

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

**NORTHERN VALLEY'S AND
SPRINT'S JOINT UNOPPOSED
MOTION TO REFER OR STAY
ISSUES WITH RESPECT TO
INTRASTATE TRAFFIC WITH
CERTIFICATE OF CONFERENCE
WITH THIRD-PARTY DEFENDANT**

On March 15, 2010, this Court issued an order referring several important issues related to the interstate traffic at issue in the above-captioned case and other similar cases to the Federal Communications Commission ("FCC"). It did not specifically address whether issues related to intrastate traffic should be referred to the South Dakota Public Utilities Commission ("SD PUC"). Northern Valley Communications, LLC ("Northern Valley") and Sprint Communications Company, LP ("Sprint") now jointly request that the Court refer questions related to the intrastate traffic to the SD PUC, or, in the

alternative, stay this case with respect to the issues related to intrastate traffic until the SD PUC resolves the claims related to this traffic in the action already before it.¹ Sprint and Sancom, Inc. (“Sancom”) are filing an identical motion in CIV. 07-4107-KES.

Sprint previously raised the question of referring or staying the intrastate issues in *Splitrock Properties, Inc. v. Sprint*, CIV. 09-4075-KES. In a March 30, 2010 Order in that case, the Court indicated that it needed further information to evaluate this question. This Motion includes that information.

A. This Case Includes Claims Related to Intrastate Traffic That Raise The Same Sorts Of Questions The Court Found Justified Referral Of Interstate Issues To The FCC.

While the bulk of the traffic at issue in this case is interstate traffic, the claims of Northern Valley and the counterclaims of Sprint also include claims related to intrastate traffic. Some of the calls to conference call providers are intrastate, rather than interstate, long-distance calls. As with the interstate calls, Northern Valley has billed Sprint access charges for this intrastate traffic. As with the interstate calls, Northern Valley seeks to collect amounts it billed that Sprint did not pay, and Sprint seeks refunds of amounts it paid that it does not believe it owed.

The parties’ claims related to this intrastate traffic are claims under state law. The tariffs that control whether the intrastate traffic is access traffic are intrastate tariffs. With respect to this intrastate traffic, the SD PUC plays the same role that the FCC plays with respect to the interstate traffic, as this court has previously explained. *Sancom, Inc. v. Qwest Communs. Corp.*, 2008 U.S. Dist. LEXIS 49491 at *3 (D.S.D. 2008) (explaining

¹ As evidenced by the Certificate of Conference attached hereto, counsel for Northern Valley has conferred with counsel for third-party defendant Global Conference Partners, LLC (“GCP”) who has confirmed that GCP does not oppose this motion.

that interstate access charges are governed by FCC but intrastate access charges are governed by PUC).²

Where state agencies have jurisdiction and expertise over a particular issue, federal courts can refer issues to them under the doctrine of primary jurisdiction in the same manner as they can to federal agencies. Indeed, even with federal causes of action, courts have referred issues to state commissions that were expert on the issues when doing so was consistent with Congressional intent. *See Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008) (referring a CLEC's claim that a ILEC failed to negotiate interconnection agreement in good faith to the Oregon Public Utilities Commission). *Illinois Bell Telephone Co. v. Global NAPS Illinois*, 551 F.3d 587, 595 (7th Cir. 2008) (holding that federal court can refer issues to state commission and "can properly stay its proceedings to allow the state commission to interpret the terms of an interconnection agreement to assure compliance with the statutory criteria"); *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 1996 WL 32891 (E.D.Pa. Jan. 23, 1996) (referring issues concerning power purchase agreements to state commission).

In their consolidated reply on the referral motions, Northern Valley and Sancom noted that they agreed with an argument made by AT&T that any arguments justifying referral of interstate questions to the FCC would equally justify referral of intrastate

² *See also*, 47 U.S.C. § 152(b) (confirming that states retain jurisdiction over charges and classifications for intrastate communications); *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385, 119 S. Ct. 721, 733, 142 L. Ed. 2d 835 (1999) (recognizing that the Communications Act "entrusts state commissions" with resolving disputes about intrastate communications); *In re Pub. Serv. Co.*, 560 N.W. 2d 925, 930 (S.D. 1997) (outlining statutory authority of SD PUC); *In re West River Elec. Ass'n, Inc.*, 675 N.W.2d 222, 230 (S.D. 2004) (noting that the SD PUC is "is deemed to be an administrative tribunal with expertise").

questions to the SD PUC. Northern Valley and Sancom explicitly “incorporate[d] AT&T’s suggestion into their motion.” *See* Consolidated Reply at 26. 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.

The tariff terms in Northern Valley and Sancom’s intrastate tariffs are similar (*see* Ex. 1) to those in their interstate tariffs, but their meaning is interpreted under state law. The filed tariff doctrine applies to intrastate as well as interstate traffic, as this Court previously held, *Sancom*, 2008 U.S. Dist LEXIS at *7, and state law, like federal law, limits carriers to collecting reasonable rates. SDCL § 49-31-4. Thus, 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 than federal law.

The expertise of the SD PUC is as relevant for the intrastate traffic as the expertise of the FCC is for the interstate traffic. The SD PUC, for example, can evaluate whether the intrastate access tariff requires that traffic be terminated to local customers to constitute access traffic, and, if so, whether the free calling providers are local customers, something over which the SD PUC has particular expertise.

B. There Is Already An Open Proceeding At the PUC.

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. *See South Dakota Network, LLC v. Sprint Commc’ns Co.*, Docket TC-09-098 (S.D. Pub. Utils. Bd.).

While the above-captioned action was pending in court, South Dakota Network (SDN), the tandem provider in South Dakota, filed a complaint against Sprint at the SD PUC. The Sprint traffic that ultimately is routed by Northern Valley to conference call providers comes to it from SDN, which receives the traffic from Sprint. Like Northern Valley, SDN bills Sprint access charges (tandem charges) on this traffic. Sprint has not been paying these charges for the same sorts of reasons it is not paying similar charges billed by Northern Valley. Sprint's dispute of these charges led to SDN's complaint at the SD PUC.

After SDN filed that complaint, Sprint filed a third party complaint to bring in Northern Valley, Sancom and Splitrock Properties, whom it believed were integral for the PUC to understand the traffic at issue and then evaluate the tariff and related legal questions. In that third party complaint, Sprint sought a declaratory ruling that the Northern Valley, Sancom and Splitrock cannot assess intrastate switched access charges for calls to Call Connection Companies.³ Sancom and Northern Valley then filed cross-claims at the PUC seeking the same money damages already being sought in this action for the intrastate traffic. These claims between Sprint and the three LECs raise the same issues for intrastate traffic under state law that this Court referred to the FCC for interstate traffic under federal law.

During briefing of a motion Sprint made to dismiss the cross claims in the SD PUC matter, Northern Valley and Sancom stated that the PUC was best suited to decide all of the intrastate claims. They argued, however, that Sprint could not pursue its intrastate claims at the PUC while Sprint was pursuing claims on the same traffic before

³ Sprint also asserted a claim that each of these LECs is liable to Sprint for amounts billed by SDN with respect to calls to their CCC partners.

this Court. They thus asked the PUC to hold the case in abeyance until this Court decided the primary jurisdiction motions or, in the alternative, dismiss Sprint's claims against them and declare that SDCL 49-13-1.1 prohibits parties that have made claims for damages in court from seeking relief from the PUC, including declaratory relief, absent a referral from the court. In their view, a decision by this Court in favor of referral is necessary to vest the PUC with jurisdiction over the intrastate claims.

However, because this Court's referral decision does not discuss the intrastate claims, some uncertainty remains regarding the jurisdictional argument that Northern Valley and Sancom advanced at the PUC. 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. That will in turn help ensure that all integral parties are before the PUC when it evaluates the issues concerning the charges billed by SDN.

As noted above, 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. Alternatively, Sprint believes that the Court can simply make clear that proceedings will not resume until the SD PUC has decided the intrastate claims of Sprint and Northern Valley now pending before it. That would be similar to what the district court did in *Tekstar* where it referred questions related to interstate traffic to the FCC, while staying the case until both (1) the FCC decided the referred issues and (2) the Minnesota Public Utilities Commission decided the claims in the action pending before it concerning Tekstar's intrastate traffic. See *Tekstar Commc'ns, Inc. v. Sprint Commc'ns Co.*, Civil No. 01-1130 (JNE/RLE), 2009 WL 2155930, at *3 (D. Minn. July 15, 2009).

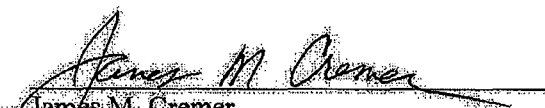
See also *Brandenburg Telephone Co. v. Sprint Communications Co., L.P.*, No. 3:09-CV-00190, 2009 WL 3172071 (W.D. KY 2009) (staying case involving dispute concerning billing of access charges until Kentucky PSC resolved questions of whether interstate calls had been improperly billed at intrastate rate).

As Sancom and Northern Valley explained in their consolidated reply brief on the referral motions, a decision by this Court that the PUC should decide issues related to the intrastate claims would not lead to additional delay given the open proceeding at the PUC. Indeed, the SD PUC is likely to act significantly faster than the FCC where there is not yet an open proceeding.

CONCLUSION

For the foregoing reasons, 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 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.


Dated this 15th day of April, 2010.


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Dated this 16th day of April, 2010.


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CERTIFICATE OF CONFERENCE

The undersigned counsel for Northern Valley Communications, LLC hereby certifies that on this the 15th day April 2010, I conferred with Jeana Goosmann, counsel for Third Party Defendant Global Conference Partners, LLC, regarding the Joint Motion. Ms. Goosmann indicated that Global Conference Partners is not opposed to the motion for referral of issues to the South Dakota Public Utilities Commission.


James M. Cremer

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 "Northern Valley's and Sprint's Joint Unopposed Motion to Refer Or Stay Issues with Respect to Intrastate Traffic With Certificate of Conference with Third-Party Defendant" was served by electronic service from the Court upon:

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on this 16th day of April, 2010.

/s/ Cheryle Wiedmeier Gering
Electronically Filed