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.'S OPPOSITION TO SPRINT COMMUNICATIONS COMPANY LP'S MOTION TO DISMISS COUNTERCLAIMS**

Northern Valley Communications, L.L.C. ("Northern Valley") respectfully submits this memorandum in opposition to the Sprint Communications Company L.P.'s ("Sprint") Motion to Dismiss Northern Valley's Counterclaim for Declaratory Relief ("Sprint Motion").

Sprint's Motion has a single aim: to avoid as much as possible bringing light to the fact that Sprint has paid *nothing* to Northern Valley for many years for the traffic at issue in this dispute, despite the fact that Sprint continues to send its intrastate interexchange traffic to Northern Valley's network for termination. Sprint tries desperately to create a world in which the hearing in this case is entirely about whether Northern Valley should be billing access charges on calls terminating to conference calling services, and in which Northern Valley is on trial. Sprint hopes this Commission will simply ignore the significant amounts of money Sprint has billed and collected from its customers for the very same calls in which Sprint has refused to pay Northern Valley a single penny. The limits of this Commission's jurisdiction, however, compel no such unbalanced and prejudicial outcome. Indeed, Northern Valley has a statutory right to obtain reasonable compensation and Sprint should not be permitted to hamper Northern

Valley's ability to present its case fully. Nor should Sprint be allowed to deprive this Commission from exercising the full scope of its jurisdictional authority. For these reasons, and as discussed fully below, Sprint's Motion should be denied.

STANDARD

A motion to dismiss tests the legal sufficiency of the pleading. *Elkjer v. City of Rapid City,* 695 NW2d 235, 239 (SD 2005). "It is well settled that '[a] motion to dismiss . . . tests the law of a plaintiff's claim, not the facts which support it.'" *Osloond v. Farrier,* 659 NW2d 20, 22 (SD 2003) (quoting *Thompson v. Summers,* 567 NW2d 387, 390 (SD 1997) (additional citations omitted)).

In considering motions to dismiss for failure to state a claim upon which relief may be granted, the decision maker:[1]

> consider[s] the complaint's allegations and any exhibits which are attached. The court accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom.... "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The question is whether in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states any valid claim of relief. The court must go beyond the allegations for relief and "examine the complaint to determine if the allegations provide for relief on any possible theory."

Id. (internal citations omitted). Accordingly, Sprint's motion must be denied unless it is "beyond doubt" that there is "no set of facts" upon which Northern Valley would be entitled to a

[1] Though Sprint fails to cite any statutory authority for its ability to seek the dismissal of Northern Valley's claims or to provide the standard it believes is applicable in evaluating such a motion, Northern Valley assumes Sprint's motion rests on the theory that there are no claims upon which Northern Valley would be entitled to a declaratory judgment.

declaratory judgment confirming that it is entitled to compensation for terminating Sprint's intrastate interexchange traffic .

ARGUMENT

I. SPRINT'S PROCEDURAL ARGUMENT DOES NOT JUSTIFY DISMISSING NORTHERN VALLEY'S COMPLAINT

Sprint argues that Northern Valley's declaratory judgment claims should be dismissed purely on procedural grounds. Northern Valley acknowledges ARSD 20:10:01:16 provides that, after the expiration of certain periods, amendments to pleadings shall be accomplished by stipulation of the parties or "upon application of a party and at the discretion of the commission." ARSD 20:10:01:16. Accordingly, simultaneously herewith, Northern Valley is filing such a motion and asks that the Commission grant the motion and deny Sprint's request to strike the counterclaims filed on October 7, 2011.

Leave should be granted to Northern Valley because no harm will accrue to Sprint by allowing Northern Valley's declaratory claims to remain. *See Isakson v. Parris*, 526 NW2d 733, 737-38 (SD 1995) ("the most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment"). First, Sprint is not prejudiced because it can claim no surprise regarding Northern Valley's intent to pursue these claims. *Id.* at 738 (amendments to pleadings are especially appropriate "when the opponent could not claim surprise, but effectively should have recognized that the new matter included in the amendment would be at issue." (citing 6 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1487 (1990)). Northern Valley included similar claims in its initial Answer, but sought monetary damages on those claims, which caused the PUC to dismiss based on the election of remedies statute. *See In the Matter of South Dakota Network, LLC against Sprint Communications Company L.P.*, Docket TC09-098, Order Granting

Motion to Dismiss Cross-Claims (Sep. 15, 2011). During the course of that hearing, however, it was discussed repeatedly and at length that Northern Valley would lodge these counterclaims again as declaratory claims, eliminating the request for monetary damages that caused the dismissal.

For example, Mr. Buntrock, counsel for Northern Valley, discussed repeatedly that Northern Valley would file amended claims if the claims for monetary damages were dismissed:

- I think the correct way to articulate that would be – would be to the extent that we would be seeking to amend our claims to essentially ask for declaratory relief rather than asking for money damages. Tr. 36:19 – 22.

- We think – we do believe that it is improper for Sprint to be seeking declaratory relief in this proceeding. But to the extent that Sprint is allowed to proceed with its claims against us, we then should be allowed to proceed with claims against them of the same type of declaratory nature, and we would amend our existing claims to make that clear. Tr. 37:6 – 13.

- I guess the only thing that I wanted to address is that we will be having – to the extent that Northern Valley and Sancom are allowed to amend their claims and seek the same kinds of declaratory relief that Sprint is seeking, Mr. Schenkenberg is correct. Tr. 72:6 – 11.

See In the Matter of South Dakota Network, LLC against Sprint Communications Company L.P., Docket TC09-098, Transcript of Ad Hoc Committee Meeting (Aug. 30, 2011)

Northern Valley has sought, from the time discovery began in this case, to obtain information it believes is relevant to allowing the Commission to determine the compensation Northern Valley is due, in the unlikely circumstances that the Commission concludes Northern Valley's intrastate access tariff does not apply to the disputed traffic. Though Sprint has resisted the production of these relevant materials, its own defiance should not now be used by Sprint to preclude the resolution of these issues.

Moreover, though Sprint's motion argues that "this case is rapidly proceeding towards completion," Sprint Motion at 2, it has failed to demonstrate that any harm will accrue as a result of having these claims adjudicated in this case. Sprint's witnesses have yet to be deposed, and Sprint has already agreed with South Dakota Networks and Northern Valley that those depositions can be delayed until after the Commission resolves the pending motions. Thus, there is still ample time for Sprint to produce relevant documents and evidence before depositions. Absent a demonstration of harm to Sprint, there is no basis to refuse to allow Northern Valley to file the amended counterclaims. Accordingly, Sprint's motion to dismiss on the procedural basis should be denied.

II. THE COMMISSION HAS AMPLE AUTHORITY TO DETERMINE THAT NORTHERN VALLEY IS ENTITLED TO COMPENSATION FOR THE DISPUTED TRAFFIC, EVEN IF ITS INTRASTATE TARIFF DOES NOT APPLY

Sprint argues that the Commission lacks appropriate jurisdiction to determine that Northern Valley is entitled to compensation for the work it has done and continues to do to terminate Sprint's intrastate long-distance calls, if it is determined that those services are not within Northern Valley's intrastate access tariff. In other words, it asks this Commission to reach solely a binary conclusion: does Northern Valley's tariff apply, yes or no? Then, if the Commission accepts Sprint's arguments and determines there is some technical defect in Northern Valley's tariff that prevents it from applying to the termination of long-distance calls terminating to conference call providers, Sprint seeks to block the Commission from even considering the question of whether Northern Valley is nevertheless entitled to some form of compensation for the significant work it has done for the benefit of Sprint for many years. But, neither the law nor logic compel the outcome that Sprint seeks.

A. SPRINT'S CASE LAW IS READILY DISTINGUISHABLE FROM NORTHERN VALLEY'S DECLARATORY JUDGMENT CLAIMS

Sprint's motion relies largely upon *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 648 NW2d 342 (SD 2002) for the proposition that a state agency does not possess inherent power, but must rely on its statutory grant of authority. Northern Valley does not dispute this general proposition, but rather disagrees with the conclusions Sprint reaches as a result of this principle. Specifically, Sprint concludes that this language means the Commission lacks jurisdiction to evaluate whether Northern Valley would be entitled to compensation, and what that compensation would be, if it is determined Northern Valley's intrastate access tariff does not apply to the intrastate telecommunications Northern Valley terminates for Sprint to conference call providers. None of Sprint's cases reaches such a conclusion.

In *O'Toole*, the O'Tooles had been refunded payments they made into the state retirement system. Sometime after they received their refunds, the Board successfully sought to have state law changed to enable retirement plan participants to seek refunds of amounts they had paid into the system, as well as matching funds that had been provided to the participant's account by the state. The O'Tooles sought an additional refund of the matching funds that had been applied to their account, claiming the Board owed them a fiduciary duty to inform them of the potential that the Board would seek a change in the law. Importantly, the Court concluded that the Board *did have jurisdiction* to hear the claim for the further refund, because the request was within the Board's statutory authority. 648 NW2d at 345. However, the Court went on to conclude that because the statute also expressly prohibited any payment of matching funds to plan participants who had already withdrawn funds before the effective date of the statute, the Board was precluded from granting the relief the O'Tooles requested. Thus, "[t]he only decision [the] Board could properly make was to deny the refund, even if a breach of fiduciary duty had occurred."

Id. at 347. Thus, *O'Toole* stands for the simple and undisputed proposition that a state agency may not act outside of its statutory mandate. Nothing more; nothing less.

Sprint similarly seeks to rely upon *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 CT02-21 (SDPUC Sep. 26, 2003). But, again, this case offers no support for Sprint's position that Northern Valley's declaratory claims in this case should be dismissed. *Cutler* evaluates the Commission's jurisdiction over fragmented T-1 services. The Commission made a series of conclusions: (1) the **fragmented T-1 services were jurisdictionally *interstate* services** and, **thus, not subject to state regulatory oversight**; (2) under federal law, the FCC had mandatorily detariffed these services; and (3) because the services were detariffed, the appropriate tribunal in which to evaluate whether compensation was due would be "a court of general jurisdiction." *See id.*, ¶¶ 13, 15-16, 23. This case is very different from *Cutler* because Sprint has alleged specifically that its complaint relates to traffic that has been billed as "intrastate switched access," Sprint's Third Party Complaint, ¶ 7-10, and there is no dispute that the traffic Sprint is sending to Northern Valley's network is intrastate interexchange traffic that would be subject to the Commission's jurisdiction.

Like *O'Toole* and *Cutler*, Sprint misconstrues the import of *Black Hills Fibercom, LLC v. Qwest Corporation*, 2005 WL 856149 (SDPUC March 14, 2005). *Black Hills* involves a dispute regarding the appropriate intercarrier compensation on ISP-bound traffic that traversed local exchanges. Qwest had billed the traffic as intrastate access. *Id.* at ¶ 47. The Commission determined that for the period prior to the FCC's *Order on Remand*, intrastate access charges were appropriately billed. *Id.* at ¶ 55. However, after the FCC's *Order on Remand,* the

Commission concluded that its authority over the traffic was preempted, and that FiberCom's traffic was now jurisdictionally interstate traffic. *Id.* at ¶ 53 ("We therefore find that FiberCom ISP-Bound Traffic was interstate traffic.") Because the traffic was interstate rather than intrastate, Qwest was required to refund the amounts billed under its intrastate access tariff for the period following the adoption of the *Order on Remand*. *Id.* at ¶ 68. Thus, Qwest had received full compensation for the traffic for the period prior to the *Order on Remand*, and was not entitled to an award of compensation from the Commission for the period following the effective date of the FCC's *Order on Remand*. Notably, the Commission noted that it did not, and could not, find that Qwest was prohibited from being paid for the ISP-bound traffic after the *Order on Remand*, only that the Commission "lacked authority to determine what the compensation should be" **because the traffic was interstate in nature**. *Id.* at ¶ 65 & 67. Thus, when it dismissed Qwest's unjust enrichment claim, it dismissed those claims because it did not have the jurisdiction to determine how unjust enrichment would apply in the light of the "interstate nature of the service." *Id.* at ¶ 70. In other words, like *Cutler*, the Commission determined that it lacked jurisdiction to determine what payment would be due when the traffic at issue was ***inter*state traffic, not within the jurisdiction of the Commission**. Again, this case does not establish the Commission's inability to ensure a South Dakota carrier is paid a reasonable rate for the provision of intrastate access services. It is inapposite.

In short, each of the cases Sprint offers as support for a general presumption that the Commission lacks jurisdiction over the dispute in this case are off point. If the disputed traffic were **interstate traffic**, then these cases would apply to preclude the Commission from considering Northern Valley's claims. But, of course, if the traffic in this dispute was interstate,

then the Commission would lack jurisdiction to hear Sprint's claims and this case should be dismissed. Sprint cannot have it both ways and, thus, its motion must fail.

B. THE COMMISSION'S STATUTORY AUTHORITY ENABLES IT TO EVALUATE NORTHERN VALLEY'S DECLARATORY JUDGMENT CLAIMS

As stated earlier, Northern Valley acknowledges that a state agency must act within its statutory grant of authority. *O'Toole*, 648 NW2d at 346 ("The general rule is that administrative agencies have only such adjudicatory jurisdiction as conferred upon them by statute."). However, this only begs the question: is Northern Valley's requested declaratory relief outside of the boundaries of the Commission's statutory authority? Sprint's motion quizzically leaves this most fundamental question unanswered. But, the reality is that no, Northern Valley's requested relief is well within the confines of the Commission's statutory grant of authority. Several statutory provisions compel this conclusion.

The Commission has broad authority over telecommunications carriers in South Dakota. Sprint and Northern Valley each acknowledge that the Commission has general oversight authority over the intrastate traffic sent to Northern Valley's network by Sprint, which is the subject of this case. *See, e.g.,* SDCL § 49-31-15 and 49-31-18. The Commission also has broad authority to inquire into *any complaints* about the telecommunications services that fall within the Commission's regulatory arena. SDCL § 49-31-3.

Specifically, SDCL § 49-31-3 provides:

> The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies.

SDCL § 49-13-1 makes clear that the Commission's jurisdiction to investigate complaints is not limited to an award of money damages, and thus the Commission's authority expands to declaratory judgments, such as those requested by Northern Valley (and Sprint). SDCL § 49-13-1 ("No complaint may be dismissed because of the absence of direct damage to the complainant or petitioner.").

Further, SDCL §§ 49-2-10 and 49-31-37 collectively operate to ensure that no common carrier is denied reasonable payment for the provision of intrastate telecommunications, which would include intrastate access services. Specifically, SDCL § 49-2-10 provides that a "common carrier is entitled to a reasonable compensation. . . ." SDCL § 49-31-37 provides that any person, including Sprint, who "obtain[s] telecommunications services … or . . . through any scheme or device, obtains the transmission of a communication without payment of the lawful charges is guilty of theft." Thus, these two provisions support Northern Valley's request for declaratory judgment that, even if its intrastate access tariff does not apply, Northern Valley is nevertheless entitled to "reasonable compensation," and that Sprint is not permitted to obtain intrastate telecommunications services without payment of the lawful charges.

Finally, and perhaps most importantly, South Dakota law makes it expressly clear that, even if it is determined a carrier has provided an intrastate service that does not conform to its tariff, the Commission may "determine and prescribe the just and reasonable charge" for the service that has been provided. SDCL § 49-13-13. As the Commission recently observed, "SDCL 49-13-13 sets forth **the considerable powers** of the Commission to consider complaints and determine remedies." *In the Matter of the Complaint Filed by Kennebec Telephone Company, Inc. against Alltel Communications, Inc. Regarding Nonpayment of Transiting*

Charges, Order Denying Summary Judgment, TC08-31, at * 1 (March 3, 2010) (emphasis added).

Specifically, the statute states:

> **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 the laws of this state, or that an 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. The telecommunications company or motor carrier may not thereafter publish, demand, collect, or receive any rate or charge for in excess of the maximum rate or charge prescribed and they shall adopt the classification and conform and abide by the regulations or practice prescribed by the commission.

SDCL § 49-13-13 (emphasis added).

Contrary to Sprint's argument, the Commission's statutory authority makes clear that, if the Commission concludes that calls Northern Valley has terminated to conference call providers do not conform to Northern Valley's current tariff, the Commission may "determine and prescribe the just and reasonable charge, to be observed as the maximum to be charged" for the traffic that has already been exchange. *Id.* Moreover, the Commission "shall *also* determine what classification, regulation, or practice is just, fair, and reasonable to be *thereafter* followed." *Id.* (emphasis added). Thus, the statutory provision clearly contemplates the setting of both a retroactive rate for services already provided, as well as a prospective or forward-looking rate in, the unlikely event Northern Valley's tariff is inapplicable.

Noticeably, the language of SDCL § 49-13-13 materially differs from its closest federal counterpart, which is silent about the ability of the FCC to set rates for disputed services that have already been provided. 47 U.S.C. § 205 provides:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be **thereafter** observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be **thereafter** followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

47 U.S.C. § 205 (emphasis added). The federal statute does not include the provision that South Dakota law has expressly recognized this commission's authority to establish just and reasonable rates for traffic that has already been exchanged ("determine and prescribe the just and reasonable charge, to be observed as the maximum to be charged"). Rather, the federal statute is silent about payments for retroactive traffic (presumably because the filed-tariff doctrine has historically required parties to pay the tariffed rates even in the face of a dispute), and discusses only the ability of the FCC to set rates that will "thereafter" be observed. This material difference is overlooked or ignored by Sprint's motion to dismiss and, Northern Valley believes, is dispositive of whether this Commission has jurisdiction to evaluate the issues included in Northern Valley's counterclaims.

As the Commission has observed, its "authority to impose a remedy other than damages under SDCL 49-13-1 is grounded in its regulatory authority to enforce the provisions of SDCL

Title 49. . . ." *Cutler*, ¶ 23. Among those provisions, are the requirement to ensure that a carrier is paid a reasonable rate for intrastate telecommunications services, SDCL § 49-2-10; the requirement to prevent the theft of telecommunications services, SDCL § 49-31-37; and the authority to establish rates that should be paid in situations where the Commission determined the services provided did not conform to a carrier's tariff or were otherwise in conflict with state law, SDCL § 49-13-13. Taken together, each of these provisions independently and collectively support Northern Valley's request that, if it becomes necessary, the Commission not abandon its role of overseeing intrastate telecommunications traffic if it determines the disputed traffic in this case did not fit within Northern Valley's tariff. Such a finding, standing alone, would not mean that the traffic is outside of the Commission's jurisdiction, or that the Commission does not have relevant expertise to use in determining what rates should be applied to the traffic.

C. SPRINT'S OTHER ARGUMENTS ARE MISPLACED

Sprint attempts to mount a series of additional arguments in order to try to convince the Commission it should dismiss Northern Valley's declaratory judgment claims. But, upon examination, each of these arguments fail to support the outcome sought by Sprint.

First, Sprint argues that Northern Valley is asking the Commission to establish a "regulated rate for non-access traffic." Sprint Motion at 4. But, this characterization is invalid. Northern Valley's counterclaims ask the Commission to consider how to classify the traffic and what rates would apply to the termination of this intrastate interexchange traffic in this case, if the specific terms of its tariff do not apply, as Sprint has alleged. Third Party Complaint, ¶ 14 ("calls delivered to Call Connection Companies are not subject to switched access charges under [Northern Valley's] intrastate switched access tariffs.").

If the Commission agrees with Sprint that the tariff does not apply, it could conceivably reach this conclusion as a result of two very different analyses: (1) the traffic *is* intrastate access, but does not conform to the terms of the specific tariff and, therefore, the tariff is inapplicable; or (2) the traffic *is not* intrastate access, and is some other form of traffic.[2] Sprint's motion, however, does not even address or contemplate the first possibility, instead making the erroneous assumption that if the tariff does not apply, the traffic is not intrastate access traffic. But, such a conclusion does not follow as night follows day. Thus, Sprint's motion should be denied because it has failed to establish that there is no set of facts under which the Commission would have jurisdiction to determine the reasonable compensation due Northern Valley, if its intrastate tariff is found to be inapplicable.

Similarly, Sprint is in error when it suggests that Northern Valley's position, as articulated in its counterclaims, that *local* exchange service is de-regulated, somehow precludes recovery on the services Sprint has received from Northern Valley. Sprint concludes, without support, that if Northern Valley's intrastate access tariff is found not to apply, it necessarily follows that the services Northern Valley provided to Sprint would also "be de-regulated." Sprint Motion at 4. Sprint offers no support for this assumption, because there is none. And, equally importantly, such a conclusion is one that could only be made by the Commission. Indeed, Northern Valley's declaratory judgment claims are designed specifically to ensure that the Commission, not Sprint or the federal court, is afforded the first opportunity to make a decision about how to classify the services Northern Valley has been providing to Sprint for all these years without payment. This is a policy decision over which this Commission has jurisdiction, and about which it has expertise. SDCL § 49-13-13 specifically provides that the

[2] For the sake of clarity, in either case, Northern Valley believes that SDCL § 49-13-13 authorizes the Commission to establish an appropriate rate for the termination of the traffic.

Commission "shall also determine what **classification**, regulation, or practice is just, fair, and reasonable. . . ." The statute compels the Commission to make this determination, and it should neither cede its statutory authority over intrastate interexchange traffic nor prejudge the outcome of that analysis by dismissing Northern Valley's claims at this stage of the case.

Further, Sprint's discussion about the need for the Commission to utilize the procedures in SDCL § 49-31-12.4 and § 49-31.4 should be rejected for reasons similar to those discussed above. First, Sprint's argument ignores entirely the provisions of SDCL § 49-13-13, which permit the Commission to determine rates that should apply on a retroactive basis. Moreover, Sprint erroneously tries to impose a regulatory regime for rate-setting that is applicable for establishing prospective rates, once the Commission first determines whether the particular service at issue is competitive, emerging competitive or noncompetitive. If, as Sprint seems to suggest, the traffic is not "access" traffic, the Commission would then be able to consider, after appropriate briefing, whether and how best to categorize the traffic and establish a fair and just rate on a going-forward basis. But, there are many, many layers of analysis that would be required before the Commission reached the conclusions offered by Sprint's motion. And, again, all Northern Valley's declaratory claims do, is serve to ensure that this Commission would be afforded the first opportunity to evaluate these policy questions, rather than having Sprint or the federal court make presumptions based on only half of the story.

III. NORTHERN VALLEY'S COUNTERCLAIMS WOULD NOT NECESSARILY REQUIRE THE COMMISSION TO ENGAGE IN RETROACTIVE RATE MAKING

Finally, though Northern Valley believes the Commission has the statutory authority to do so, Northern Valley takes issue with Sprint's presumption that Northern Valley's

counterclaims would necessarily compel the Commission to engage in retro-active ratemaking.[3] Northern Valley notes that, even if the Commission concludes the tariff did not apply based on some technical argument raised by Sprint about the definitions in Northern Valley's tariff, it could nevertheless conclude that the tariff rate is just and reasonable -- at which point there would be no need to establish a rate retro-actively.

As the FCC observed in *In the Matter of Qwest Communications Corporation v. Farmers and Merchants Mutual Tel. Co.,* Second Order on Reconsideration, 2009 WL 4073944 (Nov. 24, 2009), the conclusion that an access tariff does not apply to disputed traffic **does not mean that no compensation is due**. Specifically, after concluding that the specific language in Farmers and Merchants traffic rendered the interstate access tariff inapplicable to conference calling traffic, the FCC stated:

> This is not to say that Farmers is precluded from receiving any compensation at all for the services 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.

[3] For clarity, Northern Valley does not agree with Sprint's broad conclusion that retro-active ratemaking is precluded. As discussed at length above, in the context of a complaint proceeding, the statute in South Dakota expressly authorizes the Commission to engage in such an analysis. And, in that regard, Sprint's reliance on *Re Montana-Dakota Utilities Company*, 27 P.U.R.4th 583, 601 (S.D. Pub. Utils. Comm'n Dec. 28, 1978) is in error. *Montana-Dakota* involved a request to retroactively add a "surcharge" to rates that had been previously approved by the Commission for a service that was included, without dispute, in the utility's tariff. Here, Northern Valley's declaratory judgment claims are designed to ensure that it is provided with any reasonable compensation, not to apply a surcharge on top of its prior tariffed rates. Moreover, *Montana-Dakota* simply does not arise in the same context as the instant case and, thus, it does not appear that SDCL § 49-13-13 would have been applicable.

> Car. 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"). *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 telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed").

2009 WL 4073944 at n.96.

Of particular significance to a consideration of whether Northern Valley's declaratory claims should be dismissed is the decision *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd. 5128, 5133, ¶ 12 (2000) cited by the FCC. In that case, the FCC concluded that, despite the tariff not covering the intrabuilding circuits that had been provided, the charges that were assessed were just and reasonable, because the services were the functional equivalent of services contained in the tariff. As such, New Valley was obligated to pay the rates that had been billed and was not entitled to any refunds.

As in *New Valley*, in the unlikely event the Commission concludes that the services provided to Sprint were not encompassed by Northern Valley's intrastate access tariff, Northern Valley believes the Commission can nevertheless conclude those rates are the reasonable rates because the services are the functional equivalent. In this case, even Sprint would have to concede, that there was no retroactive ratemaking and its arguments would thus have to fail, rendering it improper to dismiss Northern Valley's claims at this stage of the case. Accordingly, the appropriate course of action is to deny Sprint's motion at this time, and allow the parties to fully present their case, rather than accepting Sprint's invitation to prematurely block the Commission's full consideration of the dispute.

IV. SPRINT FAILS TO ESTABLISH THAT FEDERAL LAW IS IMPLICATED BY NORTHERN VALLEY'S DECLARATORY CLAIMS

Finally, in what can best be described as an afterthought, Sprint includes a one-paragraph discussion suggesting Northern Valley's claims should be dismissed because of an order by the Federal Communications Commission and some vague suggestion that federal law is applicable. Northern Valley finds it impossible to fully comprehend Sprint's argument, and should not be left to hazard a guess about what Sprint may have intended.

Thus, Northern Valley simply makes the following observations. First, it is undisputed that the traffic at issue in this case is *intra*state interexchange traffic over which this Commission has long exercised jurisdiction. The FCC's opinion in no way suggests it intended to pre-empt this Commission's jurisdiction over that traffic. Moreover, Sprint's argument about some form of federal preemption would, according to Sprint's own words, arise only "*if* CCC traffic is non-access traffic. . . ." Sprint Motion at 7 (emphasis added). Again, Northern Valley's declaratory judgment claims are aimed precisely at ensuring this Commission examines that question *if* it concludes that Northern Valley's tariff does not apply. Because Sprint's motion rests on the erroneous assumption that *if* the tariff does not apply, the traffic is non-access traffic, it must be rejected. In sum, Sprint's argument about federal law being implicated provides no basis to dismiss Northern Valley's declaratory judgment claims.

CONCLUSION

The purpose for Northern Valley's declaratory judgment claims is simple and straightforward. Northern Valley believes that, even if its tariff does not apply, it is nevertheless entitled to reasonable compensation for the work it has done to the benefit of Sprint for many years. Northern Valley asks only that the Commission allow it a full and fair opportunity to present its case. Northern Valley believes, unlike Sprint, that if the tariff is found not to apply, it is only the beginning, not the end of the analysis the Commission is empowered to undertake. In that circumstance, the Commission's expertise will indeed be critical in determining the classification and appropriate compensation for the traffic. For these reasons, Northern Valley respectfully requests that the Commission grant Northern Valley's motion to file its amended counterclaims and deny Sprint's motion to dismiss those claims.

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