

**BEFORE THE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

| | | |
|-------------------------------------|---|----------|
| In the Matter of |) | |
| The Filing by |) | |
| Northern Valley Communications, LLC |) | TC19-052 |
| for Approval of Revisions |) | |
| to Its Access Service Tariff No. 1 |) | |

**NORTHERN VALLEY COMMUNICATIONS, LLC’S
OPPOSITION TO AT&T’S AND SPRINT’S PETITIONS TO SUSPEND TARIFF**

Northern Valley Communications, LLC (“Northern Valley”), pursuant to A.R.S.D. § 20:10:01:15.04, hereby responds to the Petitions to Intervene filed by AT&T Corp. (“AT&T”) and Sprint Communications Company L.P. (“Sprint”) (collectively, “Petitioners”), which request that the South Dakota Public Utilities Commission (“PUC” or “Commission”) suspend Northern Valley’s Intrastate Access Tariff No. 1. Because neither Petitioner identifies any area of state law implicated by Northern Valley’s tariff revisions, and because Northern Valley’s interstate tariff became effective after a one-day suspension by the Federal Communications Commission (“FCC”), the open-ended suspension of Northern Valley’s intrastate tariff sought by Petitioners is entirely unwarranted. The Motions should be denied.

I. Introduction and Background

On December 27, 2019, Northern Valley filed before the PUC revisions to its Intrastate Access Tariff No. 1, reflecting certain changes to the terms and conditions of Northern Valley’s Tariff No. 1 that were made in response to the FCC’s *Access Stimulation Order*.¹

The revisions to the tariff indicated that, effective January 11, 2020, Northern Valley would no longer home to the centralized equal access (“CEA”) tandem switch of South Dakota

¹ *In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, FCC 19-94, 2019 WL 4785554, Rep. & Order and Modification of Section 214 Authorizations (rel. Sept. 27, 2019) (“*Access Stimulation Order*”).

Network, LLC (“SDN”), in Sioux Falls, South Dakota, but instead would home to the tandem switch of James Valley Cooperative Telephone Company (“James Valley”) in Groton, South Dakota, as “its intermediate Access Provider for terminating Feature Group D Interexchange traffic pursuant to 47 C.F.R. § 51.914(b)(2).”² The tariff revisions did not change any intrastate rates currently in effect.

These revisions to its intrastate tariff mirrored revisions previously made by Northern Valley to its interstate tariff. On December 27, 2019, Northern Valley filed Tariff Transmittal No. 12 to revise its FCC Tariff No. 3 to comply with the new rules adopted by the FCC in the *Access Stimulation Order*. On January 10, 2020, the FCC adopted an Order suspending Northern Valley’s proposed revisions for one day, thus depriving the tariff revisions of “deemed lawful” status.³ Nevertheless, the FCC suspend the tariff only for a single day and otherwise allowed it to become effective. It took no action to stop Northern Valley’s re-homing. Critically, under FCC precedent, the revisions Northern Valley made to its federal tariff are thus not only effective, but also legal unless and until the FCC determines otherwise following a full and fair examination of the record.⁴ Northern Valley has updated the Local Exchange Routing

² The revised tariff further indicates that, in compliance with the *Access Stimulation Order*, “Northern Valley will not bill any Interexchange Carrier for terminating switched access tandem switching or terminating switched access transport charges for any Feature Group D Interexchange traffic between the James Valley access tandem switch and Northern Valley’s end office. Further, Northern Valley shall assume financial responsibility only for the designated Intermediate Access Provider’s charges for terminating Feature Group D interexchange traffic between the James Valley access tandem switch and Northern Valley’s end office.”

³ See *In re N. Valley Commc’ns, LLC Tariff F.C.C. No. 3*, WC Docket No. 20-11, Transmittal No. 12, Order (rel. Jan. 10, 2020) (“*Norther Valley Order*”) (attached hereto as **Exhibit A**); see also 47 U.S.C. § 204(3).

⁴ See *In re Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996*, 12 FCC Rcd. 2170, 2182 ¶ 19 (1997) (“[W]here the Commission suspends and initiates an investigation of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3) . . . the LEC streamlined tariffs would not be ‘deemed lawful’ under section 204(a)(3) because they were suspended and set for investigation[, but] they would be ‘legal’ until the Commission concluded an investigation and made a determination as to their lawfulness.”).

Guide (“LERG”) and NECA Tariff No. 4 to implement the tandem re-homing. The FCC’s Order thus signifies that, while the tariff raised questions that it intends to investigate, it could not find that those issues were so significant as to warrant rejection of the tariff. As such, James Valley’s switch in Groton, South Dakota, is the *only* location under federal law in which carriers may currently deliver traffic to Northern Valley pursuant to tariff.

Notably, while the FCC’s January 10, 2020 Order provides that the FCC will investigate the question of whether Northern Valley’s proposed revisions comply with the *Access Stimulation Order*,⁵ it has not yet commenced that investigation. Northern Valley anticipates that it will do so in due course and that Northern Valley will be able to demonstrate that its re-homing to the James Valley tandem switch was fully consistent with and expressly authorized by the *Access Stimulation Order*.

On January 17, 2020, Sprint and AT&T submitted a Petition to Intervene before the PUC, requesting suspension of Northern Valley’s intrastate tariff. On January 31, 2020, Northern Valley, Sprint, and AT&T submitted a Joint Statement by which Northern Valley did not oppose the intervention of Sprint and AT&T, and the parties extended Northern Valley’s response deadline to February 12, 2020, and Sprint’s and AT&T’s reply deadline to February 24, 2020, because neither had perfected service on Northern Valley in a timely manner. On February 6, 2020, the PUC issued an order granting intervention to Sprint and AT&T and affirming the extension agreed to by the parties.

II. The Petitioners Rely Solely on an Alleged Violation of Federal Law

Under South Dakota law, upon a petition to intervene in a procedure where a telecommunications company has filed any tariff stating a new rate, price, or practice, the PUC

⁵ See generally *Northern Valley Order*.

may conduct a hearing concerning the propriety or reasonableness of the new rate, price, or practice.⁶ Pending such hearing, the PUC may suspend the tariff's operation and the use of the rate or practice.⁷ After the hearing, the PUC will determine a fair and reasonable rate or price.⁸

In this case, Sprint and AT&T allege the revisions to Northern Valley's tariff violate the FCC's *Access Stimulation Order*, not South Dakota law. Sprint's Petition alleges "the FCC found that there were substantial questions regarding the lawfulness of Northern Valley's proposed tariff revisions that require further investigation."⁹ AT&T's Petition asks the PUC to "reject or suspend the effective date of Northern Valley's tariff revisions,"¹⁰ arguing that the change in tandem "is a clear end run around both the terms and intent of the FCC's *Access Stimulation Order*."¹¹

AT&T concedes that, if the PUC decides to enter upon a hearing concerning the proprietary or reasonableness of Northern Valley's intrastate tariff revisions, "such a hearing would be duplicative of the FCC investigation."¹² Yet, AT&T claims "it would be imprudent to allow Northern Valley's proposed revisions to become effective during the pendency of the FCC's investigation into Northern Valley's comparable interstate tariff revisions."¹³ AT&T's statement is misleading and incorrect. AT&T ignores the fact that Northern Valley's interstate tariff revisions are currently legal and effective under federal law. Even though the FCC suspended the tariff for a single day, the tariff became effective on January 11, 2020.¹⁴

⁶ SDCL 49-31-12.4(1)

⁷ SDCL 49-31-12.4(2)

⁸ SDCL 49-31-12.4(4)

⁹ Sprint's Pet. to Intervene ¶ 3.

¹⁰ AT&T's Pet. to Intervene ¶ 7.

¹¹ *Id.* ¶ 5.

¹² *Id.* ¶ 7.

¹³ *Id.*

¹⁴ See *In re Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996*, 12 FCC Rcd. at 2182 ¶ 19 ("[W]here the Commission suspends and initiates an investigation of a LEC tariff within the 7

In light of this fact, it is telling that neither Sprint nor AT&T explains how their requested suspension of Northern Valley's intrastate tariff would work as a practical matter because, as a matter of current federal law, Northern Valley's interstate access traffic must be handed off in Groton, South Dakota, if it is exchanged pursuant to tariff. Therefore, it is not unreasonable for Northern Valley to also have its intrastate traffic handed off in Groton. To do otherwise would require Northern Valley to incur the considerable costs to maintain facilities between Groton and Sioux Falls, just so that it may accept the less than 1 percent (0.35%) of its traffic that is intrastate when IXCs must already deliver their interstate traffic to Groton.

Sprint and AT&T cite no authority for the proposition that the PUC should suspend Northern Valley's intrastate tariff revisions and implement a duplicative investigation regarding compliance with an FCC Order. They offer no explanation as to how this Commission would make such a determination or why it would not be bound by whatever determination the FCC ultimately makes. Indeed, as a result of the *Connect America Fund Order*, the PUC's authority over such matters appears to be quite limited and may be preempted insofar as the decision implicates the rates that Northern Valley may or may not charge.¹⁵ For these reasons, the PUC should decline the invitation to incur the time and expense of running a duplicative proceeding regarding matters that are squarely within the FCC's jurisdiction.

or 15 day notice periods specified in section 204(a)(3) . . . the LEC streamlined tariffs would not be 'deemed lawful' under section 204(a)(3) because they were suspended and set for investigation[, but] they would be 'legal' until the Commission concluded an investigation and made a determination as to their lawfulness.”).

¹⁵ See *In re Connect Am. Fund*, WC Docket No. 10-90, Rep. & Order & Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 ¶¶ 740-97 (2011), at 740 (sections of Report and Order addressing “Bill-and-Keep as the End Point for Reform” and “Federal/State Roles in Implementing Bill-and-Keep”).

III. Revisions to Northern Valley's Tariff are Fair and Reasonable

In the event the Commission nevertheless determines that Northern Valley must demonstrate that the tariff is fair and reasonable under SDCL 49-31-12.4(3),¹⁶ the result would be the same. The revisions Northern Valley made to its instate tariff are fair and reasonable. They were adopted in response to and to comply with the FCC's *Access Stimulation Order* and to conform Northern Valley's intrastate tariff to its currently-effective and legal federal tariff.

Sprint's and AT&T's arguments that Northern Valley's designation of its tandem switch in Groton, South Dakota, is somehow a violation or a "run around" of the FCC's *Access Stimulation Order* lack any merit and are clearly and demonstrably false. Sprint's and AT&T's positions share the fatal flaw of ignoring the plain language of the *Access Stimulation Order*, which made it abundantly clear that access-stimulating CLECs, like Northern Valley, are free to designate the tandem switch of their choosing, and that Northern Valley was no longer required to utilize SDN's CEA services for the delivery of tariffed interexchange traffic. The *Order* eliminated any mandatory use requirements for the CEA tandem providers in South Dakota:

To facilitate the implementation of the rules we adopt today, we modify the section 214 authorizations for Aureon and SDN—the only CEA providers with mandatory use requirements—to **permit traffic terminating at access-stimulating LECs that subtend those CEA providers' tandems to bypass the CEA tandems**. By eliminating the mandatory use requirements, we enable IXCs to **use whatever intermediate access provider an access-stimulating LEC that otherwise subtends Aureon or SDN chooses**. Eliminating the mandatory use requirements for traffic bound for access-stimulating LECs will also allow IXCs to directly connect to access-stimulating LECs where such connections are mutually negotiated and where doing so would be more efficient and cost-effective.

¹⁶ SDCL 49-31-12.4(3) ("If a telecommunications company files with the commission any tariff stating a new rate or price or any new practice affecting any noncompetitive telecommunications service, the commission ... [d]uring any hearing conducted pursuant to subdivision (1) of this section, [may] receive whatever evidence, statements or arguments the parties may offer pertinent to the investigation. The burden is on the company to prove that the tariff is fair and reasonable.").

Historically, IXCs delivering traffic to LECs that subtended the CEA tandems were required to use Aureon's and SDN's tandems, because terminating traffic to those LECs was subject to mandatory use requirements contained in the CEA providers' section 214 authorizations. **Wide Voice suggests that we “[b]reak[] the CEA monopoly” to the extent needed so that other providers can serve the access-stimulating LECs. This Order does that. Sprint suggests that we eliminate the CEA mandatory use requirements for the termination of all traffic.** There is no evidence that doing so would be in the public interest, or even that there are other tandem switching and transport providers available to serve other LECs subtending the CEA providers. This proceeding is focused on access stimulation. We, therefore, adopt rules that are narrowly focused on access stimulation.

Aureon and SDN present seemingly opposing views. Aureon wants to continue to carry access-stimulation traffic on its CEA network because it believes the traffic volumes will drive down its rates to a point where arbitrage will not be profitable. At the outset, we note there is nothing preventing a CEA provider from voluntarily reducing its rates to keep such traffic on its network rather than completely forgoing the revenue opportunity. Unlike Aureon, **SDN wants the Commission to prohibit access-stimulating LECs from using SDN's tandem.** Because we expect that our adopted rules will effectively remedy the incentives associated with the differences in tandem switching and tandem switched transport rates between CEA providers and other intermediate access providers, we decline to prohibit access-stimulating LECs from subtending CEA providers.¹⁷

As an access-stimulating CLEC, Northern Valley has no continuing obligation to utilize the SDN CEA tandem switch in Sioux Falls, South Dakota. It also makes clear that Sprint advocated to require Northern Valley to remove access-stimulating traffic from SDN's CEA network, even though it now asks the Commission to reach precisely the opposite conclusion. Northern Valley is doing precisely what these carriers requested at the FCC. They should be estopped from demanding the opposite result now.

The *Access Stimulation Order* also makes it clear that Northern Valley, as the access-stimulating CLEC – *not* the IXCs – is empowered to choose the tandem switch it will home to after the *Order's* effective date. The access-stimulating LEC's power to designate the tandem

¹⁷ *Access Stimulation Order*, 2019 WL 4785554, at *37 ¶¶ 106-08 (emphasis added).

switch of its choice is expressly codified in the FCC's new rules.¹⁸ The *Order* also expressly rejects AT&T's request to place limits on the access-stimulating LECs by mandating that they use only tandem switches in existence as of January 1, 2019.¹⁹

Northern Valley's designation of James Valley as its tandem switching provider in Groton, South Dakota, is fully consistent with the *Access Stimulation Order* and reinforced by its federally-filed, effective, and legal tariff.²⁰ Accordingly, the only "legal" place for a carrier to deliver traffic to Northern Valley pursuant to its federal tariff is Groton, South Dakota, and the same should be true of its intrastate traffic as well.

In sum, Northern Valley's designation of James Valley as its tandem switching provider is not an effort to circumvent or "run around" the terms and intent of the FCC's *Access Stimulation Order*. To the contrary, that order clearly provides that Northern Valley had no continuing duty to utilize SDN as its tandem provider,²¹ and articulated SDN's desire to have access stimulation traffic removed from its network.²² Thus, Northern Valley's designation of James Valley as its tandem provider implements, rather than circumvents, the plain language of the *Access Stimulation Order*.

¹⁸ 47 C.F.R. § 51.914(a)(2) (providing that "a local exchange carrier [] engaged in Access Stimulation . . . [s]hall designate, if needed, the Intermediate Access Provider(s) that will provide terminating switched access tandem switching and terminating switched access tandem transport services to the local exchange carrier").

¹⁹ See *Access Stimulation Order*, 2019 WL 4785554, at *12 ¶ 34.

²⁰ *In re Implementation of Section 402(b)(1)(A) of the Telecomms. Act of 1996*, 12 FCC Rcd. at 2182 ¶ 19 ("[W]here the Commission suspends and initiates an investigation of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3) . . . the LEC streamlined tariffs would not be 'deemed lawful' under section 204(a)(3) because they were suspended and set for investigation[, but] they would be 'legal' until the Commission concluded an investigation and made a determination as to their lawfulness.").

²¹ *Access Stimulation Order*, 2019 WL 4785554, at **37-39, ¶¶ 106-14.

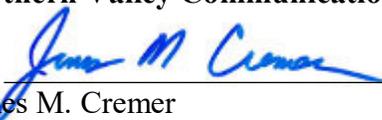
²² *Id.* at *37 ¶ 108.

IV. CONCLUSION

Nothing about the FCC's *Access Stimulation Order* prevents Northern Valley from switching its tandem from Sioux Falls to Groton, and neither Sprint nor AT&T have cited any provision of state law to grant them the relief they seek. Northern Valley's tariff revisions are fair, reasonable, and lawful and should not be suspended.

Dated: February 12, 2020

Northern Valley Communications, LLC

By: 
James M. Cremer
Bantz, Gosch & Cremer, LLC
PO Box 970
Aberdeen, SD 57402-0970
Phone (605) 225-2232
Fax (605) 225-2497
jcremer@bantzlaw.com

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Answer to the Petition for Intervention (Docket TC19-052) was delivered to the following individuals by electronic mail on February 12, 2020.

Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us
(605) 773-3201

Ms. Kristen Edwards
Staff Attorney
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
Kristen.edwards@state.sd.us
(605) 773-3201

Mr. Patrick Steffensen
Staff Analyst
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501
patrick.steffensen@state.sd.us
(605) 773-3201

Sprint Communications Company, L.P.

Talbot J. Wiczorek
Gunderson Palmer Nelson and Ashmore
506 Sixth Street
P.O. Box 8045
Rapid City, SD 57709
Phone (605) 342-1078
Fax (605) 342-9503
tjw@gpna.com

AT&T, Corp.

John D. Mason
AVP, Senior Legal Counsel AT&T Legal Department
816 Congress Ave., Suite 1100
Austin, Texas 78701
Phone (512) 457-2302
jm6361@att.com