

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
NOTICE OF
SUPPLEMENTAL AUTHORITY**

Northern Valley Communications, L.L.C. ("Northern Valley"), by counsel, respectfully submits this Notice of Supplemental Authority in support of its motion for leave to file counterclaims and in opposition to Sprint's motion to dismiss Northern Valley's counterclaims.

On February 9, 2011, the Federal Communications Commission ("FCC" or "Commission") issued a Notice of Proposed Rulemaking wherein it proposed new rules to transform the intercarrier compensation regime for telecommunications traffic.¹ Following receipt of comments from industry participants (including the large national carriers such as Sprint, AT&T, Verizon and Qwest and small regional carriers, such as NVC), the FCC released its new rules in its November 18, 2011, Order.²

In the Order, the Commission expressly affirmed the ability of LECs, such as Northern Valley, to provide service to conference call providers and to assess switched access charges on

¹ *In the Matter of Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, 26 FCC Rcd. 4554 (rel. Feb. 9, 2011).

² *In the Matter of Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, WC Docket No. 10-90 (rel. Nov. 18, 2011) (the "Order").

long-distance carriers, such as Sprint, for these calls.³ In so doing, the Commission has made clear that Northern Valley is not in violation of the Communications Act and is entitled to payment from Sprint Communications Company, LP ("Sprint") for the services at issue in this case.

In discussing why it has decided to impose lower rates on a *prospective* basis, the FCC has made clear that conference calling traffic involves "access minutes terminated to the LEC" and that the LEC is entitled to "access revenues" for these calls.⁴ The FCC recognizes that "revenues received by the [LEC] cover its costs, and it therefore may not need to . . . assess a separate charge for the service it is offering" to the conference call provider.⁵ The Order also makes clear that Northern Valley has correctly argued that Sprint's self help refusal to pay is improper:

Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate switched access services. As the Commission has previously stated, "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions."⁶

In adopting its revised rules, the FCC rejected arguments proffered by Sprint and other long-distance carriers and made it abundantly clear that revenue sharing between a LEC and its end user customer, such as the conference call providers, does not violate the Act.⁷ As the Commission stated:

Several parties have urged us to declare revenue sharing to be a violation of section 201(b) of the Act. Other parties argue that the

³ See Order, ¶¶ 662 – 701.

⁴ Order at ¶ 656.

⁵ *Id.*

⁶ *Id.*, ¶ 700.

⁷ See, e.g., *id.* ¶¶ 668 - 674.

Commission should prohibit the collection of switched access charges for traffic sent to access stimulators. Many commenters, on the other hand, assert that revenue sharing is a common business practice that has been endorsed in some situations by the Commission. As proposed in the *USF/ICC Transformation NPRM*, **we do not declare revenue sharing to be a *per se* violation of 201(b) of the Act.** A ban on all revenue sharing could be overly broad, and no party has suggested a way to overcome this shortcoming. **Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges** in all cases.⁸

Indeed, the FCC now views revenue sharing as part of its trigger for the implementation of lower rates that will apply on a prospective basis, which renders any on-going arguments about revenue sharing a legal nullity.⁹ Moreover, the FCC reversed an earlier proposal, and now has ensured that under the new rules, a LEC will remain able to file tariffs on 15 days notice, which will accord the rates "deemed lawful" status under § 204(a)(3) of the Communications Act. Thus, Sprint's arguments about Northern Valley's decision to pay its high volume customers marketing fees that result in a net payment for increasing the utilization of Northern Valley's network are baseless.¹⁰ The FCC has made clear that this activity does not violate the Act.

In short, the FCC has reaffirmed that interstate long-distance traffic destined to conference call providers remains subject to the FCC's access rules and are compensable under the existing tariffs. The FCC has also made clear that an IXC is not entitled to deliver traffic to a LEC's network that is bound for a conference call provider without providing compensation to the LEC. Thus, Northern Valley respectfully urges the Commission to accept Northern Valley's

⁸ *Id.*, ¶ 672 (emphasis added).

⁹ *Id.* ¶¶ 668-70 ("This rule focuses on revenue sharing that would result in a net payment to the [conference call provider] over the course of the agreement."); *see also* ¶ 674 (rejecting the suggestion that sharing revenue with an unaffiliated end user violates section 254(k) of the Act).

¹⁰ *See, e.g.*, Dkt. 36, Sprint's Opposition to Motion for Summary Judgment, at n.8.

proposed counterclaims, which serve as an alternative theory of recovery to ensure that Northern Valley receives compensation for the services that it has provided to Sprint for these past several years. The FCC's order supports Northern Valley's position that it has provided a valuable service to Sprint and that Sprint is not entitled to take that service without compensating Northern Valley.

Given the significant volume of the Order (759 pages), Northern Valley attaches hereto as an Exhibit only the relevant portions of the Order. However, should the Commission so desire, the entire document may be obtained online at:

http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1122/FCC-11-161A1.pdf

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CERTIFICATE OF SERVICE

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