**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF SPRINT COMMUNICATIONS COMPANY L.P.'S PETITION FOR CONSOLIDATED ARBITRATION PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996, AND THE APPLICABLE STATE LAWS FOR RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH CITY OF BROOKINGS UTILITIES D/B/A SWIFTEL COMMUNICATIONS	)	Docket No. TC06-176

SPRINT'S RESPONSE TO SWIFTEL'S MOTION TO COMPEL

Sprint Communications Company L.P. ("Sprint") hereby submits its Response to Swiftel's Motion to Compel in the above-referenced Docket.

On December 22, 2006, Swiftel served Sprint with its discovery in this arbitration proceeding. Sprint timely responded to the data requests, subject to and without waiving the objections Sprint raised in its responses. On January 9, 2007, Swiftel filed its Motion to Compel Discovery (the "Motion to Compel").

Sprint properly objected to several requests. Notwithstanding, Sprint is providing additional information as part of this response. By providing this additional information, however, Sprint does not waive its original objections or waive its right to contest the admissibility of the information should Swiftel attempt to offer any of it into evidence in this proceeding.

LEGAL ANALYSIS

"South Dakota Codified Law § 15-6-26(b)(1) establishes the general scope *and limits* of discovery." Score, 2003 SD 17, ¶ 20 (*emphasis added*). The rule states,

> (1) In general. 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. ...

S.D.C.L. § 15-6-26(b)(1). "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders...." Id. (*citing* S.D.C.L. § 15-6-26(c)). Specifically, S.D.C.L. § 15-6-26(c), provides the Court discretion to protect a party from annoyance, undue burden, or expense.

In addition, South Dakota has long recognized the importance of confidentiality that surrounds trade secrets. It explicitly enacted a statute that provides a trade secret holder a privilege, "...to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him...." S.D.C.L. § 19-13-20. It likewise provided the courts a means by which to protect this trade secret privilege, as well as other confidential information. S.D.C.L. § 15-6-26(c). Specifically, S.D.C.L. § 15-6-26(c), states,

> Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) That the discovery not be had; ...
>
> (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ...

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; ....

Notably, the statute grants the court the authority to make "any order," including an order that prohibits discovery, that justice so requires. Id.; Public Entity Pool for Liability v. Score, 2003 SD 17, ¶ 21, 658 N.W.2d 64, 72. Under A.R.S.D. 20:10:01:22.01, this Commission likewise maintains the same authority to protect confidential and privileged information.

The contracts Swiftel seeks contain trade secrets and other confidential and proprietary information. Sprint is obligated under those contracts to take all steps necessary to ensure that the same is protected. To illustrate, under the Letter of Intent that Sprint entered into with MCC, Sprint is duty bound to protect the proprietary and confidential nature of the information exchanged between the two parties. The subject contract further expounds on the duty to protect the information exchanged. There under, Sprint is contractually obligated to refrain from taking any actions that would result in a waiver of the protections that are afforded to the proprietary and confidential information.

Moreover, the South Dakota Supreme Court has recognized that an entity who discloses trade secret information can be held liable for the disclosure. Mid-america Marketing Corp. v. Dakota Industries, Inc., 281 N.W.2d 419, 426 (S.D. 1979). As such, Sprint's disclosure of the contracts Swiftel seeks would not only breach the contracts between Sprint and third parties, it could also subject Sprint to potential civil liability.

It needs to be recognized that the majority of the requests and interrogatories where Swiftel seeks to compel responses revolve around producing or comparing agreements with numerous entities that are not parties to this action. It should come as no surprise to Swiftel, that confidentiality requirements arise in the highly-competitive telecommunications market.

These confidentiality requirements obligate companies to object to providing information that contains trade secrets and confidential information of entities that are not parties to proceedings, such as this arbitration.

DISCOVERY DEMANDS

Discovery Request 4

Swiftel requests Sprint to identify any contracts and billing agreements that Sprint has entered into with any "third party customers." Sprint properly objected to this request and further responded that it has an agreement with MCC. Sprint did not understand the question to require the exact title of the agreement which it appears Swiftel is now requesting. Thus, in a good faith attempt to resolve this dispute, Sprint responds that the agreement Sprint identified in response to this request is: MCC TELEPHONY, INC. SPRINT COMMUNICATIONS COMPANY, L.P. LETTER OF INTENT

Discovery Request 5

Swiftel requests Sprint to identify any residential or business entities other than "third party customers" to whom you will provide service. Sprint renews its objection that the term "services" is vague. In its Motion, Swiftel explains that it did not intend the question to be limited to cable companies. In an attempt to resolve this issue, Sprint further responds that it will provide its services in connection with MCC initially to residential customers in Swiftel's territory. Sprint has already begun to provide its services in connection with MCC to residential customers in Qwest's territory. In addition, Sprint provides long distance service to residential and business consumers in South Dakota.

Discovery Requests 13, 14 and 15

In the requests, Swiftel asks Sprint to:

List the retail telecommunications services that you intend to provide to end users of MCC or other telecommunications carriers or service providers. State the rate that you intend to assess for each service listed. (Request 13)

List the wholesale telecommunications services that you intend to provide to telecommunications carriers or services providers. State the rate that you intend to assess for each service. (Request 14)

List the wholesale telecommunications services that you intend to provide to MCC. State the rate that you intend to assess for each service listed. (Request 15)

Sprint maintains its objection to providing rates to Swiftel as this is highly competitively sensitive information that has no bearing whatsoever on the interconnection issues in this proceeding. With respect to Swiftel's statement that Sprint attempts to evade the questions, Sprint is at a loss as to what else it can provide. First, Swiftel did not define the word "retail," therefore, Sprint listed the functions it provides and explained that it provides the functions indirectly to the public through MCC and also directly to the public even though the retail relationship is between MCC and the subscribers. Sprint's response explains the relationship. It cannot be expected to fit the arrangement into an undefined term.

The Western District of New York Court recently observed, Sprint's services would be available to any end user within the specified territories, albeit through Sprint's business relationship with the cable company (in that case, Time Warner). See copy of Decision attached hereto. Indeed, added the Court, "neither Sprint nor Time Warner, by themselves, will be providing all of the network components of a competitive local exchange company. Rather, Time Warner will provide the local loop, and Sprint will provide the end office switch and interconnection trunk." The Court therefore held that it was proper to consider the Sprint

services that the end users would obtain "since, under this business arrangement, the services being purchased are being provided only through the combined efforts of both companies, even though the end users deal directly only with Time Warner."[1]

With respect to Swiftel's request 14, Sprint intends to provide any of the wholesale services Sprint offers cable companies that the particular cable company wishes to purchase. See Attachment 1 to the Sprint's responses to Swiftel's discovery. Finally, Sprint will provide a copy of Sprint's filed tariffs in South Dakota to Swiftel. Sprint would also refer Swiftel to Sprint's agreements with Qwest and PrairieWave that are filed in South Dakota. See SDPUC Docket No. TC04-002 and Docket No. TC06-067.

Discovery Requests 18 and 20

Request 18 asks, "At page 18 of the Arbitration Petition, you state that "Sprint will provide industry standard call records that can be used for billing purposes. Sprint also agrees to provide the necessary records for audit purposes to ensure accurate billing." Identify all information that would be provided by Sprint as part of "industry standard call records." Identify all records that would be provided by Sprint as "necessary records for audit purposes." State how wireline and wireless traffic will be identified in the records. State the format (paper or electronic) that the data will be provided."

Request 20, asks "At page 19 of the Arbitration Petition, you state that "Sprint will provide industry standard call records that can be used for billing purposes or the development of factors (percent interstate usage ("PIU") and percent local usage ("PLU"). Sprint also agrees to provide the necessary records for audit purposes to ensure accurate billing." Identify all information that would be provided by Sprint as part of "industry standard call records". Identify

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[1] Berkshire Tel. Co. v. Sprint Commc'ns Co., L.P.,No. 05-cv-6502, 2006 WL 3095665 at 6. (W.D.N.Y. Oct. 30, 2006)

all that would be provided by Sprint as "necessary records for audit purposes." State how traffic subject to interstate access charges will be distinguished from traffic subject to intrastate access charges in the records and the format (paper or electronic) that the data will be provided."

Sprint responded to these interrogatories explaining that SS7 information would be delivered that could be captured in the LEC's Automated Messaging Accounting (AMA) records to render a bill using exchange message records, an industry standard or, an option exists where the LEC can use billing factors provided by Sprint to render a bill.

While Sprint believes this response is adequate, in an attempt to resolve this issue, Sprint supplements its response as follows: Sprint's proposed solution for multi-use and multi-jurisdictional trunking is consistent with current industry practices in that Sprint and/or Swiftel will utilize standard industry information that can be used by Swiftel to accurately bill all traffic passed to Swiftel by Sprint over the proposed interconnection trunks. Sprint will populate all mandatory and some optional SS7 signaling fields. This information can be used by Swiftel to create its own records to invoice Sprint for the traffic or Sprint can utilize this information to develop factors by which Swiftel can invoice Sprint. Swiftel will have the right to validate the accuracy of the factors by auditing the records Sprint used to calculate the factors. Below is a list of the mandatory and optional parameters used in SS7 ISUP signaling that may be used for billing purposes:

- Mandatory
    - Called Party Number (CLD)
- Optional
    - Calling Party Number (CPN)
    - Charge Number (ChN)
    - Carrier Identification
    - Originating Line Information (OLI)

The field necessary to differentiate between wireless and wireline traffic is the Originating Line Information parameter. (OLI) This is an optional field that Sprint will populate.

The field necessary to determine the originating location is the Calling Party Number (CPN). Sprint will populate this field.

The field necessary to determine the terminating location is the Called Party Number (CLD). Sprint will populate this field.

Although not necessary for residential traffic, another field that could be useful for future business traffic identification is the Charge Number (ChN). Sprint will populate this field if necessary.

Discovery Requests 23, 24 25 and 26

In these Requests, Swiftel demands Sprint to provide a list of manufacturer and model numbers for equipment installed or required to be installed to deliver services to MCC or MCC end users, including but not limited to switching equipment, a list of all equipment and facilities owned or leased by Sprint which are available for use to deliver traffic exchanged under the Agreement, a list of all equipment Sprint intends to uses to deliver traffic exchanged under the Agreement or to receive traffic; and a list of the locations of all equipment identified in Questions 24 and 25.

Sprint maintains its objection that these questions are not relevant to the interconnection issues in this proceeding. The questions are also burdensome in that the equipment and facilities are not defined terms. Notwithstanding, after reading Swiftel's argument, which provided more information, Sprint supplements its response as follows: Sprint's switch located at 101 Holmes Road, Kansas City, MO 64106 will be used to deliver and receive traffic to and from MCC end-users and to and from Swiftel. Nortel Networks is the manufacturer. The Model is

Communication Server 2000 - Compact (CS2Kc). Sprint understands that Swiftel can go to www.nortel.com to obtain additional information about the switch. In addition to the switch, a facility of the required capacity will be provisioned at Sprint's POP which is located at 1000 North Cliff Avenue, Sioux Falls, S.D. 57103.

PDR 1

In PDR 1, Swiftel requested Sprint to produce all documents Sprint references in responding to any interrogatory, identified in any interrogatory response, relevant to any interrogatory response, or that Sprint contends support responses to the interrogatories propounded herein. Swiftel complains that Sprint does not identify whether the documents are provided in support of a.,b.,c., or d.

Sprint maintains its objection that a blanket request for all documents relevant to any interrogatory response (1.c.) is overly broad and burdensome. Further, because many of the interrogatories are irrelevant themselves as explained in Sprint's responses, production of any documents related to those documents would also be burdensome. With respect to Swiftel's request to identify whether the documents provided support a.,b.,c., or d, Sprint responds the documents provided support: a., b., c., and d.

PDR 3

Swiftel requests Sprint to provide a diagram of the facilities identified in Question 24 and 25. Sprint retains its objections to this request and notes that does not a have a diagram to produce in response to this request. While Sprint does not have a diagram specific to South Dakota or Swiftel, Sprint has provided as attachment POD 8 a diagram showing how the network would work. Additionally, Sprint is providing with this response a call flow chart labeled as POD 8.1. (document is confidential).

PDR 4 and 6

Swiftel requests Sprint to provide a copy of the contract and other documents… which establish and govern the operations and business relationship between Sprint and MCC for the provision of CLEC service in the Brookings exchange territory. Swiftel also requests all agreements between Sprint, including its affiliates and MCC including its affiliates that are required to implement the delivery of services as outlined in its Petition.

Sprint maintains its original objections to these requests. Regarding the contract that exists between MCC and Sprint, Sprint is under an obligation in that contract to treat the contract as confidential. It should not come as a surprise that MCC wishes to prohibit its primary competitor from obtaining access to key business terms, including pricing, term of the agreement, termination provisions, and launch default provisions. These terms all are central to the business deal between Sprint and MCC and are highly proprietary and incredibly sensitive for competitive purposes.

Sprint stands by its position that in determining the rights on its interconnection agreement the MCC agreement with Sprint is not relevant or likely to lead to admissible evidence. Moreover, the confidential nature of the document prevents Sprint from unilaterally making a decision to disclose the agreement. If the Commission should order disclosure of the agreement, it should allow Sprint and MCC to confer and redact items that are confidential or competitively sensitive material. S.D.C.L. § 15-6-26(c). Such a right is consistent with the Protective Order this Commission has previously entered. That Order states: "This Order does not waive any party's rights to … redact competitively sensitive material from the Designated Material." See Protective Order at paragraph 9.

There are no other competitive service providers in S.D. that Sprint is providing service to at this time; however, Sprint offers its various services to all cable companies as evidenced in Attachment 1.1 to Sprint's discovery responses.

PDR 5

Swiftel requests Sprint to provide an actual fully populated call record sample (AMA CDR) for each and every call type Sprint is proposing to transport over the multi-jurisdictional, multi-use trunk you are describing. Sprint responded that it did not have a sample. The fact that Sprint expressed concerns about the possibility of releasing customer or carrier proprietary information does not change the fact that Sprint does not have a sample.

PDR 8

Swiftel requests Sprint to provide diagrams detailing how the Sprint/MCC network will process all call types for its subscribers. Sprint maintains its original objections, however, to attempt to resolve this issue, Sprint provides Attachment POD 8.1 to this response. It should be noted that N11 calls are typically translated into 800 calls and terminated to the correct destination. Sprint has not determined the specific requirements for each N11 call. Further, Sprint will not route operator, DA and 911 calls over the proposed interconnection trunks.

Respectfully submitted this 12th day of January, 2007.

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The undersigned certifes that on this 12th day of January 2007, a copy of the foregoing was served electronically to:

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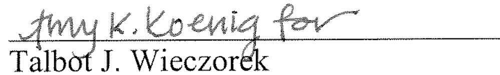
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Doc# 416872v1, 1544-060005

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BERKSHIRE TELEPHONE CORPORATION, et al.,

Plaintiffs,

-vs-

No. 05-CV-6502 CJS

DECISION AND ORDER

SPRINT COMMUNICATIONS COMPANY, L.P.,
NEW YORK PUBLIC SERVICE COMMISSION,
et al.,

Defendants.

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INTRODUCTION

This is an action pursuant to § 252(e)(6) of the Telecommunications Act of 1996 ("the Act"), 47 U.S.C. § 251 *et seq.*, in which plaintiffs seek judicial review of a decision by the New York Public Service Commission ("PSC") pertaining to interconnection agreements between plaintiffs and Sprint, who are competing providers of local telephone service. The following applications are now before the Court: 1) plaintiffs' motion for summary judgment [#25]; 2) PSC's cross-motion for summary judgment [#30]; and 3) Sprint's cross-motion for summary judgment [#33]. For the reasons that follow, plaintiffs' motion is denied and defendants' motions are granted.

BACKGROUND

This action involves a dispute between plaintiffs and defendant Sprint, all of whom are "local exchange carriers" ("LECs") within the meaning of the Act. Such LECs "are companies that provide local telephone service." *Global NAPs, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 93 n. 1 (2d Cir. 2006). The act "established two types of local-exchange carriers: incumbents (or ILECs) and competitors (or CLECs). Before the 1996 Act, the ILECs held exclusive local telephone franchises. The 1996 Act, however, preempted local laws establishing the franchises and permitted the CLECs to interconnect their networks to that of the ILECs." *Id.* In this regard, the Act was intended

> to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies. A major purpose of the 1996 Act was to end local telephone monopolies and develop a national telecommunications policy that strongly favored local telephone market competition. Toward this end, the 1996 Act imposes, among other things, a duty on ILECs (such as [plaintiffs]) to provide interconnection with their

> networks and to negotiate in good faith the terms and conditions of the agreements with CLECs (such as [Sprint]). 47 U.S.C. § 251(a)(1), (c)(1) (2006). If the parties cannot agree, either party may petition the state commission charged with regulating intrastate operations of carriers to arbitrate any unresolved issues. [47 U.S.C.] § 252(b)(1).

Id. at 94 (citations omitted). In the instant case, Sprint petitioned defendant PSC to arbitrate various issues, after Sprint and plaintiffs were unable to come to terms on an interconnection agreement. The PSC eventually resolved those issues in Sprint's favor, which led plaintiffs to commence the subject proceeding.

Before addressing the specific legal issues raised by plaintiffs, it is necessary to discuss Sprint's relationship to another key player in this dispute, Time Warner Communications ("Time Warner"). Essentially, Sprint and Time Warner have entered into an agreement whereby they each provide to the other certain aspects of local telephone service. Sprint provides certain "telecommunications services," namely: "interconnection to the public switched telephone network (PSTN), number acquisition and administration, submission of local number portability orders to the ILEC, inter-carrier compensation for local and toll traffic, 911 connectivity, operator services, directory assistance and the placement of orders for telephone directory listings." (Joint Record, Ex. 1, p. 6) Time Warner provides the remaining aspects of local telephone service, consisting of "the 'last mile' network over Hybrid Fiber Coaxial [cable], marketing and sales, end user billing and customer service." (Joint Record Ex. D, p. 2) Under this arrangement, Sprint does not have a direct business relationship with the end-user consumers who will be benefitting from Sprint's services, but rather, those consumers deal directly with Time Warner.

Pursuant to its agreement with Time Warner, Sprint was required to obtain all

necessary interconnection agreements, including those at issue here.[1] That is, Sprint and Time Warner agreed that Sprint would negotiate and enter into interconnection agreements on their behalf with ILECs. Accordingly, Sprint requested that the plaintiff ILECs enter into such agreements. Plaintiffs and Sprint negotiated but were unable to come to terms, in large part because plaintiffs objected to the fact that Sprint did not have a direct relationship with Time Warner's end-user customers. As a result, Sprint petitioned defendant PSC to arbitrate the dispute.

The parties raised various issues before the PSC, but only three are significant to the instant action. First, plaintiffs argued that, under 47 U.S.C. § 251(a), they were not required to enter into interconnection agreements with Sprint because Sprint was not a "telecommunications carrier." Second, plaintiffs asserted that, even if Sprint was a telecommunications carrier, Sprint was not able to assert rights under 47 U.S.C. § 251(b), since those rights belonged only to Time Warner. And finally, plaintiffs maintained that the definition of "local traffic" in the interconnection agreements, which definition affects reciprocal compensation obligations under 47 U.S.C. § 251(b)(5), should not include "extended area service" ("EAS") calls, which are inter-exchange calls billed as local calls, rather than as toll calls.

With regard to this first issue, in the proceeding before the PSC, plaintiffs admitted that Sprint would be a "telecommunications carrier" if it was acting as "the ultimate provider of end user services." However, they claimed that Sprint was not a telecommunications carrier when it acted as a mere "'transit provider' for other service

[1] "Sprint's business arrangements as a provider of PSTN services requires Sprint to meet all inter-carrier contractual obligations, including obtaining all necessary ICAs." (Joint Record, Ex. D, p. 6)

providers", such as Time Warner. (Joint Record, Ex. B, p. 5) Plaintiffs argued that when Congress enacted the Act, it did not "contemplate[ ] that end user service providers [such as Time Warner] could [use such arrangements as that between Sprint and Time Warner to] skirt their obligations to request and negotiate competitive interconnection agreements with the ILEC." (*Id.* at 6) Rather, plaintiffs stated, the Act requires "a Telecommunications Carrier [such as Time Warner] that provides end user services to request . . . interconnection agreements *directly* with the ILEC." (*Id.*) (Emphasis added) In short, plaintiffs argued that under the Act, they had the right to "deal directly with the requesting telecommunications carrier [i.e. Time Warner] that intends to serve the end user for which that carrier and the [plaintiffs] will compete." *Id.* [2]

In their initial brief before the PSC, plaintiffs argued that Sprint was not a telecommunications carrier, solely because Sprint had no direct relationship with Time Warner's end-user customers. (Joint Record, Ex. B) Plaintiffs did not make any argument as to whether or not Sprint was a common carrier. (In that regard, and as will be discussed further below, it is undisputed that a telecommunications carrier must also be a common carrier.) However, in a footnote in their reply brief, plaintiffs raised the common carrier issue, stating: "Conspicuously absent from Sprint's Petition and

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[2]Plaintiffs did not contend that there was anything improper about the contract between Sprint and Time Warner *per se*, but argued that Time Warner was the appropriate party with whom they were entitled to negotiate the interconnection agreement: "Nothing stops the ultimate provider of end user service from utilizing Sprint, but the competitive interconnection is only between the third party (i.e., the ultimate provider of end user service) and the [ILECs]. The only thing stopping that from occurring is Sprint's insistence that, contrary to law, its private 'third party business arrangements' trump the rights and obligations of the [ILECs] to deal directly with the requesting telecommunications carrier that intends to serve the end user for which that carrier and the [ILEC] will compete." (Joint Record, Ex. B, p. 6); *(see also, Id.* at 8) ("Generally, the Act requires negotiation under the Act by the ultimate providers of end user service and clearly does not require and [ILEC] to accommodate . . . novel 'third party business arrangements.'")

Submission is any demonstration of whether, when Sprint acts as a 'facilitator' for a third party carrier like [Time Warner], those arrangements will be provided on a common carrier basis." (Joint Record, Ex. E, p. 2 n. 4)

Following the submission of briefs to the PSC, the parties met with an Administrative Law Judge ("ALJ") to discuss the issues. Counsel for the parties informed the ALJ that they would rely on their briefings, and the ALJ specifically agreed that the PSC would consider plaintiffs' reply brief as part of the record. (*Id.* at 52)

On May 24, 2005, the PSC issued a decision in which it rejected plaintiffs' arguments and found, in relevant part, that Sprint was a "telecommunications carrier" because the services that it provided to Time Warner "[met] the definition of 'telecommunications services." (Joint Record, Ex. K, p. 5) The PSC further stated that "Sprint's arrangement with Time Warner enables it to provide service directly to the public," and that "the function that Sprint performs is no different than that performed by other competitive local exchange carriers with networks that are connected to the [ILECs]." (*Id.*) Significantly, in finding that Sprint was a telecommunications carrier, the PSC did not specifically discuss whether Sprint was a "common carrier," though such a finding is implicit in the determination that one is a telecommunications carrier under the Act. The PSC further found that Sprint was entitled to assert the rights set forth under 47 U.S.C. § 251(b), and that the term ""local traffic" in the interconnection agreements should include "extended area service" ("EAS") calls. With regard to the definition of local traffic, the PSC stated:

> Sprint proposes to use a broad definition of 'local traffic' that includes calls between telephone numbers in the same rate center, and calls between telephone numbers in different rate centers that have an established local

> calling area approved by the Commission. The Independents, on the other hand, support a more restrictive definition of local traffic, limiting local calls to single telephone exchanges, not extending to local calling areas . . . .
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> ***
>
> Our regulations and orders (in 16 NYCRR § 602.1 and Cases 00-C-0789 and 01-C-0181) define local exchange service and provide the requirements for the exchange of local traffic. To comply with our regulations and requirements, the interconnection and the traffic exchange agreements provided by incumbent and competitive local exchange carriers have defined the local service exchange areas and the local calling areas. Thus, the applicable regulations establish the basis for the definition of local traffic that we are requiring here. We find that Sprint's definition of local traffic should be used in the interconnection agreements as it conforms best to the stated requirements.

(Joint Record, Ex. K, pp. 7-8)

Plaintiffs moved for reconsideration before the PSC, arguing, in relevant part, that Sprint could not be a telecommunications carrier because it was not a common carrier. (Joint Record, Ex. L, pp. 5-8) The PSC denied the application, finding that Sprint was a common carrier.[3] (Joint Record, Ex. Q, pp. 5-7) As to that, the PSC found first that Sprint "indiscriminately offers its services to potential users," meaning that "Sprint will offer the same services it will provide to [Time Warner] to any cable company provider desiring those services." (*Id.* at 6) The PSC further concluded that the services that Sprint provided would "be available to any end user within the specified service territory, albeit through a business relationship with [Time Warner]." (*Id.*)

In moving for reconsideration, plaintiffs also argued, *inter alia*, that the PSC had erroneously included EAS calls within the definition of local service:

> [T]he commission has failed to explain how its decision in this proceeding

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[3] At oral argument before this Court, PSC's counsel stated that this was a decision on the merits which this Court could review, and that PSC only grants motions for reconsideration when it intends to reverse its earlier decision.

> can be reconciled with its prior decisions in Cases 00-C-0789 and 01-C-0181. Long-standing Commission decisions in these cases have enunciated that traffic subject to Section 251(b)(5) must both originate and terminate within the certificated service area of an Independent. Further, EAS, in turn, is a distinct traffic type that the Commission has specifically found is not subject to Section 251(b)(5) because the LECs providing EAS do not compete for the end users making the EAS calls.

(Petition for Rehearing, Joint Record Ex. L, p. 15)(citing 00-C-0789 and 01-C-0181) The PSC rejected this argument, and explained its holdings in cases 00-C-0789 and 01-C-0181, referred to as the "Virtual NXX Case," as follows:

> [I]n the Virtual NXX Order, we determined that calls to an NXX code[4] within an established local calling area should be treated as local calls for rating purposes. . . . These calls were defined as local, but we did not require reciprocal compensation for several reasons. First, CLECs were not located within the same geographic territory as the Independent telephone companies. Second, the CLECs did not directly compete with the independent telephone companies for local customers. . . . In this case, however, [Time Warner] will compete directly with the Independents for local customers and extended area service [EAS] (which classifies telephone traffic that is geographically beyond the defined local service area as local) that is the equivalent of local exchange service.

(Joint Record, Ex. Q, p. 11)

Plaintiffs commenced the subject action pursuant to § 252(e)(6) of the Act, seeking review of the PSC's determination. The parties subsequently filed the subject motions for summary judgment, and counsel for the parties appeared before the undersigned for oral argument on September 13, 2006.[5]

ANALYSIS

In an action such as this brought pursuant to § 252(e)(6) of the Act, the Court

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[4]An NXX code is the first three digits of a seven-digit local phone number, which identifies the specific telephone company central office which serves that number. PSC Decision 00-C-0789 at 1 n.1.

[5]The Court's Law Clerk also held a telephone conference call with counsel on October 5, 2006.

reviews the PSC's rulings on issues of Federal Law *de novo*, and reviews all other issues, including rulings on issues of state law, using the arbitrary and capricious standard. *Global Naps, Inc. Verizon New England, Inc.*, 454 F.3d 91, 96 (2d Cir. 2006) (*citing Southwestern Bell Telephone Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 498 (10th Cir. 2000)). At oral argument, counsel agreed that in making its review, this Court is limited to the record that was before the PSC.

Whether Sprint is a Telecommunications Carrier

Plaintiffs contend that Sprint is not a telecommunications carrier for two reasons: because it is not a "common carrier", and because it does not have a direct relationship with the end users of its services.

47 U.S.C. § 153(44) states, in relevant part, that "[t]he term 'telecommunications carrier' means any provider of telecommunications services." "Telecommunications service," on the other hand, is defined as follows: "[T]he offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). In this case, the parties concede that Sprint does not provide its services "directly to the public." Therefore, in deciding whether Sprint is a telecommunications carrier, the issue is whether it offers its services "to such classes of users as to be effectively available directly to the public." That issue turns upon whether Sprint offers its telecommunications services as a "common carrier." *Virgin Islands Telephone Corp. v. FCC* ("*VITELCO*"), 198 F.3d 921, 922, 926 (D.C. Cir. 1999) (Holding that the FCC's interpretation, that the term "telecommunications carrier" "means essentially the same as

common carrier," was reasonable.); *see also*, *Iowa v. F.C.C.*, 218 F.3d 756, 758 (D.C. Cir. 2000) ("[A] carrier that provides a service on a non-common carrier basis is not a 'telecommunications carrier.'")

To qualify as a common carrier, a telecommunications service provider must satisfy two requirements: 1) first, it must hold itself out to the public, meaning that it must "offer indiscriminate service to whatever public its service may legally and practically be of use"; and 2) second, it must allow its customers to "transmit intelligence of their own design and choosing." *United States Telecom Ass'n v. Federal Communications Comm'n*, 295 F.3d 1326, 1332-33, 1335 (D.C. Cir. 2002); *see also, F.T.C. v. Verity Intern., Ltd.*, 443 F.3d 48, 58 (2d Cir. 2006) ("[T]he definition of a common carrier [has] coalesced into two requirements: (1) the entity holds itself out as undertaking to carry for all people indifferently; and (2) the entity carries its cargo without modification. . . . This definition does not differ meaningfully for our purposes from the definition of "common carrier" under the Communications Act.") (citations omitted). Here, it is not disputed that customers would be able to transmit intelligence of their own design and choosing over the facilities provided by Sprint and Time Warner. Accordingly, the only issue is whether Sprint offers its services indiscriminately "to whatever public its service may legally and practically be of use."

Applying these principles to the instant case, it appears clear, at the outset, that Sprint could qualify as telecommunications carrier even if it did not deal directly with Time Warner's end-user customers. In *VITELCO*, the Second Circuit reaffirmed that common carriers "need not serve the whole public," that "common carriers' customers

need not be end users and that common carrier services include services offered to other carriers." *VITELCO*, 198 F.3d at 926, 929 (citations and internal quotation marks omitted). Consequently, the fact that Sprint did not deal directly with Time Warner's customers would not be determinative of whether it was a telecommunications carrier within the meaning of 47 U.S.C. § 251.

However, Sprint must be a common carrier in order to qualify as a telecommunications carrier. As to that, the Court agrees with plaintiffs that the PSC's finding, that Sprint is a common carrier, is unsupported in the record, insofar as that finding pertains to the services that Sprint provides to other telecommunications companies such as Time Warner.[6] In finding that Sprint was such a common carrier, the PSC stated that, "Sprint will offer the same service it will provide to [Time Warner] to any cable company provider desiring those services." That may be true. However, it is unclear how the PSC made that finding, since there is no support for it in the record. As to that, the administrative record contains only the following statements concerning Sprint's business: "Sprint has entered into agreements with service providers that intend to compete with ILEC local voice services." (Joint Record, Ex. A, p. 8); "[I]n New York, Sprint has entered into a business arrangement with Time Warner . . . to support its offering of local and long distance voice services." (*Id.*, Ex. D, p. 1); "Sprint currently has . . . ICAs [interconnection agreements] with RBOCs and other ILECs in 12 other states."

[6]Sprint contends that plaintiffs waived the "common carrier" argument, because it was only raised in plaintiff's motion for reconsideration. However, as previously mentioned, that is incorrect. While it was not plaintiffs' main argument before the PSC, and in fact was only raised in a footnote in their reply brief, it is clear that plaintiffs raised the issue prior to PSC's initial ruling. Moreover, even if the argument had only been raised in plaintiffs' motion for reconsideration, PSC nonetheless considered it and issued a decision on the merits of the argument.

(*Id.*, p. 2). The Court does not believe that these statements establish that Sprint is operating as a common carrier to telecommunications companies such as Time Warner in the specified service territory.[7]

Nonetheless, the Court finds that the PSC's alternate basis for finding that Sprint was a common carrier was correct. As to that, the PSC stated, in relevant part, that "the services Sprint is providing . . . will be available to any end user within the specified service territory, albeit through the business relationship with [Time Warner]." (Joint Record Ex. Q, p. 6). Plaintiffs argue that the Court "cannot rely upon [Time Warner's] end users . . . as indicia of Sprint's purported common carrier role," and in that regard, they cite the *VITELCO* case, in which, according to plaintiffs, the court "rejected the use of services provided by the customers of an entity for purposes of determining that entity's status as a 'telecommunications carrier.'" (Pl. Memo, Petitioner 21) However, while the Court agrees with plaintiffs' description of the holding in the *VITELCO* case, the Court finds that the *VITELCO* decision is not dispositive here.

The *VITELCO* case involved a situation where AT&T was installing an underwater telecommunications cable between St. Thomas and St. Croix in the Virgin Islands. AT&T intended to sell capacity in the cable to common carriers of telecommunications services. A competing telecommunications company argued that AT&T should be

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[7]PSC mistakenly contends that support for Sprint's common carrier status is found in the Joint Record at Exhibit D, p.2. (PSC Memo at 17-18: "Sprint has entered into the same type of agreement that it has with [Time Warner] with other parties in other service territories in New York.") Actually, the portion of the record cited by PSC merely shows that Sprint has similar contracts *with Time Warner* in those territories. (Joint Record, Ex. D, p. 2: "Sprint provides telecommunications services *to enable [Time Warner] to offer* local exchange and long distance voice services to New York consumers under interconnection agreements ('ICAs') with Frontier, Citizens Communications, AllTel and Verizon.") (emphasis added); (see also, Joint Record, Ex. D, p. 1) (According to Sprint, it has contracted with only one company, Time Warner, with which to provide service in the State of New York).

regulated as a common carrier, arguing that AT&T was "making a service effectively available directly to the public because AT&T's . . . customers will use the capacity to provide a service to the public." *Id.*, 198 F.3d at 924. In other words, the competitor argued that AT&T should be treated as a common carrier, because its customers were in turn making use of the cable to provide telecommunications services to their customers on a common carrier basis. However, the court rejected this argument, affirming the FCC's determination that it would be improper to "look to the customer's customers to determine the status of a carrier." *Id.*, 198 F.3d at 926.

However, the Court finds that this aspect of the VITELCO decision is not applicable in the instant case. That is because, here, Sprint is not merely selling services to Time Warner, which Time Warner will then use to provide services to its customers. Rather, Sprint and Time Warner are together providing local exchange service to the end users. As discussed more fully below, neither Sprint nor Time Warner, by themselves, will be providing all of the network components of a competitive local exchange company. Rather, Time Warner will provide the local loop, and Sprint will provide the end office switch and interconnection trunk. (Joint Record, Ex. Q, p. 5). This is an undisputedly new type of business arrangement, which is unlike the situation presented in *VITELCO*. In short, the Court finds that it was not erroneous for the PSC to consider the provision of services to "Time Warner's customers" in deciding that Sprint is acting as a common carrier, since, under this new business arrangement, the services being purchased are being provided only through the combined efforts of both companies, even though the end users deal directly only with Time Warner.

Whether CLEC telecommunications carriers need to have direct relationships with end users in order to utilize 47 U.S.C. § § 251(b)(2),(3) & (5) and 47 U.S.C. § 222

Plaintiffs further contend that PSC erred by holding, pursuant to 47 U.S.C. § 251(b), that they were required to provide number portability, dialing parity, reciprocal compensation, and subscriber list information to Sprint, because Sprint does not have a direct relationship with Time Warner's end-user customers. Plaintiffs contend that, even if Sprint is found to be a telecommunications carrier within the meaning of § 251(a), plaintiffs are not necessarily required to provide the services listed under § 251(b), since the two sections involve "separate analyses." (Pl. Memo p. 24) According to plaintiffs, it was Congress' intent, clearly expressed, that the rights under § 251(b) "may be asserted *solely* by the telecommunications carrier/common carrier that is the *ultimate provider of end user services*." (*Id.* at 25) (Emphasis in original).

In that regard, plaintiffs cite two sections of the Act: 47 U.S.C. § 153(26) (definition of Local Exchange Carrier) and 47 U.S.C. § 153(47) (definition of Telephone Exchange Service). (Pl. Memo, p. 25) Those sections state, in relevant part:

> **Local Exchange Carrier** The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access[8].
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> ***
>
> **Telephone exchange service** The term "telephone exchange service" means (A) service within a telephone exchange , or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a

[8]The term "exchange access," as used above, means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16).

> system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

47 U.S.C. § § (26) & (47). Plaintiffs also cite, *inter alia*, 47 C.F.R. § 51.205, which states, in relevant part, that LECs "shall provide local . . . dialing parity to competing providers of telephone exchange service." In short, plaintiffs contend that even if Sprint is a telecommunications carrier, it has no rights under § 251(b) because it does not provide "exchange service."

The PSC rejected this argument, essentially finding that Sprint and Time Warner *together* were providing "exchange service" to Time Warner's customers. As to that, the PSC set forth Sprint's argument as follows:

> Pointing to the five network components of a competitive local exchange company (CLEC) service (the local loop, the end office switch, the interconnection trunks, and the incumbent local exchange company (ILEC) switch and loop) Sprint states that it will provide end office switching and interconnection to end users. The only difference in the model proposed here by Sprint and [Time Warner] is that [Time Warner] will provide the CLEC local loop and the telecommunications services will be provided under [Time Warner's] name. End users will be connected to Sprint's end office switch using the interconnection trun[k]s that it obtains from the ILECs.

(Joint Record, Ex. Q, p. 5). Ultimately, the PSC concluded that "the reality of the business arrangement presented here [between Sprint and Time Warner] is that an alternative network will originate and terminate local traffic." (Joint Record, Ex. Q, p. 7)

The Court finds that PSC's determination was not erroneous. In that regard, the Court understands PSC to have held that, in the ordinary case, a CLEC provides three components of local exchange service: 1) the local loop; 2) the end office switch; and 3) the interconnection trunks. However, here, these components are being provided by two

companies working together, as opposed to a single CLEC. In other words, here there is no single company providing competitive local exchange service, but rather, there are two companies, each providing a portion of the exchange service. That being the case, the Court agrees that Sprint, acting on behalf of itself and Time Warner, is entitled to request the services listed under § 251(b). The Court has considered all of plaintiffs' arguments on this point and finds that they lack merit.

Whether PSC correctly determined that the term "local traffic" should include extended area service (EAS) traffic

The parties do not dispute that, as a matter of federal law, state commissions such as the PSC have the authority to define local calling areas. *See, Global Naps, Inc. v. Verizon New England, Inc.*, 454 F.3d at 97 ("[T]he FCC clearly indicated that it intended to leave authority over defining local calling areas where it always had been - squarely within the jurisdiction of the state commissions.") However, plaintiffs contend that the PSC's decision to include EAS calls within the definition of local traffic was arbitrary and capricious. As to that, plaintiffs state, *inter alia*, that the PSC's *Virtual NXX* decision stands for the proposition that "the Act's Section 251(b)(5) reciprocal compensation structure did not apply to the provision of EAS between an Independent and a CLEC," and that the PSC's determination in the instant case represents an arbitrary and capricious "mid-stream departure":

> The only finding upon which the NY PSC based its mid-stream departure from its prior decisions regarding intercarrier treatment of EAS traffic is . . . [that Time Warner] will compete directly with the Independents for local customers and extended area service . . . . Since the Independents do not 'compete directly' for end users in an adjacent EAS exchange, the NY PSC's justification for its mid-stream change in the treatment of EAS by the Independents is without basis.

(Pl. Memo of Law, p. 34)

The Court disagrees with plaintiffs' arguments on this point, and finds that the PSC's determination was not arbitrary or capricious. As to that, the Court notes, at the outset, that the *Virtual NXX* case did not involve an interconnection agreement under 47 U.S.C. § 251. Rather, it is clear that no such agreement existed between the carriers involved in that matter. Nor were the carriers in the *Virtual NXX* case competing to provide local exchange access service. The issue in that case was how to treat calls, for rating purposes, made to telephone numbers assigned by a CLEC to internet service providers ("ISPs"), where the ISPs were assigned NXX codes within an Independent's local calling area, even though the CLEC and ISPs were physically located outside the calling area. The PSC ruled that such calls should be treated as local for rating purposes, since the NXX code corresponded to the local calling area. The PSC then addressed the issue of inter-carrier compensation, and found that the Independent and the CLEC should handle the calls on a "bill and keep" basis.[9] As to that, the PSC determined that "bill and keep", and not reciprocal compensation, the method provided for in 52 U.S.C. § 251(b)(5), was the appropriate means of intercarrier compensation: "[S]ince the CLEC is not located within the same geographic territory as the independent and is not directly competing with the Independent for local customers, treatment of the call as local for the purpose of reciprocal compensation does not appear warranted." (00-C-0789 at 8) However, the PSC further stated, in its subsequent clarifying decision, that, "if a different arrangement is presented as a result of the interconnection

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[9]"'Bill and keep' is a compensation method whereby each carrier is responsible for its own costs and recovers those costs from its end users." PSC Decision 00-C-0789 at 8 n. 9

arrangement process, the Commission may consider the appropriateness of bill-and-keep for that situation." (00-C-0789, 01-C-0181 at 10)

This Court interprets the discussion in the *Virtual NXX* case concerning the lack of competition as merely reflecting the idea that there, the ILEC and the CLEC were not competing to provide local exchange service. Therefore, the *Virtual NXX* case did not involve a situation where 47 U.S.C. § 251 was applicable, and consequently, it would have been inappropriate for the PSC to direct the payment of reciprocal compensation under 42 U.S.C. § 251(b)(5). The instant case is clearly distinguishable, since here, plaintiffs and Sprint are competitors for local exchange service and, as such, are entering into interconnection agreements under 47 U.S.C. § 251. Plaintiffs focus on the fact that they and Sprint are not technically competing for customers in EAS areas, since ILECs can only operate within the geographic confines of their certificated area, and EAS calls either originate or terminate outside of that area. In other words, an ILEC cannot provide service or compete for service in an EAS area, since the EAS area is part of a neighboring exchange. However, the Court finds that plaintiffs are attempting to construe the *Virtual NXX* decision in an overly-narrow manner. The determinative factor is that plaintiffs and Sprint are competing for customers within each plaintiff's certificated area. Moreover, as discussed above, the PSC indicated that it might reconsider the appropriateness of using reciprocal compensation if a "different arrangement" was presented as a result of interconnection under 47 U.S.C. § 251, which is exactly the situation presented here. Consequently, the Court finds that PSC's determination to include EAS within the definition of "local traffic" was neither arbitrary nor capricious.

CONCLUSION

Plaintiffs' motion for summary judgment [#25] is denied, defendants' cross-motions for summary judgment [#30][#33] are granted, and this action is dismissed.

SO ORDERED.

Dated: Rochester, New York
October 27, 2006

ENTER:

/s/ Charles J. Siragusa
CHARLES J. SIRAGUSA
United States District Judge