

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 L.P.'S
AMENDED MOTION TO DISMISS NORTHERN VALLEY'S CROSS-CLAIM**

Sprint Communications Company L.P. ("Sprint") respectfully submits this memorandum in support of its amended motion to dismiss the Cross-claim filed by Northern Valley Communications, L.L.C. ("Northern Valley").

ARGUMENT

South Dakota Network, LLC ("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 demands a refund of amounts it overpaid between 2007 and 2009. In addition to filing its Answer and Counterclaim, Sprint filed a Third Party Complaint against Northern Valley, seeking declaratory relief from the South Dakota Public Utilities Commission (the "Commission") that Northern Valley cannot assess intrastate switched access charges for calls to Call Connection Companies ("CCCs"). *See* Sprint's Third Party Complaint.

Sprint specifically limited the demand in its Third Party Complaint against Northern Valley to declaratory relief because Northern Valley and Sprint are presently parties to litigation in the United States District Court for the District of South Dakota, Docket No. 1:08-CV-01003-KES (the "Litigation"). In the Litigation, Northern Valley has demanded money damages from Sprint for failing to pay intrastate switched access charges for calls to CCCs, and Sprint has counterclaimed to recover amounts improperly billed by and paid to Northern Valley for calls to

CCCs. A copy of Northern Valley's Complaint and Sprint's Counterclaim were attached as Exhibits A and B to Sprint's corrected Memorandum In Support Of Sprint Communications Company L.P.'s Amended Motion To Dismiss Northern Valley's Cross-Claim (filed Feb. 12, 2010).

Because the parties have asserted claims for damages in the Litigation, SDCL 49-13-1.1 prevents the parties from seeking a damages award from the Commission. SDCL 49-13-1.1 provides:

49-13-1.1. Complaint to commission or suit by private person—Election of remedies. Any person claiming to be damaged by any telecommunications company or motor carrier may 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.

Northern Valley's Cross-claim seeks to recover the very same damages it is seeking to recover in the Litigation. *Compare* Northern Valley's Federal Complaint ¶¶ 11-14 (seeking monetary damages for alleged failure to pay intrastate access charges) *with* Northern Valley Cross-claim ¶¶ 9-13 (seeking monetary damages for alleged failure to pay intrastate access charges).

The South Dakota Supreme Court has recognized that SDCL 49-13-1.1 limits a party's ability to present claims before the Commission when those claims have been already asserted in another venue. *See State v. Public Utilities Comm'n of South Dakota*, 381 N.W.2d 226, 230 (S.D. 1986) (upholding the lower court's decision to deny a party's petition to intervene in commission proceedings when the party had elected to pursue its remedy in circuit court, citing to SDCL 49-3-23 (the predecessor statute to 49-13-1.1)). The same result is required in this case.

In addition, Northern Valley's Cross-claim Count III (Unjust Enrichment) and Count II (Implied Contract), must be dismissed because the Commission has no jurisdiction or authority to award a party equitable damages or damages under traditional state law causes of action. The

scope of the Commission's jurisdiction is defined by statute. *In re Establishment of Switched Access Rates for U.S. West Commc'ns, Inc.*, 618 N.W.2d 847, 851 (S.D. 2000). Thus, "[t]he general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute." *O'Toole v. Bd. of Trustees of South Dakota Retirement Sys.*, 648 N.W.2d 342, 346 (S.D. 2002); *Thies v. Renner*, 106 N.W.2d 253, 255 (S.D. 1960). Therefore, the Commission has subject-matter jurisdiction over matters specifically conferred to it by statute, including engaging in price regulation and "approving individual prices to be charged by a telecommunications company for any emerging competitive service." SDCL 49-31-1.4 and SDCL 49-31-4.

However, an "agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *O'Toole*, 648 N.W.2d at 346 (quoting *Lee v. Div. of Fla. Land Sales & Condominiums*, 474 So.2d 282, 284 (Fla. App. 5 Dist. 1985)). There is no statute that provides the Commission with the jurisdiction to award equitable relief. Accordingly, under these statutory restraints, the South Dakota Public Utilities Commission lacks jurisdiction to award equitable or quasi-contractual relief. *Black Hills Fibercom, L.L.C. v. Qwest Corp.*, Am. Interim Decision and Order, Docket CT03-154, 2005 WL 856149 at *9 (S.D. PUC Mar. 14, 2005) ("With respect to Qwest's claims of international interference with business relations and unjust enrichment, the Commission finds that to the extent these claims may state causes of action under state law despite the interstate nature of the service, the Commission nevertheless lacks jurisdiction because these claims are grounded in the common law of tort and in equity, respectively"); *In the Matter of the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Commc'ns of the Midwest*,

Inc. Regarding Failure to Provide Service, Final Decision and Order Granting Mot. to Dismiss, Docket CT02-021 at *8 (S.D. PUC Sep. 26, 2003) (“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.”).

Because the Commission does not have jurisdiction to award equitable or quasi contract relief, Northern Valley’s Unjust Enrichment and Implied Contract claims must be dismissed, and any decision by the Commission on these theories would be at risk of being voided. An administrative agency, like the Commission, “may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void.” *O’Toole*, 648 N.W.2d at 346 (quoting *Montana Bd. of Natural Resources and Conservation v. Montana Power Co.*, 536 P.2d 758, 762 (Mont. 1975) (internal quotations removed)).

The fact that the Commission has jurisdiction over the calls at issue does not provide it jurisdiction over Northern Valley’s unjust enrichment and implied contract claims. The Commission considered this issue in the *Recreational Adventures* matter. There, the defendant moved to dismiss, arguing that the Commission lacked jurisdiction in the case because certain elements were subject to exclusive FCC and federal court jurisdiction. Docket CT02-021 at *1. The Commission held that, while it may have had authority over some elements of the case, dismissal was proper:

Although Commission has been unable to find legal authority precisely addressing the issue of whether the Commission may or should exercise jurisdiction over a complaint which seeks, as its primary relief, a remedy which the Commission lacks jurisdiction to award due to federal preemption, the Commission concludes that under principles of primary jurisdiction, the Commission should, in such a situation, defer to the jurisdiction of the appropriate

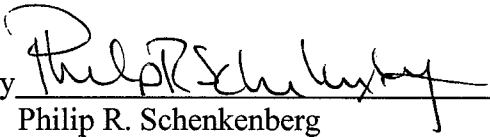
state or federal forum having jurisdiction to determine the entirety of the controversy and award the requested relief.

Id. at *8. Therefore, the Commission determined that “Complainant’s Complaint should be dismissed without prejudice so that Complainant may seek relief from the FCC or in the appropriate state or federal court having jurisdiction to hear the entirety of Complainant’s claims and to award the full range of remedies that may be justified by the facts and the law in this case.” *Id.* Likewise, Northern Valley’s unjust enrichment and implied contract claims are best suited for disposition by a court of general jurisdiction that can consider all elements of the claims and award relief, if appropriate.

For the above reasons, the Commission should grant Sprint’s motion to dismiss Northern Valley’s Cross-claim in full.

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BRIGGS AND MORGAN, P.A.

By 
Philip R. Schenkenberg

80 South Eighth Street
2200 IDS Center
Minneapolis, MN 55402
612.977.8400

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

Attorneys for Sprint Communications Company
L.P.