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	))))	**TC 09-098**
IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY LP AGAINST SPLITROCK PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, INC., SANCOM, INC., AND CAPITAL TELEPHONE COMPANY	))))))	

MEMORANDUM IN SUPPORT OF SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO DISMISS NORTHERN VALLEY'S COUNTERCLAIM

Sprint Communications Company L.P. ("Sprint") respectfully submits this memorandum in support of its Motion to Dismiss Northern Valley Communications, L.L.C.'s ("Northern Valley") Counterclaim for Declaratory Relief. Northern Valley's filing is not only procedurally defective, its Count II asks the Commission to declare a retroactive rate for non-access traffic using equitable principles and ignoring the limitations in South Dakota law. Northern Valley's Counterclaim, and at very least Count II, should be dismissed.

ARGUMENT

I. <u>NORTHERN VALLEY'S COUNTERCLAIM SHOULD BE DISMISSED BECAUSE IT DID NOT OBTAIN LEAVE TO AMEND</u>

Northern Valley initially responded to Sprint's Third Party Complaint by serving an Answer and Crossclaim, which it filed on January 22, 2010. The Commission voted to dismiss the Crossclaim in full on August 30, 2011. The Commission's written order was issued on September 15, 2011, and that order did not grant Northern Valley leave to amend. Nonetheless, three weeks later, without seeking or obtaining Sprint's consent, NV has simply filed a Counterclaim, thereby amending its responsive pleading.

ARSD 20:10:01:16 provides:

> **Amendments**. A pleading may be amended once as a matter of right if filed and served prior to the filing of a responsive pleading or within 20 days from the date the pleading was filed and served, whichever is earlier. After such time, a pleading may be amended by stipulation of the parties or upon application of a party and at the discretion of the commission.

Northern Valley did not follow this process, and Sprint's Motion can and should be dismissed on that basis alone.

While leave to amend is generally freely granted, this case is rapidly proceeding towards completion. Final initial discovery was to be served by October 11, depositions must be completed by November 8, and testimony will be filed starting in December. Moreover, Northern Valley's Count II, if not dismissed on the merits (as argued below) would inject new issues that would change the scope and complexion of this case. As such, this is not the time to freely grant amendment of pleadings. This docket should be limited to whether the various intrastate access tariffs apply to traffic to call connection companies ("CCCs"), and should not be extended to address these new issues raised by Northern Valley.

II. THE COMMISSION SHOULD DISMISS COUNT II TO THE EXTENT IT ASKS THE COMMISSION TO INVOKE EQUITABLE POWERS

If not dismissed on procedural grounds, Northern Valley's Counterclaim Count II should be dismissed to the extent Northern Valley asks the Commission to address equitable issues. The parties have been down this road once before and as Sprint has previously explained, the Commission does not have equitable powers. 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). 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)). Because there is no statute that provides the Commission with equitable powers, the Commission lacks jurisdiction to adjudicate claims by applying equitable principles. *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.").

Having had its equitable claims dismissed, Northern Valley now seeks to accomplish an end around by pleading that if CCC traffic is not access traffic Sprint would be "unjustly enriched" by not paying a "reasonable rate," and asking the Commission to declare what such a rate would be. Counterclaim, ¶ 22, and Count II ¶ 2. This attempt should fail. The Commission cannot invoke equitable principles, cannot award equitable relief, and cannot declare a rate that would prevent alleged unjust enrichment. *See also O'Toole*, 648 N.W.2d at 346 (Commission

"may not acquire jurisdiction by estoppel or consent . . . where it acts without jurisdiction, its orders are void.") (internal quotations removed).

To avoid heading down a path that would take the Commission beyond its jurisdiction, the Commission should grant Sprint's Motion and dismiss Northern Valley's Count II to the extent it invokes equitable principles or asks the Commission to declare a rate based on equitable theories.

III. THE COMMISSION SHOULD DISMISS COUNT II BECAUSE THERE IS NO REGULATED RATE THE COMMISSION MAY IMPOSE RETROACTIVELY FOR NON-ACCESS TRAFFIC

Count II must also be dismissed because Northern Valley's request that the Commission declare a "reasonable rate" for non-access traffic delivered to Northern Valley in prior periods cannot be squared with South Dakota law.

A. Northern Valley's Alleged Non-Access Service is not Subject to Commission Regulation

The first problem with Northern Valley's demand for a regulated rate for non-access traffic is highlighted by its allegations in Count I. The premise of Northern Valley's Count I is that because it is de-regulated, it is allowed to enter into individual case basis ("ICB") contracts with CCCs outside the Commission's purview.[1] Counterclaim, ¶¶ 14-15. This premise, however, sinks Northern Valley's theory of compensation if CCC traffic is found to be non-access traffic. That is because any intrastate non-access service would (like local exchange service) be de-regulated. As such, Northern Valley rates for that "service" would not be set by the Commission, but would be set forth in the contracts it would have to enter to have a compensation right.

[1] Whether Northern Valley had legitimate relationships with its CCC partners for the provision of local exchange service is beyond the scope of this Motion.

In its Count II, Northern Valley asks that if traffic to CCCs is not subject to access charges, that the Commission establish a just and reasonable charge for the alleged service at issue. The only way for the Commission to set this rate would be to utilize the procedure in SDCL § 49-31-12.4, the rate setting procedure for a non-competitive service.[2] If this traffic is not access, the only power the Commission has to set a rate is found under SDCL § 49-31-4. That statute requires the Commission to set rates using rate of return regulation or, if a hearing is held pursuant to SDCL § 49-31-4.1, by price regulation. Yet, if Northern Valley is de-regulated under SDCL 49-31-5.1, then SDCL § 49-31-4 and SDCL § 49-31-4.1 do not apply to Northern Valley or this alleged service. In fact, to invoke SDCL § 49-31-4 and elect to have its rate for this service regulated, Northern Valley would have to do the following:

> The election to be regulated shall be made by filing with the Commission a certified copy of the resolution of the board of directors . . . Commission regulation shall become effective thirty days after receipt of the resolution by the Commission.

SDCL 49-31-5.1. Because Northern Valley has made no such filing, the Commission has no authority to regulate this alleged non-access service Northern Valley claims to have provided. To determine otherwise would be concluding that the Commission lacks the power to regulate Northern Valley's rate but can establish a rate in equity. This result is not supportable under South Dakota law.

B. <u>The Commission Cannot Establish Rates Retroactively</u>

Second, even in the event Northern Valley were to elect to have this service regulated, any rates would have to be established in a Northern Valley tariff filing subject to the process in SDCL § 49-31-12.4. Under this process, rates are effective only going forward. This is fully consistent with the bedrock principle that the Commission (like other rate-setting agencies)

[2] SDCL § 49-31-12.4 is currently only applicable to Northern Valley for review of access rates. See SDCL § 49-31-18 and 19.

cannot engage in retroactive ratemaking. *See Re Mont.-Dakota Utils. Co.*, Application by a gas company for authority to increase its rates and charges; granted with modifications, 27 P.U.R.4th 583, 601 (S.D. Pub. Utils. Comm'n. Dec. 28, 1978) ("However, the commission finds that MDU's requested surcharge constitutes retroactive rate making which this commission shall not permit."). To the extent Northern Valley has asked to the Commission to declare a retroactive rate, that relief cannot be granted.

C. Northern Valley Would Have to Follow the Procedure in SDCL § 49-31-12.4

Third, under SDCL § 49-31-12.4, the process for setting a rate must begin with a filing by Northern Valley describing the new non-competitive service for which it seeks to be paid. SDCL § 49-31-12.4. That proposed rate would apply not just to Sprint, but to all similarly situated carriers, any of which could intervene and challenge the new tariff provision. The Commission could then, on its own motion or upon a motion to intervene, order a hearing for the purpose of evaluating the reasonableness of the rate. SDCL § 49-31-12.4(1). The Commission could choose to suspend the tariff (subject to certain limits), or could allow the rate to go into effect prospectively, subject to refund liability in the event the rate were found unreasonable. SDCL § 49-31-12.4(2)-(5). This process, which was mandated by the Legislature, ensures there is an appropriate process and that regulated rates apply uniformly to all of those receiving the service.[3] Northern Valley's request that the Commission simply declare a rate for Sprint alone without the filings and due process called for by South Dakota law is defective and Count II must be dismissed.

[3] See, for example, Docket TC 11-010, in which the Commission granted parties intervention and suspended a traffic pumper's tariff pending just this kind of analysis.

D. The Commission Would have to Consider Issues of Federal Law

Finally, Sprint notes that the Federal Communications Commission ("FCC") has already advised Northern Valley that if it wishes to obtain compensation for delivering non-access traffic to CCCs that it must do so by contract. *Qwest Commc'ns Co. v. Northern Valley Commc'ns, LLC*, File No. EB-11-MD-001, FCC 11-87, ¶ 11 (2011) ("[T]hus, if Northern Valley wishes to charge IXCs for terminating [non-access calls], it must do so through a negotiated contract.") This is fully consistent with the 1996 Telecommunications Act, which drew a line separating legacy access traffic and traffic subject to reciprocal compensation requirements. Legacy access traffic continued to be subject to access charges to the extent provided in 47 U.S.C. § 251(g), while other traffic was subject to the reciprocal compensation regime under 47 U.S.C. § 251(b)(5).[4] As a result, if CCC traffic is non-access traffic subject to Section 251(b)(5), the 1996 Act and the FCC's pricing rules would apply and could impose both procedural and substantive limitations on any Commission rate setting actions. This provides an additional reason for the Commission to decline to grant the declaratory relief Northern Valley has requested.

CONCLUSION

For the above reasons Sprint respectfully requests the Commission grant Sprint's Motion to Dismiss.

Dated: October 17, 2011

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By______________________________

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[4] Neither Section 251(g) nor 251(b)(5) distinguish between interstate and intrastate traffic.

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The undersigned certifies that on the 17th day of October, 2011, I served a true and correct copy of SPRINT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS NORTHERN VALLEY'S COUNTERCLAIM in the above-entitled action electronically to:

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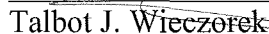

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