PUBLIC VERSION

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED COMPLAINT OF SOUTH DAKOTA NETWORK, LLC, AGAINST SPRINT COMMUNICATIONS COMPANY L.P.	)	DOCKET NO. TC09-098
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	)	**SPRINT COMMUNICATIONS COMPANY L.P.'S MEMORANDUM OPPOSING NORTHERN VALLEY'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Commission should deny Northern Valley's Motion for Summary Judgment and instead award Sprint Summary Judgment. Not only are there numerous disputes of fact that prevent Northern Valley's motion from being granted, but the facts Sprint has uncovered in discovery, and documented in these motions, demonstrates that Northern Valley has not provided local exchange service to CCCs, and that intrastate switched access charges are not due.

FACTS[1]

A. SPRINT'S DISCOVERY OF TRAFFIC PUMPING SCHEMES

Sprint became aware of traffic pumping in late 2006 when Regina Roach received a call from an employee in Sprint's Fraud Department. The employee was investigating suspicious traffic for a carrier in Iowa and asked Ms. Roach if Sprint was being billed an unusually high amount in switched access charges by that carrier. Sprint's Access Verification team began investigating these operations and confirmed that the Iowa carrier was operating "free international calling" and "free chat line" schemes. Sprint's SOF 202.

Over the next several years, Sprint came to find many other similar traffic pumping schemes, operating mainly in Iowa and South Dakota. In general, these schemes involve a LEC with high access rates, partnering with call connection companies ("CCCs") that market services like free or low cost conference calling, international calling, chat lines, and voicemail. The partner companies are assigned telephone numbers from the LEC's exchange and place the bridging equipment in the LEC's end office switch facility. The partner companies then advertise their service on the Internet, generating enormous volumes of calls to the assigned

[1] The parties agreed, and the Commission ordered, that the scope of this case would extend only to calls billed on or before August 1, 2011. *See* Order Approving Procedural Schedule, p. 4 (Sept. 28, 2011). To the extent Northern Valley's facts and argument extend beyond that date, it is inconsistent with the Commission's Order.

telephone numbers. With bulk or unlimited long distance calling now a common feature of many consumers' landline and cellular phone service plans, end users can call a non-local number to reach the "free" service at no incremental cost. The rural LEC bills access charges to the IXCs that have carried the long distance calls and then shares collected revenues with the CCCs through marketing fees or other thinly disguised revenue-sharing arrangements. Sprint's SOF 203.

It has become clear over time that, from a business standpoint, pumpers are not necessarily concerned about providing tariffed switched access services in compliance with their tariffs. Instead, the scheme works for the pumpers so long as they bill high access rates and then negotiate a lower payment amount with IXCs who wish to avoid costly litigation that is necessary to uncover the facts surrounding these business practices. The lower payment is then offered only to IXCs who agree to pay for pumped traffic, and the CCCs agree to reduce their share of the profits accordingly. Pumpers then use aggressive litigation tactics with IXCs that do dispute, hoping to prompt settlement. Again, to extent the settlement amounts represent a reduction from the tariff amounts, that loss is shared between the LEC and its CCCs. Sprint's SOF 204.

Traffic pumping schemes are concentrated in rural areas because small rural LECs historically have been allowed to charge high access rates to recover the costs associated with serving sparsely populated, low volume markets. The high access rates allowed by regulators were intended to subsidize the end users. Without the subsidy, an end user in a small rural community might have to pay a prohibitively-high monthly cost for local phone service compared to an end user in a large metropolitan area where the LEC can gain economies of scale. Sprint's SOF 205.

Sprint decided that when it identified a carrier with operations that evidenced traffic pumping – e.g., provision of free services by the entities using the numbers, a spike in volumes, a disproportionate amount of terminating traffic – Sprint would dispute charges for the traffic and seek to obtain additional information to determine whether the calls at issue fit the regulatory and tariff requirements for the application of access charges. If further information provided by the LEC validated the charges, Sprint would pay the billed amounts. If such information was not forthcoming, Sprint would stand on its dispute. Sprint's SOF 206.

B. SPRINT'S DISCOVERY OF NORTHERN VALLEY'S TRAFFIC PUMPING SCHEME

In September 2007, Sprint's Access Verification department determined that Northern Valley's monthly billing to Sprint's IXC operations had increased dramatically, from an average of $17,000 per month during 2004 to charges of **[CONFIDENTIAL BEGINS]** [redacted] **[CONFIDENTIAL ENDS]**[2] Sprint analyzed the traffic on which Northern Valley was assessing switched access charges and identified that the vast majority of the calls were to conference line numbers, and calls were disproportionately in the terminating direction. Sprint's SOF 207.

Even Northern Valley appears to have been astonished by the way in which this business exploded. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

[2] These charges continued to skyrocket, all the way up to **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** a month starting in 2009. *See* NV's Ex. 74.
"NCG" refers to "National Communications Group." "GCP" refers to "Global Conference Partners."

Sprint filed its initial dispute in September of 2007. At that time, Sprint disputed **[CONFIDENTIAL BEGINS]** [redacted] **[CONFIDENTIAL ENDS]** Sprint's SOF 209. Sprint increased its refund claim in November 2009 when it filed a retroactive claim for the March 2007-August 2007 time period. During subsequent months, Sprint disputed and withheld payment for charges on pumped traffic, and held payments for non-pumped traffic to reduce its refund demand. Sprint's SOF 209.

Sprint applied its account payable debit balance mechanism to Northern Valley as Sprint had done with SDN. After reducing the billed amount by the amount of the unlawful charges, Sprint has approved compensation for the charges for non-pumped traffic each month. The approved amounts are applied to reduce the account payable debit balance created by Sprint's refund claim for prior amounts unlawfully billed by Northern Valley. Instead of sending a check to Northern Valley for the charges associated with non-pumped traffic, Sprint has held those amounts and reduced on its books the payable that was generated when it filed its refund claim. Sprint's SOF 210.

In December of 2010, the account payable debit balance had been reduced to $0, and Sprint began making payments each month for charges associated with non-pumped traffic. Sprint's SOF 211. In addition, in December 2010 and March 2011, Sprint made payments totaling **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** to substantially reduce the outstanding amount of traditional traffic for which payment was being withheld.

Sprint's SOF 212. At present, the amount Sprint has withheld for non-pumped intrastate traffic is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Sprint's SOF 213.

C. NORTHERN VALLEY'S TRAFFIC PUMPING SCHEME AT THE TIME OF THE DISPUTE

As it turns out, at the time that Sprint began disputing Northern Valley's bills Northern Valley was involved in all of the kinds of bad behavior that Sprint and other IXCs had come to be on the lookout for:

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Based on these practices – practices that Northern Valley was concealing when Sprint filed its dispute – there is no question that Sprint took prudent and appropriate action by disputing Northern Valley's bills. In fact, Northern Valley essentially concedes this by leaving out of its motion traffic delivered before Sprint's initial disputes were filed. NV Mem., pp. 3-4.

D. THE FEDERAL COURT LITIGATION

Northern Valley sued Sprint in federal court in February of 2008. Sprint's SOF 223. Sprint denied the allegations and pled affirmative defenses of unjust enrichment, unclean hands, and excuse. Sprint also asserted counterclaims for judgment against Northern Valley for the amounts it had been overbilled for prior periods, and for breach of tariff, negligent misrepresentation, unjust enrichment, and civil conspiracy. Sprint's SOF 224. On July 30, 2008, the court denied Northern Valley's motion to dismiss the negligent misrepresentation, unjust enrichment, and civil conspiracy claims, and those claims remain pending. Sprint's SOF 225.

[4] Capital Tel.'s operations were the subject to a complaint by Verizon in 2008. *See* TC08-065.

That case was stayed on March 15, 2010 on primary jurisdiction grounds. Sprint's SOF 226. The Commission has already recognized that the court's stay did not refer any issues to the Commission. *See* Order Granting Motions to Dismiss Cross-Claims (Sept. 15, 2011).

Northern Valley filed a second lawsuit against Sprint in April of 2011. The court stayed that case by Order dated March 23, 2012. Sprint's SOF 228.

E. THE *IUB ORDER* AND THE *FARMERS II* DECISION

In 2009, two decisions substantially vindicated the IXCs that disputed access charges billed by traffic pumpers. First, in September of 2009, the Iowa Utilities Board ("IUB") held that intrastate switched access charges did not apply to pumped calls because 1) the CCCs were not end users of local exchange service, 2) such calls were not terminated to an end user's premises, and 3) such calls did not terminate in the LEC's certificated local exchange area. *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Final Order, No. FCU-07-2, slip op. at 34 (Iowa Utils. Bd. Sept. 21, 2009) ("*IUB Order*") (attached as Sprint's Ex. 138).[5] The IUB found it was clear that the LECs and the CCCs were sharing profits as partners because CCCs were paid marketing fees only if IXCs paid switched access invoices:

> If a LEC was not paid by the IXC for terminating calls to an [CCC], that LEC would not recover its costs terminating those calls and the LEC and [CCC] would each experience a loss of profit. Since the [CCCs] contracted to share the profits and the losses with the [LECs], this arrangement satisfies the [LECs'] definition of "partnership" and supports the IXCs' argument that the [CCCs] in this case were acting as business partners rather than end users.

IUB Order, p. 33. The IUB accordingly ordered LECs to refund improperly billed switched access charges billed to IXCs, including Sprint. *Id.*

[5] In 2011, the IUB reaffirmed this decision in all material respects. *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, No. FCU-07-02, 2011 WL 459685, Order Denying Requests for Reconsideration (Iowa Utils. Bd. Feb. 4, 2011). In addition, the decision was upheld on appeal. *Farmers Tel. Co. of Riceville v. Iowa Utils. Bd.*, No. 5771 CVCV 8561, at 16-17 (Polk Cnty. Dist. Ct. Oct. 12, 2011) (attached as Sprint's Ex. 139).

In November 2009 the FCC issued the *Farmers II* decision. *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 24 F.C.C.R. 14,801, 2009 WL 4073944, Second Order on Reconsideration (2009) ("*Farmers II*"). The FCC evaluated tariff language in light of the facts regarding the delivery of calls, the relationships between the LEC and the CCCs, and the payments between the LEC and the CCCs. *Id*. ¶ 10. The FCC concluded that the CCCs did not subscribe to the services, so they were neither "customers" nor "end users" within the meaning of the tariff, and thus access charges were not due. *Id*. ¶ 10. The FCC also emphasized the stark difference between true customer relationships (a prerequisite under the tariff for switched access service to occur), which, in the normal case, involves individuals who subscribe to local exchange service and pay a local exchange carrier for that service, compared to the LEC's relationship with the CCCs, in which money and other benefits were flowing out of the LEC to the so-called customers. *Id*. ¶ 12 n.49 ("the flow of money between these parties is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to Farmers, not payments that flow in the reverse direction").

These two decisions (especially in light of the facts that Sprint would later uncover) supported Sprint's decision to dispute charges like those assessed by Northern Valley.

F. NORTHERN VALLEY'S FURTHER ATTEMPTS TO MAKE THESE ARRANGEMENTS APPEAR LEGITIMATE

Faced with the *IUB Order*, *Farmers II*, and pending disputes and litigation that would open its practices to scrutiny, Northern Valley took further steps over time to try to give the appearance that its relationships with CCCs were legitimate. Yet, while Northern Valley and CCCs changed appearances, they did not change the basic nature of their relationships.

In July of 2010, Northern Valley filed a new federal access tariff that attempted to redefine the term "end user" in a way that would bring calls to CCCs within the scope of the

tariff. *In the Matter of Qwest Commc'ns v. N. Valley Commc'ns, LLC*, 26 F.C.C.R. 8332, 2011 WL 2258081, ¶ 4 (2011) ("*Qwest/Northern Valley Tariff Order*") (Sprint's Ex. 140). The FCC not only rejected the Northern Valley tariff, it also found Northern Valley violated 47 U.S.C. § 201(b) by attempting to subvert the FCC's access charge rules. *Id.* ¶ 2; *see also id.* ¶ 11 (CLEC "may not impose switched access charges *pursuant to tariff* unless it is providing interstate switched exchange access services to its own end users," and "an entity to whom the CLEC offers free service is not an end user").

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Now, despite years of being one of the worst actors in the industry, and a major contributor to a problem the FCC found costs consumers hundreds of millions of dollars a year,[6] Northern Valley brazenly claims its charges are due based on the undisputed facts.

STANDARD

Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). All reasonable inferences drawn from the facts must be construed in favor of the nonmoving party, *Rehm v. Lenz*, 547 N.W.2d 560, 564 (S.D. 1996), while the moving party must show the absence of any genuine issue of material fact. *Wilson v. Great N. Ry. Co.*, 83 S.D. 207, 212 (1968).

Sprint relies in part on this motion on expert opinion testimony of Don Wood. Mr. Wood's opinions bear on the question of whether Northern Valley provided local exchange service to CCCs and whether intrastate access charges are due with respect to those calls. It is appropriate for the Commission to consider expert opinions on these issues, and these opinions necessarily create fact disputes that would prevent the entry of summary judgment in favor of Northern Valley. In fact, the judge who is presiding over the two pending federal lawsuits has already determined that the finder of fact – here the Commission – must consider expert opinions on these very issues as it determines whether access charges are due. In *Sancom, Inc. v. Qwest Communications Corp.*, counsel for Sancom – the same counsel that represents Northern Valley

[6] *In the Matter of Connect America Fund, et al*, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C.R. 17,663, 2011 WL 5844975, ¶ 649 (2011) ("*CAF Order*").

– argued that Qwest's expert testimony could not be considered because the witness reached legal conclusions bearing on the ultimate issues in the case. 683 F. Supp. 2d 1043, 1051 (D.S.D. 2010). The Court disagreed, and found that the opinions should be considered:

> But Owens' analysis of why Sancom did not provide telecommunications service to Free Conference and Ocean Bay, and as a result did not provide telephone exchange service or exchange access to Qwest is permissible testimony that a specific set of facts does not fit within the meaning of the statutory terms. *Id.* at 1053.
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> In Section H, Owens set out the relevant tariff provisions and opined that Sancom did not provide legitimate local exchange services to Free Conference and Ocean Bay. Owens compared the details of Sancom's relationship and arrangement with Free Conference and Ocean Bay with the applicable terms of Sancom's interstate and local exchange tariffs with regard to the provision of ISDN Primary Rate Interface Service, DS1 to DS3 multiplexing, DS1 and DS3 Channel Terminations, 800 Database Queries, collocation, electrical power, 911 service, and directory listings. Owens Report at 43-49. Owens concluded that Sancom did not provide these services in accordance with its tariffs, either because the applicable tariffs did not cover the service or because Sancom's provision of the service to these companies was inconsistent with the terms of its tariffs. *Id.* at 1054-55.
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> …
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> Owens' conclusion that these agreements are more consistent with a partnership relationship than with an access provider-customer relationship does not state an impermissible legal conclusion. *Id.* at 1056.
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> …
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> In Section J(3), Owens explained that switched access service is only provided to an end user's premises under Sancom's tariffs and argued that the conference bridges and voice broadcast equipment Free Conference and Ocean Bay placed in Sancom's central office did not satisfy the definition of "customer premise equipment" in Sancom's local exchange tariff. Owens Report at 77-78. Again, the court will determine issues of tariff interpretation and application as a matter of law, if possible, at the summary judgment stage. If there are questions of material fact regarding the application of the definition of "customer premise equipment" to the facts of this case, then Owens' proposed testimony in Section J(3) will be admissible. *Id.* at 1057.
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> …

> In Section J(6), Owens identified several facts about Sancom's relationships with Free Conference and Ocean Bay and opined that Sancom treated these companies as partners, rather than as end user customers, and that the services provided by Sancom were a form of private carriage…. Owens' testimony is helpful to the finder of fact because it identifies the relevant facts supporting his opinion and does not merely tell the finder of fact what result to reach. *Id.* at 1058.

As in the Sancom case, the Commission should allow these expert opinions to be considered and evaluated at the hearing, making summary judgment in favor of Northern Valley inappropriate.

ARGUMENT

I. THE COMMISSION SHOULD AWARD SUMMARY JUDGMENT TO SPRINT, NOT NORTHERN VALLEY, BECAUSE CCCS DID NOT RECEIVE LOCAL EXCHANGE SERVICES

As Northern Valley acknowledges, access charges are due only on calls delivered to end users of local exchange service. Yet Northern Valley has never provided local exchange service to its CCCs. As such, Northern Valley's motion must be denied, and Sprint's motion should be granted.

A. Access Charges Are Due Only For Calls Delivered to End Users of Local Exchange Service

The parties agree the Commission must determine whether Northern Valley provided local exchange service to CCCs. As stated by Northern Valley, "the appropriate inquiry is whether the conference call companies are 'end users of local exchange service.'" NV Mem. p. 23 fn 7 (quoting and agreeing with Sprint). South Dakota law supports the parties' agreement on this point. SDCL 49-31-1(27) defines switched access service as "exchange access service." As this definition makes clear, the "access" that is provided is to one receiving "exchange" service, with termination occurring via a "local loop" facility. *Id.* These are the defining characteristics of local exchange service. The Commission's rules pick up this theme by defining an access minute as "usage of exchange facilities." ARSD 20:10:29:01(1) (emphasis added). Access

charges are assessed by a "local exchange" company, and intrastate access is charged for use of "local exchange" facilities. ARSD 20:10:24:01(1) and 20:10:24:01(10).[7]

Both the LECA tariff and the SDN tariff tie access service to the provision of local exchange service. The LECA tariff defines an access minute as usage of "exchange facilities." NV's Ex. 16, LECA Tariff, § 2.6. SDN's tariff imposes centralized equal access charges with respect to calls delivered to a "Participating Telecommunications Carrier," which is a type of "Exchange Telephone Company." SDN Tariff § 2.6.

Thus, the first threshold issue in this case is whether Northern Valley has provided its CCCs with local exchange services.

B. Northern Valley Has Not Produced Undisputed Facts That Prove its CCCs Obtained Local Exchange Services

Northern Valley's legal argument is based on the Commission's decision not to regulate CLECs' rates for local exchange services, and not to require tariff filings. Northern Valley argues this makes local exchange service offerings "completely unregulated" (p. 5) and then makes the leap that the CCCs therefore received local exchange services. NV Mem. pp. 24-29. Northern Valley essentially argues local service can be any service because it is unregulated. There are two flaws in this logic. First, while there is no rate regulation and no tariff requirement, there is (as discussed below) some regulation of local exchange services. Second, a lack of regulation does not mean the CCCs received local exchange services. While CCCs may have received some unregulated service, they certainly did not receive "local exchange service."

Northern Valley's motion must be denied because Northern Valley assumes, without proving, that CCCs obtained local exchange services. Nowhere in its Statement of Fact does Northern Valley even attempt to establish that the services received by CCCs constitute local

[7] The same result would be achieved under federal law. *See, e.g.,* 47 C.F.R. § 69.5(b) (2011) (carrier's carrier charges assessed on IXCs that use local exchange facilities).

exchange services under any accepted definition.[8] In fact, what Northern Valley does say is that CCCs are not local exchange subscribers. Its Statement of Fact 8 attests that "Northern Valley currently has **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** local exchange subscribers," which is a number that does not include CCCs. *See* Sprint's Resp. to NV's SOF 8. A party that fails to establish material undisputed facts necessary for its claim cannot prevail on summary judgment. *Discover Bank v. Stanley*, 757 N.W.2d 756, 761 (S.D. 2008) (the "well-settled standard of review for a motion for summary judgment" specifies that "[t]he burden is on 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.") (*quoting Mueller v. Cedar Shore Resort, Inc.*, 643 N.W.2d 56, 62 (S.D. 2002)). For this reason alone, Northern Valley's motion should be denied.

The term "local exchange service" has a specific meaning under South Dakota law, under federal law, and in the industry. Under South Dakota law, "local exchange service" is the access to, and transmission of, two-way switched telecommunications service within a local exchange area. SDCL § 49-31-1(13); *see also* 47 U.S.C. § 153(54) (telephone exchange service offers subscribers a service regularly furnished by a single exchange). Northern Valley fails to establish that CCCs received access to, and transmission of, two-way service, or that they were obtaining local calling within a local exchange area.

Nor does Northern Valley demonstrate that it provides CCCs with the list of functionalities that both the FCC and the Commission have decided reflect local exchange service. When Northern Valley applied to become an eligible telecommunications carrier ("ETC"), it acknowledged that local customers must receive:

[8] Nowhere in Northern Valley's 42-page Statement of Undisputed Facts does it assert CCCs received "local exchange service."

1) voice grade access to the public switched network;
2) local usage;
3) dual tone multi-frequency signaling or its functional equivalent;
4) single-party service or its functional equivalent;
5) access to emergency services;
6) access to operator services;
7) access to interexchange service;
8) access to directory assistance; and
9) toll limitation for qualifying low-income consumers.

Sprint's Ex. 130, Northern Valley's Application In Docket No. TC09-023, p. 2. Yet Northern Valley is silent as to whether its CCCs have received these functionalities.

In addition, local exchange service is not "completely unregulated." A carrier providing local exchange services must report its number of local lines served, by exchange, annually with the Commission. ARSD 20:10:32:12. Northern Valley fails to establish whether it reported CCC lines under this rule. In addition, there are various taxes, surcharges and assessments that apply to the provision of local exchange services. SDCL §§ 34-45-4 and -5 establish a process for the assessment, collection, and remittance of surcharges of $0.75 per local exchange line to support 911 service. SDCL § 49-31-51 imposes a surcharge of $0.15 per local exchange service line to be paid by local exchange subscribers to support Telephone Relay Service ("TRS"). And, federal law imposes a 3% excise tax on local exchange service receipts. 26 U.S.C. § 4251. Northern Valley never addresses whether it treated CCCs as local exchange customers for purposes of these taxes and surcharges.

Northern Valley presumes the "fact" that it provided local exchange services to CCCs, but has not established that fact based on record evidence. For that reason alone, Northern Valley's motion must be denied.[9]

[9] **[BEGIN CONFIDENTIAL]** [redacted]

C. The Undisputed Facts Show That CCCs Did Not Receive Local Exchange Service

Sprint has obtained information in discovery that proves Northern Valley did not provide local exchange services to its CCCs under the definitions and standards discussed in the above section. **[BEGIN CONFIDENTIAL]** [redacted]

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Based on these undisputed facts, Northern Valley did not provide local exchange service to CCCs and intrastate access charges are not due.

II. THE COMMISSION CANNOT AWARD SUMMARY JUDGMENT IN FAVOR OF NORTHERN VALLEY BECAUSE NORTHERN VALLEY AND CCCS ENTERED INTO SHAM ARRANGEMENTS TO TRY TO DISGUISE A PARTNERSHIP

Even if Northern Valley had provided CCCs with local exchange services, the Commission would have to deny summary judgment because the CCCs were not legitimate end user customers of such service. Instead, Northern Valley and CCCs entered into pretextual agreements that gave the appearance of an "end user" relationship, but were really operating together in a business relationship.

A. CCCs Were Not Legitimate End User Customers, But Were Instead Business Partners

Northern Valley concedes that, for access to be due, calls must be delivered to an "end user," which is defined as a "customer" of the service provided. NV Mem. pp. 22-23. An

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examination of the business arrangements in place shows the CCCs operated as business partners with Northern Valley, not as customers.

1. Northern Valley and its CCCs operated as business partners.

Under South Dakota law, "the association of two or more persons to carry on as co-owners of a business for profit forms a partnership, whether or not the persons intend to form a partnership." SDCL § 48-7A-202(a). The most important hallmark of a partnership is the sharing of profits, and any person who receives a share of profits is presumed to be a partner in the business. SDCL § 48-7A-202(3). **[BEGIN CONFIDENTIAL]** [redacted]

[11] For Example, Northern Valley's Ex. 23 (January 2009 Amendment with Global Conference) provides **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**.

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Northern Valley disputes that it shared profits with CCCs. But its contention runs contrary to the conclusion of the Iowa District Court in affirming the Iowa Board's order when it examined similar relationships:

> In addition to finding that the FCSCs were not subscribers, the Board also determined that the FCSCs were not customers but instead treated more like business partners. (Final Order at 32-33, 34). The Board made this finding based upon the profit sharing between the LECs and the FCSCs in the form of the sharing of switched access fees. (Final Order at 33). The Board also noted that at least some of the agreements called for the marketing fee or revenue sharing to be reduced or halted if the IXCs did not pay the LECs the tariffed rates for the calls. *Id.* The LECs argue that such a finding is not supported by substantial evidence and is the result of an irrational, illogical, or wholly unjustifiable determination by the Board. (Petitioners' Brief at 45-47). Aventure argues further that there is no rule prohibiting an LEC and a customer from being business partners. (Aventure's Brief at 20).
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> The record is unclear as to whether the Board ultimately concluded that the relationship was a business partnership, or if it merely found that the LECs merely acted as though the relationship was more like that of a partnership or business association rather than a customer/service provider relationship. Such a distinction is irrelevant, however, as the Board's factual findings regarding the profit sharing and the reduction of any such payments in the absence of profits are the truly relevant points. Specifically, the Board made a finding that the LECs must have been retaining revenue to cover their costs plus some amount of profit, or else there would have been no reason for them to undertake the ventures. (Final Order at 33). Thus, any money transferred from the LECs to the FCSCs must have logically been part of the profits from the arrangement.
>
> Regardless of whether the relationship between the LECs and the FCSCs was a true business partnership, the financial incentives still provide evidence that would support a finding that whether or not they were true business partners, the FCSCs were not customers. Consequently, substantial evidence supports the finding of the Board that the FCSCs were not customers, and therefore not end users as required by the tariff.

Farmers Tel. Co. of Riceville v. Iowa Utils. Bd., No. 5771 CVCV 8561, at 16-17 (Sprint's Ex. 139).

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2. Northern Valley and CCCs entered into sham agreements to simulate end user relationships and disguise a partnership.

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There should be no doubt that Northern Valley and its CCCs entered into sham arrangements for the purpose of trying to make their partnership look like an end user relationship. *See also* Wood Aff. ¶ 24. Because the CCCs were not legitimate end users of local exchange service, access charges are not due.

B. Deregulation of CLEC Offerings Does Not Legitimize Sham Arrangements, and Northern Valley and CCCs Were Participants in Sham Arrangements

Northern Valley argues that its arrangements must be legitimate because the Commission has deregulated the provision of local exchange service. NV Mem. pp. 26-28. It goes so far as to argue that it would be an unwarranted "governmental intrusion" for the Commission to pull back the curtain and conduct a critical analysis of these business relationships. NV Mem. pp. 21, 28. Northern Valley's argument is absurd. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

III. ACCESS CHARGES ARE NOT DUE BECAUSE CCCS ARE NOT END USERS WITH PREMISES

The LECA tariff requires that in order to provide switched access service, Northern Valley must deliver calls for termination and an end user's premises. LECA Tariff § 6.1 Consistent with the common and accepted industry usage of the term, there are two definitions of customer premises that could apply. The first, and most common, is for Northern Valley to deliver calls to a "building or buildings" occupied by an end user customer of local exchange services. LECA Tariff, § 2.6. A second possibility is that an end user customer can lease collocation space from a LEC (such as Northern Valley) and establish its premises at this leased space.

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IV. A *FARMERS II* TEST IS AN APPROPRIATE WAY TO DETERMINE WHETHER THESE ARE TRADITIONAL CARRIER/CONSUMER RELATIONSHIPS AS CONTEMPLATED FOR THE APPLICATION OF ACCESS CHARGES

Northern Valley attempts to distinguish the FCC's *Farmers II* decision on the basis that local exchange service is not subject to tariffing requirements in South Dakota. NV Mem. pp. 24-26. Yet the FCC's analysis remains a sound way to analyze whether Northern Valley and

CCCs were involved in traditional end user relationships as contemplated for the application of access charges.

In *Farmers II*, the FCC relied on the following characteristics of the LEC/CCC relationships:

- CCCs received services different from those received by traditional customers. *Farmers II*, ¶ 12.
- CCCs' network connections differed from those made available generally. *Id.* ¶ 13.
- The LEC/CCC agreements did not resemble traditional agreements. *Id.* ¶ 14.
- The parties did not act as if these were traditional end user relationships. *Id.* ¶ 15.
- The LEC did not intend to treat CCCs as they did traditional end users. *Id.* ¶ 16.
- The LEC and CCCs had no intention to treat this as traditional local service. *Id.* ¶ 17.
- The LEC persuaded CCCs to sign contracts as part of a litigation strategy. *Id.* ¶ 20.

All of these factors are present with respect to Northern Valley and its CCCs.

A. CCCs Received Services Different From Those Received by Traditional Local Customers

In *Farmers II* the FCC noted that Farmers' CCCs established a free service accessed via toll calls, and in return Farmers agreed to pay a share of revenue generated. *Farmers II*, ¶ 12. The flow of compensation – from LEC to CCC – was "essential" to analyzing the relationship because a traditional relationship contemplates payment from the end user to the LEC. *Id.*

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B. Connections Differed From Those Made Available Generally

In *Farmers II* the FCC noted that CCC connections and network facilities differed from those used for traditional end users. *Farmers II*, ¶ 13. Farmers used high capacity trunks and bought a "soft switch" to serve CCC traffic. *Id.* The same is true here. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

C. Northern Valley's Agreements Did Not Resemble Traditional Agreements

The FCC found Farmers' CCC agreements did not resemble traditional agreements as they included confidentiality clauses, exclusivity clauses, unique forms not available generally, and the right to be paid for traffic. *Farmers II*, ¶ 14. The FCC noted that a "common carrier" is one who offers telecommunications services to the public. *Id.; cf.* SDCL § 49-31-1. As in *Farmers II*, Northern Valley's CCC agreements do not resemble traditional arrangements. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** These are not traditional common carrier arrangements.

D. The Parties Did Not Act as if These Were Traditional End User Relationships

The FCC found the actions of Farmers and its CCCs were driven by litigation concerns. *Farmers II*, ¶ 15. The same is true here. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

E. Northern Valley Did Not Intend to Treat CCCs as They Did Traditional End Users

The FCC found that Farmers did not intend to treat CCCs as traditional end users. *Farmers II*, ¶ 16. They did not collect traditional account information or issue bills as they would have generally. *Id.* ¶ 16. Again, the same is true here. **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

F. Northern Valley Had No Intent From the Beginning to Treat This as a Traditional Local Service Offering

The FCC found that from the beginning Farmers did not intend this to be a traditional local service offering. *Farmers II*, ¶ 17. Farmers willingly incurred expenses associated with the provision of the underlying services to CCCs, and, in addition, paid the CCCs marketing fees. *Id.*

[BEGIN CONFIDENTIAL] [redacted]

[redacted]

[redacted] **[END CONFIDENTIAL]**

G. Northern Valley Persuaded CCCs to Sign Contracts as Part of a Litigation Strategy

Finally, the FCC relied on the fact that Farmers undertook to persuade the CCCs to sign contract amendments as part of its litigation strategy. *Farmers II*, ¶ 20. **[BEGIN CONFIDENTIAL]** [redacted]

[redacted] **[END CONFIDENTIAL]**

Based on these factors, the Commission should find Northern Valley, like Farmers, did not engage with CCCs in traditional end user relationships, and that as such, access charges are not due. *See also* Wood Aff. ¶ 23 (application of *Farmers II* test demonstrates that Northern Valley did not engage its CCCs in traditional end user relationships, and as such access charges are not due).

V. THE COMMISSION SHOULD AWARD SPRINT SUMMARY JUDGMENT WITH RESPECT TO THE TRAFFIC NOT WITHIN THE SCOPE OF NORTHERN VALLEY'S MOTION

Northern Valley did not include all CCC traffic within the scope of its motion. It left out traffic it admits was delivered to Groton – an exchange it was not authorized to serve – and traffic that bypassed its switch. Because neither category of calls is subject to intrastate access charges, the Commission should award Sprint summary judgment (if judgment is not already rendered for the reasons set forth above).

[BEGIN CONFIDENTIAL]

[redacted]

[redacted]

[END CONFIDENTIAL]

VI. THE COMMISSION CANNOT AWARD SUMMARY JUDGMENT WITH RESPECT TO SPRINT'S RIGHT TO OFFSET ITS REFUND CLAIM AGAINST NEW CHARGES FOR NON-PUMPED TRAFFIC (THE ACCOUNT PAYABLE DEBIT BALANCE ISSUE)

Northern Valley has also moved for summary judgment on its new Counterclaim Count I. Northern Valley seeks a declaration that Sprint was not entitled to reduce its refund claim by holding payment of charges for non-pumped traffic that Northern Valley billed between September 2007 and December 2010. Northern Valley's motion should be denied because the LECA tariff on which it relies is different from the SDN tariff previously considered by the Commission, and also because no order for payment can be made until Sprint's affirmative defenses and counterclaims are adjudicated by the FCC and/or the federal court. In the event Northern Valley's motion is not denied for these reasons, Northern Valley's calculation of purported "undisputed" charges is inaccurate.

A. Northern Valley's Calculations are Incorrect

Even if the Commission agrees with Northern Valley's legal argument, Northern Valley's damages calculation is flawed, requiring that summary judgment in favor of Northern Valley be denied. As described in Sprint's Responses to Northern Valley's SOF 187 and 196, the amount of intrastate traditional traffic that remains unpaid is **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** Northern Valley's numbers are flawed because i) it failed to support and explain its calculations, ii) it failed to properly account for the paybacks that Sprint made in December 2010 and March 2011, and iii) it improperly overstates intrastate amounts due while understating interstate amounts due. *See* Sprint's Response to NV's SOF 187 and 196, and Roach Aff. ¶¶ 13-16. Sprint's calculations are explained in and attached to the affidavit of Ms. Roach. Because of this dispute of fact, Northern Valley's motion must be denied.

B. The LECA Tariff Does Not have the Same Terms as the SDN Tariff

Northern Valley argues (correctly) that Sprint's application of the account payable debit balance mechanism with respect to Northern Valley was accomplished in the same way that was done with respect to SDN. It then argues (incorrectly) that the LECA tariff has the same provisions as the SDN tariff. In fact, the language of the LECA tariff is wholly distinguishable from the SDN tariff that the Commission analyzed earlier in this case. When it addressed SDN's motion for partial summary judgment,[12] the Commission held the SDN tariff language at issue prohibited Sprint's practice of offsetting prior payments with undisputed portions of the bills. *SDN Order*, p. 4. In coming to that conclusion, the Commission relied on very particular tariff language: "[i]n the event of a dispute concerning the bill, SDN may require the customer to pay a sum of money equal to the amount of the undisputed portion of the bill." *Id.* at 3 (citing SDN

[12] Order Granting Partial Summary Judgment; Order Granting Leave to File Counterclaims; Order Denying Dismissal of Counterclaim, TC09-098 (Jan. 18, 2012) ("*SDN Order*").

tariff § 2.4.1(B)(2)). The Commission thus held that, since "for each bill there was an undisputed portion," the SDN tariff required Sprint to pay "a sum of money equal to the amount of the undisputed portion of the bill." *Id.* at 4.

The language the Commission relied in the *SDN Order* is absent from the LECA tariff. *See* NV's Ex. 16, LECA Tariff. § 2.4.1(C)-(F). In an attempt to evade a critical analysis of the LECA tariff, Northern Valley cites two portions of the LECA tariff, neither of which is analogous to the key SDN tariff language. First, Northern Valley notes that the LECA tariff states, "if a payment or any portion of the payment is received by the Telephone Company in funds which are not immediately available to the Telephone Company, then a late payment penalty shall be due to the Telephone Company." NV Mem., p. 14 (citing LECA Tariff § 2.4.1(C)(2)). This language does not compel the result Northern Valley seeks – it simply stands for the unchallenged proposition that if Sprint is ultimately ordered to write a check to Northern Valley, then late charges will also be assessed.

Northern Valley then points to language stating, "[l]ate payment charges will apply to amounts withheld pending settlement of the dispute," but that, "when the customer disputes the bill on or before the payment date and pays the undisputed amount on or before the payment date," then the "penalty interest period shall not begin until 10 days following the payment date." NV Mem., p. 14 (citing LECA Tariff § 2.4.1(D)). This gives the customer the right to mitigate the application of the late charges by paying an "undisputed portion," but certainly does not make payment of the "undisputed portion" mandatory.

Absent tariff language compelling the result SDN seeks, the Commission must construe the language in favor of the customer, which, in this case, is Sprint. *Penn Cent. Co. v. General Mills, Inc.*, 439 F.2d 1338, 1240 (8th Cir. 1971) (any ambiguity in tariff language should be

strictly construed against its author). As such, Northern Valley's motion on this point should be denied.

C. Sprint's Interstate Claims, Equitable Claims, and Equitable Defenses Would Have to be Adjudicated Before Payment Could be Ordered

Northern Valley's attempt to obtain the same outcome as SDN on this issue also fails because, unlike in the SDN case, Sprint has counterclaims and affirmative defenses pending in federal court that must be adjudicated before any payment can be ordered.

SDN's complaint in this case demanded that the Commission order payment of intrastate amounts. Given the Commission's limited jurisdiction, Sprint could not assert equitable defenses, and could not ask the Commission to reduce any award based on its claim for interstate damages. Because of this procedural posture, the issues raised on SDN's motion were quite limited.

Northern Valley is much differently situated than SDN. Because Northern Valley and Sprint are already in litigation over intrastate and interstate charges,[13] the Commission cannot award damages or order payment. *See* SDCL § 49-13-1.1; Order Granting Motions to Dismiss Cross-Claims (Sept. 5, 2011) (dismissing Northern Valley's damage claims based on SDCL § 49-13-1.1). Northern Valley's counterclaims – including its new Counterclaim Count I – are limited to intrastate issues and seek only declaratory relief, not an order for payment. The interstate issues, equitable claims and defenses, and tort claims are either referred to the FCC or remain pending (and stayed) before the federal court. As such, whatever declarations the Commission makes in this proceeding will be taken into consideration by the federal court, but can be transformed into an order for payment only after the referral to the FCC is completed and the court lifts its stay. *See* Sprint's Ex. 134, p. 30, and Sprint's Ex. 135, p. 2 (providing that the

[13] *See* Sprint's SOF 223-226.

case is stayed until both FCC and PUC referrals are completed). And, for payment to be ordered in favor of Northern Valley (something extraordinarily unlikely given the facts described above), the FCC and the court would have to deny Sprint's affirmative defenses and counterclaims.

Northern Valley completely ignores Sprint's defenses and counterclaims that have been asserted in federal court, and that have been (at least to some extent) referred to the FCC. Sprint does not dispute that Northern Valley billed, and Sprint has not paid, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** for "traditional" access charges between September 2007 and November 2010. Sprint's Response to NV's SOF 187. But Sprint claims it has no obligation to pay that amount to Northern Valley because i) Northern Valley improperly billed Sprint intrastate and interstate switched access charges for prior periods, ii) Northern Valley cannot recover under principles of equity, iii) Sprint is excused from any payment oblations, iv) Northern Valley is liable to Sprint for engaging in civil conspiracy, and/or v) Northern Valley is liable to Sprint under principles of negligent misrepresentation. Sprint's Ex. 132. The federal court refused to dismiss those claims when it decided to stay the case. Sprint's Ex. 133. Northern Valley is essentially asking the Commission to prejudge the FCC (on interstate claims) and the Federal court (on tort claims, equitable claims, and affirmative defenses). In deference to the court, and in recognition of its own limited jurisdiction, the Commission simply cannot issue an order that Sprint owes Northern Valley money, much less a sum certain.

A federal court in Minnesota has already reached this issue and decided that it could not award judgment to a similarly-situated plaintiff because it had not yet adjudicated Sprint's claims and defenses. In that case, Minnesota Independent Equal Access Corp. ("MIEAC"), a

centralized equal access provider in Minnesota, brought the exact same summary judgment against Sprint challenging Sprint's application of the AP debit balance:

> In the alternative, MIEAC argues that the question of whether Sprint is permitted to withhold payment for calls that both parties agree are covered by MIEAC's tariff, as a form of self-help for the allegedly improper charges for the Tekstar calls, is wholly separate from the issues that this Court has referred to the FCC.

Sprint's Ex. 137, p. 23. The court denied summary judgment because MIEAC had not proven that "all of Sprint's affirmative defenses to Count One are legally insufficient." *Id.* at 24. Because Sprint had pending defenses based on MIEAC's overbilling of Sprint for pumped traffic during prior periods, it was legally inappropriate to award judgment to MIEAC for the non-pumped traffic. *Id.*

The same is true here. Judgment will not be entered by this Commission, but instead by the court. Any judgment will reflect i) the amounts Northern Valley would have been entitled to for non-pumped traffic, ii) any reductions or offsets based on Sprint's defenses as determined by the federal court, iii) any amounts by which Northern Valley overbilled Sprint in prior periods for pumped traffic as determined by the Commission, the FCC and/or the federal court, and iv) any damages awarded to Sprint by the federal court on Sprint's tort claims. It is not for this Commission to adjudicate Sprint's affirmative defenses or its counterclaims.

It would be most appropriate for the Commission to issue an order determining that Northern Valley billed, and Sprint has not paid, for non-pumped traffic in the amount of **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** The Commission could also order that to the extent such amounts are not reduced or offset by the federal court, interest would be due as set forth in the tariff. The Commission cannot go any further than this without improperly infringing on the responsibility of the federal court.

CONCLUSION

For the above reasons, Sprint respectfully requests the Commission deny Northern Valley's motion and grant Sprint's motion.

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