

TC05-017

Issued by the
UNITED STATES DISTRICT COURT

DISTRICT OF

South Dakota

S&S Communications

SUBPOENA IN A CIVIL CASE

V.

Local Exchange Carriers Association, Inc.

Case Number:¹ 02-1028

RECEIVED

TO: South Dakota Public Utilities Commission

JAN 18 2005

SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

YOU ARE COMMANDED to appear in the United States Districtcourt at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
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YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

(1) All documents submitted to the South Dakota Public Utilities Commission by or on behalf of S&S Communications (SDPUC), (2) unredacted versions of all orders issued by the SDPUC relating to S&S Communications, (3) all transcripts of hearings involving S&S Communications.

PLACE c/o Darla Rogers, 319 South Coteau St., Pierre, South Dakota	DATE AND TIME 1/24/2005 10:00 am
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YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME
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Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
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ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Darla Rogers, 319 South Coteau St., Pierre, South Dakota. (605) 224-7889.

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on next page)

¹ If action is pending in district other than district of issuance, state district under case number.

PROOF OF SERVICE

DATE 1-18-05

PLACE puc offices, Pierre SD

SERVED
Pam Bonrud
SERVED ON (PRINT NAME)

Personal
MANNER OF SERVICE

Parla P. Rogers
SERVED BY (PRINT NAME)

Attorney
TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 1-18-05
DATE

Parla P. Rogers
SIGNATURE OF SERVER

319 S. Coteau
ADDRESS OF SERVER

Pierre, SD 57501

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to comply production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

- (i) fails to allow reasonable time for compliance,
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend

trial be commanded to travel from any such place within the state in which the trial is held, or

- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific event or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
- (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to the subpoena, quash or modify the subpoena, or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the person demanding a party to contest the claim.

FILED

JAN - 3 2005


CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
NORTHERN DIVISION

S&S COMMUNICATIONS,

CIV 02-1028

Plaintiff,

ORDER

-vs-

LOCAL EXCHANGE CARRIERS
ASSOCIATION, INC.,

Defendant.

We have pending motions. Plaintiff seeks a protective order (Doc. 86) to provide that plaintiff need not respond to interrogatories 13, 14, and 15 of the first interrogatories of defendants and need not respond to requests 26, 27, and 28 of defendants' first request to plaintiff to produce. In the same motion, plaintiff seeks an order to prevent discovery of the plaintiff's proceeding before the South Dakota Public Utilities Commission ("PUC") which resulted in the revocation of plaintiff's certificate of authority to do business.

Defendants filed a "corrected" document (Doc. 91) to oppose the motions of plaintiff and, in the same document, moved for an order to compel plaintiff to respond to the discovery which was described in Doc. 86.

The requests for production and the interrogatories in question are substantially overly broad and substantially overly burdensome to plaintiff. A protective order should be entered to protect plaintiff from annoyance, oppression, and undue burden and expense, all of which would be substantial. Justice requires the same. Let me point out that plaintiff would not know "all facts relevant to the order issued by the South Dakota Attorney General and/or Public Utilities Commission on or about June 10, 2003" or "any other documents relevant to such order." Plaintiff would be required to know and explain what was in the minds of these public officials. How would plaintiff know what these officials and their staff members thought might be or was relevant? The request for plaintiff to "identify any person with knowledge relating to such order"

would include any person reading any daily newspaper in South Dakota in the applicable time frame. Likewise, the request for plaintiff to "state the knowledge you believe such person has" would require plaintiff to guess what each newspaper reader or viewer of a television news report retained from the many stories. All of these interrogatories in question are entirely over broad and oppressive. Interrogatory 15 seeks information about beating a dead horse. It is clear that plaintiff and its principals have been prohibited from further providing long distance telephone service within South Dakota. This interrogatory is also oppressive and would be only a matter of annoyance. It could not possibly lead to the discovery of any admissible evidence.

These disputes, like most discovery disputes, arise out of the failure of counsel to narrowly tailor interrogatories and requests to produce. Counsel should examine the language used to be able to predict what the reaction of opposing counsel (and perhaps the court) might be.

We are talking about documents on file with a public agency. The fact that the PUC may have issued redacted orders does not mean they are not discoverable in an action pending in federal court. If defendants desire certain documents in the possession of the PUC, the proper procedure is and would have been to serve and file a subpoena duces tecum. If the PUC objects to the subpoena or portions of it, it will say so and I will rule on those matters. Defendants can then reimburse the PUC for the reproduction costs of any documents produced in response to the subpoena or pursuant to a court order. All of this would have been far more economical than what has gone on here with regard to these discovery disputes. The court is certainly not going to rule (in connection with the sought after protective order) now that all documents the PUC has with regard to plaintiff are not discoverable. If the PUC has no objection, the files will be produced.

The protective order should also be granted for the same reasons set forth above as to the requests for documents as contained in requests 26, 27, and 28. Plaintiff would otherwise also be required to produce all documents which are already in the "public sector" and already in the possession of or readily available to defendants. Likewise, plaintiff would have no way of identifying or producing all documents submitted to the Attorney General or the PUC. That could include legal advice from attorneys and other confidential information not available to plaintiff or probably anyone else. It could include unsolicited comments from the general public.

I know of no dispute or problem with regard to the financial records of plaintiff. Apparently, they have been produced. The parties have spent considerable time discussing abstract questions under the Fifth Amendment and whether a witness will provide answers during a deposition or at trial or both. None of these questions are now before the court and the court declines to provide any advisory opinion. Obviously, the credibility of any witness in a civil case may be attacked by a finding that the party or the witness provided false and misleading information, especially to the PUC, an important regulatory agency of the State of South Dakota. It is also obvious that an attorney must be very careful in instructing any witness to not answer a question at a deposition. Claimed lack of relevance is not a basis for that. Claims of privilege are. *See* Fed.R.Civ.P. 30(d)(1).

Plaintiff has also filed a motion (Doc. 94) to compel defendants to make themselves available for depositions. It would seem that the simple solution, in dealing with an attorney who will not agree to a schedule of depositions, is to notice the depositions and take whatever action is required to ensure the appearance of the witness. If counsel from out of state do not wish to attend any scheduled deposition, that is their right. The court is certainly not going to order some unknown person (all defendants being corporate entities) to appear at some unknown time and place. Plaintiff should long ago have acted to solve the claimed deposition problems by exercising rights available under the Federal Rules of Civil Procedure. The motion is entirely without merit and should be denied.

The court should have acted more expeditiously as to these discovery disputes. The press of trials, especially criminal cases required to be tried promptly, has prevented that. The parties obviously should now attempt to agree on an extension of the deadlines. If the parties cannot agree, the matter should be submitted to the court by motion.

Now, therefore,

IT IS ORDERED, as follows:

1) The motion for a protective order (Doc. 86) is granted, in part. Plaintiff need not respond to interrogatories 13, 14, and 15, or requests to produce as contained in requests 26, 27, and 28.

2) The motion for a protective order (Doc. 86) is denied as to preventing discovery of what took place before the PUC as to plaintiff.

3) The motion (Doc. 91) of defendants to compel plaintiff to respond is denied.

4) The motion (Doc. 94) to compel depositions and seeking some extension of dates without specificity is denied.

5) The parties shall attempt to stipulate to new deadlines or file a motion amend the Rule 16 scheduling order.

Dated at Aberdeen, South Dakota, this 30th of December, 2004.

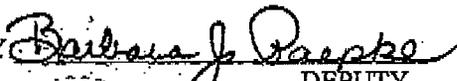
BY THE COURT:



CHARLES B. KORNMANN

United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY 
DEPUTY
(SEAL)