Schenkenberg Aff.
Exhibit K

OAH 3-2500-21151-2
MPUC P-5096, 5542/C-09-265

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint by Qwest Communications Company, LLC, against Tekstar Communications, Inc., Regarding Traffic Pumping

ORDER ON TEKSTAR MOTION TO COMPEL DISCOVERY FROM SPRINT

This matter came before Administrative Law Judge Kathleen D. Sheehy on the motion of Tekstar Communications, Inc., to compel discovery from Sprint Communications Company, LP. Tekstar filed its motion to compel on October 21, 2011; Sprint filed its response on November 4, 2011. The record on the motion closed at that time.

Dan Lipschultz and Matthew P. Kostolnik, Moss & Barnett, appeared for Tekstar Communications, Inc. (Tekstar).

Philip R. Schenkenberg, Briggs and Morgan, appeared for Sprint Communications Company LP (Sprint).

Upon the record, and for reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that: Tekstar's Motion to compel discovery responses from Sprint is **GRANTED in part and DENIED in part,** as provided in the Memorandum attached hereto. To the extent the motion is granted, Sprint shall provide supplemental responses within 10 business days.

Dated: November 21, 2011

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Background

To complete a typical long-distance call, three telecommunications firms must cooperate to complete the call: the local exchange carrier (LEC) serving the customer that originates the call, the LEC serving the customer that receives ("terminates") the call, and the long-distance carrier (or interexchange carrier, IXC) that transmits the call between the two LECs. Retail customers typically would pay their respective LECs a set fee on a monthly basis for local service; the calling customer would also pay the long-distance carrier, often on a per-minute basis, for long-distance service.

The long-distance carrier incurs costs in the form of "access charges" paid to the LEC for the use of the plant in originating or terminating the call. "Switched access charges" are access charges that include the use of the LEC's routing computer, or switch.

The terms of switched access charges are contained in tariffs that a LEC files with the FCC (for interstate calls) and with state commissions (for intrastate calls). With respect to interstate calls, the FCC generally prohibits a competitive LEC (CLEC) from charging a higher access rate than the incumbent LEC does for the same exchange, but there is an exception for CLECs in rural areas that compete with non-rural incumbent LECs (ILECs). Similarly, rural LECs typically charge more for intrastate access than do non-rural LECs, on the theory that the limited volume of calling in sparsely populated areas provides less opportunity to recover the cost of plant.[1]

This matter is one of a number of cases in courts and before the Federal Communications Commission (FCC) and state utility commissions involving disputes between local and interexchange carriers about access charges that the LECs charge the IXCs for traffic delivered to "free conference service companies" (FCSCs).[2] The conference and chat line services provided by FCSCs generate very high volumes of traffic from callers through IXCs to LECs for delivery to FCSCs. The combination of high call volumes and high access charge rates creates high revenue opportunities for rural LECs.

Tekstar provides local exchange service in rural parts of Minnesota in which Qwest is the ILEC. Because Tekstar qualifies as a rural CLEC, it may charge more than Qwest (the ILEC) for both interstate and intrastate switched access service. In this case, Qwest and Sprint as IXCs claim that Tekstar's arrangements with FCSCs amount to profiteering in violation of federal and state tariffs. They claim, among other things, that Tekstar is not entitled to tariffed access charges because Tekstar does not "terminate" calls for the FCSCs and because the FCSCs are not "end users" within the meaning of Tekstar's access tariffs.

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[1] *Order Granting Intervention and Requiring Mediation and Briefings* at 2 (Aug. 4, 2009).
[2] FCSCs are also referred to as "conference calling companies" (or CCCs) in some jurisdictions.

The Commission has referred the following issues to the OAH for a contested case proceeding:

(1) Qwest asserts that Tekstar has illegally billed QCC for intrastate access charges. Qwest questions whether the calls in question meet the tariff requirement in the Tekstar access tariff.

(2) Qwest claims that the calls are delivered (i) to the Free Calling Service Companies (FCSCs) who are not end users and (ii) to Tekstar itself rather than to end-user premises, and that neither destination meets the requirements of Tekstar's access tariffs.

(3) Qwest refers to the payments that Tekstar makes to one set of customers, the FCSCs as "kickbacks" and states that these payments (i) violate the purpose of certain access charges and (ii) are unreasonably discriminatory, in violation of Minnesota law.

(4) According to Qwest, Tekstar improperly bills access charges for calls that "do not terminate in the local calling area that corresponds to the number called as required."

(5) Qwest asserts that Tekstar does not provide local exchange services to FCSCs as it "purports" to.

(6) Qwest claims that some of the FCSCs who receive telephone numbers and payments from Tekstar provide pornographic material in ways that prevent parents from protecting their children.

(7) Qwest states that Tekstar's traffic stimulation program is not in the public interest and abuses the certificate that Tekstar received from the Commission.

(8) The Department has found that certain contracts between Tekstar and the FCSCs provided for the FCSCs to receive tariffed services without having to pay for them. Qwest states that Tekstar does not charge for Tekstar employees installing the equipment of the FCSC or for local exchange service provided by Tekstar. Tekstar appears to have acknowledged some portion of this issue by stating in its Answer that some customers "were not billed for services provided by Tekstar."

(9) In the event that Tekstar's switched access tariffs do apply to the disputed charges, Tekstar has requested that the Commission order Qwest and Sprint to make all payments in intrastate access charges that Tekstar claims are owed by Qwest and Sprint.

(10) Similarly, in the event the switched access tariffs do apply to the disputed charges, the Department raises the question whether Tekstar's access rates are just and reasonable.[3]

The parties have engaged in extensive discovery. At this point, Qwest and Sprint have filed their direct testimony; Tekstar filed its responsive testimony on October 3, 2011. The current procedural schedule calls for the remaining testimony to be filed by January 2012 and for the hearing to take place February 13-17, 2012.[4]

Tekstar's motion to compel seeks the production of information in response to Request Nos. 6, 12, 23, 45-47, 59, and 69 from Tekstar's First Set of Information Requests; Request Nos. 2 and 5 from Tekstar's Second Set of Information Requests; and Request No. 1 from Tekstar's Third Set of Information Requests. In general, Sprint has objected to these requests as being overly broad and unduly burdensome and as seeking information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence.

Discovery Standards

Minn. Rule 1400.6700, subp. 2, provides:

> Subp. 2. **Discovery of other information.** Any means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed. If the party from whom discovery is sought objects to the discovery, the party seeking the discovery may bring a motion before the judge to obtain an order compelling discovery. In the motion proceeding, the party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party's case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery. In ruling on a discovery motion, the judge shall recognize all privileges recognized at law.

Rule 26.02 of the Minnesota Rules of Civil Procedure permits discovery regarding any unprivileged matter that is "relevant to the subject matter involved in the pending action," including information relating to the "claim or defense of the party seeking discovery or to the claim or defense of any other party." Materials that may be used in impeachment of witnesses may also be discovered as relevant information.[5] It is well accepted that the discovery rules are given "broad and liberal treatment" in order to ensure that litigants have complete access to the facts prior to trial and thereby avoid surprises at the ultimate hearing or trial.[6] Administrative Law Judges at the OAH "have

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[3] *Notice and Order for Hearing* (Feb. 16, 2010).
[4] *Twelfth Prehearing Order* (Aug. 4, 2011).
[5] *See, e.g., Boldt v. Sanders*, 261 Minn. 160, 111 N.W.2d 225 (1961).
[6] *See, e.g., Hickman v. Taylor,* 329 U.S. 495, 507 (1947), *quoted with approval in Jeppesen v. Swanson*, 243 Minn. 547, 551, 68 N.W.2d 649, 651 (1955); *Baskerville v. Baskerville*, 75 N.W.2d 762, 769 (1956).

traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts."[7]

The definition of relevancy in the discovery context has been broadly construed to include any matter "that bears on" an issue in the case or any matter "that reasonably could lead to other matter that could bear on any issue that is or may be in the case."[8] As a general matter, evidence is deemed to be relevant if it would logically tend to prove or disprove a material fact in issue.[9] In summary, "matters sought to be discovered in administrative law settings will be considered relevant if the information requested has a logical relationship to the resolution of a claim or defense in the contested case proceeding, is calculated to lead to such information, or is sought for purposes of impeachment."[10] The definition of "relevancy" for discovery purposes is not limited by the definition of "relevancy" for evidentiary purposes. Thus, information that is deemed relevant at the discovery stage may not necessarily be admissible evidence at the hearing.[11]

Discussion

First Set, Information Request No. 6.

This information request asks Sprint to identify each LEC (other than Tekstar) that Sprint has refused or declined to pay for services provided or billed in connection with the LEC's termination or delivery of interexchange calls placed by Sprint subscribers to FCSCs, from January 1, 2004, to the present. The request further seeks in 6(b) an explanation of the reason why Sprint refused to pay the access charges; in 6(c) a statement of the amount of the charges billed and the number of minutes for which it refused to pay; in 6(d) an explanation of the nature of the dispute; in 6(e) an explanation of whether the dispute was resolved, and if so, a copy of such agreement and "all related nonprivileged communications and documents"; in 6(f), all correspondence and documents exchanged between Sprint and the LEC regarding these charges; and in 6(g), all LEC invoices received for such charges. Sprint objected to the request as being overly broad, unduly burdensome, and as seeking information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence.

Tekstar argues that this information is relevant because Sprint may be treating Tekstar differently than other LECs, in violation of nondiscrimination laws. In response to the overbreadth objection, Tekstar has offered to narrow the information request to the period from January 1, 2007, to the present; and to eliminate the requests in subparagraphs 6(f) and 6(g), which seek "all correspondence and documents

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[7] G. Beck, M. Gossman & L. Nehl-Trueman, *Minnesota Administrative Procedure*, § 8.5.2 at 135 (1998).
[8] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).
[9] *Boland v. Morrill*, 270 Minn. 86, 132 N.W.2d 711, 719 (1965).
[10] G. Beck, M. Gossman & L. Nehl-Trueman, Minnesota Administrative Procedure, § 9.2 at 146 (1998).
[11] 2 D. Herr & R. Haydock, Minnesota Practice 9 (2d ed. 1985), citing *Detweiler Brothers v. John Graham & Co.*, 412 F. Supp. 416, 422 (E.D. Wash. 1976), and *County of Ramsey v. S.M.F.*, 298 N.W.2d 40 (Minn. 1980).

exchanged between Sprint and each LEC regarding such charges" and "all LEC invoices received by Sprint for such charges."

In parallel litigation commenced by Tekstar against Sprint in U.S. District Court for the District of Minnesota, the federal court required Sprint to produce settlement agreements with other carriers but did not require Sprint to provide detailed responses seeking additional information about those disputes, reasoning that, if Tekstar needed additional information after reviewing the documents, it could narrowly tailor further discovery requests. The settlement documents were to be provided under the following conditions: only Tekstar's retained counsel could review them, and retained counsel were prohibited from sharing the contents, either directly or indirectly, with any of Tekstar's business personnel, inclusive of in-house counsel; and that Tekstar's attorneys were prohibited from sharing, disclosing the contents of the agreements or using the agreements for any purpose outside of that litigation.[12] Sprint produced the settlement agreements required by the federal court order, and it does not appear to Sprint's in-house counsel that Tekstar used any of that information in its testimony filed thus far.[13] In addition, Sprint has documented the burden that would be required to locate and produce "all related nonprivileged communications and documents" pertaining to those agreements.[14]

The Administrative Law Judge concludes that the request, as modified, is still an overbroad and unduly burdensome way of obtaining relevant information as to how Sprint has handled similar disputes with other LECs. Sprint shall produce any additional settlement agreements that have been executed since the federal court's discovery order, subject to the same confidentiality protections imposed by the federal court. This is a more efficient and less expensive method of obtaining the information. To that extent, Tekstar's motion to compel with regard to Request No. 6 is granted; it is otherwise denied.

First Set, Information Request Nos. 12, 23, 45, and 46.

This group of information requests seeks, in the words of the federal court, a "wide swath of information" regarding Sprint's own calling plans and revenues from long-distance service plans, subscribers who have placed calls to FCSCs served by Tekstar, and other service offerings involved in the termination of calls by Tekstar. Sprint objected to these requests as being overly broad, unduly burdensome, and as seeking information that is neither admissible nor reasonably calculated to lead to the discovery of admissible evidence.

•Information Request No. 12 seeks, from January 1, 2004, to the present, a description of all retail long distance or toll calling service plans, programs, or packages offered by Sprint to customers or potential customers in the United States, along with identification of the per-minute rate, or the percentage of the total package that is intended to recover the cost of access charges billed by all LECs combined and Tekstar

[12] Affidavit of Philip R. Schenkenberg (Nov. 4, 2011) at Ex. C, pages 8-9.
[13] Affidavit of Bret Lawson ¶ 6 (Nov. 3, 2011).
[14] *Id.* ¶¶ 3, 7-8.

specifically; the average revenue per minute for each service offering, and customer count. Tekstar offered to narrow the request to the period from January 1, 2007, to the present. This request would require Sprint to identify and describe every long-distance product offering since 2007, for all 50 states and under a detariffed federal regime, and to identify or calculate what percentage of every price was intended to recover the cost of access charges.

•Information Request No. 23, as modified by Tekstar, seeks the identification of all revenues that Sprint has received from its subscribers who have placed calls to FCSCs served by Tekstar in the Minnesota jurisdiction and interstate jurisdiction, as well as combined, from January 1, 2007, to the present. The request seeks the production of all invoices and payment records. This requires would require Sprint to provide every invoice and payment record for every subscriber that ever made a call to a Tekstar number since 2007, and to identify revenues attributable to such calls.

•Information Request No. 45 seeks the average revenue per minute that Sprint receives for interexchange traffic originated by Sprint customers that Sprint considers to be traffic that Tekstar is terminating to FCSCs, and total interexchange traffic originated by Sprint customers terminating to all LECs. This request asks Sprint to calculate a nationwide average revenue per minute, broken down between pumped calls and total calls.

•Information Request No. 46 asks Sprint to identify, for each toll minute of use terminated by Tekstar for which Sprint was billed a switched access charge in 2010, the service offering used to originate the call, including the total number of switched access minutes paid by Sprint for each such service offering in 2010. This requires asks Sprint to identify the product offering associated with each of the tens of millions of calls to Tekstar and to provide nationwide revenue information for each service offering that governed any of those calls.

The federal court appears to have denied Tekstar's motion to compel similar discovery responses on the basis that much of the requested information is not relevant to any claim or defense presented in that case, and that Tekstar's need for responses to requests seeking minimally relevant information was outweighed by the tremendous burden required for Sprint to respond to it.[15] Tekstar argues that the requested information is indeed relevant because it goes directly to the heart of Sprint's claim that it has been damaged by Tekstar's access charge pricing practices. In addition, Tekstar argues that if Sprint's unlimited long-distance plans do not generate sufficient revenues to cover Tekstar's access charges, Sprint's "harm" may be self-inflicted. It contends that a "complete picture and understanding of the revenues Sprint has generated for itself" is necessary to fully explore and understand the extent to which Sprint is suffering harm or damages.

In response, Sprint argues that this motion is untimely, as Tekstar waited more than one year to serve any written discovery on Sprint, engaged in half-hearted meet

[15] Schenkenberg Aff. at Ex. C, pages 6-7.

and confer sessions, and then waited ten more weeks to bring this motion. Sprint contends it is far too late to open these significant new issues to discovery, when the parties have already filed their initial testimony.

In addition, Sprint argues that Tekstar's arguments about determining the "harm" to Sprint are unfounded. In this case, Tekstar seeks an order requiring the payment of disputed intrastate access charges by Qwest and Sprint; Sprint has demanded a refund of wrongly billed access charges. Sprint has not asserted any claim for general damages.

Finally, Sprint argues that its business practices, whatever they may be, are not the focus here. In this contested case, the complaint filed pursuant to Minn. Stat. § 237.081 concerns Tekstar's imposition of access charges under its intrastate tariff and its compliance with laws and rules governing the provision of local exchange service.

The Administrative Law Judge concludes that the focus of this contested case is properly on Tekstar's practices and whether the access charges in question comply with Tekstar's intrastate tariff and with laws and rules governing the provision of local exchange service. If the disputed charges do apply, Tekstar has requested that the Commission require Qwest and Sprint to pay them, and in that event the Department seeks an analysis of whether the access charges themselves are just and reasonable. This does not open the door to broad-ranging discovery concerning Sprint's pricing plans for long-distance service or its revenues from different types of service offerings or from different types of calls (pumped vs. nonpumped). Moreover, Sprint has established that the requested discovery is overbroad, burdensome, unreasonable and oppressive, taking into account the issues or amounts in controversy, the costs or other burdens of compliance when compared with the value of the information sought.[16] Tekstar's motion to compel responses to Information Request Nos. 12, 23, 45, and 46 is accordingly denied.

First Set, Information Request No. 59.

Information Request No. 59 asks Sprint to answer whether it provides to its end users the functional equivalent of "SIP Bindings," as that term is used in the testimony of Jeffrey Owens. "SIP Binding" is apparently a technical arrangement whereby a conference bridge is connected to Tekstar's network for the purpose of providing service to FCSCs.[17]

Tekstar argues that it needs this information to determine whether Sprint's complaints are consistent or inconsistent with its own practices and with industry standards. Sprint argues in response that its business practices as a CLEC are irrelevant to its claims as an interexchange carrier and that, even if it did have such products, identification of those products would not be relevant. The issue is not whether Sprint or anyone else has such technology available; it is whether Tekstar used

[16] *See* Affidavits of Marybeth Banks (2009 and 2011); Affidavits of Bill Davison (2009 and 2011); Affidavits of Karine Hellwig (2009 and 2011).
[17] *See, e.g.*, Direct Testimony of Jeffrey Owens at 355-61.

the technology improperly. The Administrative Law Judge agrees that this information request is not reasonably calculated to lead to the discovery of admissible evidence, and Tekstar's motion to compel a response to Information Request No. 59 is denied.

First Set, Information Request No. 69.

Information Request No. 69 asks Sprint to state whether it has paid any refunds to originating end user subscribers in connection with calls the end users placed to FCSCs. If so, it asks Sprint to identify the states in which the end users resided, whether the refunds were for intrastate or interstate traffic, and the amount of the refund.

Tekstar argues that Sprint is collecting toll revenue from its customers for the toll service that generates traffic to Tekstar's FSCS customers but is not forwarding any portion of that revenue to Tekstar for terminating that traffic. It contends that this information request seeks information about whether there were any defects in Tekstar's delivery of traffic that reduced Sprint's toll revenues from its own customers. Tekstar maintains that this information relates to Sprint's claims of harm or damage and to the determination of a "just and reasonable" resolution of the complaint.

Sprint points out that this request is overbroad and unduly burdensome because, contrary to Tekstar's argument, it is not limited to refunds that concern defective delivery of traffic. Moreover, Sprint maintains it does not track information on this basis.[18]

The Administrative Law Judge concludes that Request No. 69 is overly broad and unduly burdensome. In addition, discovery regarding how Sprint's toll revenues may have been diminished by refunds is no more reasonably calculated to lead to the discovery of admissible evidence than is the requested discovery of the revenues themselves. For the same reasons, Tekstar's motion to compel a response to Information Request No. 69 is denied.

First Set, Information Request No. 47 and
Second Set, Information Request Nos. 2 and 5.

Information Request No. 47 asks Sprint to provide a list of entities that collocate their facilities in Sprint switching offices in Minnesota, including the switched access rate elements that Sprint assesses for traffic transmitted to or from the collocation arrangement and the total switched access revenues received in 2010 from access traffic transmitted to/from the collocation arrangements.

In the Second Set of Information Requests, Request No. 2, as modified by Tekstar, asks Sprint to identify whether Sprint has refused to pay originating (as opposed to terminating) switched access charges in connection with LECs' origination of calls by Sprint subscribers to FCSCs. Tekstar argues that Sprint has identified the amounts it paid for terminating access; it should not be burdensome to identify amounts paid for originating access.

[18] *See* Affs.of Banks, Davison, and Hellwig.

Request No. 5 similarly asks Sprint whether it has ever refused to pay originating (as opposed to terminating) switched access charges to any LEC in connection with interexchange calls by Sprint subscribers that Sprint believes were destined for FCSCs.

Sprint maintains that it provided responsive information to this request in draft form on August 1, 2011, and that Tekstar failed to follow up to identify any alleged inadequacies with the draft response.[19] Sprint provided the draft responses subject to Tekstar's agreement to withdraw all or substantially all of its remaining objections, which Tekstar has not done; however, Sprint has not provided the substance of these responses in connection with the motion to compel. Sprint should finalize and serve the draft supplemental responses to these information requests so that the information is available to Tekstar in usable form. To this extent, Tekstar's motion to compel with regard to Request No. 47 (First Set) and Request Nos. 2 and 5 (Second Set) is granted; it is otherwise denied.

Third Set, Information Request No. 1.

This request asks Sprint to admit or deny that Sprint offers voice mail services to its customers, and if admitted, to describe the physical and technological manner in which the service is provided; the assessment of switched access charges on interexchange calls that reach a customer's voice mail service; and an explanation of how such a practice would be consistent with Sprint's tariffs in that they do not necessarily terminate to an end user premise.

Tekstar argues that it is entitled to know, in light of Sprint's claim that that traffic terminated to a conference bridge is not a "customer premise," whether Sprint charges terminating access for traffic that is routed to voice mail equipment located in a different exchange than the called party. If Sprint charges access for traffic in situations similar to Sprint's claims related to FCSCs, Tekstar argues this information is directly relevant in determining whether Sprint is acting consistently with its advocacy and whether Tekstar's practices are consistent with those of other carriers in the industry.

Sprint argues in response that its billing practices as a CLEC are not relevant to a dispute concerning the propriety of access charges imposed on it as an interexchange carrier. In addition, it argues that its billing practices as a CLEC would not be relevant to the legality of Tekstar's intrastate tariff billing practices.

The Administrative Law Judge concludes that Sprint's practice as a CLEC regarding the billing of access charges when traffic destined for a Sprint customer is terminated to voice mail equipment, regardless of the exchange in which that equipment is located, is simply not calculated to lead to the discovery of admissible evidence. This scenario is not remotely comparable to the allegations made in this case, and information responsive to this request would shed no light on the propriety of Tekstar's actions. Tekstar's motion to compel with regard to Request No. 1 (Third Set) is denied.

K.D.S.

[19] Schenkenberg Aff. ¶ 12 & Ex. G.

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November 21, 2011

To All Individuals on the ALJ eDockets Service List

Re: ***In the Matter of the Complaint by Qwest Communications Company, LLC against Tekstar Communications, Inc. regarding Traffic Pumping*; MPUC P-5096, 5542/C-09-265; OAH Docket No. 3-2500-21151-2**

The document listed below has been filed with the E-Docket system and served as specified on the ALJ eDockets Service List.

Order on Tekstar Motion to Compel Discovery from Sprint

Sincerely,

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

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KDS/nh

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
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CERTIFICATE OF SERVICE

Case Title: ***In the Matter of the Complaint by Qwest Communications Company, LLC against Tekstar Communications, Inc. regarding Traffic Pumping***	**OAH Docket No. 3-2500-21151-2** **MPUC Docket No. P-5096, 5542/C-09-265**

Nancy J. Hansen certifies that on the 21st day of November, 2011, she e-filed a true and correct copy of the ***Order on Tekstar Motion to Compel Discovery from Sprint*** and also served the document via U.S. Mail and electronic service-mail as designated on the Official Service List on file with the Minnesota Public Utilities Commission.