



SIDLEY AUSTIN LLP  
1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
(202) 736 8000  
(202) 736 8711 FAX

dlawson@sidley.com  
(202) 736-8088

BEIJING  
BRUSSELS  
CHICAGO  
DALLAS  
FRANKFURT  
GENEVA  
HONG KONG  
LONDON  
LOS ANGELES  
NEW YORK  
SAN FRANCISCO  
SHANGHAI  
SINGAPORE  
SYDNEY  
TOKYO  
WASHINGTON, D.C.

FOUNDED 1866

August 4, 2009

**By Electronic Filing**

Marlene H. Dortch  
Secretary, Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Response To Letter By Northern Valley & Sancom, WC Docket No. 07-135

Dear Ms. Dortch:

AT&T submits this letter in response to the July 17, 2009 letter by counsel for Northern Valley Communications, LLC (“Northern Valley”) and Sancom, Inc. (“Sancom”).<sup>1</sup> Northern Valley and Sancom chose to litigate their access charge disputes with AT&T (and Verizon, Qwest and Sprint) in federal district court, and those cases are now pending in their home state of South Dakota. They are now apparently unhappy with that choice, having repeatedly failed in their efforts to convince the federal court that the Commission’s prior decisions entitle them to judgment as a matter of law without ever disclosing the details of their traffic stimulation schemes or proving that they, in fact, provided the access services they billed. Their current request that the Commission declare that the court got it wrong is patently improper and based solely on bluster, falsehoods, and gross mischaracterizations of the governing law.

The South Dakota federal district court has issued four separate decisions rejecting the claim by Northern Valley and Sancom that the Commission’s *Farmers* decision<sup>2</sup> compels judgment in their favor and finding that whether they provided the disputed access services is a

---

<sup>1</sup> Letter from Ross Buntrock (counsel to Northern Valley and Sancom) to Marlene H. Dortch (FCC), WC Docket No. 07-135 (filed July 17, 2009) (“CLEC Letter”).

<sup>2</sup> Memorandum Opinion And Order, *Qwest Commc’ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17973 (2007) (“*Farmers*”), *recon.* Order on Reconsideration, *Qwest Commc’ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 23 FCC Rcd. 1615 (2008) (“*Order on Reconsideration*”).

Marlene H. Dortch  
August 4, 2009  
Page 2

fact-based question that cannot be resolved prior to discovery.<sup>3</sup> As the court explained, “[a]lthough the issues that confronted the FCC in *Farmers* are similar to those at issue in this case, the court does not find that the FCC’s findings are dispositive at this stage of the litigation. In *Farmers*, both parties had the opportunity to conduct discovery, and the FCC relied on the developed record in determining that Farmers had acted lawfully under the tariff.”<sup>4</sup> The court further “stress[ed] the importance of developing the factual background in resolving issues presented in these tariff disputes.”<sup>5</sup> Other federal courts have reached the same conclusion.<sup>6</sup>

Clearly nervous about what discovery might reveal about their activities – Northern Valley and Sancom now ask the Commission to say that all of these federal court decisions are wrong. They want a Commission declaration that *Farmers* is dispositive in all traffic pumping cases, regardless of the individual facts in each case, and that it is binding precedent for all federal courts, notwithstanding that it was based on an incomplete and falsified record and is now under reconsideration. The Commission should obviously reject this extraordinary request.

Northern Valley/Sancom’s lead argument (at 2) is an incomplete Chicago Tribune quote from Dusty Johnson of the South Dakota Public Utilities Commission, stating that “[s]tarting a teleconferencing center is not illegal and charging a low price for that is not illegal.” But, as Chairman Johnson has explained, “N[orthern Valley] and Sancom fail to state the entire quotation, which in my opinion, results in a mischaracterization of what I said in that article.”<sup>7</sup> Northern Valley and Sancom omit the very next sentence in the article where Chairman Johnson

---

<sup>3</sup> See *Sancom, Inc. v. Sprint Commnc’s Co., L.P.*, 618 F.Supp.2d 1086 (D.S.D. 2009); *Sancom v. Qwest Commc’ns Corp.*, 2008 WL 2627465 (D.S.D. June 26, 2008); *Northern Valley Commc’ns LLC, et al. v. MCI Commc’ns. Servs., Inc.*, 2008 WL 2627519 (D.S.D. June 26, 2008); Order, *Northern Valley Commc’ns, L.L.C. v. Sprint Commc’ns Co., LP*, Civ. 08-1003 (D.S.D. entered July 30, 2008).

<sup>4</sup> *Sancom v. Qwest Commc’ns Corp.*, 2008 WL 2627465, \*6 (D.S.D. June 26, 2008); see also, e.g., *Northern Valley Commc’ns. LLC, et al. v. MCI Commc’ns. Servs., Inc.*, 2008 WL 2627519, \*5 (D.S.D. June 26, 2008) (same).

<sup>5</sup> *Sancom, Inc. v. Sprint Commnc’s Co., L.P.*, 618 F.Supp.2d 1086, 1091 (D.S.D. 2009). The Commission likewise has held that the issue “whether the conference calling companies were end users under Farmer’s tariffs” is a “factual” issue. *Request for Review by Intercall*, 23 FCC Rcd. 10731, ¶ 21 (2008) (“*Intercall*”).

<sup>6</sup> See *All Am. Tel. Co. v. AT&T*, Memorandum and Order, 2009 U.S. Dist. LEXIS 26034 (S.D.N.Y. Mar. 16, 2009).

<sup>7</sup> Letter from Dusty Johnson (Chairman, South Dakota PUC) to FCC Commissioners, WC Docket No. 07-135, at 1-2 (filed Aug. 4, 2009).

Marlene H. Dortch  
August 4, 2009  
Page 3

is quoted as emphasizing that “[s]pecific facts matter a lot in cases like this.”<sup>8</sup> The CLECs also omit the part of the same article describing the South Dakota Telecommunications Association’s adoption of a resolution urging its rural carrier members to avoid traffic-pumping, which stated in part that “[c]arriers engaged in such arrangements hurt the interests of all rural telephone companies in South Dakota, and jeopardize the ability of rural telephone companies to properly charge other carriers for their use of local network facilities.”<sup>9</sup>

Northern Valley and Sancom (at 3-4) then renew their complaint that the IXC’s have withheld payment of the disputed access charges, accusing the IXC’s of engaging in “impermissible self-help tactics” and “theft of access service.” But, again, they leave out the most important part: their federal access tariffs expressly contemplate that customers will withhold payment of disputed access charges,<sup>10</sup> and in such circumstances, the Commission has expressly recognized that IXC’s are entitled to withhold payment of such disputed charges.<sup>11</sup>

---

<sup>8</sup> See Carson Walker, Rural Telephone Battlefield: David vs. Goliath, Chicago Tribune, July 10, 2009, at <http://www.chicagotribune.com/news/chi-ap-sd-phonefeud.0.07102212.print.story> (Attached to CLEC Letter as Exh. 1).

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., Sancom Inc., Tariff F.C.C. No. 1., § 2.4.1(D)(6) (effective Feb. 1, 2005) (“in the event that a billing dispute concerning any charges billed to the customer by the Telephone Company is resolved in favor of the Telephone Company, any payments *withheld* pending settlement of the dispute shall be subject to late payment”) (emphasis added); Northern Valley Communications L.L.C., F.C.C. Tariff No. 2, § 2.4.1(D)(4) (effective Nov. 16, 2004) (“In the event that a billing dispute concerning any charges billed to the customer by the Telephone Company is resolved in favor of the Telephone Company, any payments *withheld* shall be subject to the late payment penalty set forth above”) (emphasis added).

<sup>11</sup> See Memorandum Opinion & Order, *AT&T Corp. v. Beehive Tel. Co., Inc.*, 17 FCC Rcd. 11641, ¶ 26 (2002) (“Beehive argues that AT&T cannot challenge the lawfulness of Beehive’s interstate access rates in 1995-1996, because AT&T refused during that time to first pay all of the charges based on those rates. Beehive’s argument fatally ignores the fact that its own Tariff contemplates that a customer may withhold payment of disputed charges pending resolution of the dispute. Under the filed rate doctrine, therefore, Beehive’s argument fails.”). Further, the decisions Northern Valley and Sancom cite apply only to tariffed access services that have actually been provided. Here, payments were withheld on the grounds that that the tariffed services were *not* provided and that *no* amounts are due under the access tariffs, and thus those decisions are not applicable here.

Marlene H. Dortch  
August 4, 2009  
Page 4

Next Northern Valley and Sancom mischaracterize recent tariff proceedings at the Commission. They assert that a Public Notice<sup>12</sup> issued by the Wireline Competition Bureau (“Bureau”) “rejected” AT&T’s claim that two incumbent local exchange carriers (“ILECs”) that appeared likely to engage in traffic pumping should be required to modify their proposed tariffs. That is false. The two ILECs filed their proposed tariffs on June 16, 2009 on 15 days’ notice to become effective July 1, 2009. In accordance with the public notice inviting comment, on June 23, 2009, AT&T filed a petition challenging the new tariff filings. AT&T proposed that the ILECs be required to modify their proposed tariffs so that their rates would automatically be reduced if they did in fact engage in traffic pumping, that certain of the proposed rate elements be reduced to correct miscalculations and violations of Commission rules, and that the Commission investigate the ILECs further to determine whether additional rate reductions might be appropriate. Although the ILECs filed oppositions to AT&T’s petition on June 26, 2009,<sup>13</sup> they *capitulated* four days later (one day before the tariffs would have become effective, absent suspension). Specifically, they filed amendments to their proposed tariffs to include the precise traffic pumping language proposed by AT&T and to correct each of the specific rate element errors that AT&T had identified.<sup>14</sup> It was in this context – the day after the ILECs *agreed* to make each of the specific tariff changes proposed by AT&T – that the Bureau issued the Public Notice declining to suspend the (revised) tariffs.

---

<sup>12</sup> Public Notice, Report No. WCB/Pricing File 09-02, DA 09-1493 (rel. July 1, 2009) (“Public Notice”).

<sup>13</sup> *See, e.g.*, Reply of Northwest Iowa Telephone Company To Petition Of AT&T Corp. To Suspend And Investigate, *July 1, 2009 Access Charge Tariff Filings*, WCP/Pricing 09-02, at 10 (filed June 26, 2009).

<sup>14</sup> *Compare* Petition of AT&T Corp. To Suspend And Investigate, *July 1, 2009 Access Charge Tariff Filings*, WCP/Pricing 09-02, at 10 (filed June 23, 2009) (“AT&T Petition”) (“both of these LECs should be required to include a provision in their tariff that requires them to file updated tariffs within 60 days if their demand increases by more than 100% compared to the demand levels on which their previous rates were set.”) *with* Geneseo Communications, Inc., Transmittal No. 14, at 1, 3 (filed June 30, 2009) (“Geneseo Amended Tariff Filing”) (“Revised . . . [r]ates . . . must be filed within 60 days of the month in which its interstate local switching demand increases to a level that is more than 100 percent over the interstate local switching demand in the same month of the previous year.”); ICORE Consulting, Transmittal No. 92, at 1, 3 (filed June 30, 2009) (same). *Compare also* AT&T Petition at 10-12 (describing errors in the method used by Geneseo to compute local switching rates) *with* Geneseo Amended Tariff Filing at 1, 3 (“revis[ing] Geneseo’s Local Switching Rate” by 30 percent, from \$0.0277 to \$0.0193). In this regard, the *only* AT&T proposal that was not ultimately implemented was AT&T’s suggestion that the Commission conduct further investigations to determine whether yet additional rate reductions should be required.

Marlene H. Dortch  
August 4, 2009  
Page 5

Northern Valley and Sancom also falsely assert (at 6-7) that the “Bureau reli[ed] on” and “reaffirmed” the *Farmers* decision in the Public Notice, which, they say, “demonstrates that the core ruling of *Farmers*[] – that LECs are entitled to terminating access when they terminate long-distance calls to conference services and chat line providers – remains applicable and intact.” In fact, the Public Notice nowhere mentions the *Farmers* decision. And the Bureau was never asked in the tariff suspension proceeding to address whether LECs are entitled to charge terminating access when they terminate long-distance calls to conference services and chat line providers.<sup>15</sup>

Finally, Northern Valley and Sancom make three equally meritless arguments that the *Farmers* decision is binding on the federal courts in the cases before them involving different CLECs, different traffic stimulation schemes, different calling service partners, and different IXCs. First, they contend that the “plain language” of the Commission’s *Order On Reconsideration* makes clear that the Commission intends courts to treat the original *Farmers* decision as dispositive in all other traffic stimulation disputes. But the *Order on Reconsideration* says no such thing. To the contrary, the Commission expressly stated that it may “change [its] decision on the merits” and that the Commission is reconsidering its factual finding that the “conference calling companies did subscribe to services under *Farmers*’ tariff.”<sup>16</sup> Further, the Commission in a subsequent order held that any attempt to read *Farmers* as a binding determination that “conference calling companies are end users” was “misplaced” because *Farmers* merely “was assuming certain facts as the parties presented them,” and “is subject to reconsideration.”<sup>17</sup>

Second, Sancom and Northern Valley contend that the Commission has only 90 days to address petitions for reconsideration (citing 47 U.S.C. § 405(b)), and that because it has not acted within that time frame, courts are required to presume that the Commission intends for the

---

<sup>15</sup> Northern Valley and Sancom also incorrectly assert that their claim that *Farmers* is controlling in their federal court cases is supported by the Commission’s decision in *North County Commc’ns Corp. v. MetroPCS*, File No. EB-06-MD-007, DA 09-719 (rel. Mar. 30, 2009). But that decision also does not mention, cite to, or otherwise rely on *Farmers*. Moreover, that decision *dismissed* and *denied* the claims by the traffic pumping LEC that it was entitled to payment. *Id.* ¶ 1 (“we dismiss in part and otherwise deny the claims”).

<sup>16</sup> *Order on Reconsideration* ¶ 6 & n.25. *See also id.* ¶¶ 7, 11 (discussing that its initial order was based on “backdated” documents submitted by *Farmers* and Merchants that raise questions about the “integrity of [the Commission’s] process”).

<sup>17</sup> *Order, Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, 23 FCC Rcd. 10731, ¶ 21 (2008).

Marlene H. Dortch  
August 4, 2009  
Page 6

original *Farmers* order to be binding precedent. No such presumption is possible here in light of the Commission's other actions, discussed above, confirming that *Farmers* is not settled. In any event, the Commission did comply with the 90 day deadline set forth § 405(b), which states, in relevant part, that “[w]ithin 90 days after receiving a petition for reconsideration of an order concluding . . . an investigation under section 208(b), the Commission shall issue an order granting or denying such petition.”<sup>18</sup> The Commission received Qwest's petition for reconsideration on November 1, 2007, and the Commission “issued an order . . . granting” Qwest's petition for reconsideration on January 29, 2008 – 89 days later – in compliance with section 405(b).<sup>19</sup>

Third, Northern Valley and Sancom argue that, notwithstanding that *Farmers* is actively being reconsidered by the Commission, “the FCC's rules require compliance with final orders, regardless of whether a petition for reconsideration is pending.” But the Commission rule they cite (47 C.F.R. § 1.429) governs only reconsideration in Commission *rulemaking* proceedings, and *Farmers and Merchants* is, of course, an order in a complaint proceeding.

Respectfully submitted,

/s/ David L. Lawson

---

<sup>18</sup> 47 U.S.C. § 405(b).

<sup>19</sup> Relatedly, Sancom argues (at 6) that the Commission has violated § 405(b) by not taking action on submissions that Qwest made after the Commission granted Qwest's petition for reconsideration. But as the Commission explained in the *Order on Reconsideration* (at n.25):

If the Commission grants a petition for reconsideration in whole or in part, it need not rule on the merits immediately, but may “[o]rder such other proceedings as may be necessary or appropriate.” 47 C.F.R. § 1.106(k)(iii). If the Commission does initiate further proceedings, “a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission . . . may affirm, reverse, or modify its original order. . . .” 47 C.F.R § 1.106(k)(2).