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 MOTION TO COMPEL

Sprint Communications Company L.P. ("Sprint") responds to Northern Valley Communications, L.L.C.'s ("Northern Valley") motion to compel.[1] As between Sprint and Northern Valley, this case is about whether Northern Valley's tariffed intrastate access charges apply to the calls delivered to Northern Valley's free chat line and conference calling partners ("call connection companies" or "CCCs"). Yet Northern Valley wants this Commission to allow extensive discovery, take testimony, and issue a ruling that Sprint has been "unjustly enriched" if the calls are found not compensable under tariff. Northern Valley may be able to pursue such a claim in court, but cannot do so before this Commission, which has no jurisdiction to adjudicate such a claim. And contrary to Northern Valley's representation, no court has referred an unjust enrichment claim or unjust enrichment issues to the Commission, and no court has directed the Commission to set a retroactive "reasonable rate" if this is non-access traffic. In the event the

[1] Sancom, Inc. has joined the motion, and so Sprint is responding to the joinder as well.

Commission is intent on setting a rate for pumped non-access traffic, there is no statute or rule that authorizes the Commission to do so based on Sprint's financial information. Any proposed rate for a non-access service would have to be filed by Northern Valley, interested parties could participate, and the Commission would evaluate that rate using the tools provided by the Legislature. None of these tools is litigation of an equitable claim that looks to revenues of one potential customer. The Commission should deny Northern Valley's motion so that discovery and hearing proceed with respect to matters over which the Commission has jurisdiction, and which are within the scope of the pleadings.

I. NORTHERN VALLEY AND ITS TRAFFIC PUMPING SCHEME

Northern Valley is a competitive local exchange carrier ("CLEC") that is one of the highest volume traffic pumpers in the country. Traffic pumping schemes are generally established by LECs with high access rates that partner with CCCs to generate large traffic volumes, and then share the access revenues that are collected. Northern Valley has been pumping since 2005, and continues to generate enormous volumes of traffic.

Traffic pumpers like Northern Valley know interexchange carriers ("IXCs") like Sprint are forced to deliver CCC calls as a matter of federal law, as IXCs are barred from blocking such calls. *In re Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC 07-135, 22 FCC Rcd. 11629, 2007 WL 1880323, ¶ 1 (F.C.C. 2007) (interexchange carriers like Sprint may not engage in call blocking with respect to disputed calls). Once calls are delivered, Northern Valley claims they are subject to access charges (which they are not), or claims a right to be paid some other "non access" rate for terminating calls the IXCs do not want and believe are illegal.

A. The *Farmers* and IUB Cases

Two regulatory bodies have evaluated LEC-CCC relationships in light of tariff terms and found that calls to CCCs do not constitute compensable access. In 2009 the Federal Communications Commission ("FCC") evaluated tariff language in light of the facts regarding the delivery of calls to CCCs, the relationships between the LEC and the called parties, and the payments between the LEC and the called parties, and concluded that the CCCs did not subscribe to the services offered under Farmers' tariff, so they were neither "customers" nor "end users" within the meaning of the tariff, and thus access charges were not due. *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, FCC 09-103, 24 FCC Rcd. 14801, Second Order on Reconsideration, ¶ 10 (F.C.C. 2009) ("*Farmers II*"). The seminal state commission decision was issued by the IUB in 2009, and reaffirmed in 2011. The IUB held intrastate switched access charges do not apply to calls delivered to CCCs because: 1) the called parties are not end users of local exchange service; 2) such calls are not terminated to an end user's premises; and 3) such calls do not terminate in the LECs' certificated local exchange area. *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Final Order, Docket No. FCU-07-2, 2009 WL 3052208, at *35 (Iowa Util. Bd. Sept. 21, 2009) ("*IUB Order*").[2] Accordingly, the IUB ordered LECs to refund improperly-billed switched intrastate access charges billed to IXCs, including Sprint. *Id.*

B. The FCC's Recent Rejection of Northern Valley's 2010 Interstate Tariff

Earlier this month the FCC rejected a switched access tariff filed by Northern Valley in 2010. *In the Matter of Qwest Commc'ns Co., LLC v. Northern Valley Commc'ns, LLC*, FCC 11-87, 2011 WL 2258081 (F.C.C. June 7, 2011) ("*Northern Valley Tariff Order*") (attached as

[2] The IUB recently reaffirmed its earlier decision in all material respects. *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Docket No. FCU-07-02, Order Denying Requests for Reconsideration, 2011 WL 459685 (Iowa Util. Bd. Feb. 4, 2011).

Exhibit A hereto). Northern Valley filed a tariff in which it attempted to draft around the FCC's *Farmers II* decision. Northern Valley (through its Washington DC counsel of record in this case) decided that if it defined the term "End User" to include entities that did not pay for service, then calls to its CCC partners might be subject to access charges. *Northern Valley Tariff Order*, ¶ 4. The FCC disagreed, confirming that the presence of an End User – a customer to whom the carrier offers service for a fee – was a necessary part of an access call. *Id.* ¶ 5. Calls not delivered to such end users do not involve the provision of access service. The FCC determined that Northern Valley violated Section 201(b) of the Communications Act by trying to tariff a service that could not constitute access service. Accordingly, Northern Valley was ordered to withdraw the tariff.

II. PROCEDURAL POSTURE[3]

This matter was initiated by South Dakota Network, LLC ("SDN") against Sprint, demanding payment of tariffed intrastate centralized equal access charges. Sprint filed an answer and counterclaim, and served third-party complaints against four LECs to whom pumped calls had been delivered, including Northern Valley and Sancom. Sprint brought these parties in because SDN can only assess access charges for calls that are subject to access charges as between Sprint and the participating carrier receiving the call. *See* Sprint's Third Party Complaint, ¶¶ 18-20.

Northern Valley and Sancom filed counterclaims against Sprint, demanding payment of intrastate terminating switched access charges. On February 11, 2010, Sprint moved to dismiss those counterclaims in accordance with the state's election of remedies statute, SDCL § 49-13-1.1. Because both Northern Valley and Sancom had sought money damages in federal court for

[3] Procedural matters will be addressed further in Sprint's Response to Northern Valley and Sancom's Motion for Adoption of Procedural Schedule.

Sprint's alleged failure to pay intrastate access charges, SDCL § 49-13-1.1 prevented a damages claim in this case.

Northern Valley opposed Sprint's motion to dismiss. However, Sprint's motion to dismiss was not set for hearing because the parties anticipated federal court referral orders and were working on negotiating a procedural schedule. When the federal court's referral order was issued, it was addressed to the FCC:

> IT IS FURTHER ORDERED that this matter is referred to the FCC for resolution, to the extent the FCC's jurisdiction permits, of the following issues:
>
> (1) Whether, under the facts of the present dispute between Northern Valley and Sprint, Northern Valley is entitled to collect interstate switched access charges it has billed to Sprint pursuant to Northern Valley's interstate access tariff for calls to numbers assigned to free calling providers.
>
> (2) In the event that the services provided by Northern Valley to Sprint, by which calls placed by Sprint's customers are delivered to free calling providers served by Northern Valley, do not qualify as switched access service under Northern Valley's applicable interstate access tariff, determination of the proper classification of these services, whether such services are subject to federal tariffing requirements, and whether Northern Valley is entitled to obtain compensation for these services.
>
> (3) In the event that the services provided by Northern Valley to Sprint do not qualify as switched access service under Northern Valley's applicable interstate access tariff, but Northern Valley is otherwise entitled to compensation for these services, determination of a reasonable rate for these services.

See Northern Valley Referral Order, p. 30.[4] Following a joint motion of the parties, the federal court issued a second order. While the Court declined to refer any specific issues to the Commission, it extended the term of the stay to allow this matter to proceed to completion before taking further action:

[4] A copy of this order was attached as Exhibit C 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.

> 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.[5] As evidenced by that Order and discussed more below, the notion that the Court "specifically" referred issues to the Commission is simply not true.

The parties were unable to reach final agreement on the language for a procedural schedule, with the main point of dispute being the scope of claims and issues to be resolved by this Commission in this docket. Those issues are presently being briefed on Northern Valley and Sancom's Motion for Adoption of a Procedural Schedule, and are intertwined with Northern Valley's motion to compel. In addition, on June 14, 2011, Sprint amended its motions to dismiss Sancom's and Northern Valley's Cross-Claims to add an argument that Count III (unjust enrichment) and Count II (implied contract) seek relief the Commission lacks jurisdiction to award.

These four motions – Sprint's two motions to dismiss, Sancom and Northern Valley's Motion to Establish Procedural Schedule, and Northern Valley's Motion to Compel – give the Commission the opportunity to set the parameters of this case now in a way that will guide the parties as they proceed through discovery, pre-filed testimony, and hearing.

III. ISSUES FOR RESOLUTION IN THIS CASE

The issues before the Commission are those contained in SDN's Complaint, Sprint's Answer and Counterclaim, Sprint's Third Party Complaint, the Answers to the Third Party

[5] 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.

Complaint, and the cross-claims if not dismissed. While the Court did not refer any specific claims or issues to the Commission, Sprint expects the Commission will address intrastate issues within its jurisdiction that relate to the disputes between Sprint and the Third Party Defendants. Those issues are necessarily within the scope of Sprint's Third Party Complaints, which allege that the calls delivered through SDN to the Third Party Defendants are not subject to intrastate access charges and are not being delivered to end users of local exchange service.

Traffic pumping business plans like Northern Valley's rely primarily on the interstate access revenues, as almost all calls are generated from outside South Dakota. Though most of the dollars at issue are for interstate calls, there are critical intrastate issues between Sprint and Northern Valley to be addressed by the Commission. First, the Commission must decide whether intrastate access charges apply to calls delivered to Northern Valley's CCC partners. This is within the scope of Sprint's Answer and its Third-Party Complaint, and will guide the Court in entering judgment on Northern Valley's pending intrastate tariff claim. Second, because local exchange service is regulated by the Commission, the Commission will decide whether Northern Valley's CCC partners were end users of local exchange service. As Sprint and Northern Valley stated in their joint motion to the federal court, "the SD PUC, for example, can evaluate whether the intrastate access tariff requires that traffic be terminated to local customers to constitute access traffic, and, if so, whether the free calling providers are local customers, something over which the SD PUC has particular expertise."[6] This will impact not just the application of intrastate access charges, but may also be considered by the FCC as it evaluates the application of interstate access charges, which can apply only for calls delivered to an end user of state-regulated local exchange service.

[6] A copy of this document is attached as Exhibit B hereto.

IV. INFORMATION ON THE BENEFITS TO SPRINT OF PUMPED CALLS IS NOT RELEVANT TO ANY CLAIM OR ISSUE BEFORE THE COMMISSION

The scope of this present discovery dispute is quite narrow. Northern Valley wishes to obtain discovery it would use to support a proposed damage award in furtherance of an unjust enrichment claim. *See* Northern Valley's Mem. In Supp. of Mot. to Compel, p. 1 ("Specifically, Northern Valley requests that the PUC find that Northern Valley is entitled to discovery on issues relevant to its alternative theory of unjust enrichment, and the compensation that Northern Valley would be entitled to collect if Northern Valley's tariff does not apply."). Sprint has objected to such discovery on several grounds – not least of which is the enormous burden it would impose on Sprint to produce the massive amounts of information sought. The only objection challenged by Northern Valley at present is Sprint's relevance objection. This threshold issue should be resolved in Sprint's favor because (contrary to Northern Valley's representation) unjust enrichment issues have not been referred to the Commission by the Court, the Commission lacks jurisdiction to award equitable relief, and there is no rate setting mechanism the Commission could use to set a Northern Valley rate based on the value of calls to Sprint.

As an initial matter, Sprint does wish to be clear that because Northern Valley has challenged only one of Sprint's objections, if the Commission were to resolve this relevancy objection in favor of Northern Valley, other significant objections would remain. For example, Northern Valley's Interrogatory No. 7 (Buntrock Aff. Ex. 1, p. 9) asks Sprint to identify every phone call made by its long distance customers to its CCC partners since 2005 and determine the "gross revenues" collected for each of those calls. Sprint objected to this request on relevance grounds, but also as being overly broad and unduly burdensome. Presumably, this would require Sprint, on a customer-by-customer basis, to identify every call made since 2005, segregate calls to the specified numbers, determine whether each call was part of the customers' calling plan

(either within the allotted minutes or during free nights and weekend), and then determine the amount billed for each minute outside the calling plan. Northern Valley wants this exercise to be performed with respect to every one of the hundreds of millions of minutes of use in dispute between Sprint and Northern Valley. Interrogatory No. 7 goes on to demand that with respect to every individual Sprint customer with an unlimited local usage plan, Sprint pull out (on a per-month basis) those who made calls to Northern Valley's CCCs, the total revenue received from all such customers, and the percentage of calls that went to CCCs. Similarly, Document Request No. 26 demands production of documents sufficient to identify gross revenues received from each of its wholesale customers for traffic delivered to Northern Valley since 2005. Sprint objected to this request as overly broad and unduly burdensome. Presumably, to be "sufficient," such documents would include all contracts, invoices, and payment records, plus all Call Records from every Sprint long distance switch nationwide, which would be necessary to identify the calls from wholesale customers to Northern Valley numbers. The volume of information Northern Valley seeks is astounding, and Sprint reserves the right to submit affidavits support this objection if the relevance objection is overruled and Northern Valley challenges Sprint's remaining objections.

A. The Court Did Not Refer Any Specific Issues to the Commission

Northern Valley attempts to obtain massive amounts of Sprint's financial data by fundamentally misreading the applicable court orders. Northern Valley states: "[S]everal issues must be resolved by the PUC because they have been specifically referred to the PUC by a federal court...." Northern Valley's Mem. In Supp. of Mot. to Compel, p. 2. As shown above, this is simply wrong. The Court specifically did not refer issues to the Commission, it merely stayed the federal case to allow this docket to take its course.

This fundamental flaw pervades Northern Valley's argument, as it repeatedly suggests that the Court has directed the Commission to consider specific issues and report back to it. Northern Valley's Mem. In Supp. of Mot. to Compel, p. 10 ("specific issues related to an unjust enrichment claim were referred to the PUC (just as they were to the FCC)" (emphasis added)); *id.* ("the federal court is expecting the PUC to provide guidance on the same issues for intrastate traffic that the FCC is providing for interstate traffic" (emphasis added)); *id.* ("that guidance expressly includes whether Northern Valley is entitled to compensation if Northern Valley's tariff does not apply and a reasonable rate for such compensation" (emphasis added)); *id.* at 19 ("To resolve the issues referred to the PUC, the PUC may need to determine if Northern Valley is entitled to compensation in the unlikely event that it is determined that Northern Valley's tariff does not apply. Those issues are pending before the PUC as a result of the federal court's referral of these issues to the PUC for intrastate traffic, and the federal court has expressly asked the PUC to apply its expertise to that question." (emphasis added)). None of these statements can be squared with the actual language of the Court's referral orders.

As such, the Commission's responsibility in this docket is to resolve these issues properly before it based on the pleadings filed and applicable law. In Sprint's view, those issues include all issues within the Commission's jurisdiction related to the intrastate dispute between Sprint and Northern Valley, and resolution of those issues will be helpful to the Court. Any suggestion, however, that the Commission needs to expand the scope of this docket in order to satisfy the Court's expectations is wrong and must be rejected.

B. This Commission Lacks Jurisdiction to Award Equitable Relief

Even if the Court's referral had directed the Commission to resolve specific issues, the referral, and applicable law, limit the Commission to acting within its jurisdiction. Because the

Commission has no jurisdiction to award equitable relief, it cannot address such claims or issues, making discovery on such claims irrelevant.

While Northern Valley quotes the statement of issues referred by the Court to the FCC (at pages 7-8 of its Memorandum), it fails to quote a significant, express limitation. The Court, mindful of the jurisdictional limitations imposed on agencies by legislatures, prefaced its referral language as follows:

> [T]his matter is referred to the FCC for resolution, to the extent the FCC's jurisdiction permits, of the following issues ....

Northern Valley Referral Order, p. 30. This is fully consistent with South Dakota law, as an administrative agency, like the Commission, "may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void." *O'Toole v. Bd. of Trustees of S. Dakota Retirement Sys.*, 2002 SD 77, ¶ 15, 648 N.W.2d 342, 346 (quoting *Montana Bd. of Natural Res. and Conservation v. Montana Power Co.*, 536 P.2d 758, 762 (Mont. 1975)). To the extent the Court did refer issues to the FCC or the Commission, it was not attempting, nor was it empowered to, expand those agencies' jurisdiction, and it fully expects the agencies to decline to address issues that must be left to the Court for jurisdictional reasons.

The scope of the Commission's jurisdiction is defined by statute. *In re Establishment of Switched Access Rates for U.S. West Commc'ns, Inc.*, 2000 SD 140, ¶¶ 16-19, 618 N.W.2d 847, 851. Thus, "[t]he general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute." *O'Toole*, 2002 SD 77, ¶ 15, 648 N.W.2d 342, 346; *Thies v. Renner*, 106 N.W.2d 253, 255 (S.D. 1960). Therefore, the Commission has subject-matter jurisdiction over matters specifically conferred to it by statute, including engaging in price regulation and "approv[ing] individual prices to be charged by a telecommunications company for any emerging competitive service." SDCL § 49-31-1.4 *and* SDCL § 49-31-4. An "agency

may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction." *O'Toole*, 2002 SD 77, ¶ 15, 648 N.W.2d 342, 346 (quoting *Lee v. Div. of Fla. Land Sales & Condominiums*, 474 So.2d 282, 284 (Fla. Ct. App. 1985)).

There is no statute that provides the Commission with the jurisdiction to award equitable relief or litigate equitable claims. Accordingly, under these statutory restraints, the Commission lacks jurisdiction to award equitable relief. *Black Hills Fibercom, L.L.C. v. Qwest Corp.*, Amended Interim Decision and Order, Docket CT03-154, 2005 WL 856149, at *9 (S.D. PUC Mar. 14, 2005) ("With respect to Qwest's claims of intentional interference with business relations and unjust enrichment, the Commission finds that to the extent these claims may state causes of action under state law despite the interstate nature of the service, the Commission nevertheless lacks jurisdiction because these claims are grounded in the common law of tort and in equity, respectively"); *In re the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Commc'ns of the Midwest, Inc. Regarding Failure to Provide Service*, Final Decision and Order Granting Mot. to Dismiss, Docket CT02-021 at *8 (S.D. PUC Sep. 26, 2003) ("The issues presented by the Complaint are predominantly contract formation or equitable reliance issues as to which the special expertise of the Commission concerning telecommunications services is largely inapplicable, and where such traditional legal and equitable issues significantly preponderate, the matter is more appropriately within the province of the legal expertise and general jurisdiction of the courts.").

Because the Commission does not have jurisdiction to litigate equitable claims or award equitable relief, the Commission must reject Northern Valley's attempt to obtain discovery on its equitable claim. Under South Dakota law:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

SDCL § 15-6-26(b).

Here, Sprint's revenue information (and other information Northern Valley seeks to prove an unjust enrichment claim) is unrelated to the claims and defenses within the scope of the pleadings, and, thus, could not possibly be admissible at the hearing in this matter. Furthermore, when the Federal Court lifts its stay and proceeds, if Northern Valley's unjust enrichment claim is still pending, it can seek discovery in that forum.[7]

C. The Court Did Not Refer The Unjust Enrichment Claim or Ask the FCC to Determine Equitable Damages

Northern Valley's misreading of the Court's referral orders continues with its suggestion that the Court's referral of issue (3) encompasses damages under an equitable theory of relief. Northern Valley's Mem. In Supp. of Mot. to Compel, p. 16 ("The third referred issue would determine the compensation due Northern Valley, if any, if Northern Valley's tariff does not apply. This issue similarly, therefore, relates to the resolution of Northern Valley's unjust enrichment claim...."). It does not. As the Court itself stated:

> Here, the court does not intend to refer Northern Valley's unjust enrichment claim, the question of whether Northern Valley can recover under an unjust enrichment theory, or the question of whether this theory is barred by the filed rate doctrine. Rather, the court seeks the FCC's guidance on the issues of whether the services Northern Valley provided in this case are subject to the tariff requirements, where

[7] In addition, Northern Valley will also have an opportunity to ask the FCC to order such discovery with respect to interstate traffic, which is the vast majority of traffic in dispute.

> these services fall into the regulatory regime, and how Northern Valley can obtain compensation for these services if its access tariff does not apply.

Northern Valley Referral Order, p. 24 (emphasis added). The Court went on:

> Likewise, the court will make clear that the FCC should only consider the reasonable rate issue if it has jurisdiction to do so and its analysis on the tariff interpretation and classification of services issues requires determination of the reasonable rate.

Id. at 28 (emphasis added). In other words, the Court directed the FCC not to adjudicate the unjust enrichment claim. Issue 3 is to be addressed only if the FCC classifies pumped traffic as non-access traffic for which a rate must be set through the administrative rate-setting process. The setting of a regulated rate under the administrative rate setting process is far different than determining an equitable damage award. Because the Court did not refer the resolution of equitable claims, equitable issues, or equitable damage awards to the FCC (much less to the Commission), Northern Valley has no basis to demand discovery in furtherance of those claims. Northern Valley's motion should be denied.

D. The Commission Need Not Evaluate the Benefit to Sprint to Determine Whether Northern Valley is Entitled to a Commission-Approved Non-Access Rate

In the event the Commission were to establish a rate for Northern Valley's non-access traffic, nothing in state law authorizes discovery into Sprint's revenue information. As an initial matter, the entire notion of setting a rate as Northern Valley suggests is procedurally deficient. There is no state law authority that allows the Commission to set a retroactive regulated rate to be applied to Sprint (and Sprint alone) for non-access traffic. *See, e.g.*, SDCL § 49-31-12.2(3) (telecommunications company shall not deviate from filed rates). To obtain the right to be paid a rate for a new non-competitive service[8] under the jurisdiction of the Commission, a

[8] Northern Valley has monopoly control over access to the facilities using its assigned numbers, so this would be a non-competitive service.

telecommunications carrier must file a tariff containing a proposed rate. SDCL § 49-31-12.4. From there, the Commission could investigate the rate, and interested parties could intervene, and the filing carrier would have the burden to prove the rate is fair and reasonable. *Id.* That rate would be effective prospectively, not retroactively. Thus, Northern Valley's assumption that the Commission could establish retroactive rates is contrary to South Dakota law.[9]

If Northern Valley did make a filing and seek to establish a rate for non-access traffic, evidence of the alleged benefit to the customers buying the service would be completely irrelevant. A rate setting case under SDCL §§ 49-31-12.2 and 49-31-12.4 requires the Commission to determine and approve rates and prices pursuant to SDCL § 49-31-4. SDCL § 49-31-1.4 defines "price regulation" and sets forth five factors for the Commission to consider when determining a fair and reasonable price of a "noncompetitive telecommunications service which is not based on the rate of return regulation": (1) "the price of alternative services," (2) "the overall market for the service," (3) "the affordability of the price for the service in the market it is offered," (4) "the impact of the price of the service on the commitment to preserve affordable universal service," and (5) "the fully allocated cost of providing the service." "In order to set a 'fair and reasonable price,' the PUC is *required* to 'determine and consider' [these] five factors." *In re Establishment of Switched Access Rates for U.S. West Commc'ns, Inc.*, 2000 SD 140, ¶ 19, 618 N.W.2d 847, 851 (emphasis in original). The analysis is thus forced on the market, and the costs of the providing carrier. None of these five factors allows the Commission to consider one customer's gross revenues or profits it would obtain as a result of purchasing the service, nor are there other Commission rules that would do so.

[9] Certainly the Commission can imagine the due process concerns raised by carriers not a party to this docket (for example, Qwest, AT&T, Verizon) if the Commission were to set a rate for this traffic that could be imposed on IXCs on a retroactive basis.

Not surprisingly, Northern Valley points to no state statute or regulation that gives the Commission the authority to set a regulated rate for Northern Valley by sifting through revenue and profit information from one potential customer. Instead, Northern Valley cites to two FCC orders and one court case, all of which were decided under federal law. If this motion is really about Northern Valley's attempt to obtain discovery related to revenues for interstate traffic (as it appears), Northern Valley can and should seek this discovery from the FCC, not this Commission, in the case initiated pursuant to the referral. In any event, Northern Valley ignores a later FCC order when it relies on a footnote in the *Farmers II* decision for the proposition that the FCC has decided that "the services provided by LECs in delivering calls from the IXCs' customer to conference calling providers are compensable." Northern Valley's Mem. In Supp. of Mot. to Compel, p. 7 (relying on fn 96 of *Farmers II* decision). The FCC recently decided that these calls are not necessarily compensable, saying:

> The CLECs reason that, if a carrier is always entitled to some compensation for a service rendered, then AT&T's failure to pay any compensation for the CLECs' termination of AT&T's traffic must violate the Act. The CLECs' reasoning fails. *Qwest v. Farmers* does not hold that a carrier is always entitled to some compensation for a service rendered, even if the service is not specified in its tariff. *Qwest v. Farmers* merely holds that a carrier may be entitled to some compensation for providing a non-tariffed service, depending on the totality of the circumstances.

In re All Am. Tel. Co. v. AT&T Corp., Memorandum Opinion and Order, FCC 11-5, 26 FCC Rcd. 723, ¶ 19, 2011 WL 194539, at *5 (F.C.C. Jan. 20, 2011).

Northern Valley's other two cites fare no better. In *In re Petitions of Sprint PCS & AT&T Corp.* (discussed at p. 19 of Northern Valley's Mem.), the FCC held that AT&T did not have to pay tariffed rates to terminate Sprint's wireless calls, and that the only way for Sprint to be compensated was through a contract. Declaratory Ruling, 17 FCC Rcd. 13192, ¶ 1, 2002 WL 1438578, at *1 (F.C.C. 2002). The FCC sent the case back to the court to decide whether there

was a contract, as answering that question was a judicial function. *Id.* This Commission should similarly decline to decide issues better suited for court disposition.

Finally, Northern Valley relies on *Manhattan Telecomms. Corp. v. Global NAPS, Inc.*, No. 08 Civ. 3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010). There, the Court engaged in a traditional unjust enrichment analysis after deciding, earlier in the case, not to refer issues to the FCC. The fact that a court evaluated a party's unjust enrichment claim is unremarkable – that is what courts do. That is not, however, what agencies like this one do.

CONCLUSION

The Commission has no jurisdiction to litigate an unjust enrichment claim, has not had such issues referred to it by the Court, and cannot possibly set a regulated rate for Northern Valley based on Sprint's revenues and profits. Northern Valley's Motion to Compel should be denied in all respects.

Dated: June 21, 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 21th day of June, 2011, I served a true and correct copy of **SPRINT COMMUNICATIONS COMPANY L.P.'S RESPONSE TO NORTHERN VALLEY'S MOTION TO COMPEL with Exhibits A and B** in the above-entitled matter, electronically to:

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