

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED) DOCKET NO. TC09-098
COMPLAINT OF SOUTH DAKOTA)
NETWORK, LLC, AGAINST SPRINT)
COMMUNICATIONS COMPANY L.P.)
IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT COMMUNICATIONS)
COMPANY L.P. AGAINST SPLITROCK)
PROPERTIES, INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM, INC.,)
AND CAPITAL TELEPHONE COMPANY)

PUBLIC VERSION

**SPRINT COMMUNICATIONS COMPANY L.P.’S MEMORANDUM OF LAW IN
SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT**

Sprint Communications Company L.P. (“Sprint”), pursuant to SDCL § 15-6-56 and ARSD 20:10:01:01:02, submits this Memorandum of Law in Support of its Motion for Partial Summary Judgment with respect to Northern Valley Communications, Inc.’s (“Northern Valley”) Counterclaim Count II. Sprint requests an order that if the Commission sets a rate as requested, it will employ rate of return regulation.¹

¹ Sprint assumes, but does not concede, that the Commission has the authority to grant Northern Valley’s requested relief on Count II. Sprint believes SDCL § 49-13-13 is intended to protect customers – it allows the Commission to order a regulated carrier to accept a lower rate than it billed when a complaining customer proves the rate billed or tariffed was unjust or unlawful. In its Counterclaim Count II, Northern Valley is attempting to use SDCL § 49-13-13 to punish a customer (Sprint) and require Sprint to pay for a “service” that was never before tariffed, and that Northern Vally mis-billed. In response to a recent round of discovery requests, Northern Valley makes that clear – it first urges that the Commission can use SDCL § 49-13-13 to punish Sprint in order to remedy Northern Valley’s unjust conduct. *See* Exhibit D to Sprint’s Statement of Undisputed Fact, Response to Interrogatory 123, pp. 5-6. In the alternative, it asserts that the Commission can punish Sprint for delivering calls (which Sprint is bound by law to do). *Id.* Neither assertion is consistent with the language or intent of the statute.

I. BACKGROUND

A. The Parties

Northern Valley is a South Dakota competitive local exchange carrier (“CLEC”) that receives interstate and intrastate calls from Sprint. Northern Valley provides originating and terminating intrastate access service to interexchange carriers (“IXCs”) in accordance with its tariff, and alleges in its Counterclaim Count II that it provides something other than access service with respect to calls delivered to its Call Connection Company (“CCC”) partners. *See* Northern Valley’s Counterclaim, p. 6 (Count II pleading in the alternative).

B. The Dispute

As the Commission is well aware, the parties dispute whether calls to CCCs are subject to Northern Valley’s intrastate tariffed access charges. That issue is raised by Count I of Sprint’s Third Party Complaint and Northern Valley’s Counterclaim Count I. In the event that the Commission agrees with Sprint, Northern Valley’s Counterclaim Count II asks the Commission to prescribe a rate for this service using the authority granted to it in SDCL § 49-13-13. The present motion asks the Commission to decide that, if it acts on Northern Valley’s Counterclaim Count II, any rate must be set using rate of return regulation, as required by SDCL § 49-13-4.

II. STANDARD OF REVIEW

Under South Dakota law,

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

SDCL § 15-6-56(b) (emphasis added). “[S]ummary judgment is the preferred method for disposing of any legally inadequate claim.” *Farm Cred. Servs. of Am. v. Dongan*, 704 N.W.2d 24, 27 (S.D. 2005). “Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” *Horne v. Crozler*, 565 N.W.2d 50, 52 (S.D. 1997). “All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party” and it is the burden of the moving party to “clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law.” *Mattson v. Rachetto*, 591 N.W.2d 814, 817 (S.D. 1999).

III. UNDISPUTED FACTS

1. Northern Valley is a competitive local exchange carrier (“CLEC”). *See* Northern Valley’s Answer to Sprint’s Third-party Complaint, p. 8, ¶ 5.

2. Northern Valley’s Counterclaim Count II, pled in the alternative, asks the Commission to set a “reasonable rate” under SDCL § 49-13-13 for intrastate calls destined to numbers assigned to its call connection company (“CCC”) partners, in the event its intrastate access tariff does not apply. *See* Northern Valley’s Counterclaim, p. 6; Dec. 20, 2011 Hearing Tr. pp. 54-55 (arguing Commission has authority granted by statute); *id.* at 66 (“So you don’t have to go beyond 49-13-13.”)

3. The calls that are the subject of the dispute (and thus Counterclaim Count II) are delivered by Sprint to South Dakota Network, LLC (“SDN”), which delivers the calls to Northern Valley in Groton. *See* Shlanta Dep. Tr. pp. 85-86 and Shlanta Dep. Ex. 13 (attached as Exhibit A to Statement of Undisputed Material Facts).

4. Sprint is obligated by law to deliver the calls at issue, as the Federal Communications Commission (“FCC”) has prohibited carriers from engaging in call blocking as part of traffic pumping disputes. *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC Rcd. 11629, 2007 WL 1880323, ¶ 1 (2007).

5. When the calls hit Northern Valley's network, they are delivered to CCCs through facilities owned or leased by Northern Valley. *See* Groft Vol. I Dep. Tr. pp. 51-56 (attached as Exhibit B to Statement of Undisputed Material Facts).

6. The calls are delivered in this way because they are destined to unique telephone numbers that Northern Valley has obtained and assigned to these CCCs. *See* Northern Valley's Response to Sprint's Interrogatory No. 5 (attached as Exhibit C to Statement of Undisputed Material Facts).

7. The "service" of delivering calls to CCCs who are assigned a unique telephone number is therefore a noncompetitive service. No other telecommunications provider delivers calls to those CCCs assigned those numbers.

8. For the year 2010, Northern Valley's switching costs have been approximately [BEGIN CONFIDENTIAL] [REDACTED]. [END CONFIDENTIAL] This is calculated as follows:

- a. Northern Valley pays its parent company James Valley \$15,000 per month to lease capacity on the Metaswitch softswitch that is used for calls to Call Connection Companies ("CCCs"). *See* Northern Valley's Response to Sprint's Interrogatory No. 125, p. 8 (attached as Exhibit D to Statement of Undisputed Material Facts).

[REDACTED] In September 2011 Mr. Groft testified that [BEGIN CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
d. [REDACTED]
[REDACTED]. [END

CONFIDENTIAL] See Exhibit F to Statement of Undisputed Material Facts.

9. The Commission can take judicial notice of the fact that Northern Valley has not filed a petition pursuant to SDCL § 49-31-4.1 to have the rate for this “service” set using price regulation. See SDCL § 19-10-3.

10. Northern Valley has served responses to Sprint’s 2012 discovery requests in which it denied Sprint’s RFA 17, which asked Northern Valley to admit that the service for which it sought compensation is unrelated in accordance with SDCL § 49-31-5.1. See Exhibit D hereto, p. 13.

IV. THE COMMISSION’S ONLY OPTION IS TO EMPLOY RATE OF RETURN REGULATION

The Commission should enter partial summary judgment that any rate set pursuant to Northern Valley’s Counterclaim Count II must, as a matter of law, be based on rate of return regulation. The Commission’s authority is limited to the jurisdiction conferred upon it by statute. *In re Establishment of Switched Access Rates for U.S. West Comm’cns, Inc.*, 618 N.W.2d 847, 851 (S.D. 2000). The “service” at issue here is delivery of calls to CCCs, which is, indisputably, a noncompetitive, monopoly service. *Supra*, p. 3 (describing single network route for delivery of calls); see also *Report and Order and Further Notice of Proposed Rulemaking, Connect Am. Fund*, WC Docket No 10-90 *et al.*, FCC 11-161, ¶ 674 (rel. Nov. 18, 2011) (under longstanding FCC authority, “terminating access is a monopoly service”).

South Dakota law sets forth the proper procedure for determining a rate for noncompetitive service:

Except as provided in § 49-31-4.1, the Commission shall utilize a rate of return regulation when determining the charge for a noncompetitive service.

SDCL § 49-31-4. When the legislature uses the word “shall,” that is mandatory, and must be applied as such. *Fritz v. Howard Tp.*, 570 N.W.2d 240, 242 (S.D. 1997) (“when ‘shall’ is the operative verb in a statute, it is given ‘obligatory or mandatory’ meaning”).

The only exception to rate of return regulation is “as provided in SDCL § 49-31-4.1.” But, that statute is inapplicable here. SDCL § 49-31-4.1 applies only when the Commission has made a decision to utilize price regulation for a noncompetitive service, which it has not done here.² Therefore, under statute, the Commission “shall” utilize rate of return regulation. South Dakota law defines “rate of return regulation”:

“Rate of return regulation,” the procedure used by the commission to approve the charge for a service which gives due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenues sufficient to enable it to meet its total current cost of furnishing such service, including taxes and interest, and including adequate provision for depreciation of its utility property used and necessary in rendering service to the public, and to earn a fair and reasonable return upon the value of its property.

SDCL § 49-31-1(18).

Under rate of return regulation, “a public utility admittedly is entitled to charge such rates as will permit it to earn a reasonable rate of return on the value of the property devoted to public service.” *Northwestern Public Serv. Co. v. Cities of Chamberlain, Huron, Mitchell, Redfield, Webster, and Yankton*, 265 N.W.2d 867, 873 (S.D. 1978) (referencing *Application of Northwestern Bell Tel. Co.*, 69 S.D. 36, 47, 6 N.W.2d 165 (1942)). “In order to arrive at a figure that will provide a reasonable rate of return on a utility’s investment, the ratemaking body must

² The Commission can decide to employ price regulation only by issuing an order following public hearing. SDCL § 49-13-13.

determine the proper rate base, that is, the value of the property owned by the utility which is used and useful in providing service to the public.” *Id.* at 874. “In arriving at the rate of return, the ratemaking body must determine the future revenue requirements of the utility. This is done by determining the revenues, expenses and investments during a selected period of time, usually referred to as a ‘test year.’” *Id.*

Northern Valley may argue that it is exempt from rate of return regulation under SDCL § 49-31-5.1, which states that independent telephone companies serving less than 50,000 local exchange subscribers are not automatically subject to certain statutory provisions. While Northern Valley may generally be entitled to such an exemption, Northern Valley waived this exemption when it filed Count II of its Counterclaim and requested that the Commission establish a rate for a noncompetitive service. SDCL § 49-31-5.1 specifically states that an exempt telecommunications company “may elect to have its rates regulated by the commission and be subject to commission regulation for its emerging and noncompetitive telecommunications services.” SDCL § 49-31-5.1. Northern Valley confirmed it has waived any such exemption in its response to Sprint’s Request for Admission 17:

RFA 1.7. With respect to your Counterclaim Count II, admit the "service" for which you would seek to recover is unregulated by the Commission pursuant to SDCL § 49-31-5.1.

RESPONSE: ... Subject to and without waiving its General and Specific Objections, denied. If the service is not tariffed intrastate access service, the Commission will, pursuant to SDCL § 49-13-13, consider and determine how to classify the service that has been provided.

See Exhibit D to Sprint’s Statement of Undisputed Fact, Response to RFA 17, p. 13. Now that Northern Valley has waived such exemption, the Commission must now follow the mandate of SDCL § 49-31-4.

Even if Northern Valley could have retained an exemption from SDCL § 49-31-4, SDCL § 49-31-18 and ARSD 20:10:27:06 establish a pricing methodology for “access” to a carrier’s network. That pricing methodology incorporates the standards used in rate of return regulation – requiring “fair and reasonable rates” determined by a carrier’s costs and its allowed rate of return on net investment. SDCL § 49-31-18, ARSD 20:10:27:06.³ The Commission is accustomed to determining fair and reasonable regulated rates looking at a carriers’ costs, and comparing those costs to the demand for the service. By using very simple math and undisputed facts, one can see that Northern Valley’s switching cost is a tiny fraction of what it seeks to recover in this case. *Supra* pp. 4-5. Any decision by the Commission to ignore Northern Valley’s costs and instead use some other rate setting methodology would be inconsistent with the directives of the Legislature, and not fair, just and reasonable.

When a carrier asks this Commission to set a rate for the carrier’s service under SDCL § 49-13-13, the Commission must use the standards in SDCL Chapter § 49-31 to set that rate – that is the only viable result that gives force to all the applicable statutes. To hold otherwise would allow a carrier to avoid the Commission’s pricing rules in hopes of establishing more favorable treatment through litigation under SDCL § 49-13-13.

Northern Valley has asked that the Commission set a rate for its noncompetitive service. The Commission must do so by employing rate of return regulation with respect to this service. The Commission should grant Sprint’s motion, which will make clear it will abide by the Legislature’s directives to the extent it awards relief on Northern Valley’s Counterclaim Count II. It will also focus discovery and prefiled testimony, allowing this case to proceed efficiently to hearing.

³ SDCL § 49-31-4 and SDCL § 49-31-18 require rates be “fair and reasonable.” While SDCL § 49-13-13 uses the phrase “just and reasonable,” the terms “just and fair” are synonymous.

V. **CONCLUSION**

Based on the analysis herein, Sprint respectfully requests that the Commission determine that, as a matter of law, if the Commission sets a rate in accordance with Northern Valley's Counterclaim Count II, it will do so by employing rate of return regulation.

Dated: March 12, 2012

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of March, 2012, copies of **SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** were served via email to:

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