

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 LP)
AGAINST SPLITROCK PROPERTIES,)
INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM,)
INC., AND CAPITAL TELEPHONE)
COMPANY)

**SPRINT’S RESPONSE IN SUPPORT OF MOTION
TO DISMISS CROSS CLAIMS**

Sprint Communications Company L.P. (“Sprint”) respectfully provides this consolidated response in support of its Amended Motions to Dismiss the Cross-claims asserted by Northern Valley Communications, L.L.C. (“Northern Valley”) and Sancom, Inc. (“Sancom”).¹ Sprint’s Amended Motion was based on two legal theories, neither of which has been challenged by Northern Valley and Sancom. As such, the Commission should grant Sprint’s Amended Motion.

A. SDCL 49-13-1.1 Bars the Cross-claims

First, Sprint argued that SDCL 49-13-1.1, the state’s election of remedies statute, bars a party from seeking damages both in court and before the Commission. *See* Sprint’s Mem. in Support of Amended Motion to Dismiss (filed June 14, 2011), pp. 1-2. Northern Valley and Sancom do not dispute that they are seeking damages in both forums, and that SDCL 49-13-1.1 prohibits a party from doing so. Northern Valley and Sancom Opp. (filed July 14, 2011), pp. 16-22. Instead, they appear to concede that their affirmative claims are barred, and suggest only that

¹ Sprint’s Amended Motions were filed on June 14, 2011.

the Commission take additional action in the event it grants Sprint's motion.² There being no dispute that SDCL 49-13-1.1 bars Northern Valley and Sancom's Cross-claims, the Commission should grant Sprint's Amended Motion.

B. The Commission Has no Jurisdiction to Entertain Northern Valley and Sancom's Counts II and III

Second, Sprint moved to dismiss Cross-claim Count III (Unjust Enrichment), and Cross-claim Count II (Implied Contract) because they demand equitable relief the Commission is without jurisdiction to award. *See* Sprint's Mem. in Support of Amended Motion to Dismiss (filed June 14, 2011), pp. 2-5. Again, Northern Valley and Sancom offer no opposition to Sprint's argument that Cross-claim Counts II and III, as pled, are beyond the Commission's jurisdiction, and they even appear to acknowledge that those claims were improperly pled. *See e.g.*, Northern Valley and Sancom Opp. (filed July 14, 2011), p. 15 (arguing the Commission should resolve referred issues so that the claims can be resolved by the federal court); *id.* at 14 ("Northern Valley and Sancom . . . are not seeking monetary damages on the cross-claims.").

Because Northern Valley and Sancom have not argued that the Commission has jurisdiction to adjudicate Counts II and III, and because they make no claims for monetary relief on those claims, those claims are properly dismissed.

C. SDCL 49-13-1.1 Does Not Require Dismissal of Sprint's Claims for Declaratory Ruling

As noted above, rather than argue that SDCL 49-13-1.1 saves their own claims, Northern Valley and Sancom argue the statute sinks Sprint's third party claims as well. Yet Sprint's Count I seeks declaratory relief, not damages. Sprint alleged:

19. There is an actual controversy between Sprint and Sancom, Splitrock, Northern Valley, and Capital with respect to whether those companies provide

² Sprint responds to that argument *infra* at § C.

intrastate switched access services for calls to Call Connection Companies. The resolution of this controversy is necessary to determine whether SDN has properly billed intrastate switched access charges for those calls.

20. Sprint is entitled to a declaration pursuant to ARSD 20:10:01:34 and SDCL 21-24-1 that Sancom, Splitrock, Northern Valley, and Capital cannot assess intrastate switched access charges for calls to Call Connection Companies, and that Sprint has no access charge liability for such calls on and after June 2007, and/or that their actions constitute an unjust or unreasonable practice.

Sprint did not seek damages already in play in the pending federal court cases out of deference to SDCL 49-13-1.1. In so doing, Sprint gave the Commission the act consistent with its jurisdiction without running afoul of the election of remedies statute.

As an initial matter, Northern Valley and Sancom have waived the argument that Sprint's Declaratory Judgment claim must be dismissed. Not only have they failed to move to dismiss on this basis (even to this day) but their Motion for Adoption of Procedural Schedule proposed language saying:

As between Sprint and the Third Party Defendants . . . the parties agree that the hearing in this matter will encompass and address 1) the issues raised in Sprint's third party complaint (and the answers thereto)

Northern Valley and Sancom's Motion for Adoption of Procedural Schedule (filed June 8, 2011), p. 5. Northern Valley and Sancom are not entitled to the dismissal of claims they have not moved to dismiss and have specifically asked the Commission to adjudicate.

Even if this argument has not been waived, SDCL 49-13-1.1 plainly prohibits a party from seeking damages both in court and before the Commission:

49-13-1.1. Complaint to commission or suit by private person – Election of remedies. Any person claiming to be damaged by any telecommunications company or motor carrier may make complaint to the commission or may bring suit on his own behalf for the recovery of damages in any court of competent jurisdiction in this state, but no person may pursue both remedies at the same time (emphasis added).

Once a person or entity seeks damages in one of these two forums, it cannot then seek damages in the other. Northern Valley and Sancom argue this statute is not about damages at all, and that

it prohibits concurrent actions of any kind, even a request for declaratory ruling that does not seek recovery of damages. Northern Valley and Sancom Opp. (filed July 14, 2011), p. 16. It is difficult to understand why the Legislature would make multiple references to damages in a statute it did not intend to limit to damage actions. Such a result is even more unlikely given that the Legislature specifically authorized any person to file a complaint with respect to “anything done or omitted . . . in contravention of the provisions” of the Chapter, whether or not the complainant suffered damages. SDCL 49-13-1. In other words, the Legislature contemplated the Commission would have broad authority to address matters within its jurisdiction (whether or not there was a damage claim) and then in the following section (SDCL 49-13-1.1) placed a limitation that applied only to damages claims. The Commission should adopt the plain reading of these two provisions and find that Sprint’s Declaratory Ruling claim is properly filed under SDCL 49-13-1, while Northern Valley and Sancom’s damages claims are barred by SDCL 49-13-1.1.

Northern Valley and Sancom do not cite any South Dakota law in support of their argument, but argue that a federal statute (47 U.S.C. § 207) and Sprint’s advocacy with respect to that federal statute somehow provide guidance as to the intent of the Legislature in adopting SDCL 49-13-1.1. Northern Valley and Sancom Opp. (filed July 14, 2011), pp. 17-18. The Commission should reject this argument and decline to expand the scope of SDCL 49-13-1.1 beyond its reasonable reading.³

Finally, if the Commission were to dismiss Sprint’s third party complaint, that could leave this proceeding in a very odd procedural posture. Sprint has defended SDN’s complaint by

³ Northern Valley and Sancom do not mention Sprint’s Count II, which seeks indemnification from the third party defendants to the extent Sprint is found liable to SDN. That claim is not barred because Sprint did not seek those damages in the federal court proceedings.

claiming the calls that went through SDN and then to Northern Valley and Sancom are not subject to SDN's intrastate access tariff because the calls were not subject to intrastate switched access charges billed by Northern Valley and Sancom:

34. Four of SDN's Participating Telecommunications Companies have been identified by Sprint as engaged in traffic pumping activities. Those Participating Telecommunications Companies are Sancom, Inc. ("Sancom"), Splitrock Properties, Inc. ("Splitrock"), Northern Valley Communications, LLC ("Northern Valley"), and Capital Telephone Company ("Capital").

* * *

37. For many reasons, LECs do not provide switched access services to interexchange carriers ("IXCs") for calls delivered to Call Connection Companies. For example, the Iowa Utilities Board decided on September 21, 2009 in its docket FCU 07-02 that intrastate switched access charges do not apply to calls delivered to Call Connection Companies because 1) Call Connection Companies are not end users of local exchange services, 2) such calls are not terminated to an end user's premises, and 3) such do not terminate in the LEC's certificated local exchange area. The Iowa Utilities Board ordered LECs to refund improperly billed intrastate switched access charges billed to IXCs, including Sprint.

38. For reasons identified in the Iowa Board's order, and for other reasons, calls delivered to Call Connection Companies are not subject to switched access charges under the Participating Telecommunications Companies' intrastate switched access tariffs. Sprint is presently involved in litigation with Sancom, Splitrock and Northern Valley in which it has alleged that those three Participating Telecommunications Companies have wrongfully billed Sprint intrastate switched access charges for traffic delivered to Call Connection Companies. Those cases remain pending.

39. Because the calls to the Participating Telecommunications Companies are not subject to intrastate switched access charges, SDN does not provide centralized equal access service under its South Dakota Tariff No. 2 when it delivers such calls to Participating Telecommunications Companies.

Sprint's Answer and Counterclaim (filed Nov. 23, 2009).

As a result, to evaluate the claims between Sprint and SDN, the Commission will have to determine the nature of calls between Northern Valley and Sancom and their CCC partners, and whether those LECs properly billed intrastate access charges for calls to those CCC partners. Sprint brought Northern Valley and Sancom into this case as third party defendants because it is

only fair that Northern Valley and Sancom participate in a case that will adjudicate matters that bear on their rights. By taking the odd position that they want dismissal (especially after moving to establish a procedural schedule), Northern Valley and Sancom would apparently allow the Commission to adjudicate their rights without their involvement.⁴ Sprint's preference is to have all parties in interest fully participate, but if the Commission determines Northern Valley and Sancom are entitled to dismissal, it will proceed to hearing on its defense and counterclaim.⁵

D. Northern Valley and Sancom's Remaining Arguments Repeat Arguments Made in Other Briefs

Northern Valley and Sancom's remaining arguments are simply a rehash of arguments made in support of their Motion to Compel and Motion for Adoption of Procedural Schedule. Sprint will not repeat its responses to all these arguments, but does wish to respond to Northern Valley and Sancom's argument that Sprint agreed the Commission would resolve the three referred issues when the parties jointly moved the federal court for referral or stay. Northern Valley and Sancom Opp. (filed July 14, 2011), pp. 11-13.

Even assuming that Sprint's filing in federal court could act as a grant of jurisdiction to this Commission – an extraordinary proposition – at no time did Sprint agree that the three issues were within the Commission's jurisdiction. Instead, the Court had referred the three issues to the FCC only “to the extent the FCC's jurisdiction permits.” *See, e.g., Northern Valley Referral Order*, p. 30. The parties' joint motion to either refer the intrastate issues or extend the stay asked for a “parallel” order, which would have necessarily included that same limitation – “to the

⁴ Northern Valley and Sancom's suggestion that upon dismissal the parties would immediately return to federal court and litigate is incorrect. Northern Valley and Sancom Opp. (filed July 14, 2011), pp. 13-14. Per the courts' referral and stay orders, those federal cases are stayed until the FCC cases and this case are completed.

⁵ Northern Valley and Sancom do not indicate whether they would seek to participate as intervenors if they were dismissed as defendants.

extent the Commission's jurisdiction permits." See Sprint's Response to Northern Valley's Motion to Compel (filed June 21, 2011), Ex. B, p. 7. Even if the federal courts had specifically referred the three issues to the Commission (which it did not), the Commission would still have had to determine its jurisdiction to adjudicate those issues. As Sprint has argued elsewhere, the Commission certainly has the jurisdiction to adjudicate issue 1, but cannot set a regulated retroactive rate (issue 2), and has no jurisdiction to adjudicate the equitable issues within the scope of issue 3.

CONCLUSION

For the above reasons, Sprint respectfully requests the Court grant Sprint's Amended Motion.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 29th day of July 2011, I served a true and correct copy of **SPRINT'S RESPONSE IN SUPPORT OF MOTION TO DISMISS CROSS CLAIMS** in the above-entitled matter, by email to:

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