

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

IN THE MATTER OF THE COMPLAINT)
OF SOUTH DAKOTA NETWORK, LLC,)
AGAINST SPRINT COMMUNICATIONS)
COMPANY LP)

DOCKET NUMBER TC 09-098

)
IN THE MATTER OF THE THIRD)
PARTY COMPLAINT OF SPRINT)
COMMUNICATIONS COMPANY LP)
AGAINST SPLITROCK PROPERTIES,)
INC., NORTHERN VALLEY)
COMMUNICATIONS, INC.,)
NORTHERN VALLEY, INC., AND)
CAPITAL TELEPHONE)
COMPANY)

**SANCOM, INC'S RESPONSE
TO SPRINT COMMUNICATIONS COMPANY L.P.'S MOTION TO RESOLVE
DISCOVERY DISPUTE**

Sancom, Inc. ("Sancom"), by counsel, hereby responds to Sprint Communications Company L.P.'s ("Sprint") Motion to Resolve Discovery Dispute (the "Motion"). In support of its response, Sancom states as follows:

To date, counsel for Sprint has caused both parties to expend considerable time and resources in this proceeding in its effort to obtain improperly confidential documents, despite admitting that it already has all relevant *evidence* and knowing that Sancom is obligated not to produce these materials, which were authored by a third party and are subject to a protective order. Now, with its Motion, Sprint's desire to gain discovery of the confidential, non-public version of Qwest Communications Company's ("Qwest") Federal Communications Commission ("FCC") complaint against Sancom (the "Qwest/Sancom FCC Complaint") goes beyond any bounds of reasonableness.

What Sprint appears either unwilling or unable to understand is that Sancom's hands are tied. It holds Qwest's FCC Complaint and Legal Analysis pursuant to the terms of the protective order entered by the FCC in Docket No. EB-10-MD-004 (the "FCC Protective Order") that prevents its further dissemination. Sancom simply cannot comply with Sprint's discovery requests so long as counsel for Sprint refuses to execute the FCC Protective Order and abide by its terms.

As an initial matter, however, Sprint's discovery motion should be denied as moot. Sprint already has in its possession all of the evidence that was produced by Sancom to Qwest in the FCC proceeding. Sprint, in fact, admits this in both its Motion and in Mr. Schenkenberg's Affidavit ("Schenkenberg Aff."). Specifically, Sprint admits that all of Sancom's confidential information contained within the Qwest/Sancom FCC Complaint "is already in Sprint's possession as part of the discovery in this case." Motion at 4; *see also* Schenkenberg Aff., ¶ 23. What Sprint now demands in this case then, is only Qwest's formal complaint and legal analysis – documents that are subject to the FCC Protective Order and filed under seal. Sprint already has all of the relevant evidence and cannot even begin to articulate how Qwest's complaint and legal analysis could ever become evidence in this case. In essence, there is no discovery dispute because there is no potential evidence at issue, only the idle curiosity of Sprint's counsel about how Qwest argued and litigated its case at the FCC.

Sprint's insistence that Sancom produce the Qwest/Sancom FCC Complaint in this proceeding is all the more unfortunate because counsel for Sprint – who has already wrongly obtained the materials in violation of the FCC Protective Order – admits that he knew from the outset that the information he sought from Sancom was subject to the terms of the FCC Protective Order. Schenkenberg Aff., ¶ 5. He also admits that he knew this at the time he asked

Sancom's local counsel – who himself was not counsel in the FCC proceeding and was not a signatory to the FCC Protective Order – to produce it. *Id.*¹ Mr. Schenkenberg admits that he understood the FCC Protective Order “would not allow Sprint to use that document for purposes of related litigation (like this PUC Case),” yet nevertheless endeavored to avoid the intent and meaning of the protective order by seeking the materials from an individual who unquestionably lacked authority to waive the protection of a protective order to which he was not a party. *Id.* Surely if Mr. Schenkenberg understood that Sprint was not allowed to produce or otherwise use the Qwest/Sancom FCC Complaint for related litigation, he also understood that Sancom, no less a party to the FCC Protective Order than Sprint, could not choose to produce a document authored by Qwest, a non-party to this litigation. Sancom was not then and is not now capable of granting Sprint the permission it requests without Qwest's consent.

Setting aside for the moment the propriety of Mr. Schenkenberg's decision to request a document that he knew was subject to the FCC Protective Order, and from an attorney that he knew was not representing any party in the FCC proceedings, Sprint's Motion also omits a number of salient facts that provide much needed context to the issue. Specifically, when Mr. Schenkenberg initially requested the Qwest/Sancom FCC Complaint from Mr. Larson, Sancom's local counsel, he did not represent any intent to share those documents with anyone not a party to the FCC proceeding and, indeed, expressly agreed to execute the FCC Protective Order and thus be bound by its terms.² And, until caught red-handed, Mr. Schenkenberg never submitted any

¹ See Affidavit at ¶ 5 (“I advised [Mr. Larson] that Sprint had a copy of the confidential version [of the Qwest/Sancom Complaint], but that it was being held in accordance with a Protective Order specific to the Qwest/Sancom FCC case. I did not intend to receive the document for purposes of the FCC case because **I was not Sprint's counsel in that case, and the FCC's Protective Order would not allow Sprint to use that document for purposes of related litigation** (like this PUC Case).”) (emphasis added).

² See Jan. 19, 2011 email from Mr. Schenkenberg attached as Exhibit B to Sprint's Motion.

discovery requests that would have caused Sancom to know or reasonably expect that he intended to use the materials as discovery in this case.

When Mr. Larson responded to the inquiry, he understood that Sprint would have obtained a copy of the Qwest filing based on its role as an amicus in the FCC proceeding and as a signatory to the FCC Protective Order. Thus, Mr. Larson informed Mr. Schenkenberg that Sprint would have already received the materials. Schenkenberg Aff., ¶ 7. Mr. Larson did not provide any such materials to Mr. Schenkenberg.³ *Id.*, ¶ 12. To the contrary, Mr. Schenkenberg took it upon himself to receive the Qwest/Sancom FCC Complaint directly from Sprint. *Id.* As such, the only open question is who at Sprint violated the terms of the FCC Protective Order by providing the materials to Mr. Schenkenberg without requiring him to execute the protective order?

While mindful of its obligations under the FCC Protective Order, Sancom has consistently tried to evaluate this situation objectively and endeavored to resolve the issue amicably. *See* Affidavit of G. David Carter (“Carter Aff.”), ¶¶ 6 - 11. Sancom offered Sprint’s counsel a number of options to avoid wasting the Commission’s time and energy to address this issue. *Id.* For example, Sancom offered to allow Mr. Schenkenberg, as Sprint counsel or its authorized representative, to belatedly execute the FCC Protective Order, and to hold the documents pursuant to the terms of that Protective Order. *Id.* ¶¶ 6 & 9. Nevertheless, Mr. Schenkenberg rejected this offer, suggesting he was not sure that he could meet the qualifications

³ Though Mr. Larson’s January 25, 2011 email suggests that he is going to request Mr. Buntrock provide the document to Mr. Schenkenberg, no such document was provided by Mr. Buntrock. *See* Schenkenberg Ex. C. Rather, during subsequent conversations with Mr. Schenkenberg, it became clear that he obtained the document from Sprint’s in-house counsel.

to be a signatory of the FCC Protective Order.⁴ *Id.* ¶ 6. Under this scenario, Sprint would not produce the documents to other parties in this case, each of which have confirmed to Sancom’s counsel that they have no need or desire to obtain them. *Id.* ¶ 8. Moreover, this option would resolve the issue without prejudice to Sprint, because, when asked, Mr. Schenkenberg has confirmed his inability to think of any way in which Qwest’s formal complaint and legal analysis could be admitted as evidence in this case. *Id.* ¶ 6; *see also* Schenkenberg Aff., ¶ 26.

In the alternative, Sancom has stated that, if Sprint obtains consent from Qwest (as the author of the materials), and executes the FCC Protective Order, Sancom will not object to Sprint holding the documents subject jointly to the FCC Protective Order and the protective order in this case. Carter Aff., ¶ 10. Though Mr. Schenkenberg’s January 19, 2011 email indicated that he was willing to execute the FCC Protective Order, he now flatly refuses to do so without explanation or justification. Counsel for Sprint appears to be thus more interested in engaging in expensive and unnecessary discovery gamesmanship and a “gotcha” style of litigation than resolving this issue wasting the Commission’s time.

In short, this so-called “discovery dispute” is nothing more than the byproduct of Sprint’s counsel’s curiosity about how Qwest chose to litigate its case against Sancom. Sprint’s counsel improperly obtained Qwest’s legal analysis and formal complaint from the FCC proceeding and, rather than attempting to resolve the issue amicably, has decided to bring its arguments to this Commission in a transparent and misguided effort to prejudice Sancom. But, the fact remains that Sprint has every single piece of *evidence* that Qwest has received and cannot offer any explanation as to how Qwest’s legal work would be admissible in this case. Finally, lest there be

⁴ This, of course, directly conflicts with Mr. Schenkenberg’s prior representation to Mr. Larson that he would sign the FCC protective order. *See* January 19, 2011 Email, attached as Exhibit B to the Schenkenberg Aff. (“I can sign the FCC agreement as well if you want.”).

any doubt, Sancom is in no way concerned that the materials that Sprint seeks to bring into this case would be damaging to Sancom's case, rather Sancom feels duty bound to prevent the improper distribution of materials subject to a protective order. Otherwise, if tactics such as Sprint's are allowed to persist, such orders will simply lack integrity. For these reasons, Sancom respectfully requests that the Commission deny the relief requested in Sprint's Motion. In the alternative, Sancom requests that the Commission order Sprint's counsel to execute the FCC Protective Order as he has previously indicated that he is willing to do.

Respectfully submitted,

Dated: August 19, 2011



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CERTIFICATE OF SERVICE

I, G. David Carter, hereby certify that I caused copies of the foregoing SANCOM, INC'S RESPONSE TO SPRINT COMMUNICATIONS COMPANY L.P.'s MOTION TO RESOLVE DISCOVERY DISPUTE to be served on the following via electronic mail on this 19th day of August, 2011:

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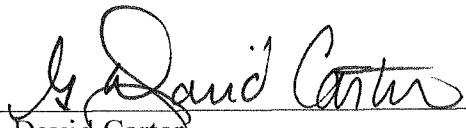
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