BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration Pursuant to the Telecommunication Act of 1996 to Resolve Issues Relating to an Interconnection Agreement with **Brookings Municipal Utilities d/b/a Swiftel Communications**	)	DOCKET TC06-176

OBJECTION TO REBUTTAL TESTIMONY OF JO SHOTWELL AND MOTION TO STRIKE TESTIMONY

COMES NOW, Sprint Communications Company, L.P., through its attorneys of record, hereby submits this motion seeking to bar testimony filed by Jo Shotwell on behalf of Brookings Municipalities Utilities d/b/a Swiftel Communications (hereinafter "Swiftel").

I. BACKGROUND

On December 1, 2006, this Commission issued an order setting forth a procedural schedule. The order provided that the parties were to file prefiled direct testimony on February 2, 2007 and rebuttal testimony on February 16, 2007. Swiftel filed direct testimony but did not file any direct testimony by Jo Shotwell on February 2, 2007. Rather, Swiftel filed the testimony of Jo Shotwell on February 16, 2007 and claimed it to be rebuttal testimony. Rebuttal testimony is evidence that is given as contradictory evidence or argument to evidence already presented.

Ms. Shotwell's testimony did not constitute rebuttal testimony. Rather, it constituted additional direct testimony and should be struck.

II. ANALYSIS

In the filing of rebuttal testimony, Swiftel added an additional witness solely as a rebuttal witness. That witness was Jo Shotwell. Ms. Shotwell identified the area of her testimony as follows:

> I will address several of the arbitration issue points brought forth by Sprint Communications Company, LP in its Petition for Arbitration. More specifically, I will address: 1) Regulatory requirements of telecommunication carriers outlined in Section 251(a), 251(b), and 251(c) of the federal Telecommunications Act of 1996 (FTA); and 2) Unresolved issues submitted by Sprint in its Petition to Arbitrate." See Shotwell Testimony, page 2, line 23 through page 3, line 5.

Ms. Shotwell's testimony then goes forth to present broad testimony on policy considerations and interpretations of 47 U.S.C. 251(a) through (c). A great portion of this testimony deals with whether a rural carrier can refuse to negotiate to enter into agreements regarding its obligations under 47 U.S.C. 251(a) and (b), unless the exemption on the rural company has been removed pursuant to section 251(f)(1)(a). See generally Shotwell, pages 6 through 13. Her testimony also addresses specific issues that were raised in the petition. See pages 13 through 17.

While Ms. Shotwell's testimony fleetingly references Mr. Burt's testimony in a couple of places, the references are to general testimony on issues known based on the filing of the petition and responses. It is undisputed that Swiftel has known that it was going to present an argument that it did not have an obligation to even negotiate its obligations under 251(a) and 251(b) since the filing of Swiftel's response to the petition and motion to dismiss, a document that was filed on November 13, 2006. The first paragraph of that document says that "Swiftel also asked the Commission to dismiss Sprint's petition with respect to Section 251(a) interconnection as this is not an "open" issue under the Telecommunications Act and, therefore, is not properly part of the

arbitration." Ms. Shotwell makes substantially the same statement at page 7, line 10 of her testimony: "Because Swiftel did not negotiate Section 251(a) interconnection, this is not an open issue." Further, Swiftel's response addresses the issues raised in the petition and those issues have not changed nor were they changed by any of the direct testimony. A review of Ms. Shotwell's testimony shows her testimony is on issues that were fully recognized as part of the initial filings in this matter.

The purpose of direct testimony is to allow all parties to a chance to respond to any issues raised and to provide rebuttal testimony. By Swiftel's filing of new testimony that does not constitute rebuttal testimony, Sprint is prejudiced in its ability to respond. As such, Ms. Shotwell's testimony should be stricken in its entirety.

In the alternative, Sprint respectfully requests the Commission to strike Part III, Regulatory Requirements of Telecommunications Carriers, of Ms. Shotwell's testimony beginning at page 3, line 12 – page 6, line 8. None of this testimony is rebuttal testimony; rather it is Ms. Shotwell's interpretation of certain sections of the Telecommunications Act which involved issues that were fully recognized by the initial filings. In this regard, Swiftel witness Adkins briefly discussed Section 251(a) and Section 251(c) interconnection in his direct testimony at page 3 line 12 – page 4, line 1. Swiftel had the chance to put on all of its arguments during direct testimony, but for whatever reason it did not. Even if this testimony was proper, which it is not, Sprint has no opportunity to respond at this stage. Moreover, the parties are free to argue the law and regulations with respect to the different types of interconnection in their briefs. Indeed, Ms. Shotwell cites to the Act and certain provisions of the Local Competition Order which again the parties are free to argue in their briefs. Sprint also respectfully requests the Commission to strike Part IV, Unresolved Issues – Petition to Arbitrate, at page 7, line 1 –

page 11, line 11 as improper rebuttal testimony. Again, the issues Ms. Shotwell addresses were known from the initial filings. Swiftel did not address these issues in direct and should be barred from doing so in the first instance during the rebuttal testimony stage.

The South Dakota Supreme Court has recognized that a Hearing Officer has the ability to bar testimony a party claimed to be rebuttal testimony where it was not truly rebuttal testimony and not properly, timely, disclosed. See Lagge v. Corsica Co-Op, 2004 SD 32 at ¶¶ 21 through 25, 677 N.W.2d 569. The court found that it is within the discretion of the hearing officer to bar the testimony as untimely disclosed. Id. at 25.

In this case, the Commission issued an order requiring direct testimony to be filed on February 2, 2007; Ms. Shotwell's testimony clearly is direct testimony introducing numerous factors and theories that should have been initially submitted with the direct testimony. "Rebuttal evidence is that which explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely to confirm that of the plaintiffs." See Schrader v. Tjarks, 522 N.W.2d 205 (S.D. 1994) citing Farmers U. Grain Term. v. Industrial Elec., 365 N.W.2d 275, 277 (Minn. App. 1985) and "[r]ebuttal is appropriate **[**10]** only when the defense injects a new matter or new facts" citing Pophal v. Siverhus, 168 Wis. 2d 533, 484 N.W.2d 555, 563 (Wis. App. 1992). As recognized by the Iowa Supreme Court, "Rebuttal is not intended to give a party an opportunity to tell his [or her] story twice or to present evidence that was proper in the case in chief." See Carolan v. HillIowa, 553 N.W.2d 882, 889 (IA 1996).

Ms. Shotwell's testimony is not confined to that which explains, contradicts, or refutes a new matter or new facts. Indeed, it is Swiftel that has raised new issues to which Sprint may not reply in the form of rebuttal testimony. Swiftel's action is particularly egregious with respect to the discussion regarding section 47 U.S.C. 251(a) through (c). Sprint has no opportunity to

refute these latest arguments much of which is legal in nature. Sprint's ability to counter Ms. Shotwell's testimony regarding whether negotiations took place, section 251(a) and 251(c) interconnection, and the "Brazos" case in particular has been severely prejudiced. Not only is this improper testimony prejudicial to Sprint, it is likely to take more time to address during the hearings. Had Swiftel presented this testimony during the direct testimony phase of the proceedings, Sprint would have responded accordingly and the Commission would have known Sprint's position before the hearing.

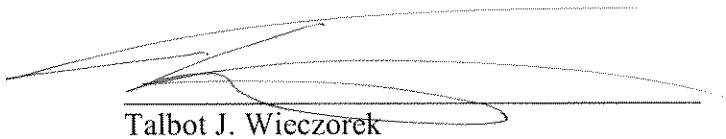
While the Commission has broad discretion whether to allow this testimony, the Commission should not exercise its discretion to admit Ms. Shotwell's improper testimony. Swiftel's use of this "expert" testimony on rebuttal, rather than in its case in chief appears to be an attempt to sandbag Sprint's case. Swiftel's failure to properly present Ms. Shotwell's testimony during its case in chief unfairly deprived Sprint of the opportunity to rebut it with testimony of its own. Further, much of the testimony is legal and policy based which can be addressed in briefs. Thus, Swiftel will not be prejudiced by the removal of this improper testimony.

III. CONCLUSION

The Commission established an orderly and fair schedule for the exchange of discovery and prefiled testimony relevant to the issues in this proceeding. Swiftel is now attempting to distort the Commission's resolution of those issues by injecting "expert" testimony on issues of law and policy and interjecting new arguments regarding the facts at the rebuttal stage. Sprint requests Ms. Shotwell's testimony be barred and stricken in its entirety or in the alternative certain portions of the testimony be stricken as described herein. Swiftel did not appropriately

follow this Commission's scheduling order and presented new arguments and issues that should have be presented as prefiled direct testimony.

Respectfully submitted this 9th day of April 2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that on the 9th day of April, 2007, I served a true and correct copy of **Sprint's OBJECTION TO REBUTTAL TESTIMONY OF JO SHOTWELL AND REQUEST TO STRIKE TESTIMONY**

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