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'S NOTICE OF SUPPLEMENTAL AUTHORITY

Sprint Communications Company L.P. ("Sprint") respectfully responds to Northern Valley Communications L.L.C.'s ("Northern Valley") Notice of Supplemental Authority. Northern Valley reads the Federal Communications Commission's ("FCC") recent *Intercarrier Compensation Order*[1] in a way that can only be described as baffling. The FCC has adopted prospective rules designed to shrink Northern Valley's intercarrier compensation revenue to $0,[2] which will eliminate traffic pumping schemes that the FCC recognized have been a drain on the industry and the economy.[3] In so doing the FCC rejected a number of the premises that Northern Valley has attempted to rely on, including the flawed notions that interexchange carriers and

[1] Report and Order and Further Notice of Proposed Rulemaking, Connect America Fund, WC Docket No. 10-90 et al., FCC 11-161 (rel. Nov. 18, 2011) ("Intercarrier Compensation Order").
[2] *Id.* ¶ 741 ("We adopt a bill-and-keep methodology as a default framework and end state for all intercarrier compensation traffic. We find that a bill-and-keep framework for intercarrier compensation best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.") (footnotes omitted).
[3] *Id.* ¶¶ 662-664.

their customers cause the costs associated with pumped calls,[4] and interexchange carrier revenues are relevant considerations.[5] Northern Valley takes this rejection of the traffic pumping business model and attempts to spin it as an express affirmation of Northern Valley's right to charge Sprint access for the past six years. Not only is this a poor reading of the FCC's order, this case is about intrastate charges, and Northern Valley's advocacy is completely irrelevant to the equitable issues before the Commission on the pending motions. The Commission should disregard Northern Valley's filing on these motions and allow the importance of the new FCC order to be addressed at a later date if and when it is relevant.

A. The *Intercarrier Compensation Order* Has No Impact on the Pending Motions

A notice of supplemental authority should be reserved for instances in which a new order bears on arguments made on a pending motion. Northern Valley makes only a halfhearted attempt to suggest the FCC's order has any impact on its Motion to Amend or Sprint's Motion to Dismiss (the "Motions"). Northern Valley spends three pages arguing that the FCC's order means it can collect its interstate access charges retroactively, which is an issue beyond the Motions and this case. It then states without explanation or citation that the order supports its position that it has provided a valuable service to Sprint. Northern Valley's Notice, p. 4. Yet the Motions have nothing to do with whether Northern Valley has provided a valuable service to Sprint (a proposition Sprint disputes), but instead whether the Commission has the jurisdiction and authority to decide, as a matter of South Dakota law, that Northern Valley is entitled to a retroactive fair rate if its tariff does not apply. Because the FCC's order does not speak to that

[4] *Id.* ¶ 744 ("*Bill-and-Keep Is Consistent with Cost Causation Principles*").
[5] *Id.* ¶ 663 fn. 1090 ("Whether the IXC's revenues for a call are more or less than its cost of terminating the call is not at issue.").

question in any way, the Commission should disregard Northern Valley's filing.[6]

B. The FCC Did not Retroactively Decide that Access is Due for Pumped Traffic

Northern Valley's substantive interpretation of the FCC's order is flawed in multiple respects. First, the FCC was abundantly clear that it was adopting new rules that apply prospectively[7] to address (and over time eliminate) traffic pumping. Northern Valley's position that the FCC ordered Sprint to pay Northern Valley's bills retroactively when it issued prospective rules is untenable.

In addition, Northern Valley fails to explain that the threshold question of whether the specific pumped calls at issue are "access" as defined by the governing tariff was not addressed at all by the new FCC order. For a call to be subject to access charges, it must (both retroactively and prospectively) qualify as such under a tariff. Going forward, a billing carrier will be subject to certain access rate caps for such tariffed services based on the presence of a revenue sharing agreement.[8] While the presence of revenue sharing may not be (on its own) determinative of whether a call meets the terms of a tariff, it will remain one of the factors to be considered under the *Farmers* analysis that the FCC conducted in 2009.[9]

The FCC has already confirmed that its *Intercarrier Compensation Order* took nothing away from its *Farmers* analysis. In a filing with the District Court of Appeals for the District of Columbia the FCC responded to a claim that its order necessarily acknowledges that when a

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[6] In fact, it appears Northern Valley drafted its notice of supplemental authority to be filed in the 2011 federal court case, which does involve interstate access charges. *See* Exhibit A hereto. It apparently then made the same filing here, without regard to whether it was pertinent to the pending Motions.

[7] *Id.* ¶ 656.

[8] *Id.* ¶ 679.

[9] *Id.* ¶¶ 673-74.

LEC completes a call to conference company, the LEC provides access service.[10] The FCC rejected that proposition, noting that the central question in *Farmers* (like the question here) is whether service was offered under the terms of the LEC's tariff. On the factual record developed in that proceeding, the FCC concluded it was not, and remains confident that its decision was sound. The FCC advised the DC Circuit:

> Thus, even apart from the prospective-only effect of the new order, these is no inconsistency between that order and [the Farmers order].[11]

This means that – as Sprint has said all along – if the calls at issue do not qualify as access charge calls after conducting a *Farmers* type analysis, then they are non-access calls and Northern Valley's bills were wrongly issued. When the facts about Northern Valley's traffic pumping operations are presented to the Commission at hearing, it will be abundantly clear that Northern Valley and its CCC partners were not operating in a way that would allow Northern Valley to assess intrastate access charges to Sprint with respect to calls to those CCCs.

For these reasons, the Commission should disregard Northern Valley's arguments regarding the FCC's *Intercarrier Compensation Order*.

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[10] Letter from Joel Marcus, Counsel, FCC, to Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, at 1, *Farmers & Merchants Mut. Tel. Co. v. FCC*, No. 10-1093 (filed Dec. 1, 2011) (attached as Exhibit B hereto).
[11] *Id.*

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