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 NUMBER TC 09-098
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IN THE MATTER OF THE THIRD PARTY COMPLAINT OF SPRINT COMMUNICATIONS COMPANY LP AGAINST SPLITROCK PROPERTIES, INC., NORTHERN VALLEY COMMUNICATIONS, INC., NORTHERN VALLEY, INC., AND CAPITAL TELEPHONE COMPANY	**NORTHERN VALLEY COMMUNICATIONS, LLC'S OPPOSITION TO SPRINT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Northern Valley Communications, LLC ("Northern Valley"), by and through counsel, and pursuant to S.D. Admin. R. 20:10:01:01.02 and SDCL § 15-6-56, hereby files its Response in Opposition to Sprint Communications Company, LP's ("Sprint") Motion for Partial Summary Judgment.

I. BACKGROUND

On December 20, 2011, this Commission heard oral argument on Sprint's Motion to Dismiss Northern Valley's Count II, an alternative claim that asks the Commission to declare a reasonable rate in the event that Northern Valley's intrastate access tariff is found not to apply to the conference calling traffic at issue in this dispute. At the conclusion of the hearing, Sprint's counsel asked the Commission, if it decided not to dismiss the claim in full, to state that it was "not going to grant equitable relief or enforce equitable rights" and suggested that doing so would "help us resolve discovery disputes going forward." Transcript of December 20, 2011 Hearing, 68:19-24. Northern Valley urged the Commission to deny Sprint's Motion in its

entirety and stated:

> [Mr. Schenkenberg] suggest that by putting in language that you're not exercising equitable rights it would somehow resolve discovery motions on a going-forward basis. We think it's exactly the opposite. We think that we would be back here next month and the month after and the month after trying to determine exactly what that means and where to draw the line.
>
> We are, again, asking the Commission, as Mr. Nelson has suggested, to preserve judgment, let us get full discovery, understand . . . what the facts are, and then determine the application of [SDCL § 49-13-13] at that time. We would discourage the Commission from granting the alternative request.

Id. at 69:6-18.

Unfortunately, even though Sprint's Motion was denied in its entirety, Sprint has nevertheless persisted in its refusal to allow Northern Valley to get full discovery. It has again asked the Commission to prejudge the case and in so doing deny Northern Valley the opportunity to obtain the full scope of relevant evidence. Sprint's Motion for Partial Summary Judgment, like its prior Motion to Dismiss, ignores the relevant South Dakota law. Thus, as with its prior motion, the Commission should deny Sprint's Motion for Partial Summary Judgment and reaffirm its decision to allow Northern Valley to obtain relevant discovery before applying SDCL § 49-13-13.

II. STANDARD

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." All reasonable inferences drawn from the facts must be construed in favor of the nonmoving party, *Rehm v. Lenz*, 547 N.W.2d 560, 564 (S.D. 1996), while the moving party must show the absence of any genuine issue of material fact. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207,

212 (1968).

III. SPRINT'S MOTION FOR "PARTIAL SUMMARY JUDGMENT" IS PROCEDURALLY IMPROPER AND SHOULD BE DENIED

Sprint has styled its motion as one for "partial summary judgment," contending that SDCL § 15-6-56(b) allows resolution of "part" of a claim and that, as a result, the Commission may decide at this time that it will apply rate of return regulation to Northern Valley's Count II. *See* Sprint Memo in Support of Motion for Partial Summary Judgment ("Sprint Mem.") at 2 (citing SDCL § 15-6-56(b)). Sprint's Motion for Partial Summary Judgment is defective and therefore must be denied, however, because it does not seek to resolve any dispositive issues with regard to Northern Valley's claim. Rather, Sprint merely seeks an advanced ruling regarding one step in the process necessary to resolving the claim, namely whether, if Count II becomes applicable, the Commission will apply rate of return analysis to determine a rate for Northern Valley's services. This piecemeal approach to litigation is highly disfavored and should be rejected here.

Courts have often recognized that even though Rule 56(b) provides that a party may move for summary judgment "as to all or any part" of a claim or counterclaim, that "a motion for partial summary judgment that partitions a single claim for relief into constituent parts and then seeks partial summary judgment on some but not all of the constituent parts is not permitted." *Rubin v. The Islamic Republic of Iran*, 408 F. Supp. 2d 549, 552 (N.D. Ill. 2005) (citing *Capitol Records, Inc. v. Progress Record Distir., Inc.*, 106 F.R.D. 25, 28 (N.D. Ill. 1985)). Courts have further observed that Rule 56(c) provides a single limited instance when partial summary judgment may be rendered as to a single claim: "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." *See Capitol Records*, 106 F.R.D. at 28. Here, Sprint does not seek to

establish liability, which would be appropriate for a partial summary judgment motion, but rather seeks only to have the Commission pre-determine how damages would be established under Northern Valley's alternative count. Thus, Sprint's Motion is one that seeks an advanced determination about how the Commission will evaluate evidence, a course of action that is not contemplated by the summary judgment rules. *See, e.g., Carr v. Strode*, 904 P.2d 489, 491 (HI 1995) ("while Rule 56 'contemplates summary judgment for a part or all of the claim made in a prayer of the complaint,' it 'does not contemplate summary judgment on evidentiary matters en route to the goal.'") (citing 6A *Moore's Federal Practice*, § 56.20); CJS Judgments § 299 ("While a summary judgment may be partial, it must grant at least some of the relief prayed for, and it may not be used merely to decide an issue. Furthermore, a partial summary judgment may not be utilized to dispose of theories of recovery, and partial summary judgments which attack theories of recovery without dismissing a party or granting part of the relief sought are improperly granted.").

Despite this fatal defect in its motion, Sprint may nevertheless suggest that the procedures set forth in Rule 56(d) are sufficient to allow it to gain the relief sought by its Motion for Partial Summary Judgment. Rule 56(d) provides that "[i]f on motion under § 15-6-56 judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted." SDCL § 15-6-56(d). The rule goes on to provide that a court may, in these circumstances, "make an order specifying the facts that appear without substantial controversy" and those facts shall be "deemed established." *Id.*

Rule 56(d) is inapplicable here, however, because Sprint's Motion was not a proper motion for summary judgment in the first place. Rule 56(d) "does not authorize the initiation of motions the sole subject of which is to adjudicate issues [ ] which are not dispositive of any claim or part thereof. . . .A party should not . . . by an improper motion for summary judgment attempt to compel the district court to pre-try a case." *Carr v. Strode*, 904 P.2d 489, 491 (HI 1995) (citing 6A *Moore's Federal Practice*, § 56.20); *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.*, 3 F.R.D. 440, 441 (S.D.N.Y. 1944) ("The procedure authorized in [Rule 56(d)] is ancillary to a motion for summary judgment. Primarily, its purpose seems to be to salvage some results from the judicial effort involved in the denial of a motion for summary judgment."); *Capitol Records*, 106 F.R.D. at 29-30 (Rule 56(d) may only be utilized after a proper motion for summary judgment has been filed, otherwise "Rule 56(d) could be used to justify numerous and repetitive motions seeking to resolve limited factual issues in a piecemeal fashion. Such adjudications would not dispose of a single claim or even become final until trial, and would waste judicial resources in almost every case. . . . A fair reading of Rule 56(d), then, is that it does not allow a party to bring a motion for a mere factual adjudication. Rather, it allows a court, on a proper motion for summary judgment, to frame and narrow the triable issues if the court finds that such an order would be helpful to the progress of the litigation."). Because Sprint's motion was an improper attempt to adjudicate a non-dispositive issue, Rule 56(d) is inapplicable.

Further, Rule 56(d) is of no help because, by its plain language, it allows the trial court to establish only uncontroverted *facts*, not to resolve issues of *law*. *See* SDCL § 15-6-56(d) (after a failed motion for summary judgment, "make an order specifying the facts that appear without substantial controversy"); *Biggins v. Oltmer Iron Works*, 154 F.2d 214, 217 (7th Cir. 1946)

(noting that under Rule 56(d), a Court is authorized "to make an 'order' as to the non-controverted *facts*, 'including the extent to which the amount of damages or other relief is not in controversy.'") (emphasis added); *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 769 n.3 (9th Cir. 1981) ("'The procedure was intended to avoid a useless trial of facts and issues over which there was never really any controversy and which would tend to confuse and complicate a lawsuit.'").

In sum, Sprint's Motion for Partial Summary Judgment is procedurally defective because it seeks to resolve a non-dispositive issue that is part of a claim. The rules for summary judgment neither contemplate nor condone this piecemeal approach to litigation. Further, the Commission should avoid sanctioning Sprint's continued requests for it to pre-try this case. For this reason, the Commission should deny Sprint's motion purely on procedural grounds.

IV. SDCL § 49-13-13 IS NOT AMENABLE TO SUMMARY JUDGMENT RESOLUTION

Sprint seeks to have the Commission determinate in advance, and prior to the hearing, that it will classify the service that Northern Valley has provided as "noncompetitive" and that, as a result, rate of return regulation is applicable. However, South Dakota law makes clear that determinations in complaint cases regarding how to classify services may only be made "after a hearing." Specifically, SDCL § 49-13-13 provides, in relevant part:

> If, **after a hearing pursuant to this chapter**, it appears to the satisfaction of the commission that anything has been done or omitted to be done in violation of the provisions of laws of this state, or that any individual or joint rate or charge demanded, charged, collected, or received by any telecommunications company or motor carrier subject to the provisions of this title, or that any individual or joint classifications, regulations, or practices of a telecommunications company or motor carrier are unjust, unreasonable, unjustly discriminatory, unduly preferential, prejudicial, or otherwise in violation of the laws of this state, or that any injury or damage has been sustained by any person, the commission may determine and prescribe the just and reasonable charge, to be observed as the maximum to be charged. The

> **commission shall also determine what classification, regulation, or practice is just, fair, and reasonable** to be thereafter followed, and to make an order that such telecommunications company or motor carrier shall cease and desist from the violations to the extent that the commission finds them to exist.
>
> SDCL § 49-13-13 (emphasis added)

Because Sprint's Motion would require the Commission to determine how to classify the traffic (*e.g.,* as competitive or noncompetitive) as part of concluding that rate of return regulation is applicable, the Motion must be denied. The statute's plain language requires evaluation of these issues to be deferred until discovery has been completed and a hearing held. Indeed, the statute plainly does not contemplate determinations about "classification" of telecommunications services unless and until the Commission has found that a practice is unjust or unreasonable. For this independent reason, Sprint's Motion for Partial Summary Judgment is procedurally defective and should be denied.

V. SPRINT'S MOTION SHOULD BE DENIED ON THE MERITS

Even if Sprint's Motion were procedurally proper (which it is not), the Commission should nevertheless deny it. Before Sprint could possibly be entitled to the partial summary judgment it seeks, it would need to establish that the service that Northern Valley has provided in delivering Sprint's customer's calls to the conference call providers is: (1) something other than *switched access* service; and (2) appropriately classified as a "noncompetitive" service. Sprint's motion establishes neither.

A. If Northern Valley Provided Intrastate Access Service, It Should Collect the Rate for CLEC Access Services Established by Law

First, to be successful, Sprint's motion would have to establish ***as a matter of law*** that Northern Valley has provided a service that is something other than switched access service. This is necessarily the case because the Commission has established price regulation for CLEC's

switched access service and directed CLECs to "charge intrastate switched access rates that do not exceed the intrastate switched access rate of the Regional Bell Operating Company operating in the state." ARSD 20:10:27:02.01. Thus, even if Northern Valley's tariff does not apply (which is the prerequisite determination that would trigger application of Northern Valley's Count II), it is nevertheless fully possible that Northern Valley has still provided switched access within the confines of South Dakota law and the Commission's rules. *See* ARSD 20:10:27:01(10) (defining "Switched access," as "a telecommunications service which provides part or all of a communications path between the customer of the service and its end user which utilizes subscriber loop, transport, and switching functions.").

Sprint's Motion fails, therefore, because it does not even attempt to establish that Northern Valley is providing anything other than switched access services with regard to the traffic at dispute in this case. Rather, Sprint's Motion seems to take logically inconsistent positions, arguing both that a mysterious and unnamed "'service' is indisputably, a noncompetitive monopoly service" – which implies that Sprint is not sure how to classify the service – and then relying on federal decisions addressing terminating ***access*** services. Sprint Mem. at 5 ("terminating ***access*** is a monopoly service") (emphasis added). While Sprint may try to have it both ways with regard to its pleadings, it cannot prevail on a motion for summary judgment using this tactic.

Sprint's Motion does not address the possibility that Northern Valley's tariff definitions could be narrower than the definitions found in the applicable regulations.[1] Under these

[1] Clearly Sprint was aware of this possibility when it prepared its Motion, as it was discussed in length during the Commission's December 20, 2011 hearing, yet Sprint, who has the burden of proving it is entitled to judgment as a matter of law, presents no argument as to why this scenario alone does not defeat its Motion for Partial Summary Judgment. *See* Hearing Tr. at 46:23 – 48:2 ("If it's not access within Northern Valley's specific tariff, then maybe it is,

circumstances, Northern Valley's tariff could be found to not apply to the disputed traffic, purely as a technical matter, but such a finding would not serve to invalidate the Commission's rules establishing that CLEC access rates are subject to price regulation, and establishing the Regional Bell Operating Company rate as the just and reasonable rate to be charged for this traffic. If, as Northern Valley has consistently contended, Sprint receives terminating access services as defined by the Commission's rules when calls are completed to the conference calling providers, then ARSD 20:10:27:02.01 establishes the reasonable rate: "the intrastate switched access rate of the Regional Bell Operating Company operating in the state." Thus, under this scenario, the Commission would simply confirm that, even though the tariff was not applicable, the tariffed rate was nevertheless the "the just and reasonable charge, to be observed as the maximum to be charged." SDCL § 49-13-13.

As Northern Valley has previously noted, such an outcome would be consistent with long-standing FCC precedent, which recognizes that when a carrier has provided a functionally-equivalent service it is entitled to collect its tariffed rate, even though the tariff was inapplicable as a technical matter. *See New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd. 5128 (2000) ("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"; because the complainant failed to prove that the rates were dissimilar, the tariffed rate was appropriate), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd. 8126, 8127, ¶ 8 (Com. Car.

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nevertheless, switched access within the definition of the statute and maybe it is, nevertheless, the case that Northern Valley is entitled to be paid its tariffed switched access rate."); *id.* 63:17 – 66:1.

Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff."). Under these circumstances, it would be erroneous, as a matter of law, to apply rate of return regulation because Sprint has not proven that the service it has received is not access service or its functional equivalent. Accordingly, Sprint has failed to prove that rate of return regulation is necessarily applicable to Northern Valley's Count II.

B. Northern Valley Has Not Waived Its Rights Under SDCL § 49-31-5.1; Rate of Return Regulation is Inapplicable

Apparently recognizing that its contention that rate of return regulation should be applied to this dispute is deeply flawed, Sprint is forced to make a baseless and misleading representation that "Northern Valley has confirmed that it has waived" its rights under SDCL § 49-31-5.1. Sprint Mem. at 7. Sprint's representation is directly refuted by the plain language of Northern Valley's response to Request for Admission 17, which is the sole piece of evidence on which Sprint relies. Northern Valley's response in no way waives application of SDCL § 49-31-5.1, rather it merely states that, if the Commission determines that its tariff is not applicable, it will then evaluate how to classify the traffic. Nothing in this response is inconsistent with SDCL § 49-31-5.1 or should be construed as a waiver and it is misleading for Sprint to state otherwise.

Quite to the contrary, it is clear that SDCL § 49-31-5.1 is fatal to Sprint's Motion because it renders the rate of return regulations inapplicable to Northern Valley's services. (". . . independent telephone companies serving less than fifty thousand local exchange subscribers are not subject to chapter . . . §§ 49-31-1.1 to 49-31-1.4, inclusive. . . ."). As an independent telephone company, state law is clear that Northern Valley's services are not subject to a rate of return analysis. Moreover, Sprint offers no support for the notion that Northern Valley could

somehow "waive" its statutory rights or that the Commission could itself ignore the statute in implementing its duties. Thus, Sprint's Motion for Partial Summary Judgment should be denied because there is no statutory basis to impose rate of return regulation on Northern Valley, a small independent carrier.

C. Sprint Has Failed to Prove That The Service Is "Noncompetitive"

Even if one set aside for a moment that South Dakota law exempts Northern Valley from rate of return regulation, Sprint's Motion would still fail because it rests on a faulty assumption that Northern Valley has provided a "noncompetitive" service. Sprint Mem. at 6. Just as Sprint fails to prove that Northern Valley is not providing access service, *see supra,* Sprint has also failed to prove that this theoretical service is "noncompetitive." South Dakota law provides a number of factors that are relevant to determining whether a particular telecommunications service should be considered competitive or noncompetitive (when it is provided by a carrier that is not exempted by SDCL § 49-31-5.1), including:

> (1) The number and size of alternative providers of the service and the affiliation to other providers;
> (2) The extent to which services are available from alternative providers in the relevant market;
> (3) The ability of alternative providers to make functionally equivalent or substitute services readily available at competitive rates, terms, and conditions of service;
> (4) The market share, the ability of the market to hold prices close to cost, and other economic measures of market power; and
> (5) The impact on universal service.

SDCL § 49-31-3.2. Sprint's Motion presents ***no evidence*** about any of these factors. Rather, as noted above, it seeks to rely on what it has already concluded would be a facially inapposite FCC decision that states that terminating *access* may be considered a monopoly service (again, it would be inapposite in these circumstances because Sprint, though not particularly clear, Sprint seems to be claiming that it is not receiving access service and, as a result, opinions regarding

access services would be irrelevant). Moreover, Sprint is wrong insofar as it implies that merely because terminating access can be viewed as a monopoly service that it necessarily follows that Northern Valley has provided a "noncompetitive" service as defined by South Dakota law. Rather, as the definition of "noncompetitive service" makes clear, the evaluation of whether a service is competitive or noncompetitive, involves a consideration of whether "regulation" is "necessary to insure *affordable local exchange service*." SDCL § 49-31-1.1. Absent any evidence regarding these factors, the Commission should deny the Motion for Summary Judgment and reserve its judgment until after the hearing.

CONCLUSION

As described above, Sprint's Motion is both procedurally and substantively defective. It is little more than a thinly-veiled attempt to re-litigate the Commission's prior opinion wherein it reserved judgment regarding the application of SDCL § 49-13-13 until all of the relevant facts – including facts from Sprint – come to light. For these reasons, the Motion should be denied in its entirety.

Dated: March 28, 2012

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 28th day of March 2012 upon the following:

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