

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

<p>NORTHERN VALLEY COMMUNICATIONS, L.L.C., a South Dakota Limited Liability Company,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>SPRINT COMMUNICATIONS COMPANY L.P., a Delaware Limited Partnership,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">Civ. 11-4053</p> <p style="text-align: center;">NORTHERN VALLEY'S NOTICE OF SUPPLEMENTAL AUTHORITY</p>
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Northern Valley Communications, L.L.C. ("Northern Valley"), by counsel, respectfully submits this Notice of Supplemental Authority in support of its Motion for Summary Judgment.

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 Northern Valley, 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 long-distance carriers, such as Sprint, for these calls.³ In so doing, the Commission has made

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").

³ See Order, ¶¶ 662 – 701.

clear that Northern Valley is not in violation of the Communications Act and is entitled to summary judgment against Sprint Communications Company, L.P. ("Sprint") for the services at issue in this litigation.

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 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

⁴ Order at ¶ 656.

⁵ *Id.*

⁶ *Id.*, ¶ 700.

⁷ *See, e.g., id.* ¶¶ 668 - 674.

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 ongoing 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 is 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 Court to promptly grant its pending Motion for Summary Judgment.

Given the significant volume of the Order (759 pages), Northern Valley attaches hereto, as **Exhibit A**, only the relevant portions of the Order. However, should the Court so desire, the

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.

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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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December 2011, a true and correct copy of foregoing **Northern Valley's Notice of Supplemental Authority** was served upon all parties to the above cause by depositing the same in the U.S. Mail, postage pre-paid, to their respective addresses disclosed on the pleadings or, in the event the party is represented by counsel, to their counsel; or notice of the filing of this instrument was sent by email, via CM/ECF, to all parties on the service list who have registered to receive service by email over CM/ECF.

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