

**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

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 RESPONSE TO
NORTHERN VALLEY AND SANCOM'S MOTION FOR ADOPTION
OF PROCEDURAL SCHEDULE**

Sprint Communications Company L.P. ("Sprint") responds to Northern Valley Communications, L.L.C.'s ("Northern Valley") and Sancom, Inc.'s ("Sancom") motion for adoption of procedural schedule ("Motion"). Sprint fully supports the adoption of a procedural schedule, and the dates in the Motion – which were dates proposed by Sprint – are acceptable. The scope of the proceeding, however, cannot be that proposed in the Motion. The Commission has no jurisdiction or authority to resolve equitable claims, and the Motion is based on the misperception that the Federal District Court referred claims and issues, including equitable claims and issues, to the Commission. Exhibit A attached hereto is a redline showing Sprint's proposed modifications to Northern Valley and Sancom's proposed Summary of Procedural History, Issues to be Litigated and Manner of Proceeding, Discovery Generally, and Proposed

Procedural Schedule.¹ Sprint respectfully requests the Commission adopt Sprint's proposed modifications, and Sprint has attached its proposal with changes accepted as Exhibit B.

I. SPRINT'S REDLINE

Sprint's proposed modifications to the procedural schedule are as follows:

- Page 2, ¶ 4.: Correction of a typographical error.
- Page 2, ¶ 6.: This paragraph describes the Federal District Court's orders in the *Sancom v. Sprint* case. Sprint has modified the language to accurately reflect what the Court's May 26, 2010, order accomplished. That order, which was attached as Exhibit B to the Motion, did not refer any issues to the Commission, but instead indicated that its stay would extend long enough to allow this case to be completed.
- Page 2, ¶ 7.: This paragraph proposes identical changes as those described above with respect to the *Northern Valley v. Sprint* case.
- Page 3, new ¶ 10.: This new paragraph indicates that Sprint filed Amended Motions to Dismiss on June 14, 2011, which occurred after the Motion was filed.
- Pages 3-4, ¶ ~~11~~.12.: Sprint has deleted self-serving and unnecessary material. In addition, Northern Valley's statement that Sprint does not share the goal of moving this case along is untrue. Sprint took the lead initially on working toward a stipulated procedural schedule in fall of 2010, has proceeded with discovery

¹ Sprint drafted and circulated a proposed stipulated procedural schedule in the fall of 2010 in an attempt to advance this case. That document was subject to a number of edits by the parties as the parties attempted to reach a negotiated solution. Ultimately, these negotiations broke down over disagreements about the scope of this proceeding and the meaning of the Federal Court's orders. Sprint expects Northern Valley and Sancom will argue that Sprint's redline now backs off language it had previously agreed to. Yet, once negotiations broke down, and this became a litigated matter, no party was bound to terms that it had previously agreed as part of a negotiated package.

before a schedule was entered, and proposed the dates that are contained within the Motion.

- Pages 4-5, ¶ ~~12.13.B.~~: This paragraph addresses the issues to be litigated as between Sprint and the Third Party Defendants (except Capital). Sprint has removed the suggestion made by Northern Valley and Sancom that the parties have agreed to the scope of the hearing. If that were the case, this Motion would not be before the Commission, nor would Sprint's motions to dismiss. Sprint also made changes to properly describe the orders issued by the Federal District Court. The Court did not refer any claims or issues to the Commission, but simply extended the scope of its stay to allow this docket to proceed to completion. Sprint believes that by deciding the issues lawfully within the scope of the pleadings in this docket, the Commission will sufficiently provide any guidance the Court may need. Furthermore, this Commission has no jurisdiction to litigate the equitable claims Northern Valley and Sancom have brought forth in federal court.
- Page 5, ¶ ~~12.13.B.C.~~: Sprint has added a subparagraph that indicates the parties will not proceed to hearing on Cross-claims filed by Northern Valley and Sancom. Sprint expected those Cross-claims to be withdrawn voluntarily when the parties reached agreement on a procedural schedule. Once the Motion was filed, Sprint filed Amended Motions to Dismiss that it expects will be granted in conjunction with this Motion.
- Pages 5-6, ¶ ~~13.~~: Sprint has deleted Northern Valley and Sancom's proposed paragraph 13. This paragraph contains two incorrect assumptions. First, it is written as if the Federal District Court referred the same issues to both the

Commission and the Federal Communications Commission (“FCC”), when that is simply untrue. The issues before the Commission are those in the pleadings, which have already been sufficiently described. Second, this proposed paragraph assumes the Commission would have jurisdiction and authority to decide the issues in paragraphs ~~13.(B)~~ and ~~13.(C)~~ in this docket, which it does not. Northern Valley and Sancom wish to use this language as a basis to ask the Commission to litigate the unjust enrichment claim they asserted in federal court or, at a minimum, use this Commission for an avenue of discovery on those claims. Yet such claims are beyond the scope of the Commission’s jurisdiction and authority, and thus beyond the scope of this docket.

- Pages 6-7, ¶ 14.: Sprint has removed language suggesting an express agreement between the parties to make extraordinarily broad discovery available. There is no such agreement. What Sprint does agree to remains at the bottom of page 6: “Accordingly, to the extent that a party is providing documents or conducting depositions, it is the intent of the parties to seek and make available discovery that would be relevant to both interstate and intrastate matters.” Sprint has proceeded on that basis, and will continue to do so. Northern Valley and Sancom added the final sentence in an attempt to prompt the Commission to undertake the litigation of Northern Valley’s unjust enrichment claim.
- Page 8, ¶ 23.: Sprint modified this paragraph to include language appropriate for a Commission order, as opposed to a party’s proposal.
- Page 9, ¶ 23.A.: Sprint has added a new paragraph relating to South Dakota Network LLC’s motion for summary judgment. This language was proposed by SDN, and is acceptable to Sprint.

- Pages 9-10, ¶ 23.A.B. through ¶ 23H.I.: Sprint has no proposed edits to the dates, and understands from Commission Staff that the week of April 23, 2012, is open on the Commission’s calendar.
- Page 9, ¶ 24: Sprint modified this paragraph to include language appropriate for a Commission order, as opposed to a party’s proposal.
- Page 10, ¶ 25.: Sprint modified this paragraph to include language appropriate for a Commission order, as opposed to a party’s proposal. Sprint has deleted the last clause, which was a source of an unresolved discovery dispute in the Federal Court Actions. Sprint’s Access Verification Department maintains spreadsheets that track the amount of all open carrier disputes. Sprint has produced versions of those spreadsheets that show the data for the requesting party (either Northern Valley or Sancom), but redacted the entries related to other carrier disputes. The only reason Northern Valley and Sancom want unredacted native versions of these particular documents is so they can identify and dig into Sprint’s disputes with other carriers, which have nothing to do with this docket. Sprint objects to this blanket language, and suggests that each dispute over production be brought to the Commission on an individual basis and decided on its merits.

II. THERE WAS NO FEDERAL COURT REFERRAL

As Sprint notes above, and as Sprint explained in its Response To Northern Valley’s Motion to Compel (filed June 21, 2011), Northern Valley and Sancom are asking the Commission to believe that the Federal District Court “expressly referred” issues and/or claims to this Commission, when that simply did not happen. After the Court referred issues to the FCC, the Parties Jointly asked the Court to issue an order either 1) referring specific issues to the

Commission, or 2) making clear that the scope of the stay would extend through the completion of this proceeding.² The Court opted for the second alternative, declining to make any referral:

The court has reviewed the motion, and it is hereby ORDERED that Northern Valley and Sprint's joint motion (Docket 111) is granted. This action is stayed pending (1) resolution of the dispute by agreement of the parties; (2) a final order in the pending SD PUC proceeding in *SD Network, LLC v. Sprint Communications Co.*, Docket TC 09-098 (S.D. Pub Utils. Bd.) and a decision on the disputed issues by the FCC pursuant to the referral described in Docket 110; or (3) further order of this Court.

See Northern Valley Stay Order, p. 2.³

Northern Valley and Sancom essentially argue that the Commission acquired jurisdiction over claims or issues by being referred them by the Federal Court. Whether it is legally possible for the Commission to acquire jurisdiction in this way (a proposition Sprint doubts), that issue need not be addressed because the Court did not, on the plain language of its order, direct the Commission to take any specific action. Any order defining the scope of this docket must emanate from the pleadings and state law, not Federal Court Orders.

III. THE COMMISSION SHOULD NOT TURN THIS DOCKET INTO A RULEMAKING TO SET A RATE FOR NON-ACCESS TRAFFIC

Northern Valley and Sancom are being forced to come to grips with the fact that traffic pumping schemes generate traffic that is not compensable as access traffic.⁴ *In the Matter of Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co., Second Order on Reconsideration*, FCC 09-103, 24 FCC Rcd. 14801, ¶ 10 (F.C.C. 2009) ("*Farmers II*") (calls to CCCs not subject to access charges); *In re Qwest Commc'ns Corp. v. Superior Tel. Coop., Final*

² A copy of this Joint Motion was attached as Exhibit B to Sprint's Response to Northern Valley's Motion to Compel.

³ A copy of this order was attached as Exhibit D to Northern Valley and Sancom's Motion for Adoption of a Procedural Schedule (June 13, 2011). A comparable order was issued in the Sancom case.

⁴ Sancom has presumably already recognized that, having now severed its relationships with call connection company ("CCC") partners.

Order, Docket No. FCU-07-2, 2009 WL 3052208, at *35 (Iowa Util. Bd. Sept. 21, 2009) (“*IUB Order*”) (calls to CCCs are not subject to access charges); *In the Matter of Qwest Commc’ns Co. v. N. Valley Commc’ns, LLC*, FCC 11-87, 2011 WL 2258081 (F.C.C. June 7, 2011) (“*Northern Valley Tariff Order*”) (attached as Exhibit A to Sprint’s Response to Northern Valley’s Motion to Compel) (calls to entities that do not pay for service are not subject to access charges). In response, Northern Valley and Sancom are trying desperately to obtain payment of any kind, under any theory, if and when the traffic is found to be outside the access charge regime. That is the basis for Northern Valley and Sancom’s attempt to have the Commission either litigate unjust enrichment claims or establish a regulated rate for non-access traffic. The Commission should, for several reasons, decline to go down this path.

As Sprint has argued in its Amended Motions to Dismiss Cross-claims, the Commission has no jurisdiction to litigate or decide unjust enrichment claims. Any action by the Commission to do so would be unlawful and void. *See* Sprint’s Amended Motions to Dismiss Cross-Claims, filed June 14, 2011.

The Motion’s request that the Commission undertake to set a “reasonable rate” for non-access traffic delivered to Northern Valley and Sancom presents a different problem. The Commission certainly has jurisdiction to set rates for intrastate traffic delivered to Northern Valley and Sancom. However, that must be done through the tariff filing and review process, and cannot be done by setting retroactive rates in a complaint docket. For that reason, if Northern Valley and Sancom wish to establish Commission-approved rates for non-access traffic, they should file tariffs and allow those dockets to proceed separately. If the Commission were inclined to set such rates on a more global basis, it should establish a separate docket open to all interested parties to evaluate such rates on a going-forward basis.

As telecommunications companies subject to SDCL § 49-31-12.2(3), Northern Valley and Sancom may not deviate from their filed rates for intrastate service. It is undisputed that during the period within the scope of this docket, the only tariffed intrastate rates Northern Valley and Sancom had in effect were access rates. As a result, if CCC traffic is not access traffic, there is no tariffed rate to charge or collect, and the collection of any rate would be a deviation from tariffs in violation of SDCL § 49-31-12.2(3). Nor could the Commission approve tariffed rates on a retroactive basis. *See Re Mont.-Dakota Utils. Co.*, Application by a gas company for authority to increase its rates and charges; granted with modifications, 27 P.U.R.4th 583, 601 (S.D. Pub. Utils. Comm'n. Dec. 28, 1978) (“However, the commission finds that MDU’s requested surcharge constitutes retroactive rate making which this commission shall not permit.”) (attached as Exhibit C hereto). Thus, the Commission cannot set a regulated rate that would apply to traffic delivered in the past, and it should reject Northern Valley and Sancom’s request to do so.

Under SDCL § 49-31-12.4, the process for setting a rate must begin with a filing by a carrier seeking to offer a new non-competitive service for which it seeks to be paid. SDCL § 49-31-12.4. Presumably, if Northern Valley and Sancom wish to establish rates for a currently untariffed intrastate service, the ball is in their court to make such a filing and propose a rate, and the proposed rate would apply not just to Sprint, but to all similarly situated carriers. The Commission could then, on its own motion or upon a motion to intervene, order a hearing for the purpose of evaluating the reasonableness of the rate. SDCL § 49-31-12.4(1). The Commission could choose to suspend the tariff (subject to certain limits), or could allow the rate to go into effect prospectively, subject to refund liability in the event the rate were found unreasonable. SDCL § 49-31-12.4(2)-(5). This process is mandated by the Legislature and ensures tariff compliance, applies regulated rates uniformly to all of those receiving the service, and ensures

just and reasonable rates.⁵ The process envisioned by Northern Valley and Sancom, whereby the Commission would set a rate outside of the tariff process in a complaint case involving only one of many customers, achieves none of these important goals.

CONCLUSION

The Commission should adopt a procedural schedule. In so doing, however, the Commission must limit the scope of this case to those matters of which this Commission has jurisdiction, and which are lawfully within the scope of the pleadings that have been filed. The Commission should thus decline Northern Valley and Sancom's request to litigate their unjust enrichment claims or undertake a retroactive rate case.

Dated: June 28, 2011

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⁵ See, for example, Docket TC 11-010, in which the Commission granted parties intervention and suspended a traffic pumper's tariff pending just this kind of analysis.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of June, 2011, I served a true and correct copy of **SPRINT COMMUNICATIONS COMPANY L.P.'S RESPONSE TO NORTHERN VALLEY AND SANCOM'S MOTION FOR ADOPTION OF PROCEDURE SCHEDULE** in the above-entitled matter, electronically to:

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