3d at 691; *see also TON Servs.*, 493 F.3d at 1244 (party may not file complaint "on the same issues in the alternative forum") (quotation omitted); *Mexiport*, 253 F.3d at 574 (dismissing even state law claims filed in federal court on same issues as FCC informal complaint).

CONCLUSION

Beehive elected to bring its claim for relief against Sprint at the FCC but has failed to date in that forum. This court thus has no jurisdiction over Beehive's complaint, and it must be dismissed.

RESPECTFULLY SUBMITTED this 31st day of July, 2009

PARR BROWN GEE & LOVELESS

By: /s/ John P. Snow
Paul C. Drecksel
Daniel E. Barnett
John P. Snow
Attorneys for Defendant and Counterclaim Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2009, I filed the foregoing **SPRINT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS BEEHIVE'S COMPLAINT PURSUANT TO RULE 12(b)(1)** electronically with the Clerk of Court using the CM/ECF system, which was served via electronic mail to the following:

- Alan L. Smith (alanakaed@aol.com)
- Gary R. Guelker (gary@jandglegal.com)

The foregoing **SPRINT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS BEEHIVE'S COMPLAINT PURSUANT TO RULE 12(b)(1)** was also served via U.S. Mail, postage prepaid, on the following:

David R. Irvine
747 E. South Temple, Suite 130
Salt Lake City, Utah 84102

DATED this 31st day of July, 2009.

PARR BROWN GEE & LOVELESS

By: /s/ John P. Snow
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Exhibit F

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH,
CENTRAL DIVISION

BEEHIVE TELEPHONE CO., INC., a Utah corporation, and BEEHIVE TELEPHONE CO. OF NEVADA, INC., a Nevada corporation, Plaintiffs, v. SPRINT COMMUNICATIONS COMPANY L.P., a Delaware limited partnership, Defendant, v. ALL AMERICAN TELEPHONE CO., INC., a Nevada corporation, Third-Party Defendant.	**SPRINT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS BEEHIVE'S COMPLAINT PURSUANT TO RULE 12(b)(1)** Case No. 2:08-cv-00380 Hon. Dee Benson

Sprint submits the following reply in support of its motion to dismiss Beehive's complaint pursuant to Fed. R. Civ. P. 12(b)(1), based on 47 U.S.C. § 207.

Beehive fully admits that it attempted to obtain relief at the FCC prior to bringing this lawsuit. But it now argues its FCC claim was so meritless on jurisdictional grounds that its FCC complaint was effectively void from the moment it was filed. This about-face does not hold water. Beehive argued repeatedly and categorically in its FCC complaint that the FCC possessed jurisdiction to resolve its claim against Sprint. And the FCC *never ruled* on the jurisdictional issue in the case. Rather than continue to litigate its claims at the FCC, Beehive turned to this court to hear the same restyled claim. That is exactly what section 207 forbids.

ARGUMENT

For all the length of Beehive's opposition, Beehive raises only two basic arguments why section 207 purportedly does not bar its claim. First it argues that section 207 does not apply when the FCC does not have jurisdiction to hear the complaint brought before it. That argument is not grounded in the text of section 207 and depends entirely on a single FCC decision that required as a prerequisite an FCC *holding* that it had no jurisdiction, as well as dismissal of the complaint without prejudice. The FCC made no such decision here, instead explicitly inviting Beehive to continue its action at the FCC by filing a formal complaint. Nothing in the plain language of section 207 or the cases on section 207 remotely suggest that a party can go to the FCC, later disclaim jurisdiction *itself*, and then go the Court. Indeed, the precedent makes clear that a party does not have the ability to reverse course once the election is made.

Second, Beehive argues that its complaint in this case is sufficiently distinct from its FCC case that it is not barred. But Beehive ignores that the relief it requested at the FCC, whether or

not styled as an action for "damages," sought a judgment for payment by Sprint for charges billed due to Beehive's access pumping scheme. That is the equivalent to the relief it requests here for payment of the same amounts.[1]

I. Beehive Cannot Disclaim the FCC's Jurisdiction Once It Has Elected Its Remedies.

Beehive deliberately chose to file a complaint at the FCC, understanding the risks it took in light of section 207. It did so because discovery at the FCC is limited, and it hoped to obtain a favorable ruling before the facts were understood. But when it appeared the FCC route might be more difficult than Beehive had anticipated, it abandoned it and instead attempted to proceed with its action in this Court. That is what section 207 is designed to prevent.

In its response, Beehive argues that if its complaint is dismissed under section 207, it will be left unable to pursue its claims at all. *See* Resp. at 9, 10. But even if that were so, Beehive assumed such a risk by going to the FCC and then to court despite the bar in section 207. And it is not so. The FCC's "no action" letter declined to take action on Beehive's informal complaint

[1] Beehive spends the first pages in its "factual" discussion on the equities of traffic pumping in a discussion that is irrelevant to the Section 207 issue. Plaintiff's Response to Motion of Defendant to Dismiss Complaint ("Resp.") at 3-4. It is also wrong. Beehive ignores the insidious effect of traffic pumping and its role in the scheme. Long-distance carriers like Sprint are required to transport traffic to whatever number is called. When this traffic is to legitimate end users, Sprint must pay the access charges of local companies such as Beehive. Regulators help ensure the rates are reasonable. Carriers such as Beehive with few customers and low volumes of traffic are permitted to charge significantly higher rates than other carriers. But if these carriers in turn inflate their traffic after establishing high rates, they can earn massive profits at the expense of long-distance carriers. That is what Beehive attempted to do in entering agreements with adult chat lines and similar call connection companies ("CCCs") in 2006 and 2007 and through its arrangement with All American thereafter. (In 2007, as a result of Beehive's high traffic volumes in preceding years, Beehive had to adopt the NECA tariff or it would have been required to lower its rates, but this meant it had limited opportunity to take advantage of pumping absent the arrangement with All American). If long distance carriers were forced to pay access charges on the calls to CCCs, the long-distance companies and their customers would effectively be subsidizing Beehive, the adult chat lines and other CCCs, and the callers that use these free or nearly free chat lines, conference calls and other CCC services.

but told Beehive it could file a formal complaint, making clear it had not ruled against Beehive on jurisdictional grounds and that Beehive could continue to pursue its arguments on both jurisdiction and the merits. Declaration of Marc A. Goldman In Support of Motion to Dismiss ("Goldman") Ex. 4 at 1 ("Based on a review of the pertinent information, the Division is not recommending further action on the informal complaint. . . .[T]he complainant may file a formal complaint. . . ."). There are many reasons the FCC may have decided not to recommend further action on the informal complaint, as the informal complaint process does not ensure to applicants a decision on the legal merits of their complaints. *See* 47 C.F.R. §§ 1.716-1.719.

While Beehive notes that both parties at the FCC admitted the FCC would not entertain a complaint for damages (Resp. at 9), that point is irrelevant. Both in its complaint and in its letter replying to Sprint's arguments that the FCC lacked jurisdiction, Beehive strenuously asserted that the FCC had jurisdiction over the action for declaratory relief that it did bring. *See, e.g.*, Goldman Ex. 3 at 3 ("The bottom line is that the Commission unquestionably has jurisdiction to interpret the provisions of the NECA tariff and determine whether Sprint Nextel has acted lawfully."). Indeed, Beehive concedes that the FCC proceedings remain open, arguing that "[i]f this Court dismisses the case, Beehive will be forced to return to the FCC . . . ." Resp. at 10. In other words, even now, Beehive concedes that parallel litigation before the FCC *remains a possibility.* That is exactly the sort of "duplicative adjudication" that section 207 forbids. *Premiere Network Servs., Inc. v. SBC Commc'ns, Inc.*, 440 F.3d 683, 689 (5th Cir. 2006) (quotation omitted). And Beehive could return to the FCC whether or not the Court dismisses the complaint, because Beehive's potential remedies at the FCC have not run their course.

Beehive acknowledges there is no judicial authority supporting its position, Resp. at 10. It instead cites *In re U.S. TelePacific Corp. v. Tel-America of Salt Lake City, Inc.*, 19 F.C.C.R. 24552 (2004), but that case supports Sprint. In that case, the district court *dismissed* a complaint on the basis that an informal complaint on the same issue had been brought before the FCC. It held "that only if the Commission finds that it lacks jurisdiction over some of TelePacific's claims and dismisses those claims without prejudice, would TelePacific be permitted to re-file its action in the District Court." *Id.* at 24554 ¶ 5. The FCC made such a finding and then held that, as a result, TelePacific could subsequently bring an action in court:

> Now that we have held that this collection action was not properly brought before the Commission in the first instance, neither TelePacific's filing of the instant Complaint, nor the filing of the earlier Informal Complaint, constitutes an election of forum under section 207 of the Act that would deprive the District Court of jurisdiction over this action. The dismissal of the instant Complaint without prejudice should thus clarify that section 207 poses no bar to TelePacific proceeding in the District Court. *Id.* at 24556, ¶ 10.

Id. at 24556, ¶ 10. The FCC thus made clear that in its view the ability to file in district court was triggered by the FCC's ruling that the agency lacked jurisdiction. There has been no such ruling here. In fact, in its reply letter to the FCC, Beehive requested in the alternative that its complaint "be dismissed without prejudice so that § 207 of the Act will pose no bar to Beehive proceeding in the Court" Goldman Ex. 3 at 2, 6, but the FCC declined to make any such ruling.

If, after this case is dismissed and Beehive returns to the FCC, the FCC ultimately determines it has no jurisdiction, then the *TelePacific* decision suggests that the FCC may conclude that Beehive can re-file in court. At that point, the parties will likely argue over whether the FCC was correct in *TelePacific* in concluding that such re-filing is permissible.

Sprint believes it was not: that under the plain terms of Section 207, it is the very act of filing in the FCC that triggers the bar to a court action. That is why in *Premiere Network*, the Fifth Circuit held that even a complaint dismissed without prejudice does not "reset" or "un-file" a case to allow it to be filed in a different forum. 440 F.3d at 688. *See also Digitel, Inc. v. MCI WorldCom, Inc.*, 239 F.3d 187, 190 (2d Cir. 2001) (question was whether there was an "invocation" of FCC's jurisdiction). But, in any event, it is clear that for now, when there has been no FCC jurisdictional decision, dismissal is required.

Beehive also argues that this Court should not play "ping-pong" with the FCC, dismissing the case now only to have the FCC also dismiss on jurisdictional grounds. Resp. at 11. But this assumes ahead of time that the FCC will decide the jurisdictional question against Beehive (Beehive's argument is thus inconsistent with the arguments it made to the FCC that it has jurisdiction). Moreover, even if the FCC decides against Beehive, whether on jurisdictional grounds or otherwise, that would not change the fact that Beehive *pursued* its remedy at the FCC. And as Beehive recognizes, Resp. at 11, it is such pursuit that triggers Section 207, which states that "a person shall not have the right to *pursue* both such remedies." (emphasis added).[2]

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[2] Beehive also makes a policy-based argument that, even if its claim were dismissed here, duplicative sets of issues would still be litigated at both the court and the FCC. Resp. at 11-12. But regardless of whether the issues would overlap, the *claims* would be different. Moreover, the claims and counterclaims do not necessarily involve the same issues. Sprint's tariff counterclaims focus on damages for amounts Sprint paid for unlawful charges before it began withholding payment, at a time when Beehive had direct relationships with CCCs; in contrast, Beehive's claims involve a period when it passed traffic through All American to the CCCs. In any case, the possibility that overlapping issues may be raised at the FCC is not a ground for denying dismissal under section 207, which turns on the forum election of the parties, not whether the FCC or the court is in a better position to decide the claim. *See TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007) ("[O]nce an election is made by either filing a complaint with the FCC or filing a complaint in federal court, a party may not thereafter file a

Beehive makes an equitable argument, suggesting that it mistakenly filed its claims at the FCC, unaware that this would deprive district courts of jurisdiction over its claims, and that after it "realized" that Sprint would object to its complaint at the FCC, it filed its complaint in court, "rely[ing] in large measure upon [Sprint's] position before the FCC." Resp. at 6. But Beehive is a sophisticated actor and repeat player at the FCC; Beehive noted the section 207 issue in its initial complaint and continued to assert the FCC had jurisdiction *after* seeing Sprint's responses to its informal complaint and after filing its federal complaint here. Goldman Ex. 3 at 3. Beehive did not suddenly "realize[]" the jurisdictional issue based on Sprint's response and decide its original position was mistaken. In fact, Beehive argued to the FCC that the same *TelePacific* case that it now argues demonstrates this Court's jurisdiction, supported its argument that the *FCC* had jurisdiction. Goldman Ex. 3 at 6. Having failed with its informal complaint at the FCC, Beehive has simply turned on a dime.

Beehive's judicial estoppel argument (Resp. at 13) is also misguided on both the law and the facts. To begin with, judicial estoppel only applies "in the narrowest of circumstances," *Johnson v. Lindon City Corp.*, 405 F.3d 1065, 1068, 1069 (10th Cir. 2005), when a party has "clearly" changed its position, *Eastman v. Union Pacific R.R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007). But Sprint has in no way changed its position. Its FCC response made entirely clear that it reserved its right to object to Beehive re-filing in court after having filed at the FCC. Goldman Ex. 2 at 7, n.10. And Sprint has not altered its position that the FCC lacks jurisdiction; Sprint's point is that once Beehive began pursuing its claims before the FCC, it could not then

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complaint on the same issues in the alternative forum, regardless of the status of the complaint.").

choose another forum on the same nexus of issues – and certainly before any jurisdictional ruling from the FCC. Indeed, it is Beehive that appears to have changed position, making arguments that depend on the conclusion that the FCC lacked jurisdiction over its informal complaint. Equally important, the FCC did not decide the jurisdictional or other issues Sprint raised but instead merely declined to take further action absent filing of a formal complaint by Beehive. But as Beehive notes, equitable estoppel applies only in the limited situation where a party makes an argument on which a court relies in ruling in that party's favor. Resp. at 13 n.1. *See also Paup v. Gear Products, Inc.*, 2009 U.S. App. LEXIS 14332, **11-12, 14-16 (10th Cir. June 19, 2009) (unpublished) (finding judicial estoppel applied because bankruptcy court's decision was necessarily based on debtor's representation); *Teledyne Indus., Inc. v. NLRB*, 911 F.2d 1214, 1218-19 (6th Cir. 1990) (finding that judicial estoppel did not apply because the district court's order in party's favor could have been based on factors other than party's representation and did not contain findings adopting representation of the party). Moreover, the Tenth Circuit has suggested the doctrine does not apply to representations before administrative agencies. *Sain v. EOG Resources, Inc.*, 2006 U.S. App. LEXIS 26898, * 8 (10th Cir. Oct. 27, 2006) (unpublished). Finally, despite Beehive's claim to the contrary, Resp.. at 13-14 n.4, it is attempting to use estoppel to expand the subject matter jurisdiction of this Court, which is plainly impermissible.[3]

[3] Beehive's argument that section 207 is not a jurisdictional bar is undermined by the cases it cites, *Eberhart v. United States*, 546 U.S. 12 (2005) and *Kontrick v. Ryan*, 540 U.S. 443 (2004). Those cases make clear that jurisdictional rules apply to "prescriptions delineating the classes of cases (subject-matter jurisdiction) . . . falling within a court's adjudicatory authority." *Kontrick*, 540 F.3d at 455. Section 207 is such a rule, prescribing that courts can hear complaints for damages based on violations of the Communications Act but only if the complainant has not previously filed an FCC complaint. *Infra* n.4. And Sprint cannot waive or forfeit a subject-matter jurisdictional defect, which the Court is obligated to consider even sua sponte. *Id.* at 455-56.

Although Beehive claims it is trying to estop Sprint from changing positions on *factual* issues decided by the FCC, it does not identify any such factual issues.

II. The Complaint Arises From the Same Factual Nexus as the FCC Complaint.

Beehive's second argument is that its FCC informal complaint and federal complaint were not "parallel proceedings," in large part because Beehive sought a different kind of relief at the FCC – declaratory relief as opposed to damages. Resp. at 12-17. Even a cursory look at Beehive's informal complaint shows this is not the case. Beehive sought an order declaring Sprint obligated to pay Beehive's access charges and late payment penalties. Goldman Ex. 1 at 11. This was based on the same set of facts raised in this complaint. *See id.* at 6-9.

Moreover, even if, as Beehive asserts, these were not "parallel proceedings," Resp. at 12, that is not the legal standard. *See Digitel*, 239 F.3d at 191 ("there must be a nexus between the claims in the two forums that is sufficient to bring § 207 into play"); *Premiere Network*, 440 F.3d at 488-89 (party cannot file complaint on "same issues in the alternative forum"); *TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1244 (10th Cir. 2007) (question is whether complaints raise same "issues"). If a party could avoid the election of remedies provision in section 207 simply by styling its FCC complaint as one for declaratory relief, section 207 would be rendered meaningless. Parties could always pursue simultaneous actions at the FCC and in court by styling the FCC action as a declaratory action on the same issues raised in court.

Beehive misreads the text of section 207, focusing on the section's applicability to "[a]ny person claiming to be damaged," to assert it only applies when a party explicitly seeks damages in both fora. Resp. at 16. But regardless of whether Beehive sought damages at the FCC, it certainly was a person "claiming to be damaged" within the meaning of section 207. By filing

its FCC complaint, Beehive necessarily claimed to be such a person since section 207 is the source of the FCC's jurisdiction over complaints.[4] Moreover, Beehive claimed to be damaged when it included in its FCC complaint the amounts at issue. Goldman Ex. 1 at 5. Finally, Beehive ignores the language in Section 207 distinguishing between court actions, which have to actually seek damages, and FCC actions, which do not. *See* 47 U.S.C. § 207 (person "may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages. . . in any district court").

In *Digitel,* even where the FCC complainant at issue did not explicitly request damages, the Second Circuit found the relevant standard is whether there is "a nexus between the claims in the two forums that is sufficient to bring § 207 into play." 229 F.3d. at 191. To be sure, *Digitel* found the informal complaint necessarily sought money damages, because the service issue complained of had already been resolved. *Id.* But that does not differentiate it from Beehive's FCC complaint, which also sought relief related to past monetary disputes, not a future change in practices. In fact, Beehive's complaint was explicit in this respect, unlike the complaint in *Digitel.*[5] Here, there is more than a "nexus" between the two actions; the issues are effectively

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[4] Section 207 provides the FCC with jurisdiction over complaints "as hereinafter provided for." Section 208 "then describes the procedures by which a complaint may be filed and investigated." *See Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 906-07 (5th Cir. 1997); *Premiere Network*, 440 F.3d 683, 692 n. 13; *Digitel*, 239 F.3d at 190.

[5] Nor do any of the other decisions Beehive cites remotely suggest that a party can bring an FCC action for a declaration that it is entitled to payment and then separately sue for damages. *Cancall PCS v. Omnipoint Corp.*, 2000 U.S. Dist. LEXIS 2830, *32 (S.D.N.Y. 2000), involved an informal FCC complaint seeking a future change of practices. *RCA Global Communications, Inc. v. Western Union Telegraph Co.*, 521 F. Supp. 998, 1006 (S.D.N.Y. 1981) involved FCC and judicial complaints on different substantive issues. Finally, *Fair Mount Telephone Co. v. Southern Bell Telephone & Telgraph Co.*, 53 Rad. Reg. 2d (P&F) 639, 642 ¶¶ 10-11 (Com. Car. Bur. 1983) and *Long Distance/USA, Inc. v. Bell Telephone Co. of Pennsylvania*, 7 F.C.C.R. 408,

the same. Indeed, the primary decision Beehive relies on in its opposition, *TelePacific*, makes clear that an FCC complaint brought under section 201 (as was Beehive's) can raise effectively the same issues as a collection action under section 203 (Beehive's complaint here), regardless of how it is "styled." *TelePacific*, 19 F.C.C.R. at 24552 ¶ 1.

Finally, Beehive contends that because Sprint argued that Beehive named the wrong party at the FCC, section 207 does not serve as a bar. Resp. at 13. But that issue too was not decided by the FCC. It is apparent from the face of Beehive's FCC complaint that Beehive fully intended to pursue the same basic cause of action against the same party that it is pursuing here. And Beehive continued to maintain the FCC had jurisdiction over these issues in its reply filing at the FCC after Sprint raised the issue of party name. Goldman Ex. 3 at 3. Both courts and the FCC often deal with technical naming issues where the proper party has notice by requiring that parties amend their complaint to name the correct party or otherwise correct their error. *See, e.g., Staren v. American Nat'l Bank and Trust Co. of Chicago*, 529 F.2d 1257, 1262-64 (7th Cir. 1976); *Hevey v. Metlife Gen. Ins. Corp. Sys. Agency of Miss., Inc.*, 147 F. Supp. 2d 517 (S.D. Miss. 2001); *Long Distance/USA*, 7 F.C.C.R. at 410 n. 20 ("We find that the LEC subsidiaries rather than the parent entities should have been named as defendants. We conclude, however, that . . . the allegations in the complaints were sufficient to allow the parent entities to respond fully on behalf of their LEC subsidiaries."). Here, the FCC did not decide that the party name issue precluded Beehive from pursuing its claims. Instead, it suggested Beehive should file a formal complaint that would relate back for purposes of the statute of limitations under the FCC's rules. Goldman Ex. 4 at 2. That Beehive named the wrong party in its informal

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410 ¶¶ 7-8 (Com. Car. Bur. 1992) involved FCC complaints pursued only *after* the complaints were filed in court and referred *by the court* to the FCC on primary jurisdiction grounds.

complaint (whether mistakenly or in a deliberate attempt to enable it to make this very argument) should not excuse it from the consequences of its choice of forum. And in any event, there can be no doubt that there is a nexus between Beehive's claims at the FCC and in court, which concerned the withholding of payments on the *same call traffic*.

CONCLUSION

As the Fifth Circuit explained, "the language of the statute is unambiguous: A complainant can file a complaint either with the FCC or in federal district court, but not in both." *Stiles v. GTE Southwest Inc.*, 128 F.3d 904, 907 (5th Cir. 1997). Based on section 207, this Court should dismiss Beehive's claims.

DATED this 21st day of September, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2009, I caused true and correct copies of the **SPRINT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS BEEHIVE'S COMPLAINT PURSUANT TO RULE 12(b)(1)** to be served via United States mail, first class postage prepaid thereon, on the following:

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