

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC 09-098

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

**MEMORANDUM IN SUPPORT OF
SPRINT COMMUNICATIONS COMPANY LP'S
MOTION TO DISMISS COUNT III**

Sprint Communications Company LP ("Sprint") respectfully submits this brief in support of its motion to dismiss Count III of the Complaint filed by South Dakota Network, LLC ("SDN").

ARGUMENT

SDN initiated this action, alleging that Sprint is liable for intrastate switched access charges billed to it by SDN. As more fully explained in its Answer and Counterclaim, Sprint denies all liability to SDN and seeks affirmative relief for a refund of amounts it overpaid between 2007 and 2009. Count I of SDN's Complaint asserts that Sprint owes SDN a total of \$178,273.61 as of September 1, 2009. Count II alleges that Sprint has failed to comply with SDN's tariff by refusing to pay for the undisputed portion of the service provided by SDN. Count III, then, asserts that Sprint's refusal to pay SDN's tariffed access rates and undisputed amounts subjects Sprint to payment of double damages and attorneys' fees pursuant to SDCL 49-13-14.1. *See* SDN Complaint, p. 4.

SDCL 49-13-14.1 reads as follows:

49-13-14.1. Violations by telecommunications company or motor carrier--Civil liability--Double liability upon suit--Attorney's fees. If any telecommunications company or motor carrier subject to the provisions of this chapter does, causes or permits any act or thing prohibited in chapters 49-7 to 49-11, inclusive, and §§ 49-31-7 and 49-31-7.1 or omits to do any act or thing required to be done, such

telecommunications company or motor carrier is liable to the person injured thereby for the amount of damages sustained in consequence of any such violation, if recovered without suit; or if recovered by suit, such telecommunications company or motor carrier is liable to the person injured thereby for not to exceed twice the amount of damages sustained in consequence of any such violation complained of, together with costs of suit and a reasonable attorney fee, to be fixed by the court in which the suit is heard on appeal or otherwise, which shall be taxed and collected as part of the costs in the case.

There are two reasons why SDCL 49-13-14.1 does not provide a basis for double damages and attorneys' fees in this action. First, double damages and attorneys' fees can be recovered when damages are "recovered by suit," and this proceeding is a complaint before the Commission, not a lawsuit. The statute directly acknowledges these statutory damages can only "be fixed by the court in which the suit is heard on appeal or otherwise."

Second, SDN makes no allegations that Sprint has violated Chapters 49-7 to 49-11, or Sections 49-31-7 or 49-31-7.1. Chapter 49-7 addresses rights-of-way, Chapter 49-7.1 relates to evacuation activities, Chapters 49-8, 49-9, and 49-10 have been transferred or repealed, and Chapter 49-11 relates to charges pending rate litigation. In addition, Section 49-31-7 relates to improvement of business and equipment and Section 49-31-7.1 relates broadly to the powers and duties of the Commission. Because the provisions referenced in SDCL 49-13-14.1 are not implicated by SDN's Complaint, its demand for double damages and attorneys' fees must fail.

This Commission has previously held that SDCL 49-13-14.1 does not support a claim for double damages and attorneys' fees in actions such as this. *In the Matter of the Complaint Filed by WWC License LLC Against Golden West Telecommunications Cooperative, Inc., et al.*, SD Comm'n Case No. CT 05-001, Order Granting Motion to Strike or Dismiss (Aug. 26, 2005). In the WWC case, the Commission granted respondents' motion to strike or dismiss, concluding "that the double damages and attorneys' fees provisions in SDCL 49-13-14.1 apply only in the

case of a suit brought in court and only with respect to claims of the type specified in SDCL 49-13-14.1.” *Id.* The same treatment is required here with respect to SDN’s Count III.

For the above reasons, the Commission should grant Sprint’s motion to dismiss Count III of the Complaint.

Dated: November 23, 2009

GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

By 

Talbot J. Wieczorek
Gunderson, Palmer, Nelson & Ashmore, LLP
440 Mount Rushmore Road
Third Floor
P.O. Box 8045
Rapid City, SD 57701
605.342.1078

Philip R. Schenkenberg
BRIGGS AND MORGAN, P.A.
80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
612.977.8400

Attorneys for Sprint Communications Company
LP