

PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION
OF SANCOM, INC. FOR EXTENSION OF
TIME OF EXEMPTION FROM
DEVELOPING COMPANY SPECIFIC
COST-BASED SWITCHED ACCESS
RATES

TC07-128

**QWEST'S RESPONSE TO SANCOM'S
MOTION TO QUASH**

Intervenor Qwest Communications Corporation ("Qwest") by and through its undersigned attorneys of record, respectfully submits this response to Sancom, Inc's ("Sancom") Motion To Quash Subpoena, Interrogatories And Data Requests dated June 17, 2008. This response is further supported by the Affidavit of Christopher W. Madsen dated June 25, 2008 ("Madsen Affidavit"), which is incorporated by this reference.

BACKGROUND

Counsel for Qwest has recently been advised that the PUC Staff and Sancom have reached a settlement in principle in this docket. Madsen Affidavit, ¶ 2. In order to determine whether Qwest will support the settlement, oppose the settlement, or seek to withdraw from the docket, Qwest has sought discovery to obtain further information. Qwest is aware that PUC Staff served data requests on Sancom which requests were communicated in three email messages from Keith Senger to Doug Eidahl. *Id.* at ¶ 4. Qwest is further aware that Sancom provided responses to the data requests to Staff. When counsel for Qwest contacted counsel for Staff to obtain copies of Sancom's responses, counsel learned that Sancom provided the information on a confidential basis. *Id.* at ¶ 1. Counsel for Qwest then contacted Douglas Eidahl to ask if Sancom would provide copies of its responses to the Staff data requests to Qwest, under the auspices of a confidentiality agreement if need be. *Id.* at ¶ 3. Mr. Eidahl was interested in whether Qwest would be supporting the settlement reached

between Sancom and Staff. *Id.* Counsel for Qwest could give no such assurances at that time. *Id.* Ultimately, Mr. Eidahl advised that because Sancom was under no obligation to provide the requested information to Qwest (ostensibly via subpoena or other discovery requests), Sancom would not provide the information. *Id.*

On or about June 5, 2008, Qwest served a subpoena duces tecum on Staff's attorney, Karen Cremer, and Mr. Eidahl to obtain the responses Sancom provided to Staff pursuant to the three email messages transmitted to Mr. Eidahl by Keith Senger.¹ *Id.* at ¶¶ 2, 4, 5. The subpoena requested that a response be provided by Friday, June 13, which time should have been reasonable considering that Qwest merely seeks a copy of Sancom's response. *Id.* at ¶ 6. In addition, Qwest served a set of interrogatories and requests for production to obtain further information from Sancom. *Id.* at ¶ 5. Counsel for Qwest served the subpoena and discovery requests on Mr. Eidahl, by mail, using the address listed in the service list on the PUC website for this docket, which is the same address listed in the South Dakota State Bar Membership directory: 1801 N. Main Street, Mitchell. *Id.* at ¶ 5. The subpoena and requests were re-served on Mr. Eidahl, by mail, on June 10, 2008. *Id.* Qwest anticipated that with delays in service and the possibility that Sancom would want to negotiate a confidentiality agreement, it was unlikely the response to the subpoena would be made by the June 13 deadline. *Id.* at ¶ 6. The requests for data and for production of documents do not contain the June 13 deadline, but rather refer to the 30-day time limit prescribed by SDCL 15-6-33 and SDCL 15-6-34. *See* Madsen Affidavit, Exhibit B.

By way of further background, as the Sancom motion alludes to, there is currently litigation pending between Sancom and Qwest in U.S. District Court for the District of South Dakota, *Sancom, Inc. v. Qwest Communications Corporation*, Civ. 07-4147. In that litigation, Sancom has

¹ Sancom's Motion To Quash states the subpoena duces tecum seeks copies of three email messages. The three email messages listed in the subpoena are the three email messages transmitted to Mr. Eidahl by Keith Senger and contain various data requests. To be clear, Qwest seeks the information Sancom provided to Staff in response to the three email messages.

sued Qwest for failing to pay certain switched access charges. Qwest answered Sancom's complaint denying the allegations and asserting various defenses. Qwest also asserted a counterclaim alleging that Sancom is engaged in an illegal "traffic pumping" scheme with various free calling service companies, which scheme improperly increases access charges which Qwest and other interexchange carriers must pay. There are at least two other cases involving allegations of traffic pumping pending in federal court in South Dakota.² Furthermore, a complaint has recently been filed with the Commission in which an IXC, Verizon, alleges that a CLEC, Capital Telephone Company, Inc., is illegally engaged in a traffic pumping scheme. *See* MCI Communications Services, Inc. d/b/a Verizon Business Services against Capital Telephone Company, Inc. Regarding Traffic Pumping. TC 08-065.

LEGAL AUTHORITY AND ARGUMENT

Sancom's motion to quash lacks valid authority as to why the Commission should quash the subpoena and the discovery requests. According to its motion, Sancom objects because the subpoena and discovery requests are "irrelevant" and "legally unfounded" and further accuses Qwest of using this docket as a surrogate to obtain information for use in litigation now pending between Sancom and Qwest in U.S. District Court. Sancom fails to identify the proper standards under the South Dakota Rules of Civil Procedure which apply pursuant to ARSD 20:10:01:01.02.

A. The Qwest subpoena and discovery requests seek relevant material.

Citing SDCL 19-12-2, Sancom claims that the subpoena and discovery requests are irrelevant. SDCL 19-12-2 is a rule of *evidence* which states:

² *Northern Valley Communications, LLC v. MCI Communications Services, Inc., d/b/a Verizon Business Services, Global Conference Partners, LLC*, Civ. 07-1016, *Sancom, Inc. v. MCI Communications Services, Inc., d/b/a Verizon Business Services, Freeconferencing Corp.*, Civ. 07-4106; *Sancom, Inc. v. Sprint Communications Company Limited Partnership v. Free Conferencing Corporation of America and Telejunctions, LLC*, Civ. 07-4107. In these cases, the CLEC's have filed motions to dismiss the counterclaims alleging the CLEC's are engaged in an illegal traffic pumping scheme. Those motions are fully briefed, but the Court is yet to rule on the motions to dismiss.

All relevant evidence is admissible, except as otherwise provided by Constitution or statute or by chapters 19-9 to 19-18, inclusive, or by other rules promulgated by the Supreme Court of this state. Evidence which is not relevant is not admissible.

This statute governs the *admissibility* of evidence at a hearing or trial. Sancom's reliance on SDCL 19-12-2 is misplaced because admissibility of the evidence at a hearing does not govern relevance of a discovery request. The proper standard to judge relevance of a discovery request is found at SDCL 15-6-26(b)(1), which states as follows (emphasis added):

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. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

Furthermore, the South Dakota Supreme Court has stated that the scope of pretrial discovery is broadly construed. *See Kaarup v. St. Paul Fire & Marine, Ins.*, 436 NW2d 17, 19 (SD 1989). The Court has further recognized that the phraseology in SDCL 15-6-26(b)(1) "implies a broad construction of 'relevancy' at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial." *Id.* at 20. Thus, as long as the Qwest subpoena and discovery requests seek information relevant to the subject matter involved in the pending action and the information sought is reasonably calculated to lead to the discovery of admissible evidence, the subpoena and requests are considered relevant for the purposes of discovery. In its motion, Sancom wholly fails to explain to the Commission how Qwest's subpoena and discovery requests do not meet this standard.

The information sought by Qwest is relevant to the subject matter involved in the pending action and the information sought is reasonably calculated to lead to the discovery of admissible evidence. As stated above, Qwest believes Sancom is engaged in an illegal traffic pumping scheme with free calling service companies. Even though Sancom and Staff have reached an agreement in

principle whereby Sancom will agree to phase in the “Qwest rate” for switched access over the course of three years, there exists a legal question as to whether Sancom can assess switched access charges for calls involving the free calling service companies, and, if so, whether the “Qwest rate” is proper for such calls. In addition, the agreement to phase in the “Qwest rate” does not address another fundamental question: whether the free calling service companies are customers or end users under Sancom’s tariff. If they are not customers, Sancom has no authority to charge IXCs, like Qwest, terminating switched access charges at any rate for traffic flowing to free calling service companies. Therefore, inquiries regarding Sancom’s agreements with free calling service companies and the volume of such traffic are relevant to the subject matter involved in the present action. Furthermore, the Qwest discovery requests are specifically calculated to learn what agreements Sancom has reached with the free calling service companies, whether the calls involving the free calling service companies are truly calls to which switched access charges should apply, and the volume of such calls. These requests could very well lead to admissible evidence. As such, the subpoena and discovery requests seek relevant information.

B. Sancom has not asserted proper grounds to quash the discovery requests or the subpoena under SDCL 15-6-26(c).

Qwest acknowledges that SDCL 15-6-26(c) provides authority for the Commission to enter protective orders with respect to discovery requests to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.” Rather than explain why the Qwest discovery requests are annoying, embarrassing, oppressive, or pose an undue burden or expense on Sancom, Sancom alludes to the letter it sent to counsel for Qwest in the federal litigation threatening to seek sanctions under Federal Rule of Civil Procedure 11 (“Rule 11”). A copy of the letter is attached to the Madsen Affidavit as Exhibit D.

Sancom's reference to its threat to seek Rule 11 sanctions in the federal litigation is a red herring with regard Sancom's motion to quash. As of this date, Sancom has not filed any motion seeking Rule 11 sanctions in U.S. District Court. Madsen Affidavit, ¶ 9. Qwest responded to Sancom's letter threatening to move for Rule 11 sanctions. *Id.* A copy of Qwest's response letter is attached to the Madsen Affidavit as Exhibit E. As Qwest's response letter indicates, Qwest denies that it approves of traffic pumping schemes orchestrated by Sancom or any other entity. At any rate, Qwest does not take Sancom's threat to seek Rule 11 sanctions in the federal litigation lightly, and in the event Sancom pursues such a motion in federal court, Qwest will vigorously oppose such a motion. Nevertheless, with respect to this docket, Sancom's threat to seek Rule 11 sanctions against Qwest in federal court remains just that - a threat, and as such has no bearing on discovery in this docket.

Irrespective of its threat to seek Rule 11 sanctions, Sancom has not complied with the requirement in SDCL 15-6-26(c), that a motion for relief from discovery requests be "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an attempt to resolve the dispute without [Commission] action." Sancom has made no such efforts. Madsen Affidavit, ¶10. As indicated, Qwest is willing to negotiate an appropriate confidentiality agreement to protect any trade secrets or competitive information contained in Sancom's responses to the subpoena or responses to the Qwest discovery requests. Nevertheless, Sancom has made no effort to confer or attempt to confer with counsel for Qwest to determine whether Sancom's dispute over the subpoena and discovery requests can be resolved without Commission action.

C. Sancom has not asserted proper grounds to quash the subpoena under SDCL 15-6-45(b).

SDCL 15-6-45(b) provides:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

- (1) Quash or modify the subpoena if it is unreasonable and oppressive; or
- (2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of reasonable cost of producing the books, papers, documents, or tangible things.

The party “seeking to modify or quash such a subpoena has the burden of proving the necessity of doing so.” *Phipps Bros. v. Nelson’s Oil & Gas, Inc.*, 508 N.W.2d 885, 890 (S.D. 1994). The burden of establishing a subpoena is unreasonable or oppressive is a heavy one. *Northrup Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 403 (D.C. Cir. 1984) (interpreting similar language in an old version of Fed. R. Civ. P. 45).³ The facts and circumstances of the case determine whether a subpoena duces tecum is unreasonable or oppressive. *Id.*

Notwithstanding Sancom’s arguments regarding the relevance of the information requested and its threat to seek Rule 11 sanctions, Sancom has not demonstrated the Qwest subpoena is unreasonable or oppressive. Qwest issued the subpoena simply to obtain copies of the information Sancom provided to Staff in response to Staff’s request for data. Sancom did not seek to quash the Staff data requests. Therefore, complying with the subpoena is simply a matter of copying documents or electronic data already provided to Staff and transmitting the copies to counsel for Qwest.

D. Sancom’s request for sanctions, expenses, and attorney’s fees are factually and legally unsupported.

Sancom’s motion states “the Commission should impose sanctions, expenses and attorney’s fees against Intervener, Qwest, for their legally unfounded subpoena and discovery requests.” Sancom offers no authority for the Commission to impose any such sanctions or award Sancom its

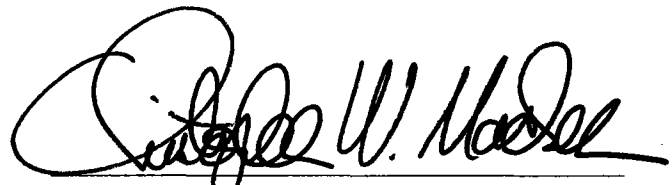
³ The South Dakota Supreme Court has never discussed what makes a subpoena unreasonable or oppressive.

attorney's fees or expenses. As set forth above, there is no factual basis for imposition of any such remedy. Moreover, there is no legal authority that would allow the Commission to impose sanctions, expenses or attorney's fees on Qwest merely for propounding the discovery requests at issue. SDCL 15-6-37(a) allows imposition of attorney's fees in situations where a party must be compelled to provide responses to discovery requests. Furthermore, ARSD 20:10:01:17.02 authorizes the Commission to impose additional sanctions for failure to respond to a subpoena. Qwest trusts that if the Commission denies Sancom's motion to quash, Sancom will timely provide responses to the subpoena and discovery requests.

CONCLUSION

For the reasons set forth above, Qwest respectfully requests the Commission: (1) deny Sancom's motion to quash; (2) set a date by which Sancom or Staff shall respond to the subpoena duces tecum and provide Qwest with copies of all responses and information produced in response to Staff's data requests to Sancom in this docket; and (3) set a date by which Sancom must respond to Qwest's discovery requests.

Dated this 25th day of June, 2008.



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