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. AND SANCOM, INC.'S OPPOSITION TO SPRINT'S AMENDED MOTION TO DISMISS CROSS-CLAIMS**

Northern Valley Communications, LLC ("Northern Valley") and Sancom, Inc. ("Sancom") (collectively, "Third-Party Defendants"), by and through counsel, and pursuant to S.D. Admin. R. 20:10:01:01.02, 20:10:01:22.01 and S.D. Codified Laws § 15-6-37(a), hereby submit this joint opposition to the amended motions to dismiss filed by Sprint Communications Company, LP ("Sprint") on June 14, 2011 (collectively, "Amended Motion"). Sprint's arguments in the Amended Motion are the same for Northern Valley and Sancom, and therefore they respond jointly in opposition to Sprint's Amended Motion.

The first paragraphs of Sprint's memorandum supporting its Amended Motion contain essentially the same arguments that Sprint put forth in its first motions to dismiss filed February 11, 2010. Northern Valley and Sancom filed a joint opposition to the first motion to dismiss on February 26, 2010. The second part of Sprint's Amended Motion contains a new argument: that the South Dakota Public Utilities Commission ("PUC") does not have jurisdiction to hear Northern Valley and Sancom's unjust enrichment or implied contract cross-claims against Sprint. The parties had previously been able to resolve Sprint's first motion to dismiss without the need

for PUC intervention, because the parties requested that a federal court refer certain issues to the PUC for guidance, thereby resolving any jurisdictional issues. Now, despite that earlier agreement, Sprint has reversed course and filed its Amended Motion without consulting or notifying Northern Valley or Sancom of its intent to also challenge the PUC's authority to resolve the issues of importance to the federal court. Sprint's Amended Motion is a transparent attempt by Sprint to avoid the impact of its earlier agreement with Northern Valley to refer certain issues from the federal court to the PUC. Sprint has apparently changed its theory and is simply employing wasteful litigation tactics to avoid having the PUC make any decisions on the referred issues.

The PUC should not condone Sprint's tactics. In walking away from its prior agreement with Northern Valley, Sprint is also 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 Northern Valley and Sancom. Sprint's interpretation of the statute is fundamentally flawed. Furthermore, Sprint's arguments that the PUC does not have jurisdiction over Northern Valley and Sancom's claims is a clear attempt to derail the referral by a federal court of issues which overlap with those claims. Sprint would apparently prefer the PUC not address those issues, despite Sprint's earlier agreement to resolve those very issues by seeking a referral from a federal court to the PUC. Sprint's arguments now demonstrate that Sprint is making every effort to avoid a resolution on the very issues it had previously agreed to refer to the PUC.

Sprint's Amended Motion should be rejected. The PUC should hold that it has jurisdiction to hear the telecommunications issues that were referred to it by the federal court. In the alternative, if the PUC is inclined to grant the Amended Motion, the PUC should declare that S.D Codified Laws § 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 PUC. In the event the PUC pursues the later course of action, it should dismiss Northern Valley and Sancom from this proceeding. Northern Valley, Sancom and Sprint could then return to federal court and resolve the issues there without Sprint's needless objections.

I. Background on the Dispute

Northern Valley and Sancom are South Dakota competitive local exchange carriers ("CLECs") that provide access services to interexchange carriers ("IXCs") like Sprint. Northern Valley and Sancom provide services pursuant to their interstate and intrastate tariffs. Some of Northern Valley and Sancom's customers provide (or, in the case of Sancom, provided) conference calling services using telephone numbers provided by Northern Valley and Sancom. Beginning in 2007, Sprint unlawfully stopped paying for the very same services that Third-Party Defendants had been providing to Sprint and other IXCs for years. To be sure, nothing changed in Third-Party Defendants' filed tariffs; rather, Sprint just stopped paying their bills. Adding insult to injury, Sprint continues to send its customers' traffic to Third-Party Defendants' customers without paying for any of those access services, knowing that Third-Party Defendants, as common carriers, are obligated to protect consumers by maintaining their ability to transmit telephone calls. While Sprint continues to take free service from Third-Party Defendants, Sprint also continues to charge and collect its long distance charges from its own subscribers.

II. Federal Cases between Third-Party Defendants and Sprint

Based on Sprint's refusal to pay for the services it was receiving from Northern Valley, Northern Valley filed a complaint in federal court in the District of South Dakota against Sprint on February 7, 2008. *See Northern Valley Commc'ns L.L.C. v. Sprint Commc'ns Co.*, Complaint, ECF No. 1, Docket No. 1:08-cv-01003 (D.S.D. Feb. 7, 2008) ("Northern Valley federal case").[1] Northern Valley asserted claims of breach of contract for Sprint's refusal to pay pursuant to Northern Valley's tariffs, and alternative claims for breach of implied contract for Sprint's refusal to pay pursuant to Northern Valley's tariffs and unjust enrichment for Sprint's refusal to pay for the valuable services that Northern Valley provided to Sprint. *Id.* at 3-4. Northern Valley's claims in the federal case seek to recover access charges for both interstate traffic and intrastate traffic. Sprint filed its answer and counterclaims on March 5, 2008. *Id.*, ECF No. 4 (Mar. 5, 2008). Sprint's counterclaims seek damages from Northern Valley pursuant to several claims. *Id.* Sprint's primary complaint is that Northern Valley was not authorized by either its interstate or intrastate tariffs to charge Sprint. *Id.* ¶ 33.

Similarly, Sancom filed a Complaint against Sprint 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*, ECF No. 1, Docket No. 4:07-cv-4107-KES (D.S.D. Aug. 1, 2007) ("Sancom federal case"). Sancom's Complaint also alleged breach of contract for Sprint's refusal to pay pursuant to Sancom's tariffs, and alternative claims for breach of implied contract for Sprint's refusal to pay

[1] Though not relevant to the instant motion, on April 18, 2011, Northern Valley initiated a second collection action against Sprint. *See Northern Valley Commc'ns, LLC v. Sprint Commc'ns Co., LP*, ECF No. 1, Docket No. 4:11-cv-04053-KES (D.S.D. Apr. 18, 2011). This collection seeks recovery for unpaid switched access invoices arising under or during the time since Northern Valley's F.C.C Tariff No. 3 became effective on July 23, 2010. This new collection action does not seek to recover amounts pursuant to Northern Valley's *intra*state tariff at issue here.

pursuant to Sancom's tariffs and unjust enrichment for Sprint's refusal to pay for the valuable services that Sancom provided to Sprint. *Id*. at 2-3. Sprint filed its answer and amended counterclaims on September 24, 2007. *Id*., ECF No. 10 (Sept. 24, 2007). Sprint's counterclaims seek damages from Sancom and also rest on the primary theory that Sancom could not charge Sprint pursuant to Sancom's interstate or intrastate tariffs. *Id*. ¶ 31.

Third-Party Defendants' dispute with Sprint is not unique. At present there are numerous other collection actions and complaints pending in federal courts and before state public utility commissions 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 operator customers in the face of IXC refusals to pay, justified by allegations of "access stimulation" by the LECs. The IXCs assert common legal defenses, 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 that revenue sharing between the LEC and the conference operator is forbidden. The LECs have argued these defenses are meritless and that they are entitled to compensation pursuant to their tariffs, but that if their tariffs do not apply, they are nevertheless entitled to some form of compensation for the valuable services they have provided the IXCs.

III. The PUC Proceeding

While the federal cases between Northern Valley and Sancom and Sprint were pending, South Dakota Network, LLC ("SDN") initiated the above captioned proceeding against Sprint on October 29, 2009. SDN's complaint alleged that Sprint had failed to pay SDN's access charges for intrastate calls in South Dakota. Sprint answered on November 24, 2009, and filed a third-party complaint against Northern Valley, Sancom, and other LECs on the same date. Sprint filed the third party complaints despite already pursuing counterclaims against Northern Valley and

Sancom in the federal cases described above. Sprint's claims against Third-Party Defendants seek a declaration that Third-Party Defendants' intrastate access tariffs do not permit Third-Party Defendants to assess access charges when Third-Party Defendants' end-user is a conference calling company and that Third-Party Defendants are liable for any intrastate access charges that Sprint might owe SDN. Third-Party Defendants filed cross-claims against Sprint on January 22, 2010, seeking payments for the intrastate access charges that Sprint has refused to pay Third-Party Defendants. Third-Party Defendants' cross-claims were for breach of contract, breach of implied contract, and unjust enrichment.

IV. The FCC's *Farmers and Merchants II* Decision

The day after Sprint filed its third-party complaint against Third-Party Defendants, the Federal Communications Commission ("FCC") issued an order on reconsideration in a long-standing dispute involving Qwest's refusal to pay access charges to a LEC in Iowa, Farmers and Merchants, for calls to conference calling companies. *See In re Qwest Commc'ns Corp. v. Farmers and Merchs. Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009) ("*Farmers and Merchants II*").

In its first order in that proceeding, 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." *In re Qwest Commc'ns Corp. v. Farmers and Merchs. Mut. Tel. Co.*, Memorandum Opinion & Order, 22 FCC Rcd. 17973, ¶ 38 (2007). 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. (emphasis added). As a result, the FCC decided that it will award damages to Qwest, in an amount to be determined at a future proceeding. *Id.* at 1.[2]

Despite its reversal of its prior order, 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 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

[2] The FCC's Second Order on Reconsideration is now on appeal to the D.C. Circuit. *See Farmers and Merchants Mut. Tel. Co. of Iowa v. FCC*, 10-1093 (D.C. Cir.).

> 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. *See also In re All Am. Tel. Co, v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd. 723, 731 ¶ 19 (2011) ("a carrier may be entitled to some compensation for providing a non-tariffed service, *depending on the totality of the circumstances*") (emphasis added).

V. Referrals by the Federal Court

Based on the individualized inquiry performed by the FCC in *Farmers and Merchants II* about whether the LEC's tariff applied, it became clear that Northern Valley would need to seek the guidance of the expert agency to resolve the issues associated with the application of its tariff and its ability to be compensated in the unlikely event that it is determined the tariffs do not cover the access services it has provided to Sprint. Thus, Northern Valley filed a motion for primary jurisdiction in the federal case to refer three issues to the FCC related to the interstate traffic at issue between Northern Valley and Sprint. *See Northern Valley Communications L.L.C. v. Sprint Communications Company*, ECF No. 91, Docket No. 1:08-cv-01003 (D.S.D. Dec. 14, 2009). Northern Valley drafted the three issues that were referred and intended them to enable the court to resolve the claims in the federal case, including unjust enrichment. On March 15, 2010, over Sprint's objections, *id.*, ECF No. 102 (Jan. 20, 2010), the federal court granted Northern Valley's motion and referred the three issues identified by Northern Valley to the FCC. *Id.*, ECF No. 110, at 30 (Mar. 15, 2010). Specifically, those three issues were:

> (1) Whether, under the facts of the present dispute between Northern Valley and Sprint, Northern Valley is entitled to collect interstate switched access

charges it has billed to Sprint pursuant to Northern Valley's interstate access tariff for calls to numbers assigned to free calling providers.

(2) In the event that the services provided by Northern Valley to Sprint, by which calls placed by Sprint's customers are delivered to free calling providers served by Northern Valley, do not qualify as switched access service under Northern Valley's applicable interstate access tariff, determination of the proper classification of these services, whether such services are subject to federal tariffing requirements, and whether Northern Valley is entitled to obtain compensation for these 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 applicable interstate access tariff, but Northern Valley is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

Id.

Because the federal court maintains jurisdiction over the case, the Northern Valley referral order does not refer any "claims" to the FCC, but rather refers "issues" that will allow the court to fully resolve the pending claims, once the FCC has provided its response. *See id*., at 24. As the federal court expressly stated, "the court seeks the FCC's guidance on the *issues* of whether the services Northern Valley provided in this case are subject to the tariff requirements, where these services fall into the regulatory regime, and *how Northern Valley can obtain compensation for these services if its access tariff does not apply*." *Id*. (emphasis added). The federal court further noted, "[w]hile the court does not refer this legal question to the FCC, the inconsistent rulings show the need for clarification by the FCC on how a CLEC may be compensated for services provided outside of its tariffs." *Id*. at 25. This clearly contemplates the FCC's guidance on issues related to Northern Valley's unjust enrichment claim, even if the claim itself is not before the FCC.

Sancom also filed a similar motion for primary jurisdiction referral over Sprint's objections. *See Sancom, Inc. v. Sprint Commc'ns Co.*, *LP*, ECF No. 97, Docket No. 4:07-cv-

4107-KES (D.S.D. Dec. 14, 2009); *id*., ECF No. 108 (Jan. 20, 2010). The federal court granted Sancom's motion and referred the same three issues above to the FCC, and for the same reasons outlined above. *Id*., ECF No. 112 (Mar. 15, 2010). Thus, both Northern Valley and Sancom have orders from the federal court referring the three issues above to the FCC for resolution.

VI. Dispute Regarding Application of S.D. Codified Laws § 49-13-1.1

While the referral motions were pending in the federal cases, Sprint filed a motion to dismiss Third-Party Defendants' cross-claims in this proceeding. *See* TC 09-098, Sprint Communications Company LP's Motion to Dismiss Northern Valley's Cross-Claim and Motion to Dismiss Sancom's Cross-Claim (both filed Feb. 11, 2010). Sprint argued that S.D. Codified Laws § 49-13-1.1 prevented Third-Party Defendants from maintaining claims for damages in this proceeding, because Third-Party Defendants' complaints at the federal court included claims for damages relating to intrastate traffic. Sprint put forth none of the jurisdictional arguments it now raises.

Northern Valley responded to Sprint's motion to dismiss by arguing that, to the extent it was applicable in the current circumstances, S.D. Codified Laws § 49-13-1.1 operated to also bar Sprint's third-party claims against Northern Valley all together, because Sprint had already sought to pursue counterclaims against Northern Valley in the federal case. *Id*., Northern Valley's and Sancom's Consolidated Memorandum in Response to Sprint's Motion to Dismiss Cross-Claims (Feb. 26, 2010). Northern Valley argued that Sprint's suggestion that S.D. Codified Laws § 49-13-1.1 barred only duplicitous claims for money damages, but nevertheless permitted it to pursue a declaratory judgment, was based on an erroneous interpretation of the statute.

VII. Referral of Intrastate Issues to the PUC

Rather than pursuing final resolution of the motions at the PUC, Northern Valley, Sancom, and Sprint agreed that, based on the referral of interstate issues to the FCC, it was appropriate to seek referral of the intrastate issues in the federal case to the PUC. By having the federal court enter a referral of these issues, the dispute over the PUC's jurisdiction would become moot. Northern Valley and Sancom also agreed that they would withdraw its request for an award of money damages from the PUC, seeking only a resolution of the referred issues.

Email correspondence between Northern Valley and Sancom's counsel and Sprint's counsel during the time after Sprint filed its first motion to dismiss in early 2010 reflects the parties' agreement that the PUC should address the same three issues above for intrastate traffic. *See* Exhibit A, email correspondence between Marc Goldman and Ross Buntrock, Mar. 10, 2010 to Mar. 22, 2010. As noted there, Sprint's counsel agreed "that the instrastate claims should be addressed by the PUC." Ex. A, Mar. 17, 2010, email. Sprint even drafted the first version of a joint motion to refer the issues to the PUC. That draft included language such as: "Sprint, too, agrees that if, as this court found, FCC expertise is important in deciding specified questions for interstate traffic, SD PUC expertise is equally useful in deciding these questions for intrastate traffic." Ex. A, Draft Joint Mot. at 3. As Sprint drafted: "A decision by this Court can ensure what all parties agree is best under the present circumstances: that the instrastate issues bearing on this case can and should be resolved by the PUC in the existing PUC action." *Id*. at 4. There is no doubt that Sprint agreed to refer the same three issues to the PUC that were referred to the FCC.

After the email correspondence and revision of Sprint's draft, on April 16, 2010, the parties filed a joint motion in the federal case to refer the same issues to the PUC related to

intrastate traffic, or, in the alternative, stay the federal case with respect to the issues related to intrastate traffic until the PUC resolved the proceeding before it. *Northern Valley Communc'ns L.L.C. v. Sprint Commc'ns Co.*, ECF No. 111, Docket No. 1:08-cv-01003 (D.S.D. April 16, 2010). Again, there is no doubt that Sprint and Northern Valley intended for the PUC to resolve for intrastate traffic the same issues that had been referred to the FCC for interstate traffic. Sprint agreed to a similar motion with Sancom. *Sancom, Inc. v. Sprint Commc'ns Co.*, *LP*, ECF No. 113, Docket No. 4:07-cv-4107-KES (D.S.D. April 16, 2010).

In reference to the three issues that were referred to the FCC, Northern Valley and Sprint specifically stated in their joint motion to the federal court:

- "Sprint, too, agrees that if, as this court found, FCC expertise is important in deciding specified questions for interstate traffic, SD PUC expertise is equally useful in deciding these questions for intrastate traffic." *Northern Valley Commc'ns L.L.C. v. Sprint Commc'ns Co.*, ECF No. 111 at 4, Docket No. 1:08-cv-01003 (D.S.D. April 16, 2010).

- "the questions of the meaning of the tariff terms, **whether Northern Valley and Sancom would be entitled to any compensation outside of their tariffs, and what a reasonable rate would be if they are, exist for the intrastate traffic as well as the interstate traffic, but must be decided under state rather that federal law**." *Id*. (emphasis added).

- "The expertise of the SD PUC is as relevant for the intrastate traffic as the expertise of the FCC is for the interstate traffic." *Id*.

- "The argument for ensuring that intrastate issues are decided by the SD PUC has particular weight here, because there is already a proceeding at the SD PUC." *Id*. (citing the above captioned proceeding).

- "These claims between Sprint and the three LECs [Splitrock, Northern Valley, and Sancom] raise the same issues for intrastate traffic under state law that this Court referred to the FCC for interstate traffic under federal law." *Id*. at 5.

- "**A decision by this Court can ensure what all parties agree is best under the present circumstances: that the intrastate issues bearing on this case can and should be resolved by the PUC in the existing PUC action**." *Id*. at 6 (emphasis added).

- "this Court can ensure that the key intrastate issues are decided by the SD PUC by referring the issues to the SD PUC, just as it referred the interstate issues to the FCC." *Id*.

- "the parties jointly request that this Court should either (1) refer to the SD PUC questions related to intrastate traffic that parallel the questions it referred to the FCC for interstate traffic and make resumption of the proceedings in this Court contingent on resolution of those questions, (2) or, alternatively, Sprint believes that the Court may simply confirm that the **lifting of the stay in this case is contingent on resolution of those questions in the pending SD PUC proceeding**." *Id*. at 7 (emphasis added).

Thus, the joint motion reflects the parties' understanding that the PUC would resolve for intrastate traffic the same issues that were referred to the FCC.

On May 26, 2010, the federal court granted Northern Valley and Sprint's joint motion and entered an order that "[t]his action is stayed pending (1) resolution of the dispute by agreement of the parties; (2) a final order in the pending SD PUC proceeding in SD Network, LLC v. Sprint Communications Co., Docket TC 09-098 (S.D. Pub Utils. Bd.) and a decision on the disputed issues by the FCC pursuant to the referral described in Docket 110; or (3) further order of the court." *Id*., ECF No. 112, at 2 (May 25, 2010). The federal court entered a similar order in response to Sancom and Sprint's joint motion as well. *Sancom, Inc. v. Sprint Commc'ns Co., LP*, ECF No. 114, Docket No. 4:07-cv-4107-KES (D.S.D. May 26, 2010).

In short, the federal court is expecting the PUC to provide guidance on the same issues for intrastate traffic that the FCC is providing for interstate traffic ***because Sprint specifically asked the federal court to refer the same issues in joint motions with both Sancom and Northern Valley***. Sprint's Amended Motion is an effort to retreat from Sprint's prior agreement that the PUC should consider the three issues identified above. The PUC should not condone Sprint's tactics, but if the PUC is inclined to grant Sprint's motion to dismiss, then Sprint's claims against Northern Valley and Sancom must also be dismissed. If Sprint's claims are also dismissed, Northern Valley, Sancom, and Sprint can go back to federal court and resolve the

intrastate traffic issues there. Per the order above, dismissal of all claims between Sprint, Northern Valley, and Sancom would be a "final order," allowing the parties to return to federal court.

ARGUMENT

I. THE PUC SHOULD DECIDE THE THREE REFERRED ISSUES.

As described above, Sprint, Northern Valley, and Sancom requested the federal court refer three issues to the PUC for resolution. Now Sprint has apparently reversed course and seeks dismissal of Northern Valley and Sancom's cross-claims in an effort to further its new strategy of limiting Northern Valley and Sancom's ability to participate in this proceeding. As explained above, there is no need to dismiss any cross-claims because Northern Valley and Sancom simply ask the PUC to resolve the three referred issues, and are not seeking any monetary damages on the cross-claims. There is no risk that the PUC will award any relief outside of its jurisdiction.

There is no question that the PUC has jurisdiction and the expertise to consider the three referred issues and provide guidance to the federal court on them. The PUC may "exercise powers necessary to properly supervise and control" telephone companies. S.D. Codified Laws § 49-31-3. As noted in the same authority relied upon by Sprint, "[t]he Commission has subject matter jurisdiction to resolve disputes arising out of intrastate tariffs, including Qwest's intrastate Access Service Tariff in this case." *Black Hills Fibercom, L.L.C. v. Qwest Corp.*, Docket CT03-154, 2005 WL 856149 at *4 (S.D. PUC Mar. 14, 2005) (citing S.D. Codified Laws § 49-13-1 and 49-31-1.1; 49-31-3, 49-31-15; 49-31-19). The PUC also has jurisdiction over rates. *See id.* §§ 49-31-1.4, 49-31-4. Thus, the PUC clearly has jurisdiction over the three issues because they all arise out of Northern Valley's intrastate tariff as noted above. The PUC can consider whether

Northern Valley could seek charges arising from its intrastate tariff, and if not, whether Northern Valley could obtain compensation outside of its tariff and at what rate.

Indeed, the fact that the PUC does not hear certain claims stems from the fact that the PUC recognizes that its expertise lies in telecommunications issues. When the PUC declines to hear claims, it is because the *issues* are outside of the PUC's expertise: "The *issues* presented by the Complaint are predominantly contract formation or equitable reliance *issues as to which the special expertise of the Commission concerning telecommunications services is largely inapplicable*, and where such traditional legal and equitable issues significantly preponderate, the matter is more appropriately within the province of the legal expertise and general jurisdiction of the courts." *In the Matter of the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Communications of the Midwest, Inc. Regarding Failure to Provide Service*, Final Decision and Order Granting Motion to Dismiss, Docket CT02-021 (Rel. Sep. 26, 2003) (emphasis added).[3] Here, of course, the PUC has the appropriate expertise to address the three issues as the federal court recognized. At one time, Sprint also acknowledged that the PUC has the expertise to resolve the three issues as shown above in the quotations from the Joint Motion, until it apparently became more expedient for Sprint to argue otherwise.

In sum, Northern Valley simply requests that the PUC provide guidance on the three issues for intrastate traffic so that the federal court can resolve the claims that remain there based on the guidance provided by the PUC. These issues are certainly within the expertise and jurisdiction of the PUC. The PUC will not be awarding any monetary damages to Northern Valley, nor resolving any claims, in providing guidance on the referred issues. Instead, the PUC

[3] Available at http://puc.sd.gov/commission/orders/complaint/2003/CT02-021fin.pdf (last visited June 27, 2011)

will simply be applying its telecommunications expertise to three specific issues and the federal court will benefit from the PUC's guidance in resolving the claims based on the PUC's guidance.

II. IF THE PUC TAKES ACTION ON THE AMENDED MOTION TO DISMISS, IT MUST ALSO DISMISS SPRINT'S THIRD-PARTY COMPLAINTS AGAINST NORTHERN VALLEY AND SANCOM.

In the event that PUC determines it appropriate to grant the Amended Motion, it is clear that it must also 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. Sprint certainly provides no authority for such a claim, and has even argued the opposite in a similar situation. If the PUC grants the Amended Motion, it should also find that, through its third party complaints, Sprint has impermissibly pursued complaints in both federal court and, later, at the PUC in violation of S.D. Codified Laws § 49-13-1.1.

Though not explicitly addressed by Sprint's Motion, S.D. Codified Laws § 49-13-1.1 mirrors the "election of remedies" statute in the federal Communications Act 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. *See St. Cloud v. Leapley*, 521 N.W.2d 118, 122 (S.D. 1994) (courts may "look to federal courts for guidance in interpretation of a state statute that is similar to a federal law"). This is especially true in light of the fact that there is not significant South Dakota law interpreting the statute.

The South Dakota 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, but no person may pursue both remedies at the same time.*

S.D. Codified Laws § 49-13-1.1 (emphasis added).

By using the language "court of competent jurisdiction" the state statute is broader that the federal statute below 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.

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, the statute's plain language makes whether the relief sought includes a request for damages only relevant with regard to suits **brought in court**. When a complaint is made to the PUC, 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. In other words, a complaint for declaratory relief at the PUC is barred if the party has already brought a suit for damages in a court of competent jurisdiction.

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 PUC, because, in that case, it was Sprint who successfully argued that a complaint for declaratory ruling to the Federal Communications 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 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.

Beehive Tel. Co., Inc. v. Sprint Commc'ns Co., LP, No. 2:08-cv-00380, 2009 WL 3297303, at *2 (D. Utah Oct. 13, 2009) (emphasis added).

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) (emphasis added) (attached as Ex. E to Northern Valley's and Sancom's Consolidated Memorandum in response to Sprint's Motion to Dismiss Cross-Claims (filed Feb. 26, 2010)).[4]

Application of the *Beehive* court's analysis (and Sprint's advocacy there) and the virtually identical language of S.D. Codified Laws § 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.[5] *See e.g., Mexiport, Inc. v. Frontier Commc'ns Services, Inc.*, 253 F.3d 573, 575 (11th Cir. 2001) ("the language of

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[4] 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 as Ex. F to Northern Valley's and Sancom's Consolidated Memorandum in response to Sprint's Motion to Dismiss Cross-Claims (filed Feb. 26, 2010)). Sprint has already conceded that the required "factual nexus" exists by filing its Motions to Dismiss against Northern Valley and Sancom.

[5] Of course, this conclusion would only apply if, as Sprint now argues, the federal court stayed the litigation, but did not refer issues to the PUC for resolution. To be clear, Northern Valley does not believe this is an appropriate interpretation of the court's order or the parties' intent as evidenced by the Joint Motion, but Sprint should not be able to escape the consequences of its own arguments.

47 U.S.C. § 207 is unambiguous. The statute allows a complainant to file a complaint with the FCC or in federal district court but not both."). The fact that Sprint "limited the demand in its Third Party Complaint against [Third-Party Defendants] to declaratory relief," Sprint Amended Motion at 1, does not alter this conclusion and is directly contradictory to Sprint's prior advocacy in a remarkably similar situation. Accordingly, Sprint's third party complaint must also be dismissed if Northern Valley's and Sancom's cross-claims are dismissed pursuant to S.D. Codified Laws § 49-13-1.1.

CONCLUSION

For the foregoing reasons, Northern Valley and Sancom respectfully request that the PUC deny Sprint's Amended Motion. In the alternative, the PUC should enforce the plain language of S.D. Codified Laws § 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.

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