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 REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY**

*** * * PUBLIC VERSION * * ***

Northern Valley Communications, L.L.C. ("Northern Valley"), by and through counsel, and pursuant to S.D. Admin. R. 20:10:01:01.02 and SDCL § 15-6-37(a), hereby submits this Memorandum in Support of its Motion to Compel against Sprint Communications Company LP ("Sprint").

I. PRELIMINARY MATTERS

A. SPRINT'S OPPOSITION IS A COLLATERAL ATTACK ON THE COMMISSION'S PRIOR ORDER DENYING ITS MOTION TO DISMISS NORTHERN VALLEY'S COUNT II; THE COMMISSION SHOULD REJECT SPRINT'S ARGUMENTS YET AGAIN

Sprint spends the first several pages of its brief blatantly distorting the record of the Commission's December 20, 2011 hearing on Sprint's Motion to Dismiss Northern Valley's Counterclaim II. Sprint attempts to argue that Northern Valley's Count II has no intersection to its claim for unjust enrichment pending in the federal court, but this position is simply belied by

the record. Indeed, Sprint selectively quotes half statements from the record in its misguided effort to spin what Northern Valley actually said. For example, Sprint quotes part of a discussion between Northern Valley's counsel and Ms. Ailts Wiest. *See* Sprint Response to Northern Valley Motion to Compel ("Sprint Mem.") at 2-3. For ease of convenience and clarity, Northern Valley sets forth the full dialogue here:

> MS. AILTS WEIST: Mr. Carter, I guess I'm trying to pin this down a little bit more closely.
>
> I believe you stated we have the authority granted to us by statute but that when you refer to words such as just and reasonable, those are words that are commonly or could be associated with some sort of equitable ideas.
>
> But so you're not actually asking, though, for equitable grounds such as unjust enrichment. Your position is that the statute that refers to just and reasonable charges are the basis for what you're talking about?
>
> MR. CARTER: That's correct. I want to be honest because I think it's cited in Sprint's Brief we have in shorthand referred to this as the unjust enrichment claim because we know that the information that would be provided by the Commission, which would be applying its expertise within the information that would **be relevant to and utilized by the Federal Court to resolve the unjust enrichment claim that's pending there in Federal Court**.
>
> But we're not asking the Commission to grant the relief, the equitable relief. We're simply asking this Commission to utilize the statutory authority it has to consider the questions of if it's not a tariff service, what is the service, and . . . is there some reasonable charge? Could it be the functional equivalent, for example, of access service?
>
> And so, again, we're not asking the Commission to award us or to actually enter equitable relief under this theory, but we do acknowledge **the information that the Commission provides and the response it provides would be relevant to the Court**.
>
> Again, I want to circle back to what I said earlier. The court's concern, as it has expressed repeatedly, is that it does not want to

> trample on the affairs of the Public Utilities Commission by engaging in rate making.
>
> * * *
>
> That is what our Count II is designed to ensure, is that you exercise the full extent of your jurisdiction so that Judge Schreier has the guidance that she may need.

Transcript of December 20, 2011 Hearing ("Hearing Tr.") 59:19 - 62:1 (emphasis added). Thus, contrary to Sprint's representations now, Northern Valley made it quite clear at the hearing that it asked the Commission to utilize the full scope of its authority to consider a just and reasonable rate, pursuant to SDCL § 49-13-13, in the event that the tariff did not apply. Northern Valley also made it clear that it was the Court, not the Commission, which would then utilize that information to evaluate whether equitable relief was appropriate.

Having fully considered the arguments before it, the Commission denied Sprint's motion to dismiss in its entirety. The Commission specifically considered Sprint's request, which it lodges here again, *see* Sprint Mem. at 3, that the Commission limit Northern Valley's right to obtain relevant discovery. Specifically, at the conclusion of the hearing, Sprint's counsel asked the Commission, if it decided not to dismiss Count II 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." Hearing Tr. 68:21-24. 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. Northern Valley also made it clear throughout the hearing that it believed the appropriate course of action was to obtain relevant discovery from Sprint and that the Commission should "not [ ] prejudge the outcome of the proceeding" and asked the Commission to "ensure that when you do make your decision that we have the full case in front of you and that you are able to see both sides of the story. You're able to see and understand Northern Valley's actions and also Sprint's actions and the manner in which it has treated these calls during the course of this relationship." *Id.* at 63:4-11. Thus, the Commission should not allow Sprint to keep rehashing the same arguments and Sprint should finally be required to produce the relevant and responsive information it has refused to provide for over a year now.

B. SPRINT'S REVENUE INFORMATION IS RELEVANT TO NORTHERN VALLEY'S COUNT II

Much of Sprint's resistance to providing relevant discovery is pinned on its false assertion that the Commission's evaluation of a "just and reasonable" rate under Northern Valley's Count II would be limited to a rate of return analysis and that, as a result, Sprint's information is not relevant to the case. Northern Valley has fully refuted Sprint's position in its Opposition to the Motion for Partial Summary Judgment, which is filed currently herewith. Stated succinctly, Sprint's motion is both procedurally improper and substantively flawed. Sprint is not entitled to summary judgment on its theory of Northern Valley's right to recovery and, as a result, discovery should proceed so that a full record may be developed. Specifically with regard to the merits, however, Sprint's position cannot prevail as a matter of law because SDCL § 49-31-5.1 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. . . .”). Thus, there is no basis to conclude that the Commission’s ability to set a reasonable rate is constrained to conducting a rate of return analysis.

Quite to the contrary, the Commission has already determined in Docket TC10-014 that “pricing regulation is appropriate for switched access services provided by CLECs.” *See In the Matter of the Investigation of Pricing Regulation for Switched Access Services Provided by Competitive Local Exchange Carriers*, Order Finding Pricing Regulation Appropriate for CLECs’ Switched Access Services; Order Denying and Granting In Part Qwest’s Motion; Order Taking Judicial Notice; and Order Closing Docket, Docket TC10-014 (May 4, 2010). Under the Commission’s standards for pricing regulation, the Commission determines a price that is “fair and reasonable” – the very exercise contemplated by SDCL § 49-13-13 – by examining five factors: “the price of alternative services, the overall market for the service, the affordability of the price for the service in the market it is offered, and the impact of the price of the service on the commitment to preserve affordable universal service.” SDCL § 49-31-1.4.

Commission precedent makes clear that, in examining the “affordability of the price for the service” for access services, an IXC’s net profits are relevant and indeed integral to the Commission’s analysis. *See In re US West Communications, Inc.*, Finding of Fact, Conclusions of Law, Order and Notice of Entry of Order, TC 96-107 (Nov. 24, 1997), at *4 (observing that the proposed rate increase would “result in a drop of net income to TAG group members, in aggregate, in the amount of 58.1%”; “Access costs have a profound effect on the ability of long distance carriers [resellers] to earn a profit”); *see also In the Matter of the Establishment of Switched Access Rates for U.S. West Communications, Inc.*, 618 N.W.2d 847, 850 (S.D. 2000) (affirming Commission’s order and noting the Commission’s determination that the rate increase

would result in a decrease in net profits). Thus, Sprint's representation that neither the five factors nor the Commission's rules allow it to consider revenues or profits is plainly inaccurate. *See* Sprint Mem. at 14. The ***very case*** that Sprint cites recognizes that an IXC's profits are relevant to evaluating what price is "fair and reasonable" for access services.

In sum, SDCL § 49-13-13 empowers the Commission to "determine and prescribe the **just and reasonable** charge, to be observed as the maximum to be charged" and SDCL § 49-31-1.4 sets forth five factors that the Commission *must* consider in determining whether a price is "**fair and reasonable**." Based on the Commission's precedent, Sprint's revenues are therefore relevant to Northern Valley's Count II because they relate directly to whether the proposed rate is "affordable," one of the issues that the Commission must consider pursuant to SDCL § 49-31-1.4. Accordingly, Sprint should be required to provide data sufficient to enable Northern Valley to understand its profits on the very traffic for which it refuses to compensate Northern Valley. No longer should Sprint be allowed to duck its obligation to provide this discovery and then continue to cast aspersions on Northern Valley by complaining about Northern Valley's rates.[1]

C. SPRINT'S ATTEMPT TO REDEFINE SOUTH DAKOTA'S STANDARD FOR DISCOVERY MUST BE REJECTED

Sprint unabashedly represents that "Northern Valley misstates South Dakota law" regarding the standard for discovery, Sprint Mem. at 6, but this is simply not true. The South Dakota Supreme Court, not Northern Valley or Sprint, is the body charged with articulating

[1] If Sprint persists in its refusal to provide this discovery then an adverse inference, at a minimum, would be appropriate. Specifically, the Commission should conclude that Sprint's refusal to provide discovery is an admission that Sprint's revenues on the disputed calls exceeds it costs, even if it pays Northern Valley's full tariffed rates. As a result of this instruction, Sprint should be estopped from presenting any challenge to the reasonableness of Northern Valley's tariffed rate.

South Dakota's standards for relevancy, and it has been quite clear. As the Supreme Court stated in *Maynard v. Heeren*, "Admittedly, our rules permit expansive discovery:

> The scope of pretrial discovery is, for the most part, broadly construed. *Bean v. Best*, 76 S.D. 462, 80 N.W.2d 565 (1957). SDCL 15-6-26(b) provides, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the **subject matter involved in the pending action**...." A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial."

563 N.W.2d 830, 838 (S.D. 1997) (alternation in original) (emphasis added); *see also Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 19 (S.D. 1989); *Weisbeck v. Hess*, 524 N.W.2d 363, 376 (S.D. 1994); *Bertelsen v. Allstate Ins. Co.*, 796 N.W.2d 685, 699 (S.D. 2011). Notably, ***none*** of these Supreme Court cases, or any case cited by Sprint, conclude that the phrase "whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party," is intended to narrow the broad statement that the requested discovery must be relevant to "the subject matter involved in the pending action. . . ." SDCL § 15-6-26(b)(1). Thus, South Dakota's discovery rules reflect the Federal Rules of Civil Procedure prior to the year 2000, when those rules were amended to change the scope of discovery from matters "relevant to the subject matter involved in the pending action" to matters "relevant to the claim or defense of any party." This difference in the applicable standard is neither immaterial nor incidental. Rather, it has been observed:

> The 2000 amendments to Fed. R. Civ. P. 26 **narrowed the scope of discoverable material**, limiting discovery as of right to matters relevant to the claim or defense of any party. "Prior to the 2000 amendments, the parties were entitled to discovery of any information that was not privileged so long as it was relevant to the 'subject matter involved in the pending action.'" 6 James Wm. Moore, *Moore's Federal Practice* § 26.41[2][a] (3d ed. 2003) (quoting Fed. R. Civ. P. 26(b)(1) (1983)). Under the current

> standard, a court should "focus on the specific claim or defense alleged in the pleadings." *Id.* (citing Fed.R.Civ.P. 26(b)(1) advisory committee note (2000 amend.)).

Montana Fish, Wildlife, and Parks Foundation, Inc. v. U.S., 91 Fed. Cl. 434, 445 (2010). Here, because South Dakota's Rule 26 has not been modified to reflect the 2000 Amendment to the Federal Rules, Northern Valley is entitled to seek discovery that is relevant to the subject matter of the litigation. The Commission should therefore respectfully decline Sprint's invitation to alter the standard applicable to discovery in South Dakota.

D. ANY SUGGESTION THAT NORTHERN VALLEY IS TRYING TO MAKE THIS CASE "EXTREMELY EXPENSIVE" FOR SPRINT IS ABSURD ON ITS FACE

Sprint tries to distract from its repeated failure to engage in good faith discovery by wrongly claiming that Northern Valley "is trying to make this case extremely expensive and unnecessarily difficult for Sprint, hoping to prompt a settlement, or at least distract the Commission from Northern Valley's bad acts." Sprint Mem. at 2. This argument is baseless in every way.

First, as the Commission knows, Sprint and Northern Valley were party to a case in the United States District Court for the District of South Dakota long before Sprint brought Northern Valley into this case. The very claims at issue in this case were already at issue in that case and Sprint was well aware of the amount of intrastate traffic it was terminating on Northern Valley's network. Thus, having brought Northern Valley into this case, Sprint should not now feign surprise when Northern Valley actively defends its rights by seeking the discovery to which it is entitled.

Moreover, Sprint has imposed far more burden on Northern Valley in this case. Indeed, on March 7, 2012, Northern Valley responded to Sprint's latest (and hopefully final) discovery

requests. In sum, **Sprint has propounded 131 interrogatories, 20 requests for admission, and 82 requests for production** on Northern Valley in this case alone (not to mention the fact that Northern Valley had already responded to discovery requests in the federal case). In addition, Northern Valley has participated in multiple days of depositions. In total, Northern Valley has reviewed 69,785 documents, produced 9,826 of those, totaling 101,397 pages of responsive material. In short, Sprint has taken every opportunity to increase Northern Valley's costs in this litigation and Northern Valley has been more than forthcoming because, despite Sprint's blatant mischaracterization of the record,[2] **Northern Valley has nothing to hide**. To fully put this specious argument to rest, Northern Valley provides the following summary of the relative discovery burdens that each party has experienced in this case:

[2] *See generally* Sprint Mem. at 9-10. By way of example only, Sprint tries to now contend that Northern Valley backdated new contracts with the conference call providers. However, during depositions, Sprint's counsel was keenly aware of the difference between backdated documents (which Northern Valley ***never*** did) and documents with prior effective dates (which Northern Valley ensured its documents set forth with clarity expressly to avoid these specious allegations of backdating). *See, e.g.*, Groft Dep. Vol. I, 167, attached hereto as Exhibit A:
[BEGIN CONFIDENTIAL]

[redacted]

[END CONFIDENTIAL]

[BEGIN CONFIDENTIAL]

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II. SPECIFIC DISCOVERY REQUESTS

A. Interrogatories No. 1 and 2

Sprint acknowledges, as it must, that Northern Valley has the right to "ask Sprint to explain what its contentions are," Sprint Mem. at 17, but nevertheless argues that it should not provide any response to these contention interrogatories that seek to understand the basis for Sprint's claims in advance of the deposition of Sprint's witnesses. Despite Sprint's arguments, there is simply no justification for requiring Northern Valley to learn the substance of Sprint's claims for the first time *after depositions have been completed* and initial testimony is filed.[3]

Sprint's other arguments regarding these interrogatories are also baseless. Insofar as Sprint's reason for providing no response is that the interrogatories utilize the words "all factual and legal bases," which Sprint contends is overly broad, Sprint offers no explanation as to why it could not previously and cannot now provide a response that in good faith informs Northern

[3] Sprint continues to insist that Northern Valley will not be prejudiced by its refusal to provide a substantive response because Northern Valley may obtain discovery after Sprint's pre-filed testimony has been served. *See* Sprint Mem. at n.19. However, as Sprint acknowledges, there is not currently a procedural schedule in place, and the prior scheduled anticipated potential follow up interrogatories, but did not allow time for follow up depositions. Accordingly, Northern Valley's chance to depose Sprint's witnesses will occur *before, not after*, the pre-filed testimony is served.

Valley of the substance of its claims. Sprint's generalized objections are no basis to escape discovery all together. Further, these interrogatories do not seek privileged work product. The *facts* that Sprint contends support its claims against Northern Valley simply cannot be privileged. Further, if Sprint's position were correct, then contention interrogatories would be *per se* improper, rather than being recognized for their usefulness in "ferreting out or narrowing the issues; providing leads to evidence or information regarding the extent of proof that is required; avoiding wasteful preparation; eliminating unnecessary testimony; facilitating a settlement; [and] generally expediting the *fair* resolution of the lawsuit. . . ." John Kimpflen, *Federal Procedure, Lawyers Edition*, 10 A Fed. Proc. L. Ed. § 26:525 (2011). Sprint's fierce opposition to fulfilling its most basic discovery obligations leaves little room for doubt that Sprint lacks interest in achieving a fair resolution of this case.[4]

B. Interrogatory No. 4 and Document Request No. 15

Sprint contends that information about what it pays other LECs for the type of traffic at issue in this dispute is irrelevant and could not be considered by the Commission in setting a rate under SDCL § 49-13-13. Sprint's argument is erroneous, however, as SDCL § 49-31-1.4 directs the Commission to consider "the overall market for the service" in setting a fair and just price for a service. Thus, the information is clearly relevant.

Indeed, other cases considering Sprint's refusal to pay for conferencing traffic have established that Sprint's agreement to pay other Local Exchange Carriers is relevant to these cases. For example, in *Tekstar Communications, Inc. v. Sprint Communications Co., LP*, Civ. No. 08-1130 (D. Minn), Sprint "agreed to answer the Plaintiff's Interrogatory No. 8, and

[4] It is worth noting that Sprint offers no explanation as to why it initially said these interrogatories were "premature" and now refuses to provide any response, even though it has obtained full discovery from Northern Valley. *See* Northern Valley Memo In Support of Motion to Compel ("Northern Valley Mem.") at 10.

Document Request No. 3, by producing its settlement agreements with other Local Exchange Carriers ("LECs") concerning services provided to Call Connection Companies ("CCCs"), as long as the settlement agreements are subject to . . . protections from further disclosure. . . ." *See* Schenkenberg Affidavit in Support of Opposition to Motion to Compel ("Schenkenberg Aff."), Ex. J, at 7. As that Court concluded, these "settlement agreements with other LECs are likely to reveal the Defendant's attitude toward, treatment of, as well as the prices paid for similar services to, other LECs. . . ." *Id.* at 8. The Minnesota Public Utilities Commission also ordered Sprint to produce these exact documents. *See In the Matter of the Complaint by Qwest Communications Company, LLC against Tekstar Communications, Inc.*, Docket C-09-265, Order on Tekstar Motion to Compel Discovery from Sprint, Schenkenberg Aff., Ex. K, at 6 ("Sprint shall produce any additional settlement agreements that have been executed since the federal court's discovery order, subject to the same confidentiality protections imposed by the federal court."). Insofar as Sprint is paying LECs pursuant to a settlement agreement, it should produce them to Northern Valley just has Sprint has had to produce them in other cases. In addition, Sprint should be required to verify under oath whether it is paying any other LECs for conference calling traffic either pursuant to an oral agreement or because it never disputed the application of the LEC's tariff.

C. Interrogatory No. 7

Interrogatory No. 7 seeks information related to Sprint's revenue for the traffic at issue in this dispute. As discussed above, this information is relevant to Northern Valley's Count II. And, as Sprint admits, other IXCs have already been required to produce this information, even though the information is not maintained in the ordinary course of business.[5] *See* Schenkenberg

[5] Sprint's reliance on its so-called goose/gander argument is misplaced. *See* Sprint Mem.

Aff., Ex. N, *In re Tier 1 JEG Telecommunications Cases*, Ruling on Motion to Compel Discovery from MCI Communications, Inc. d/b/a Verizon Business Services (Feb. 24, 2012), at 1-4 (ordering Verizon to produce revenue information regarding the conference calls at issue in the case and concluding "That the revenue information is not maintained in the ordinary course of Verizon's business is no objection to discovery if it may be retrieved from sources within Verizon's control.").

Here, Sprint's responses demonstrate that it has responsive information in its control which it has refused to produce. Specifically, Sprint admits that it "has an active database against which it may be able to run queries on minutes of use going back six months. . . ." Affidavit of Karen Hellwig, ¶ 5. Sprint offers no explanation as to why it continues to refuse to produce this information.

With regard to periods older than six months, Sprint contends that it would have to utilize "archived material no longer stored in the active database or to call detail records." *Id.* Sprint's archived minutes of use database, however, would allow Sprint to access a total of "13 months of available minute data" and it could also utilize call detail records to cover a period of "approximately 18 months to two years." *Id.* With regard to this work, Sprint's witness makes generalized assertions about "additional labor costs [that] ***may*** be incurred by Sprint in order to complete such a task," and "expensive, computer time" that may be involved, but in no way substantiates that Sprint would actually incur any costs to perform this work. *Id.* (emphasis

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at 25. Sprint is the only party that has the revenue information that Northern Valley seeks in this interrogatory, whereas Northern Valley objected to doing work for Sprint which Sprint could do for itself. In any event, since that time, Northern Valley has produced thousands of pages of documents that tracked the volume of calls delivered to the various conference call providers and undertook a separate analysis jurisdictionalizing Sprint's traffic solely for Sprint's benefit. *See* Sprint Mem. at 29. Despite Sprint's suggestion, however,

added). Absent specifics, Sprint's affidavit simply fails to prove that this request would be unduly burdensome.

Moreover, once a party files suit or reasonably anticipates doing so, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute. *Peskoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. 2008). Here, Sprint and Northern Valley have been engaged in litigation in the federal court since 2007, which means that Sprint has been under a long-standing duty to preserve relevant electronic evidence:

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending ... litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

see also Fed. R. Civ. P. 37, advisory committee notes (2006 amendments) ("When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, **intervention in the routine operation of an information system** is one aspect of what is often called a 'litigation hold.'") (emphasis added). Here, Sprint's supposed burden to provide responsive information is self-inflicted as Sprint apparently failed to intervene in the operation of its archiving procedures in order to retain the relevant data in a manner that would allow Sprint to perform the searches requested by Northern Valley. As one Court noted in ordering a party to un-archive relevant materials at its own expense:

> While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue

> burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: "that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan."

Disability Rights Council of Greater Washington v. Washington Metropolitan, 242 F.R.D. 139, 147 (D.D.C. 2007). Accordingly, while Sprint shows great chutzpah, the Commission should not allow this self-inflicted burden to deny Northern Valley the discovery to which it is entitled.

With regard to the actual revenue received on the volume of traffic in dispute, Sprint contends that it would be extremely burdensome because it would be required to do an individual study for each of the 3 million customers that called the conference calling services provided by Northern Valley's customers. (In order to inflate its perceived burden, Sprint appears to be including all of its customers across the country utilizing these services, as according to the most recent Census data, South Dakota has only 824,082 residents.) Northern Valley has long offered to work with Sprint to develop a workable sampling protocol or to ascertain what data Sprint does maintain that would allow the parties to mitigate this perceived burden. Sprint, however, refuses to engage in meaningful conversations or to articulate what it could provide that would allow Northern Valley to analyze Sprint's revenues. Accordingly, Northern Valley respectfully urges the Commission to put the question directly to Sprint during the hearing. For far too long, we've heard Sprint complain about what it either can't or won't do. Isn't it finally time to hear what they can or will do to move this case to resolution?

D. Interrogatory No. 8 and Document Requests Nos. 25, 35, and 36

Sprint argues that it should not have to produce any information regarding revenues it has received for voluntarily selling the route to Northern Valley to other long-distance carriers because, according to Sprint, the information is not relevant. Sprint Mem. at 31. This argument was rejected by the Southern District of Iowa, which recognized that "payments made to an IXC under an LCR contract are intended in part to compensate the IXC for access fees that IXC pays a LEC for terminating the calls." *See* Schenkenberg Aff., Ex. N, *In re Tier 1 JEG Telecommunications Cases*, Ruling on Motion to Compel Discovery from MCI Communications, Inc. d/b/a Verizon Business Services (Feb. 24, 2012), at 6. Here, the amounts received by Sprint relate to the "affordability of the price for the service in the market it is offered," which the Commission considers when sitting a fair and reasonable price for service pursuant to Northern Valley's Count II. *See* SDCL § 49-31-1.4. Here, Sprint charges and collects amounts from other IXCs that necessarily includes amounts that would be due to Northern Valley for its access services. Accordingly, understanding how much Sprint collects would be relevant to determining a reasonable rate for the traffic if the tariff does not apply.

As with its prior arguments, the Commission should reject Sprint's position that it will provide *no responsive* data by trying to make the process look as burdensome as possible. Sprint admits that it maintains "wholesale billing information" based on "terminating operator carrier number" "going back to December 2006." Tilloston Aff. ¶ 5. Mr. Tilloston estimates that it would take approximately 60 hours to perform certain steps, but does not make clear whether that would be 60 ***man*** hours or 60 ***computer*** hours. However, because he discusses running "queries" in his declaration, Northern Valley assumes that his estimations relate to how many computer hours may be required to perform the necessary queries. Further, Mr. Tilloston's

declaration does not describe whether or to what extent Sprint's computer systems (or those of its agents, which Northern Valley's counsel generally understands are quite sophisticated), are capable of performing multiple operations at one time. In other words, it is quite probable that the computer systems could perform this work without interrupting Sprint's normal business practices, which clearly would undermine Sprint's claims of burden. Finally, Sprint admits that, with regard to some (unspecified) number of its wholesale customers, "the summary would show the amounts billed for delivering the call to Northern Valley." *Id.* ¶ 8. In other words, Sprint concedes that through queries that it can run, Sprint can provide amounts billed for traffic to Northern Valley with regard to at least some of its wholesale traffic. With regard to other wholesale customers, determining the amounts billed might require some additional time. *Id.* Northern Valley does not believe that this is too burdensome in light of the amount of work that Sprint has required of Northern Valley in this case. In any event, however, Northern Valley remains willing to entertain proposals from Sprint about a mutually-agreeable sampling process if the Commission believes that completing the analysis for the entire time period is overly burdensome. In all such cases, however, Sprint should be required to produce information relating to its revenues from least cost routing arrangements.

E. Interrogatory No. 9 and Document Request No. 23

Sprint purports (through the title of its section D) to address Interrogatory No. 9 and Document Request No. 23 as part of its discussion of the prior requests. *See* Sprint Mem. at 31. With the exception of a single footnote wherein Sprint complains about needing to potentially add custodians and search terms to its electronic-discovery process, *see* Sprint Mem. at n.23, Sprint's arguments simply do not relate to these requests seeking information about LCR rate

increases.[6] As discussed above, the rates Sprint charges its wholesale customers, when it voluntarily sells Northern Valley's route to others, is highly relevant. Further, Sprint's arguments regarding burden should bear little weight as Northern Valley never participated in Sprint's selection of relevant custodians or search terms and has done a far-more exhaustive production of relevant electronic evidence than Sprint has apparently done. The fact that Sprint may have to do some work to provide fully responsive discovery is no excuse.

F. Interrogatory No. 13

Sprint wrongly represents that the information sought by Northern Valley's Interrogatory No. 13 "need not be provided unless and until the date set by the Court for provision of expert reports." *See* Sprint Mem. at 33 (citing SDCL § 15-6-26(b)(4)(B)). Sprint's reliance on SDCL § 15-6-26(b)(4)(B) is misplaced, as that rule only protects "draft reports" prepared by experts. Northern Valley's Interrogatory No. 13 seeks no draft report, rather this interrogatory is taken verbatim from SDCL § 15-6-26(b)(4)(A)(i) which provides that "A party may **through interrogatories *require*** any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." (emphasis added). SDCL § 15-6-26(b)(4)(A)(i) (emphasis added). The rule is clear that Northern Valley's discovery request is proper and timely.

Sprint also wrongly represents that Northern Valley responded to Sprint's expert discovery requests in "exactly the same way." *See* Sprint Mem. at 34 (citing Schenkenberg Aff., Ex. P, Northern Valley Responses to Document Requests 43-45) (emphasis in original). The

[6] Notably, these rate increase notices would seem to help mitigate the burden of establishing the revenue that Sprint obtained on the traffic.

problem with Sprint's representation is that whether or not it believes Northern Valley responded to Sprint's requests in "exactly the same way," the requests themselves were ***not the same requests***. Specifically, Sprint propounded ***document requests*** seeking information about Northern Valley's experts, while Northern Valley propounded a single ***interrogatory*** as expressly contemplated by SDCL § 15-6-26(b)(4)(A)(i). In other words, Northern Valley's discovery complies with the South Dakota Rules of Civil Procedure, while Sprint's does not. This strikes Northern Valley as the most fundamental of distinctions.[7]

G. Document Request No. 1

Sprint contends that it should have to produce only those documents that specifically refer to Northern Valley by name, rather than documents that would evidence Sprint's positions and statements regarding its nationwide attack on the competitive conference calling industry, which it pejoratively refers to as "traffic pumping." Northern Valley is entitled to know what Sprint and its employees were saying about the company's withholding activities and its attacks on conference calling, even if those statements weren't specific to Northern Valley. Indeed, if Northern Valley played by the rules that Sprint suggests are appropriate, and therefore only reviewed documents that specifically included the word "Sprint," Northern Valley would have reviewed and produced only a fraction of the documents that it has in the case. Here again, however, because Northern Valley has nothing to hide, it had no reason to improperly constrict its review of its documents as Sprint seeks to do. Sprint's use of ***only seven*** search terms, *see* Thornton Decl. at ¶ 4, is not consistent with a good faith search for responsive documents. Sprint should be required to perform a broader search that recognizes that its responsive documents

[7] For this reason, Northern Valley made clear in responding to Sprint's Eleventh Set of Interrogatories to Northern Valley that it would "respond to this request to the extent that Sprint provides similar information either voluntarily or as ordered by the Commission." *See* Northern Valley's Response to Interrogatory No. 124, attached hereto as Exhibit B.

may not have referred to Northern Valley directly.

H. Document Request No. 34

Sprint contends that Document Request 34 seeks information that is not relevant and that the Southern District of Iowa agrees with it. Sprint's position is again flawed, however, because Northern Valley's request is narrowly tailored to obtain evidence regarding Sprint's revenue-sharing in South Dakota. It is a simple, straightforward request. On the other hand, the request that was denied in the Southern District of Iowa case consumed **twenty-seven (27) lines** of the Court's opinion. *See* Schenkenberg Aff., Ex. N, *In re Tier 1 JEG Telecommunications Cases*, Ruling on Motion to Compel Discovery from MCI Communications, Inc. d/b/a Verizon Business Services (Feb. 24, 2012), at 7-8. The Court observed that revenue sharing agreements had been compelled by that very court in other cases, but that this particular request was "much broader covering many kinds of arrangements with all sorts of disparate entities pertaining to any telecommunications service over an eleven-year period." *Id.* As a result, the Court concluded that the request was patently overbroad. *Id.* In short, there is no basis to compare the request to which Verizon objected to in the Southern District of Iowa to the request at issue in this case. Here, because Sprint continues to insist that "revenue sharing . . . can be one factor in determining whether [conference call providers] are legitimate end-users of local exchange service as a matter of tariff and applicable law," Sprint Mem. at 37, it should be required to disclose whether it engages in this very practice. After all, it is only fair for Sprint to live by its own mantra that "what is good for the goose is good for the gander." Sprint Mem. at 25.

III. SPRINT'S IMPROPER REDACTIONS

Sprint continues to resist unredacting non-privileged information. It contends that a loophole in a federal protective order (which the Court subsequently removed once it learned of

Sprint's improper tactics), should excuse it from meeting its discovery obligations here. Sprint's position, however, is without merit. Even if the *federal* protective order contemplated Sprint's actions (which it does not), the Commission would be fully empowered to make Sprint redo its production because the protective order in *this case* includes no such loophole and the materials is not privileged. This is clearly the appropriate course of action given the relatively minor costs that Sprint contends would be required to complete this process. *See* Thornton Aff., ¶ 11. There can be little doubt that Sprint has already expended more than this amount in trying to defend its position, which significantly undermines any suggestion that financial considerations are relevant to Sprint's continued resistance.

IV. THE COMMISSION SHOULD DECLARE THAT SPRINT'S FEBRUARY 13, 2012 LETTER IS NOT CONFIDENTIAL AND NOT PROTECTED BY THE PROTECTIVE ORDER

As Northern Valley noted in its Motion, Sprint has improperly marked a letter between counsel regarding Sprint's improper redactions as "confidential" pursuant to the protective order. *See* Northern Valley Mem. at n. 5. Because the document does not contained confidential, proprietary, or trade secret information, Northern Valley moved pursuant to paragraph 14 of the Protective Order to have the letter declared non-confidential to the extent that Sprint would not voluntarily do so. Sprint has continued its insistence on retaining the confidential designation, even though the document clearly does not meet the requirements of the protective order. *See* Sprint Mem. at 29. Indeed, Sprint does not even try to argue that it has met the requisite standard. *Id.* Accordingly, the Commission should declare the document non-confidential.

V. FEES ARE WARRANTED TO CURB SPRINT'S CONTINUED RECALCITRANCE

Northern Valley's Memorandum fully explained why Sprint's refusal to provide meaningful discovery should give rise to an award of fees and costs under SDCL § 15-6-

37(a)(4)(A). Northern Valley Mem. at 29-30. Sprint suggests that an award of fees would be inappropriate because its continued resistance to providing discovery "is justified." Sprint Mem. at 43. Its argument about why its positions are justified, however, rests on arguments that were either rejected when the Commission denied its Motion to Dismiss or are based on a clearly erroneous reading of the statues and cases upon which Sprint relies. Accordingly, Sprint's motion fails to demonstrate that an award of fees would be inappropriate in these circumstances.[8]

Dated: March 28, 2012

Respectfully submitted:

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[8] Fees are further appropriate because Sprint has already indicated to Northern Valley its intent to continue lodging baseless discovery motions even after it loses this Motion to Compel. Specifically, Sprint previously sough to meet and confer about Northern Valley's long-standing Notice of 30(b)(6) depositions, representing that it intended to lodge any issues it may have about that notice with the Commission so that the parities could address these arguments simultaneously with this motion. Sprint's counsel even expressly stated that not doing so would result in unnecessary delay. Thereafter, Sprint reversed course and refused to address the deposition topics until after this motion as been decided. Now, apparently, Sprint intends to delay the resolution of this case further by filing another motion in an effort to hinder Northern Valley's deposition of Sprint's corporate witnesses. For this reason, the Commission should award fees and costs to compensate Northern Valley for the resources it has had to invest in gaining meaningful discovery from Sprint.

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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