

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED)	
COMPLAINT OF SOUTH DAKOTA)	DOCKET NO. TC09-098
NETWORK, LLC, AGAINST SPRINT)	
COMMUNICATIONS COMPANY L.P.)	
)	
IN THE MATTER OF THE THIRD PARTY)	
COMPLAINT OF SPRINT COMMUNICATIONS)	
COMPANY L.P. AGAINST SPLITROCK)	
PROPERTIES, INC., NORTHERN VALLEY)	
COMMUNICATIONS, INC., SANCOM, INC.,)	
AND CAPITAL TELEPHONE COMPANY)	

PUBLIC VERSION

**SPRINT COMMUNICATIONS COMPANY L.P.’S
REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER
REGARDING NORTHERN VALLEY’S CORPORATE DEPOSITION NOTICE**

I. INTRODUCTION

Sprint Communications Company L.P. (“Sprint”) submits this Reply Memorandum in Support of its Motion for Protective Order Regarding Northern Valley’s Corporate Deposition Notice. Northern Valley Communications, Inc. (“Northern Valley”) confirms it wants to engage in a fishing exhibition and obtain information that has nothing to do with the pleadings or the standards that apply in this case. Moreover, Northern Valley fails to address the question of Sprint’s burden in any meaningful way, making clear its goal is to inflict pain, not obtain information it needs to try its case. The Commission should agree that Sprint’s proposal to respond to 16 of Northern Valley’s 47 Rule 30(b)(6) topics, plus Sprint’s confirmation of facts on 4 additional topics as discussed below, will provide Northern Valley with that which it needs to litigate the claims and defenses in this case.

II. PROCEDURAL HISTORY

Northern Valley's discussion of the procedural background (Northern Valley May 8, 2012 Opp. Br., pp. 1-4) is primarily a complaint that Sprint's Motion for Protective Order was not noticed to be heard at the April 12, 2012 Commission meeting. This complaint is irrelevant – the April 12 hearing was postponed, Sprint filed its Motion on April 17, and these motions are all being heard together. There is no reason for Northern Valley to lead off its brief with an issue that is moot.

Northern Valley also complains that it was unprepared to engage in a true meet-and-confer discussion on February 17, 2012 because Sprint did not provide its concerns in writing before that call. *See* Northern Valley May 8, 2012 Opp. Br., pp. 2-3. Setting aside the question of whether that is a valid excuse for being unprepared, when Sprint did (as requested) put its concerns in writing following that call, Northern Valley still failed to provide a substantive response. That perplexing decision has, as discussed below, required Sprint to bring a motion on topics that could have been narrowed through negotiation rather than the briefing process.

III. DISCOVERY STANDARDS

A. Northern Valley Does Not Address the Issue of Burden in Any Meaningful Way

There can be no real dispute that requiring a corporate representative to testify on Northern Valley's Rule 30(b)(6) topics will impose a significant burden on Sprint. Sprint's Apr. 17, 2012 Mem., pp. 4-8. Northern Valley does not counter Sprint's evidence of the time that would be required to prepare a witness to testify on Northern Valley's topics. Nor does Northern Valley dispute that the value of its Counterclaim Count II is quite small in comparison to the amount of discovery sought and the burden associated with responding. *See Connect Insured Tel., Inc. v. Qwest Long Distance, Inc.*, No. 3-10-CV-1987-D, 2011 WL 4736292, at *4 (N.D.

Tex. Oct. 6, 2011) (marginal benefit of discovery does not justify the expenditure of tens of thousands of dollars, particularly when the amount in controversy is less than \$265,000). *See* Affidavit of Philip Schenkenberg, May 11, 2012 (“May 11, 2011 Schenkenberg Aff.”), Ex. B.

Northern Valley has tried this approach – and failed – before. In its federal litigation with Qwest, Northern Valley attempted to sidestep the fact that (as demonstrated in affidavits), compliance with its discovery demands would be burdensome. *See Northern Valley Commc’ns, L.L.C. v. Qwest Commc’ns Corp.*, No. 09-1004-CBK, 2010 WL 3672233, at *5 (D.S.D. Sept. 10, 2010) (May 11, 2011 Schenkenberg Aff. Ex. C). The Court decided the shown burden outweighed the possible marginal relevance in an unjust enrichment claim:

Northern’s motion to compel production of Qwest’s revenues derived from its customers for calls destined to Northern’s network is DENIED without prejudice because at this stage the relevance of Qwest’s revenues is questionable, probably marginal at best, and the effort to produce the information sought by Northern would be burdensome. Qwest has also asserted the cost to produce the information would be burdensome. Cost shifting may be a consideration if Northern perceives a need to pursue production of Qwest’s revenues in the future.

Id.

Instead of addressing burden, Northern Valley seems to contend that its requested discovery is appropriate because it is proportionate to what it provided to Sprint. This is not the standard. Under South Dakota law, the Commission must limit the frequency or scope of discovery otherwise allowed by the rules if it determines that “discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party’s resources, and the importance of the issues at stake in the litigation.” SDCL § 15-6-26(b)(1)(A)(iii) (emphasis added). Nowhere is a court directed to consider the proportionality of the discovery requests between the parties.

Even if proportionality were the standard, Sprint’s Rule 30(b)(6) deposition notice and topics, unlike Northern Valley’s, were focused on the claims and defenses, were well within the

spirit of the rules, did not give rise to a motion by Northern Valley, and did not create an undue burden. May 11, 2012 Schenkenberg Aff. Ex. A. In fact, Sprint covered those topics – combined with its only two individual depositions of Northern Valley – in two business days. Schenkenberg Aff. ¶ 3. Northern Valley is certainly not attempting to obtain a similar, proportionate, outcome.

Finally, Northern Valley relies on a number of unsupported and non-specific statements about what it has purportedly found in other unidentified cases. Northern Valley challenges Sprint’s assertions about burdensomeness by referring to something its counsel claims to have seen on a narrow issue in an unidentified case, involving an unidentified IXC. Northern Valley May 8, 2012 Opp. Br., pp. 17-18. Such an assertion is too vague to be meaningful, and, as it is not supported by an affidavit, it cannot support a finding of fact. SDCL § 15-6-43(e) (“Evidence on motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties”) (emphasis added).

Accordingly, the Commission should reject Northern Valley’s argument and should find that complying with Northern Valley’s Rule 30(b)(6) deposition notice will result in an undue burden on Sprint.

B. Northern Valley Must Tie its Topics to Claims and Defenses

As Sprint has noted previously, Northern Valley believes it can use the discovery rules to obtain information that is completely unnecessary to try its case. Again, Northern Valley failed in a similar attempt to obtain irrelevant information, as the federal court (1) rejected Northern Valley’s claims that an IXC’s business activities could be admissible as a “statement against interest,” and (2) held “[t]his case is about the legitimacy of Northern’s conduct,” not the IXC’s. May 11, 2012 Schenkenberg Aff. Ex. C at *5-6. The Court concluded: “The motion is directed to evidence which is not relevant.” *Id.* at *6. *See* Northern Valley May 8, 2012 Opp. Br., pp. 13-

15. The Commission should issue an order protecting Sprint's corporate witness from testifying on Northern Valley's Topics 7 and 23.

II. NORTHERN VALLEY'S DEFINITION OF "SPRINT" IS TOO BROAD

Northern Valley's definition of "Sprint" is too broad because it improperly includes dozens of Sprint's corporate affiliates that have nothing to do with this case, as well as its inside and outside legal counsel. Northern Valley suggests that Sprint used a similarly broad definition of "Northern Valley" in its Rule 30(b)(6) deposition notice. Northern Valley May 8, 2012 Opp. Br., p. 7. This is incorrect. *See* Schenkenberg Aff. Ex. A. In fact, Sprint's Rule 30(b)(6) deposition notice requested affiliate information on only two narrow topics, where such information was particularly relevant to the claims and defenses to the case at hand. *Id.* (Topics 4 & 14). The case on which Northern Valley relies, *Murphy v. Kmart Corp.*, 255 F.R.D. 497 (D.S.D. 2009), justifies Sprint's approach by holding that, on a topic-by-topic basis, defining a corporate party to include its affiliates may be appropriate. *Id.* at 505-06 (considering whether the requesting party could depose Kmart Corporation's witness on a subject-by-subject analysis and redefining the proper scope of questioning depending on the topic). Rather than identifying a few specific topics for which it makes sense to include information on Sprint's affiliates (as Sprint did), Northern Valley instead uses a blanket definition that purports to include information on every Sprint affiliate related to each and every topic. This cannot be justified.

In addition, Northern Valley's use of the word "attorney" in its definition of "Sprint" would presumably extend to both inside and outside counsel. Northern Valley makes no real argument as to why outside counsel should be within the definition. While Sprint agrees that its corporate witness will have to provide relevant facts known by its inside counsel, Northern Valley's intent to examine non-lawyers or the legal department's communications will lead to extremely broad and irrelevant discovery. For example, if left as is, Northern Valley's Topic 7

would presumably require Sprint to prepare a witness to testify about all communications that Sprint lawyers have had with any other IXC representatives regarding Calling Service Providers' activities in South Dakota. There is no purpose served by having a non-lawyer witness prepare for such questioning. The Commission can take guidance from the *Kmart Corp.* decision (relied on by Northern Valley) as that court ultimately required the requesting party to file a more limited Rule 30(b)(6) notice because the "request covers a tremendous amount of information that may be completely irrelevant to" the requestor's claims. 255 F.R.D. at 506. Similarly, Northern Valley's definition, as it stands, expands well beyond what might be relevant to the claims or defenses of this proceeding.

Accordingly, the Commission should enter an order limiting the definition of "Sprint" in the Rule 30(b)(6) deposition notice.

IV. INDIVIDUAL TOPICS

A. The Dispute on Topic 4 Has Been Resolved

Northern Valley's Topic 4 reads:

4. Sprint's understanding of Northern Valley's federal and state switched access tariffs, and their local exchange tariffs, general tariff, price lists or other written offerings for providing local services, and the reasons and material facts that Sprint maintains supports the position that the traffic at issue in these actions is not compensable under such tariffs.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 4. Sprint's counsel and Northern Valley's counsel have conferred on this topic. Based on Northern Valley's new representation that it does not expect Sprint's witness to be responsible to regurgitate all of the facts Sprint has obtained in discovery from Northern Valley and its CSP partners, the dispute on Topic 4 has been resolved.

B. Topics 5, 6 and 21, as Narrowed by Northern Valley, Can be Addressed With an Affidavit

Northern Valley's Topics 5, 6 and 21 read:

5. The relationship, if any, between Sprint and Calling Service Providers, including but not limited to Free Conferencing and GCP.
6. The distinction or similarity of products and/or services offered by Sprint and Calling Service Providers or other conferencing service providers with which it conducts business.
21. The identity of all companies which Sprint engages or has engaged to provide conferencing services to Sprint's customers or other customers, or any company whose conferencing services Sprint has promoted or marketed, and the terms pursuant to which such relationships are/were governed and the revenues which Sprint has earned relative to each such relationship.

Schenkenberg April 17, 2012 Aff. Ex. C, Topics 5, 6 and 21.

As written, Topics 5, 6, and 21 are broad and relate to Sprint's relationships with CSPs, the conference services provided by Sprint compared to those provided by CSPs, and the identity of companies Sprint has engaged to provide conferencing services. Northern Valley claims these topics "seek to understand whether Sprint has relationships with calling services providers that reflect the characteristics of the very relationships Sprint contends are improper in this case." Northern Valley May 8, 2012 Opp. Br., p. 13. Northern Valley also claims to want to know whether Sprint has any relationships "in which it shares revenues with a conference call provider." *Id.* As narrowed by Northern Valley, Sprint has already provided the information requested in response to Northern Valley's Interrogatory No. 12:

INTERROGATORY NO. 12: Identify all Calling Service Providers to which Sprint provides telecommunications services.

ANSWER: Subject to those objections and without waiver thereof, to its knowledge Sprint provides no telecommunications services to entities that provide free or nearly-free conference calling, chat-line or similar services.

See Sprint's Dec. 5, 2011 Response to Interrogatory No. 12.¹ So there is no confusion, the May 11, 2012 Affidavit of Brent Kohman, filed concurrently herewith, confirms that:

¹ Sprint provided a similar representation at the recent discovery hearing in Docket No. 11-087.

- * Sprint is not engaged in traffic pumping,
- * Sprint does not have relationships with free or nearly free conference call providers that reflect the characteristics of the relationships between Northern Valley and its CSP partners, and
- * Sprint does not share revenues with any such companies.

This should resolve Topics 5, 6, and 21 as narrowed by Northern Valley.

C. Topic 7

Northern Valley's Topic 7 reads:

7. All communications between Sprint and any other IXC regarding Calling Service Providers' activities in South Dakota, including but not limited to issues related to the routing of calls to Calling Service Providers, the billing or disputing of related LEC invoices, other IXCs' settlements of their respective disputes with any LEC vis-a-vis traffic to Calling Service Providers, and your use of other IXCs' networks to route calls to Northern Valley's network under Least Cost Routing contracts or related agreements.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 7.

Northern Valley fails to tie Topic 7 to any claims or defenses in this case. Instead, it makes two arguments as to why conversations between Sprint and other IXCs should "come to light." Northern Valley May 8, 2012 Opp. Br., p. 14. Northern Valley argues that the substance of such conversations "may lead to admissible evidence regarding Sprint's failure to mitigate its purported damages." *Id.* What Northern Valley fails to communicate is that it has never pleaded a "mitigation" defense. *See* Northern Valley Communications, L.L.C.'s Answer to Sprint Communications Company LP's Third-Party Complaint, pp. 6-7 (Jan. 22, 2010). This brand new "mitigation theory" is without support in the pleadings, and cannot support Northern Valley's discovery arguments.

Northern Valley also argues that it hopes to find information that Sprint's disputes were pretextual, *i.e.*, not legitimate. Northern Valley May 8, 2012 Opp. Br., p. 14. This is truly a

fishing expedition. Not only are Sprint's motives irrelevant to a tariff analysis, challenges to traffic pumping schemes have been extraordinarily successful for IXCs, and extraordinarily detrimental to LECs similar to, and including, Northern Valley.² And, as previously documented, Sprint has evidence showing Northern Valley [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED] [END CONFIDENTIAL]. Northern Valley has no good-faith basis to claim that Sprint's alleged pretext is an issue in this case.

D. Topic 10

Northern Valley's Topic 10 reads:

10. Sprint's consideration of blocking (or call degradation or choking) or its actual blocking (or call degradation or choking) of telephone traffic involving or implicating a Calling Service Provider in South Dakota, Sprint's consideration of delivering or actual delivering of traffic involving or implicating a Calling Service Provider in South Dakota to any other IXC under Least Cost Routing contracts or like arrangements that Sprint knew or suspected did not have the capacity or intention to deliver the traffic at issue, and any knowledge Sprint possessed regarding any other IXCs' capacity or intention or action taken to block, degrade or choke such traffic.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 10.

² See *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, No. FCU-07-2, 2009 WL 3052208, at *32 (IUB Sept. 21, 2009) ("*IUB Order*"), *recon. denied*, 2011 WL 459685 (IUB Feb. 4, 2011) (finding calls not subject to tariffed access charges based on LEC and CCC business practices), *affirmed on judicial review sub nom.*, *Farmers Tel. Co. of Riceville v. Iowa Utils. Bd.*, No. 5771 CVCV 8561 (Polk Cnty. Dist. Ct. Oct. 12, 2011); *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, No. EB-07-MD-001, 2009 WL 4073944, 24 FCC Rcd. 14801 (Nov. 25, 2009) ("*Farmers IP*") (finding calls not subject to tariffed access charges based on LEC and CCC business practices), *aff'd*, *Farmers & Merchants Mut. Tel. v. FCC*, 668 F.3d 714 (D.C. Cir. Dec. 30, 2011); *In the Matter of Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, FCC 11-87, 26 FCC Rcd. 8332, 2011 WL 2258081 (F.C.C. June 7, 2011) (rejecting tariff that attempted to impose access charges on calls not delivered to end users); *Sprint Commc'ns Co. v. N. Valley Commc'ns LLC*, FCC 11-111, WL 2838100, 26 FCC Rcd. 10780 Order (July 18, 2011) (finding tariff impermissibly vague).

Northern Valley's only argument in support of Topic 10 is that the information it seeks could relate to a claimed "mitigation" defense. Northern Valley May 8, 2012 Opp. Br., p. 14. As noted *supra*, Northern Valley has no mitigation defense. Accordingly, Sprint should not be required to produce a witness on Topic 10.

E. Topic 22

Northern Valley's Topic 22 reads:

22. All studies or analyses Sprint has undertaken of its customers' demand for calls to Calling Service Providers and the percentage, over time, of Sprint's customers' calls to Calling Service Providers vis-à-vis total traffic volume, and how those percentages differ, if at all, based on whether your consumers subscribe to a per-minute-based calling plan or an Unlimited Plan.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 22.

Based on Northern Valley's argument, the parties agree that this requested information is relevant only if the Commission decides that it can set a rate based on Sprint's financial information. Because this is not the law, Sprint should not be required to produce a witness on this Topic 22.

F. Topic 23

Northern Valley Topic 23 reads:

23. Whether and, if so, the manner in which Sprint pays interstate or intrastate access charges, transit fees, or any other form of compensation to any LEC or other company due to or arising from the provision of conferencing services.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 23.

Northern Valley fails to tie Topic 23 to any claims or defenses in this case. As such, Sprint should not be required to produce a witness on Topic 23.

G. Topic 24

Topic 24 reads:

24. All communications between Sprint and any employee or representative of the United States House of Representatives, United States Senate, Federal Communications Commission, South Dakota Legislature or South Dakota Public Utilities Commission regarding or referencing any Calling Service Provider, including but not limited to any of the Calling Service Providers, or Northern Valley, or otherwise related to activity which Sprint refers to as “traffic pumping” or “access stimulation.”

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 24.

Sprint hopes the Commission has no interest in hearing testimony about, for example, Sprint’s statements to FCC staff over the past 5 years about access pumping. Such facts cannot possibly bear on whether Northern Valley’s intrastate access tariff applies, and Northern Valley fails to support such a position by citing to any rules of evidence or caselaw regarding tariff analysis. Sprint’s motion should be granted and Sprint’s witness should not be required to testify on Topic 24.

H. Topic 25

Northern Valley’s Topic 25 reads:

25. Least Cost Routing agreements between Sprint and other IXCs that apply or during any relevant time has applied to traffic destined for Northern Valley.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 25.

Based on Northern Valley’s argument, the parties agree that this requested information is relevant only if the Commission decides it can set a rate based on Sprint’s financial information. Because this is not the law, the Commission should grant Sprint’s motion and protect Sprint’s witness from testifying on Topic 25.

I. Topic 26, As Narrowed by Northern Valley, is Resolved

Northern Valley's Topic 26 reads:

26. Sprint's understanding of the types of individuals and entities which utilize Calling Service Providers' services and, in particular, services provided by Free Conferencing and GCP and any other CSP parties to the above-captioned actions, and Sprint's assertions relating to the nature of the services provided by Calling Service Providers.

Schenkenberg April 17, 2012 Aff. Ex. C, Topic 26.

Topic 26 asks about Sprint's understanding of who uses CSPs' services, and Sprint's assertions about the nature of those services. Northern Valley narrowed this topic in its brief, and now wants Sprint to confirm that none of the CSPs' services involve "adult" calling services. Sprint has not (to its knowledge) made any such claim in this case, and certifies that it has not obtained information in discovery that Northern Valley's CSP partners are offering "adult" calling services. That certification should resolve this issue.

J. Topics 27-44 – Northern Valley's Unjust Enrichment Topics

Northern Valley agrees that information related to what it has called its "unjust enrichment claims" is relevant only if the Commission decides it can set a rate based on Sprint's financial information. Once the Commission grants Sprint's Motion for Partial Summary Judgment and determines any rate must be based on Northern Valley's information, it will be appropriate to grant Sprint's motion.

K. Topics 46 & 47

Northern Valley's Topics 46 and 47 read:

46. The operation and capabilities of any system or systems that are or have been used by Sprint to run queries on minutes of use and/or to analyze call details records as described in the Affidavits of Karine M. Hellwig and Bruce R. Tilloston in support of Sprint's opposition to Northern Valley's Motion to Compel.

47. Any actions taken by Sprint to run queries responsive to Northern Valley's discovery on data before it was archived and/or efforts Sprint took to intervene in the archival of that data.

Schenkenberg April 17, 2012 Aff. Ex. C, Topics 46-47.

Northern Valley claims these topics are designed to test Sprint's affidavits submitted on these motions on the issue of burden. Northern Valley May 8, 2012 Opp. Br., pp. 18-19. If that were true, Northern Valley would have asked this motion to be held in abeyance so it could conduct discovery before the hearing. Having chosen to go to hearing without opposing those affidavits, Northern Valley has given up that issue – there would be no purpose served by conducting discovery on burden following the Commission's ruling. And, if Northern Valley is attempting to conduct discovery to determine whether Sprint has violated the terms of the parties' ESI agreement in federal court, it is seeking discovery before the wrong tribunal.

CONCLUSION

For the above-stated reasons, the Commission should issue a protective order, relieving Sprint of the need to produce a corporate representative under Rule 30(b)(6) for the topics listed above, or, in the alternative, narrowing those topics as requested.

DATED this 11th day of May, 2012.

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