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THE PUBLIC UTILITIES COMMISSION

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OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF THE REQUEST FOR
A CONFIDENTIALITY DETERMINATION IN
ACCORDANCE WITH ARSD 20:10:01:42

TC05-017

=====

Transcript of Proceedings
February 8, 2005

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
GARY HANSON, CHAIRMAN
BOB SAHR, VICE CHAIRMAN
DUSTY JOHNSON, COMMISSIONER

COMMISSION STAFF

- Rolayne Ailts Wiest
- John Smith
- Karen Cremer
- Greg Rislov
- Harlan Best
- Keith Senger
- Dave Jacobson
- Michele Farris
- Tina Douglas
- Heather Forney
- Pam Bonrud
- Martin Bettmann
- Steve Wegman

Reported By Cheri McComsey Wittler, RPR, CRR

PRECISION REPORTING
L I M I T E D

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2 OF THE STATE OF SOUTH DAKOTA
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1 APPEARANCES BY TELEPHONE 2
2 David Fierst
3 Marcus DaCuna
4 Donna Collins
5 Mary Lohnes
6 Gary Miners
7 Melaine Acord
8 Suzan Stewart
9 Colleen Sevold
10 John Miller
11 Al Koeckeritz
12 John Burke
13 Mark Stacy
14
15 =====
16 TRANSCRIPT OF PROCEEDINGS, held in the
17 above-entitled matter, at the South Dakota State
18 Capitol, Room 468, 500 East Capitol Avenue, Pierre,
19 South Dakota, on the 8th day of February 2005,
20 commencing at 1:30 p.m.
21
22
23
24
25

1 CHAIRMAN HANSON: TC05-017, In the
2 matter of the request for a confidentiality
3 determination in accordance with ARSD 20:10:01:42.
4 The question today, shall the Commission grant
5 the Motion for determination of release of
6 information filed as confidential?
7 Mr. Smith.
8 MR. SMITH: Thank you. This is yet
9 another minichapter in the continuing saga of
10 S&S Communications.
11 CHAIRMAN HANSON: Forgive me for
12 interrupting you. Do you need to be sworn in?
13 MR. SMITH: No. Well, hopefully I'm
14 not going to act as a witness. It might be
15 possible -- before this is over today I may have to
16 call a witness who will be Mr. Senger. Hopefully
17 it won't get to that.
18 This came about as a result of a lawsuit in
19 federal court filed by S&S Communications against
20 the South Dakota Local Exchange Carriers
21 Association, Inc. I think the Commissioners know
22 what that is, but for the benefit of those persons
23 out there who don't know what that is, that's an
24 association of the rural -- basically the smaller
25 local exchange carriers in the state that's been

1 formed as a way of averaging switched access costs
2 in the state, and then apportioning those --
3 collecting them on a common basis from carriers and
4 apportioning the costs out to the local exchange
5 carriers.
6 This case is in federal court venued here in
7 Pierre, and the gist of the case involves various
8 allegations involving switched access charges made
9 by the LECA members or LECA to S&S Communications.
10 The Commission is not a party to the case.
11 On January 18 of 2005 the Commission through
12 its executive director was served with a subpoena
13 by LECA to obtain numerous documents on the face of
14 the subpoena, all documents filed by S&S in our
15 case, our show cause case against S&S which was
16 Docket No. TC02-166. As you recall we concluded
17 that case in January of 2003. As a result of that
18 Docket, the Order was issued revoking the
19 Certificate of Authority of S&S Communications,
20 Inc. and imposing a fine on S&S.
21 Currently additionally with respect to
22 S&S Communications here at the Commission we have
23 some 141 outstanding consumer Complaints against
24 S&S that remain unresolved, and we have an
25 additional 30 or so claims against bond funds that

1 have been collected as a result of bonds issued on
 2 behalf of S&S in the name of the Commission for the
 3 benefit of customers of S&S who were injured as a
 4 result of S&S's going out of business.
 5 The reason why I brought this here before the
 6 Commission today is that many of the filings that
 7 S&S made to the Commission in the months leading up
 8 to the final hearing in the S&S case and certain
 9 rulings made -- requests made by S&S's counsel
 10 during the hearing and rulings made in response to
 11 those requests in the hearing by the Commission
 12 have established under our rules much of the
 13 information that LECA is seeking pursuant to this
 14 federal subpoena as confidential under our rules.
 15 One of those rules, and the one that we're
 16 here under today, is ARSD 20:10:01:43, and it
 17 provides that a party may make a request for access
 18 to confidential information. And basically what we
 19 decided to do so we could bring this before the
 20 Commission in a Docketed manner that would give the
 21 parties a chance to make their pitches to you one
 22 way or the other is to treat the subpoena with
 23 respect to the confidential information as a
 24 request pursuant to that rule and to bring it
 25 before the Commission and let you make the decision

1 on, first of all, what we're asking for as a
 2 determination on what, if any, of that information
 3 any longer deserves confidential treatment, and if
 4 it does, then what the Commission would like to ask
 5 for in the way of some kind of protective order or
 6 protective procedure that we might follow in the
 7 federal court.
 8 I guess just to get -- since this is the
 9 Commission and not really the staff, I think we
 10 think it's incumbent on the Commission to have an
 11 opportunity to respond.
 12 And with that, I think what I would like to do
 13 maybe next is turn to my take on what I think and
 14 then perhaps let the parties respond and, if
 15 necessary, then I may have to call Mr. Senger as a
 16 witness and ask him some questions.
 17 CHAIRMAN HANSON: Mr. Smith, during
 18 your presentation you quoted a rule as 20:10:01:43.
 19 Did you mean 42 or 43?
 20 MR. SMITH: 42 is the statute -- or
 21 is the rule that sets the substantive requirements
 22 for what you must find in order to retain
 23 information as confidential. Section 43 provides a
 24 procedure whereby any person can make a request for
 25 access to that confidential information. And today

1 we're here to make that request.
 2 CHAIRMAN HANSON: Thank you. Are
 3 there any other questions at this time?
 4 VICE CHAIRMAN SAHR: I do have one,
 5 Mr. Chairman. Mr. Smith -- and if I missed it in
 6 the record or in your remarks anywhere, my
 7 apologies -- do you know if any contacts have been
 8 made with S&S to determine if they have any
 9 objections with the records being furnished?
 10 MR. SMITH: Yes. We have had
 11 repeated discussions with S&S's counsel, and he's,
 12 in fact -- he's here via the telephone right now.
 13 VICE CHAIRMAN SAHR: Right. And can
 14 you summarize their position on that, or would you
 15 rather wait and --
 16 MR. SMITH: I don't know precisely
 17 what his position is. I don't know,
 18 Mr. Chairman -- without wanting to insult the
 19 lawyers in the case, part of the record in the
 20 Docket in the case is an Order from Judge Kornmann,
 21 which is a cranky Order, I guess at the risk of
 22 insulting the Judge, and it indicates that, in my
 23 view, that his patience is running out both with
 24 respect to overreaching and burdensome requests for
 25 information through the discovery process and also

1 foot-dragging and obfuscatory behavior on the
 2 responsive side. And I don't want the Commission
 3 to be a part of that process.
 4 That said, that doesn't necessarily mean that
 5 we don't have an obligation both to S&S and to some
 6 other persons who I'm going to speak about here in
 7 a minute and also to the Commission's own authority
 8 to hold information confidential.
 9 And in that regard I might point out to the
 10 Commission, as I'm sure Commissioner Hanson in
 11 particular is aware, the current proceeding
 12 impending in FERC regarding OMS and MISO and the
 13 right of OMS and of individual MISO State
 14 Commissions to obtain access to market monitoring
 15 information for MISO. And I think one of the
 16 policy issues at stake with that kind of decision
 17 by FERC and by MISO is faith that State Commissions
 18 mean what they say when they declare information to
 19 be confidential and their willingness to stand up
 20 for protective provisions and to at least advocate
 21 in forums in which those records might be sought
 22 aggressively to both protect the confidentiality of
 23 that information and protect your prerogatives as
 24 an agency of this sovereign state.
 25 Now does the information in this case warrant

1 going to the U.S. Supreme Court over this? I tend
 2 to think not. And that said, if you don't mind,
 3 I'd like to turn to at least my position on the
 4 information itself and what I would actually like
 5 to have the Commission rule on and then maybe let
 6 the parties address it.

7 First of all, the purposes advocated by S&S,
 8 if my memory serves me correctly, and I admit that
 9 I did not go back and read the transcripts from a
 10 couple of years ago, find them and read them, but
 11 my recollection is that the arguments advanced by
 12 both Mr. Sannes during the hearing and by I believe
 13 actually Mr. Burke on one or more occasions for
 14 holding this information confidential was that it
 15 was proprietary information to S&S that had
 16 commercial value, was in the nature of a trade
 17 secret. That information consisted of customer
 18 names, customer telephone numbers, contract terms
 19 and conditions, business records that were
 20 confidential and so on and so on.

21 I guess it would be my argument today that S&S
 22 having as a result of your decision ceased
 23 operations legally and having had its authority to
 24 do business in the telecommunications area removed
 25 from this state and now having had the passage of

1 list of any group of names and addresses and phone
 2 numbers for the purpose of doing something that is
 3 wrong. And I'm going to get to that in a minute.
 4 But in terms of a legitimate sale of a phone
 5 business or a portion thereof as any kind of viable
 6 business entity, I think you and I all know those
 7 people have long since -- in fact, we all know in a
 8 day or so they were all compelled to procure
 9 alternative phone service. I certainly haven't
 10 heard and have been working with the complaint
 11 staff all along that anyone out there is still
 12 complaining of not having been able to procure
 13 alternative service.

14 So at this point in time in my view that trade
 15 secret value, if you will, the business value to
 16 S&S I think is nonexistent, and I think S&S has
 17 forfeited that right.

18 Now that said, does that mean that this
 19 information ought to be willy-nilly turned over
 20 without some attention being paid to another factor
 21 you'll see in the list of factors, and that is
 22 impair the public interest. Because there is
 23 another group of people whose interests are at
 24 stake, and that group of people are the S&S
 25 customers, whose confidential proprietary network

1 almost two years since the last of the information
 2 that we're talking about filed with the Commission,
 3 that at this point I don't think there remains a
 4 justification on behalf of S&S Communications
 5 itself as a business entity to claim trade secret
 6 protection under Federal Rule 26 for this
 7 information any longer.

8 At the time if you'll recall, even after they
 9 were out of business the argument was made by S&S
 10 that the value of the customer lists and the
 11 various other things still retained value as a
 12 potential asset that might be sold as either part
 13 of a going concern sale or as an asset sale and
 14 that S&S wanted to retain the value of that and for
 15 not a totally stupid reason, so that they could use
 16 that money they would make from hopefully an asset
 17 sale to provide funds to pay off the thousands of
 18 creditors that they left alongside the road when
 19 they finally went down.

20 Just my own take on that is having spent
 21 15 years of my life in business is that after a
 22 year and a half any value -- any asset value in
 23 those lists that's legitimate in any way, shape, or
 24 form is gone. I'm not saying there might not be
 25 some crank out there that might not want to get a

1 information, CPNI as the acronym goes in the
 2 telecommunications business, was also subpoenaed by
 3 the Commission in the days leading up to the
 4 hearing and which we have as a part of our
 5 documents in this case.

6 And I guess my thought on that is that on
 7 behalf of the staff I would like to recommend that
 8 with respect to all information that's in the
 9 Docket that we receive from S&S that does not
 10 contain CPNI, customer proprietary network
 11 information, that that information be turned over
 12 immediately to LECA, that you make a determination
 13 that except for customer proprietary network
 14 information, the information is no longer worthy of
 15 confidential treatment, but that with respect to
 16 customer proprietary network information, that the
 17 Commission issue a protective order and that we
 18 either obtain the agreement of the parties to
 19 afford that customer information the protection
 20 that it deserves under the federal law -- and this
 21 is a matter of federal law, by the way,
 22 47 U.S.C. Section 222. The federal law requires
 23 that customer proprietary network information be
 24 kept confidential.

25 So as a general proposition that would be my

1 recommendation, and what I would be hopeful of is
2 that the two lawyers on the phone would basically
3 concur with what I've just stated to you and that
4 we could resolve this fairly quickly with some kind
5 of agreed protective procedure and not have to go
6 bother the Judge with this.

7 And that said, I'm going to be quiet and let
8 Mr. -- I forgot who they are now.

9 COMMISSIONER JOHNSON: Burke.

10 MR. SMITH: Yeah. And Burke.

11 What's the other one? Fierst and --

12 MR. FIERST: David Fierst is the
13 other one.

14 MR. SMITH: I'm sorry.

15 MR. FIERST: That's okay.

16 MR. SMITH: Have their shot at the
17 mike here. Thank you.

18 CHAIRMAN HANSON: Thank you. Are
19 there any questions of John, first of all?

20 If not, I'm trying to see in my own mind who I
21 think is going to go first, and I'll ask
22 Mr. Fierst.

23 MR. FIERST: Okay. Thank you,
24 Mr. Chairman. Let me just start for 30 seconds
25 with where Mr. Smith left off, and I'm sure we can

1 conceivable value to it.

2 And the only other issue that Mr. Smith did
3 not address is the importance of this information
4 in the federal suit. I don't think we need to get
5 into that in any detail. I don't think that's
6 really the issue before you except that one of the
7 criteria under the statute is, is there a public
8 interest in releasing this information, and there
9 certainly is.

10 The members of LECA and LECA itself have been
11 sued for a lot of money. There have been claims
12 made in the suit, for example, that it was the
13 defendant that put S&S out of business when, in
14 fact, we want to be able to show that what put them
15 out of business was that the South Dakota PUC
16 revoked their Certificate of Authority and had good
17 reasons for that.

18 There's also a claim for lost profits, and we
19 need the financial information that was given to
20 the PUC to show that there were no profits, there
21 wouldn't have been profit, and, in fact, that the
22 financial records that S&S had were bogus and that
23 was part of the reason why the COA was revoked.

24 The documents also are important in the
25 federal suit on the issue of credibility. This is

1 reach an agreement on the customer proprietary
2 network information. I'm not sure exactly what the
3 parameters of that information are.

4 I would like to know names and addresses so
5 that I could communicate with these customers if
6 necessary, but anything beyond that I'd be happy to
7 work out some agreement. Either they could be
8 redacted from the information or it could go to the
9 judge for a protective order that would keep it
10 confidential or you could keep it confidential,
11 whatever. I'm sure that can be worked out. So I
12 don't think that will be a problem.

13 As to the rest of it, I would agree with
14 Mr. Smith entirely. S&S is out of business. Out
15 of business for a couple of years. There's an
16 Order that it can never get back into business
17 within the state, and so there's no conceivable
18 proprietary value to any of this information
19 anymore.

20 Customer lists, if they haven't sold them in
21 the last two years, they're not going to sell them.
22 They don't retain value. The only value to a
23 customer list is that it has to be used quickly.
24 You'd have to sell it or it loses its value and
25 certainly after this kind of time there's no

1 something that Judge Kornmann specifically referred
2 to in his decision, that we have a right to our --
3 in our case to show that the Plaintiff has already
4 been found to have misrepresented the facts to a
5 government agency. That's something that would be
6 significant for us.

7 So basically what we're saying is we don't
8 think there's any confidentiality to any of these
9 documents. We have a good public interest reason
10 to get the documents necessary in our litigation,
11 and to the extent that the customer proprietary
12 information does have some confidentiality
13 remaining in it, we'd be happy to work out an
14 agreement on that.

15 CHAIRMAN HANSON: Thank you,
16 Mr. Fierst. Mr. Burke, would you like to --

17 COMMISSIONER JOHNSON: Mr. Chairman,
18 I have a question for Mr. Fierst if that's
19 appropriate at this time.

20 CHAIRMAN HANSON: Certainly.

21 COMMISSIONER JOHNSON: Commissioner
22 Johnson here, Mr. Fierst. You said that you wanted
23 the names and contact information that the PUC
24 held. Why not just subpoena S&S for that?

25 MR. FIERST: Well, originally we

1 tried to get this information from S&S, and for
 2 reasons that frankly I don't fully understand,
 3 Judge Kornmann said get it from the PUC, not S&S.
 4 And so here I am trying to get it from the PUC.
 5 COMMISSIONER JOHNSON: Do you have
 6 any insight, Mr. Smith?
 7 MR. SMITH: I really don't. You
 8 know, the ruling made by the Judge was that the
 9 request -- that discovery request was overly broad
 10 and unduly burdensome. I mean, and I don't know.
 11 Maybe Mr. Burke knows better, having ourselves
 12 dealt with attempting to get information out of
 13 S&S.
 14 I mean, one of the problems I think they have
 15 is, you know, I don't know that they -- at this
 16 point in time I just wonder if they have it. I
 17 don't know. Honestly I don't know if they have
 18 anywhere left to store stuff like that. I just
 19 don't know.
 20 COMMISSIONER JOHNSON: Thank you.
 21 Mr. Chairman, thanks for allowing me to interject.
 22 CHAIRMAN HANSON: Certainly. Any
 23 other questions at this time?
 24 If not, Mr. Burke. You've been very patiently
 25 waiting.

1 MR. BURKE: Thank you. Can everyone
 2 hear me okay?
 3 CHAIRMAN HANSON: Yes, we can.
 4 MR. BURKE: At the outset I want to
 5 make it clear that though I would really enjoy the
 6 opportunity, I will not waste everyone's time by
 7 firing dirty laundry out about some of the merits
 8 on my side of the deal, okay, because we're not
 9 trying our case in front of you here today and it
 10 is tempting and I would like to tell you some
 11 responses but I value your time too much and I
 12 won't do that but just know that I would like to.
 13 In terms of what Mr. Smith is proposing, I
 14 think that sounds pretty decent. Actually in my
 15 own mind quite a bit of what he said would seem to
 16 be a fair response. And I entirely understand the
 17 argument as to why he would like to remove the
 18 confidential status. The main concern I had -- and
 19 I think Commissioner Johnson questioned it exactly
 20 on what my argument was going to be -- my primary
 21 concern -- I mean, I understand if he wants to see
 22 a transcript or that sort of thing or I guess use
 23 the fact that the Commission found S&S had made
 24 certain misrepresentations as one thing.
 25 My concern has to do with I don't have

1 exactly -- Mr. Sannes represented S&S at that time
 2 so I don't know entirely what the Commission has,
 3 but I do know with my encounters with Mr. Senger,
 4 and he may know better, is that there's -- in
 5 addition to names, addresses, telephone numbers,
 6 there's going to be information a little bit about
 7 financial -- I don't want to use the word status
 8 because I don't know -- and Mr. Senger can tell you
 9 otherwise. I don't know that the customers' credit
 10 apps. are in that file but I know that some of the
 11 documents would have had to do with whether they
 12 were cash or credit. If they were cash, how much
 13 cash was paid for them, and that sort of thing.
 14 I would agree with Mr. Smith that I don't see
 15 this becoming a member of LECA bundling these up
 16 and trying to do something with it. I'm just more
 17 concerned about there's a whole number of people
 18 here with quite a bit of personal information about
 19 them in these documents, and that's the focus of my
 20 concern. And I, like Mr. Johnson, don't really
 21 understand the need for all of that to be out in
 22 the open and I guess handed out. But that's the
 23 focus of my concern.
 24 In terms of Mr. Smith's proposal, if there's
 25 an agreement of some sort that it would have a

1 confidential status not to be disclosed outside the
 2 litigation, I think that alleviates a number of my
 3 concerns. We already have an agreement between us
 4 in place already as to term -- with regard to
 5 documents disclosed back and forth by the parties.
 6 In terms of Judge Kornmann's Order as to why,
 7 Mr. Johnson, this isn't coming from us, you would
 8 have had to have read the discovery request. It
 9 was incredibly broad and in my opinion almost
 10 unanswerable because it would include --
 11 Judge Kornmann gave some examples of incredibly
 12 broad and more or less said if you want to know
 13 what the PUC had or what was filed in connection
 14 with them, go to the PUC and get it. That's my
 15 reading of the Order anyway, and you're welcome to
 16 look at it. But that's my thoughts on it.
 17 MR. FIERST: Mr. Chairman, this is
 18 David Fierst. Can I just alleviate one concern?
 19 We have no interest whatsoever in any
 20 financial information whatsoever about any of the
 21 consumers. And I agree with Mr. Burke that that
 22 would be something that would be personal to the
 23 consumers, and we have no interest. We just want
 24 names and addresses of the consumers, and anything
 25 else can be withheld or redacted or in any way you

1 want to resolve that.
 2 CHAIRMAN HANSON: Thank you, David.
 3 John, in this type of a hearing are we permitted to
 4 ask Keith questions?
 5 MR. SMITH: I think so. Let me ask
 6 the lawyers, do you want Mr. Senger to be sworn and
 7 take the stand in order for the Commission to ask
 8 him questions?
 9 MR. BURKE: I don't require that.
 10 MR. FIERST: Yeah. That's not
 11 necessary.
 12 CHAIRMAN HANSON: Thank you. I have
 13 a question of Keith, if you would. There's been
 14 some speculation here as to what the lists may
 15 contain and what type of confidential information
 16 may be provided in the lists that would be accessed
 17 and concern as to how they might be used.
 18 Could you tell us what type of information is
 19 contained?
 20 MR. SENGER: Regarding only the
 21 information that staff or the Commission received
 22 from S&S, in a broad sense they contained customer
 23 identification number, which does not contain a
 24 phone number, as far as I'm concerned. It was
 25 probably an account number used by S&S, and it

1 included the -- excuse me, the town that the
 2 individual lived in, and it included the term of
 3 the contract, whether it was three years or
 4 10 years. It included price paid for the phone
 5 service, and it included various other things which
 6 probably included whether it was financed, whether
 7 it was paid for by cash.
 8 Later in the process we actually received that
 9 information along with the customer name and
 10 address.
 11 CHAIRMAN HANSON: Excuse me. Were
 12 you finished?
 13 MR. SENGER: The Commission has
 14 received, not from S&S, but has also received
 15 customer-related financial information, some of
 16 that coming from Aberdeen Finance Corporation or
 17 some of the other entities that were financing the
 18 customers in their long-term contracts with S&S.
 19 CHAIRMAN HANSON: Can these items be
 20 separated since you stated that the
 21 customer-related financial information was
 22 subsequently received as was the name and address?
 23 Can those items be separated from the other
 24 information?
 25 MR. SENGER: Yes. The customer

1 financial information was not presented as part of
 2 staff's case before the Commission.
 3 If we're looking at the transcripts and the
 4 exhibits, they would include the information that
 5 S&S provided to us. Now I too admit that I have
 6 not gone through and reread the transcript or
 7 looked at every page of the exhibits. Before we
 8 hand anything over we definitely can and will do
 9 that to make sure that we follow the Commission's
 10 wishes on this. But, you know, I think we can
 11 separate things appropriately, yes.
 12 CHAIRMAN HANSON: And, Mr. Fierst,
 13 what specifically of those items that Mr. Senger
 14 just went over are you looking for?
 15 MR. FIERST: Let's see. Well, first
 16 of all, what I'm not looking for is any of the
 17 financial information collected by Aberdeen Finance
 18 Company. I don't need that at all. What I want to
 19 know is identification information about the
 20 customers so that I can contact them if necessary
 21 and the customers, a lot of whom, for example, were
 22 noted in the various orders as having lost money as
 23 a result of S&S's actions, and I want that
 24 information, what they lost and how much they lost.
 25 Beyond that, I don't care whether they paid by

1 financing or in cash. I don't need to know any of
 2 the personal information. I guess I need to know
 3 the price they paid and the term, whether it's
 4 three years or 10 years or whatever, but not any of
 5 the confidential information about the customers
 6 themselves.
 7 CHAIRMAN HANSON: You do need the
 8 customer name and address?
 9 MR. FIERST: Yes, I do.
 10 CHAIRMAN HANSON: The I.D. number,
 11 the town, the term, the cost of the phone service.
 12 MR. FIERST: The I.D. number
 13 probably I don't need. The town I would need. I
 14 guess if I have the address, the town will be
 15 included in it. If I don't have the address, I
 16 would need the town so I could at least try to find
 17 the person.
 18 CHAIRMAN HANSON: Do I understand
 19 then that you need the name, address of the person,
 20 the amount that was lost, which Mr. Senger didn't
 21 state that he knew specifically at this juncture on
 22 each customer, the cost of the phone service to
 23 them, the term of their agreement, and obviously if
 24 you have their address, you have their town.
 25 MR. FIERST: Right. Right. That's

1 correct.

2 CHAIRMAN HANSON: Is there anything

3 else then that you feel you need?

4 MR. FIERST: Not as to the

5 customers.

6 CHAIRMAN HANSON: Okay. Mr. Senger,

7 can you separate those items out from the other

8 without -- I'll let you define undue hardship.

9 MR. SENGER: I think what we can do

10 is essentially then turn over -- if it would fit

11 the Commission's definition, we can essentially

12 turn over the transcripts and all the exhibits, and

13 it would include all of that. And I don't think,

14 barring check, that it would include any of the

15 information that they said that they don't need.

16 We'll call that customer financial-related

17 information.

18 There may be a few exhibits that weren't my

19 exhibits that we may have to go through. We may be

20 referring to other customer information that we

21 might have to dig through, but I think we can meet

22 that.

23 CHAIRMAN HANSON: Thank you. Any

24 further questions by the Commissioners?

25 VICE CHAIRMAN SAHR: Yes,

1 Mr. Chairman. Mr. Smith, the subpoena, to whom are

2 we supposed to deliver this information?

3 MR. SMITH: To LECA's attorney.

4 VICE CHAIRMAN SAHR: And, do you

5 know, is there any mechanism in place for

6 delivering that to Judge Kornmann and delivering

7 perhaps the minimal amount of information and

8 requesting in camera review by the judge to make

9 sure that we're not disclosing some information

10 that he may himself determine not to be relevant or

11 that -- because we're sitting here grasping for

12 trying to understand to a certain extent what sort

13 of information may be appropriate to turn over, and

14 I'm wondering if there's some type of provision or

15 mechanism we could turn the information over to the

16 judge and for him to make the determination in the

17 context of knowing what the lawsuit is about as

18 opposed to us sitting here speculating to that.

19 MR. SMITH: I think there is.

20 VICE CHAIRMAN SAHR: Basically

21 turning it over sealed and saying to the judge here

22 it is and now you're the one who could make the

23 determination as to what should be public and what

24 should not be.

25 MR. SMITH: You know, I think --

1 yes. The answer is yes. I think there is such a

2 procedure. What I was hoping for, and maybe we'll

3 get there yet here, that we would at least get to

4 the point where the bulk of what Mr. Fierst wants

5 will be done via stipulation and that the parties

6 would agree following this discussion today to not

7 fight over much of this.

8 When we get down to the customer information,

9 which I think now we're down to -- all we're really

10 talking about is the customer information, as I

11 understand it.

12 Is that true, Mr. Burke and Mr. Fierst?

13 MR. BURKE: I think that's probably

14 pretty fair.

15 MR. FIERST: Yeah. I don't think

16 there's any dispute over the rest of the

17 information. And I'm not sure there's any dispute

18 over customer information. We may have a common

19 ground on what I can obtain there.

20 MR. SMITH: I mean, I don't even

21 know that the Commissioners, though, are

22 comfortable with having customer information

23 released willy-nilly, Mr. Fierst. Not that I'm

24 suggesting -- you're a lawyer in a federal lawsuit

25 here, and I'm not suggesting that.

1 But what I'm getting at, is there something

2 that in lieu of a procedure where we have to go in

3 court and fight about this, is there a procedure we

4 could reach by agreement that would allow the

5 minimal amount of intrusion into these people's

6 lives as a result of this thing at this point in

7 time?

8 MR. FIERST: Right. I think about

9 all I can say there is that nowadays most federal

10 judges do not want any discovery materials brought

11 to them if they can possibly avoid it. I think you

12 saw from Judge Kornmann's attitude in his Order

13 that he just doesn't want any discovery disputes to

14 come before him if they can be avoided.

15 I personally -- I don't have the courage to

16 bring this issue before him. You know, you may,

17 but I'd rather not. If we can work it out, and I

18 think we can, I think that would be preferable.

19 VICE CHAIRMAN SAHR: Mr. Chairman, I

20 do have a question for Mr. Burke, if I may.

21 CHAIRMAN HANSON: Go ahead.

22 VICE CHAIRMAN SAHR: Mr. Burke, are

23 you familiar with the contracts between S&S and the

24 customers?

25 MR. BURKE: Generally familiar with

1 them?

2 VICE CHAIRMAN SAHR: Yes.

3 MR. BURKE: Yeah. I would say so.

4 VICE CHAIRMAN SAHR: Do you know if
5 there's a confidentiality agreement between S&S and
6 the customer?

7 MR. BURKE: I don't know off the top
8 of my head, but if I had to hazard a guess, I don't
9 think they included that. I don't know. Keith
10 might know.

11 MR. SMITH: I do know, and there
12 were a couple of cases where there were
13 confidential covenants. They were very
14 abbreviated.

15 VICE CHAIRMAN SAHR: Well, and you
16 can probably see where I'm going, Mr. Smith, is I
17 do have a concern about releasing information that
18 a customer gave to S&S. Not from S&S's perspective
19 but from the customer's expectation that it would
20 be kept private.

21 And that's where to a certain extent, yes, I
22 do hope we can come as close as possible on an
23 agreement of what sort of information the parties
24 feel acceptable to release. But I do want to make
25 sure we're giving due deference to the customer's

1 information because if they don't want that
2 information received, obviously they're the ones
3 who aren't at the table here today when this
4 determination is being made.

5 COMMISSIONER JOHNSON: I would echo
6 the Vice Chairman's comments. I mean, we're in the
7 business of protecting consumers, and at least some
8 of the time that means protecting the consumers'
9 privacy. And I understand we find ourselves in
10 this situation, but it seems as though confidential
11 information at the PUC would not be the first place
12 I would go looking for the addresss and names of
13 customers.

14 MR. SMITH: One thing to note is we
15 subpoenaed -- of the contracts I'm aware of that
16 contained those clauses, and these tended to be
17 some of the bigger ones and actually some of those
18 that had some of the stinkier evidence related to
19 them, those contracts were provided to us pursuant
20 to my subpoena that I submitted to those customers.

21 And I'm just saying this to note it for the
22 record here. None of those customers requested any
23 kind of protective order or protective treatment of
24 that information when they turned it over to me.

25 Furthermore, if you'll recall, Mr. Angerhofer,

1 for example, of AAA was one of those who had to sit
2 there while we wrangled over this at the hearing.
3 Mr. Angerhofer himself never actually made any kind
4 of objection at all as to the use of his contract
5 information at the hearing.

6 And I'm totally respectful of what you're
7 saying, Commissioner Sahr. He did not object. It
8 was actually S&S that objected. And I think we all
9 know why. They didn't want that information
10 immediately heading out, especially when we had a
11 DCI agent in the audience who had to leave because
12 we ruled that the information was confidential.
13 That said, I'm not suggesting, though -- still in
14 my view that information -- and, again, it may be
15 that your counsel, Ms. Wiest, will have a different
16 opinion on this and maybe -- Mr. Fierst, you're a
17 telephone lawyer, aren't you?

18 MR. FIERST: More an antitrust
19 lawyer.

20 MR. SMITH: Okay. I'm sorry.

21 VICE CHAIRMAN SAHR: I do want to
22 note something before we go to any other comments
23 from any of the attorneys is I did talk to a number
24 of customers of S&S, and a number of them either
25 felt hesitation about filing a Complaint with our

1 office or else said they would not because they did
2 not want to publicly be known that they had --
3 excuse me, Mr. Burke, but had made some sort of bad
4 deal or a bad business decision by paying large
5 sums of money up front for services they never
6 received.

7 And certainly I can understand from the
8 perspective of the business person where that may
9 not be the type of information that you would want
10 available to the public. So I admire that the
11 people who came forward and were willing to divulge
12 that, but I also am mindful of the people who might
13 be on a customer list who do not feel the same way
14 from the perspective of releasing personal
15 information or even perhaps that they were a
16 customer.

17 MR. FIERST: May I say something in
18 response to that? Because that raises an
19 interesting point. And I think maybe I can even
20 alleviate this a little bit more. It sounds like
21 Mr. Smith is saying or originally Mr. Smith said
22 that some of the customers turned over their
23 information without objection, without seeking any
24 kind of protection, and now it sounds like, I
25 think -- was that Mr. Senger who just spoke who

1 said some of them did want protection? And if I
2 can get the names and information from the ones who
3 went to Mr. Smith without objection, I'd be willing
4 to waive all the other customer information.

5 MR. BURKE: It should also be
6 pointed out, though, that I believe Mr. Smith said
7 they came in response to a subpoena. I'm not sure
8 the average layperson even understands what
9 objections they could place.

10 MS. AILTS WIEST: I was wondering
11 would it be possible for the two parties just to go
12 to the federal court with a joint Motion to keep
13 this as protected material within the confines of
14 the proceeding and then we don't even rule on
15 whether it's not confidential or is confidential
16 but we would release it under that protective
17 order? Is that possible?

18 MR. FIERST: I have no objection.

19 MR. BURKE: I don't have a problem
20 with that.

21 MR. SMITH: We're talking just about
22 the customer information right now?

23 MS. AILTS WIEST: What I was talking
24 about are the unredacted transcripts with exhibits
25 and the unredacted Order.

1 MR. SMITH: I'm going to reiterate
2 my argument that with respect to things that --
3 confidential provisions that are assertible by S&S,
4 that those are -- don't deserve confidential
5 treatment.

6 MS. AILTS WIEST: Well, I was just
7 trying to shorten the process is all, just not go
8 through every single line item -- I've been through
9 all of those exhibits -- and decide which one is
10 and isn't. But I was just trying to shorten
11 everything up and speed everything along.

12 CHAIRMAN HANSON: We appreciate that
13 very much.

14 MR. FIERST: I would comment on
15 Mr. Smith's side on that issue that a lot of the
16 information I just don't think is confidential, and
17 I don't think there's any reason or need to burden
18 the court for that issue. But as to the consumer
19 information, I'd be happy to file something with
20 the court for some kind of a protective order.

21 MR. SMITH: May I ask Mr. Senger a
22 question in that regard because I believe it is to
23 be the case, but I want to make sure.

24 Keith, isn't it a fact that the information we
25 receive from S&S, from S&S, which is what we've

1 asked for thus far, that contained personal
2 customer information is really all contained
3 essentially in one or two documents?

4 MR. SENGER: Yes. That is correct.

5 MR. SMITH: This isn't a case where
6 we would have a large amount of information to have
7 to redact out.

8 MR. SENGER: Well, I have to back up
9 and let me clarify. S&S from the time that I
10 started asking for more information regarding their
11 bond calculation they requested all of that to be
12 confidential, and that's the information that did
13 not include a customer address or a customer name
14 or anything.

15 The very last document that we got from S&S
16 did include the customer name, customer address
17 because we specifically requested it so if we had
18 to contact those consumers regarding Complaints
19 regarding bonds, we had requested it earlier but
20 S&S, you know, said that, well, we don't want to
21 give that up at this point. And in an effort to
22 get everything I could, we agreed to that.

23 So I guess the answer to your question, S&S
24 has asked all of it to be confidential. There was
25 only one document that has customer name and

1 addresses.

2 CHAIRMAN HANSON: Mr. Smith, you
3 look very pensive.

4 MR. SMITH: I'm just saying, you
5 understand, Mr. Fierst, that we have information
6 that was not supplied by S&S and, therefore, it's
7 not technically within what you've requested other
8 than the hearing exhibits?

9 MR. FIERST: Right. If it's hearing
10 exhibits or if it's included in any of the orders,
11 then it would be included in the subpoena.
12 Otherwise, you're right, it might not be.

13 MR. SMITH: Well, can we turn it now
14 to exactly what we can agree to do and so we can
15 get this over with for today? And I guess what I'm
16 going to recommend is that could the three of us
17 attorneys attempt to reach an agreement within the
18 next couple of days on precisely what procedure
19 we're going to follow here?

20 MR. BURKE: Absolutely.

21 MR. FIERST: Yes, certainly.

22 MR. SMITH: And maybe the Commission
23 then could set aside an hour or whatever later in
24 the week or sometime, if necessary, if we have to
25 come back but maybe what we could get today is a

1 Motion either along the lines of what Rolayne said
 2 or at a minimum if we're able to come to an
 3 agreement on a protective procedure with respect to
 4 customer information, that we could proceed then to
 5 release all of the other information as to remove
 6 the confidentiality designation and release it. It
 7 doesn't pertain to customers.

8 CHAIRMAN HANSON: Is there any
 9 objection to that?

10 Hearing none -- Rolayne?

11 MS. AILTS WIEST: No. I was just
 12 going to say did you need a Motion, or would you
 13 rather actually go through this? Do you need a
 14 Motion now about anything prior to the time you're
 15 going to talk this over?

16 CHAIRMAN HANSON: I think I would
 17 like to, and certainly the Commission's
 18 direction -- I think that a plan of action would be
 19 good to have the three attorneys look this over,
 20 make their recommendation to us, and then at that
 21 time -- we wouldn't have to take an action prior to
 22 that time, make certain that we take the right
 23 action, that it's in sync with whatever other
 24 recommendations come up.

25 COMMISSIONER JOHNSON: So you're

1 noting that no official Motion is required.

2 CHAIRMAN HANSON: At this time,
 3 yeah.

4 COMMISSIONER JOHNSON: I would
 5 agree.

6 MR. SMITH: Do you attorneys agree?

7 MR. BURKE: That's fair.

8 MR. FIERST: Yeah. That's fine.

9 MR. SMITH: I will note too just
 10 letting the Commission know we've received a
 11 similar subpoena from S&S so we'll be back at this
 12 again real soon.

13 CHAIRMAN HANSON: Then I will move
 14 that we defer action on this to a later date.

15 VICE CHAIRMAN SAHR: Second.

16 COMMISSIONER JOHNSON: Concur.

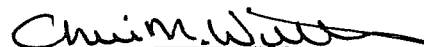
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1 STATE OF SOUTH DAKOTA)
 2 :SS CERTIFICATE
 3 COUNTY OF HUGHES)
 4

5 I, CHERI MCCOMSEY WITTLER, a Registered
 6 Professional Reporter and Notary Public in and for the
 7 State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed
 9 shorthand reporter, I took in shorthand the proceedings
 10 had in the above-entitled matter on the 8th day of
 11 February 2005, and that the attached is a true and
 12 correct transcription of the proceedings so taken.

13 Dated at Pierre, South Dakota this 11th day
 14 of February 2005.
 15
16

17 
 18 Cheri McComsey Wittler,
 19 Notary Public and
 20 Registered Professional Reporter
 21
22
23
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25