STATE OF SOUTH DAKOTA
PUBLIC UTILITIES COMMISION

In the Matter of Sprint Communications Company L.P.'s Petition for Consolidated Arbitration Pursuant to Section 252(b) of the Communications Act on 1934, As Amended by The Telecommunication Act of 1996, and The Applicable State Laws for Rates, Terms and Conditions of Interconnection with Interstate Telecommunications Cooperative.	)	Docket No. TC06-175

SPRINT'S RESPONSE TO INTERSTATE'S MOTION TO COMPEL

Sprint Communications Company L.P. ("Sprint") hereby submits its Response to Interstate's Motion to Compel in the above-referenced Docket. Interstate's motion to compel is properly denied because the (1) the subject requests improperly seek trade secret, confidential, and proprietary information; (2) the requests are impermissibly overbroad and unduly burdensome; and (3) the requests seek irrelevant information that is not subject to discovery.

INTRODUCTION

On December 22, 2006, Interstate served Sprint with its discovery in this arbitration proceeding. Sprint timely responded to the data requests, subject to and without waiving the objections Sprint raised in its responses. Therein, Sprint properly objected to several requests. On January 9, 2007, Interstate filed its Motion to Compel Discovery (the "Motion to Compel").

To illustrate the appropriateness of the objections, the great majority of the subject requests deal with broad requests for agreements that cover the entire nation and potentially all contracts Sprint has with any end-user. These requests are overly broad, unduly burdensome, and not relevant or likely to lead to admissible evidence on their face. They also seek proprietary and confidential information. As a result, Sprint objected to the production sought.

Subsequently, Interstate's counsel sent a letter requesting that various responses be supplemented. In an effort to comply, Sprint provided some supplemental information. However, Sprint did not waive its original objections. Nor did it waive its right to contest the admissibility of the information should Interstate attempt to offer any of it into evidence in this proceeding. Despite Sprint's efforts to supplement, on January 9, 2007, Interstate filed its Motion to Compel Discovery (the "Motion to Compel"). Sprint hereby files this Response.

LEGAL ANALYSIS

"South Dakota Codified Law § 15-6-26(b)(1) establishes the general scope *and limits* of discovery." Score, 2003 SD 17, ¶ 20 (*emphasis added*). The rule states,

> (1) In general. 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. ...

S.D.C.L. § 15-6-26(b)(1). "When discovery efforts go beyond those subjects not 'reasonably calculated to lead to the discovery of admissible evidence,' a court has authority to issue protective orders...." Id. (*citing* S.D.C.L. § 15-6-26(c)). Specifically, S.D.C.L. § 15-6-26(c), provides the Court discretion to protect a party from annoyance, undue burden, or expense.

In addition, South Dakota has long recognized the importance of confidentiality that surrounds trade secrets. It explicitly enacted a statute that provides a trade secret holder a privilege, "...to refuse to disclose and to prevent other persons from disclosing a trade secret owned by him...." S.D.C.L. § 19-13-20. It likewise provided the courts a means by which to protect this trade secret privilege, as well as other confidential information. S.D.C.L. § 15-6-26(c). Specifically, S.D.C.L. § 15-6-26(c), states,

> Upon motion by a party or by the person from whom discovery is sought or has been taken, or other person who would be adversely affected, and for good cause shown, the court in which the action is pending, on matters relating to a deposition, interrogatories, or other discovery, or alternatively, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
>
> (1) That the discovery not be had; ...
>
> (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; ...
>
> (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; ....

Notably, the statute grants the court the authority to make "any order," including an order that prohibits discovery, that justice so requires. Id.; Public Entity Pool for Liability v. Score, 2003 SD 17, ¶ 21, 658 N.W.2d 64, 72. Under A.R.S.D. 20:10:01:22.01, this Commission likewise maintains the same authority to protect confidential and privileged information.

The contracts Interstate seeks contain trade secrets and other confidential and proprietary information. Sprint is obligated under those contracts to take all steps necessary to ensure that the same is protected. To illustrate, under the Letter of Intent that Sprint entered into with MCC, Sprint is duty bound to protect the proprietary and confidential nature of the information exchanged between the two parties. Thereunder, Sprint is contractually obligated to refrain from taking any actions that would result in a waiver of the protections that are afforded to the proprietary and confidential information.

Moreover, the South Dakota Supreme Court has recognized that an entity who discloses trade secret information can be held liable for the disclosure. Mid-america Marketing Corp. v. Dakota Industries, Inc., 281 N.W.2d 419, 426 (S.D. 1979). As such, Sprint's disclosure of the

contracts Interstate seeks would not only breach the contracts between Sprint and third parties, it could also subject Sprint to potential civil liability.

It needs to be recognized that the majority of the requests and interrogatories where Interstate seeks to compel responses revolve around producing or comparing agreements with numerous entities that are not parties to this action. It should come as no surprise to Interstate, that confidentiality requirements arise in the highly-competitive telecommunications market. These confidentiality requirements obligate companies to object to providing information that contains trade secrets and confidential information of entities that are not parties to proceedings, such as this arbitration.

DISCOVERY DEMANDS

Interrogatory No. 7

In this request, Interstate asked Sprint to identify all agreements between "Sprint and MCC ("Sprint-MCC Agreements") and any other entity similar relationships in South Dakota." Sprint properly objected to this request and further responded that it has an agreement with MCC. Sprint identified in South Dakota an agreement only existed with MCC, but did not understand the question to require the exact title of the agreement which it appears Interstate is now requesting. Thus, in a good faith attempt to resolve this dispute, Sprint responds that the agreement Sprint identified in response to this request is: MCC TELEPHONY, INC. SPRINT COMMUNICATIONS COMPANY, L.P. LETTER OF INTENT.

Document Request No. 2 and Document Request No. 3

Document Request No. 2 states: Please produce copies of all tariffs, contract carrier agreements, and commercial agreements that describe or relate to services that Sprint offers to

the public in South Dakota or to any class of end users so as to be effectively available to the public in South Dakota.

Document Request No. 3 states: Please produce copies of any contract, business agreement, and commercial agreement with MCC as identified in paragraph 23 of the Arbitration Petition and with any other contract or business agreement with a Competitive Service Provider providing service in South Dakota, that in any way relates to a business arrangement to support the offering of local and long distance voice services in Interstate's service area and other areas of South Dakota.

These questions appear to ask for information concerning any and all services Sprint provides. As the Commission knows, Sprint is a long-distance carrier that also provides wireless services. It is clearly overly broad and unduly burdensome for Sprint to identify every individual in South Dakota, or in the nation, who might have contracts for long-distance or mobile phone service with Sprint. While Sprint thinks other agreements and provisioning of the service within the state of South Dakota are not relevant or likely to lead to admissible evidence, Sprint has read this question to be limited to the type of service being provided in relationship with MCC.

While Sprint properly objected to the foregoing requests, in a good faith attempt to resolve this dispute Sprint is providing a copy of Sprint's S.D. tariff, and cites to Sprint's agreement with Qwest and PrairieWave in South Dakota. *See* SDPUC Docket No. TC04-002 and Docket No. TC-06-067. Regarding the contract that exists between MCC and Sprint, as indicated above, Sprint is under an obligation in that contract to treat the contract as confidential. It should not come as a surprise that MCC wishes to prohibit its primary competitor from obtaining access to key business terms, including pricing, term of the agreement, termination provisions, and launch default provisions. These terms all are central

to the business deal between Sprint and MCC and are highly proprietary and incredibly sensitive for competitive purposes.

Sprint stands by its position that in determining the rights on its interconnection agreement, the MCC agreement with Sprint is not relevant nor likely to lead to admissible evidence. Moreover, the confidential nature of the document prevents Sprint from unilaterally making a decision to disclose the agreement. If the Commission should order disclosure of the agreement, it should allow Sprint and MCC to confer and redact items that are confidential or competitively sensitive material. S.D.C.L. § 15-6-26(c). Such a right is consistent with the Protective Order this Commission has previously entered. That Order states: "This Order does not waive any party's rights to ... redact competitively sensitive material from the Designated Material." *See* Protective Order at paragraph 9.

There are no other competitive service providers in S.D. that Sprint is providing service to at this time; however, Sprint offers its various services to all cable companies as evidenced in Attachment 1.1 to Sprint's discovery responses.

Interrogatory No. 14 and Interrogatory No. 15

Interstate requests Sprint to identify the names of the individuals from Sprint and MCC that negotiated the business relationship between Sprint and MCC. With respect to Sprint individuals, Interstate states it will accept a list of individuals within Sprint from a "Director" level or above identified. However, Interstate fails to state how the identity of such individuals relates in any way to the interconnection issues in this proceeding. Rather, Interstate simply states the names of the individuals involved in negotiating the relationship between Sprint and MCC, "has been demonstrated to be relevant... or may lead to the discovery of relevant information."

Discussions or negotiations leading to the agreement are not relevant. The contract speaks for itself. Moreover, such business negotiations are typically considered confidential. As such, they are properly protected under S.D.C.L. § 15-6-26(c). Accordingly, Sprint renews its objection to these requests.

Interrogatory No. 16, 17 and 18

In Interrogatory No. 16, Interstate has requested Sprint to identify all agreements nationwide between Sprint and any party that provide for the same terms, conditions or pricing as the Sprint-MCC Agreements. Interrogatory No. 17 asks for any agreement nationwide that does not contain identical terms and, for each that Sprint identify each difference and the basis for such difference and if the difference is a rate, the cost basis (including the cost study) that demonstrates the cost difference.

Sprint objected to these requests. Without waiving the same, Sprint responded that it only has one agreement in South Dakota, that being the agreement with MCC.

It appears Interstate is seeking contracts Sprint has with other cable companies outside the State of South Dakota, along with potentially every business contract Sprint has for providing any service. Sprint maintains its objection that those contracts are not relevant to the interconnection terms and conditions that are the subject of this proceeding. Furthermore, Sprint's agreements with cable companies in other states are not relevant to the issue of whether Sprint is a "telecommunications carrier" providing "telecommunications services" in the state of *South Dakota* as the terms of those agreements are based on different companies' facilities in different states.

In addition, those contracts contain confidential and proprietary business information which, if disclosed, would provide Interstate, a company with operations in South Dakota and

Minnesota, an unfair competitive advantage. Such disclosure would clearly be improper, particularly since Sprint is not providing any services to those cable companies in South Dakota pursuant to those agreements. Further, it is doubtful the Commission has jurisdiction over those parties in this proceeding. Therefore, it would be inappropriate, and Sprint should not be compelled, to divulge confidential information of other parties who are not subject to the Commission's jurisdiction in this proceeding. Accordingly, Sprint respectively requests the Commission deny the Motion to Compel to the extent it requests agreements with other cable companies not providing service in the State of South Dakota.

Sprint also requests the Commission deny Interstate's alternative request for relief to find that Sprint is not acting as a common carrier. This flippant comment that ITC inserts in its response that somehow Sprint is not a common carrier is inappropriate in this setting. ITC has provided no legal analysis for this Commission to reach this conclusion. Nor has it provided a formal analysis of why discovery of this material would be necessary to brief or assert this legal position. Rather, Interstate is requesting the Commission to presume that Interstate's interpretation of what the law requires in this regard is correct without the benefit of a fully developed record and briefing on the issues in this proceeding. Despite Interstate's interpretation, the majority of the states that have had the benefit of a fully developed record have found in Sprint's favor.[1]

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[1] See e.g., Berkshire Tel. Co. v. Sprint Commc'ns Co., L.P., No. 05-cv-6502, 2006 WL 3095665 (W.D.N.Y. Oct. 30, 2006), *In Re Arbitration of Sprint Communications Company L.P., vs. Ace Communications Grou, et al,* Docket Nos. ARB-05-02, ARB-05-5, ARB-05-6, Arbitration Order (State of Iowa, Department of Commerce Utilities Board March 24, 2006), *In the Matter of Sprint Communications Company L.P.'s Petition for Arbitration*, No. 43052-INT-01, 2000 WL 2663730 (Ind. Util. Reg. Comm'n Sept. 6, 2006); Petition of Sprint Communications Company L.P. to Terminate Rural Exception, Pub. Util. Comm'n of Tex., No. 32582, Order dated Aug. 14, 2006; Application of Sprint Communications Company L.P. For Approval of the Right to Offer, Render, Furnish or Supply Telecommunications Services Etc., Pennsylvania Pub. Util. Comm'n, No. A-310183F0002AMA et al., Order dated Dec. 1, 2006 [Exh. 3] at pp. 18-25.,

Sprint should have the opportunity to present its evidence in South Dakota so that this Commission has a fully developed record on which to base its decision. Therefore, Sprint requests the Commission make no determination of Sprint's common carrier status unless and until the issue is properly before it.

Interrogatory No. 20 and Document Request No. 5

In Interrogatory No. 20, Interstate asks that a description of the network that Sprint provides and MCC provides as it relates to voice traffic be given to include identifying all switching and transport provided by Sprint and MCC and a diagram of the network.

Sprint did not raise an objection to this request. It provided a general diagram showing the network and a description of how the network services will be provided. A general diagram was provided because Sprint does not have a developed diagram that is unique or specific to South Dakota or the Interstate service area. The rules of discovery do not require that Sprint create diagrams simply to satisfy Interstate's desires. Rather, Sprint has fulfilled its obligation under discovery by providing a general diagram and description of how the network will work. In addition, Sprint has provided a call flow diagram to illustrate how a call will flow over the network with this response. Sprint's attachment POD 1.20.1 (confidential document).

Request for Admission No. 3

Interstate requested Sprint to admit that each business arrangement with a Competitive Service Provider is individually negotiated by Sprint. In Sprint's supplemental response, Sprint objected to the term "individually negotiate" as vague but responded as it understands the term. In order to attempt to resolve this issue, Sprint responds that Sprint offers its services indiscriminately to all cable companies and Sprint admits that it negotiates with each cable company the terms of the agreement that contain the bundle of services that the particular cable

company wishes to purchase from the array of services Sprint offers. See Attachment 1.1 to Sprint's discovery responses.

Document Request No. 6

This document request asked that Sprint reproduce all discovery it has filed in the CLEC proceedings that Sprint is engaged in to provided services in Sprint and Swiftel's areas and in the arbitration Sprint currently has with Swiftel. Sprint maintains its objection to providing discovery in proceedings involving City of Brookings Municipal Utilities d/b/a Swiftel ("Swiftel"). Those proceedings involve Sprint's interconnection request with Swiftel and Sprint's certification in Swiftel's territory. Sprint should not be required to produce documents to a non-party in those proceedings. Further, Interstate opposed consolidating the Interstate and Swiftel arbitrations

With respect to the TC06-188 involving the Application of MCC, Sprint is not a party to that proceeding. MCC, not Sprint, is the party to produce documents from that proceeding. Sprint should not be burdened with gathering information in proceedings in which it is not a party. With respect to Interstate's statement that this will allow it to verify that Sprint's statements are consistent, Sprint has no incentive to make inconsistent statements before the Commission. In this regard, the Commission staff will have access to all of the information provided in these dockets and will be able cross examine Sprint's witnesses during the hearing.

Respectfully submitted on this 12th day of January, 2007,

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CERTIFICATE OF SERVICE

The undersigned certifes that on this 12th day of January 2007, a copy of Sprint's Response to Interstate's Motion to Compel was served via email to:

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