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BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PETITION  
OF SPRINT COMMUNICATIONS  
COMPANY L.P. FOR ARBITRATION  
PURSUANT TO THE  
TELECOMMUNICATIONS ACT OF  
1996 TO RESOLVE ISSUES RELATING  
TO AN INTERCONNECTION  
AGREEMENT WITH BROOKINGS  
MUNICIPAL UTILITIES D/B/A  
SWIFTEL COMMUNICATIONS

Docket No. TC06-176

**OPPOSITION TO MOTION TO STRIKE**

Brookings Municipal Utilities d/b/a Swiftel Communications (Swiftel) by its attorneys, hereby responds to the Objection to Rebuttal Testimony of Jo Shotwell and Motion to Strike Testimony (Motion) filed on April 9, 2007, by Sprint Communications Company, L.P. (Sprint). In its Motion, Sprint argues that Ms. Shotwell's testimony does not constitute rebuttal testimony and should be struck. As demonstrated herein, Sprint's Motion is without merit and should be denied.

**Background**

As the basis for its Motion, Sprint argues that while Ms. Shotwell's rebuttal testimony "fleetingly references Mr. Burt's testimony in a couple of places," it addresses issues based on Sprint's arbitration petition and Swiftel's response to the petition. Motion at 2. Sprint specifically objects to Ms. Shotwell's testimony concerning section 251(a) of the Communications Act and the obligation of telecommunications carriers

thereunder. Sprint argues that by filing Ms. Shotwell's testimony as rebuttal testimony, "Sprint is prejudiced in its ability to respond." Motion at 3. Sprint asks that the testimony be stricken in its entirety. In the alternative, Sprint argues that page 3, line 12 through page 6, line 8 and page 7, line 1 through page 11, line 11 should be stricken. With respect to page 3, line 12 through page 6, line 8, it appears that Sprint also argues that this testimony concerns the argument of law and regulations which can be argued in briefs. Motion at 3.

As shown herein, Ms. Shotwell's rebuttal testimony is properly filed as rebuttal testimony; Sprint is not prejudiced by allowing the testimony; and, to the extent Ms. Shotwell's rebuttal testimony is legal argument, Sprint's testimony suffers from the same failing. Accordingly, Sprint's Motion must be denied.

**Ms. Shotwell's Testimony is Proper Rebuttal Testimony**

Sprint's contention that Ms. Shotwell's rebuttal testimony only "fleetingly references Mr. Burt's testimony in a couple of places," is a flagrant misrepresentation of her testimony. On the contrary, every substantive question and answer offered by Ms. Shotwell directly discusses and refutes statements made by Sprint's witnesses or supports her discussion of statements made by Sprint witnesses. In support of its position, Swiftel shows the following:

At page 6, line 9-21, Ms. Shotwell addresses and refutes the argument of Sprint witness Burt that Sprint's service will help to introduce competition in Swiftel's service territory and that Sprint's business model is consistent with the goals of the Communications Act of 1934, as amended (the Act). Ms. Shotwell's rebuttal testimony

refutes Mr. Burt's testimony by showing that Sprint's position ignores the protections from competition in the Act afforded to rural LECs, like Swiftel. Ms. Shotwell's discussion of the difference between Section 251(a) and 251(c) at pages 3-6 and page 7-8 provides further support for her statements concerning the different treatment afforded rural LECs under the Act.

Ms. Shotwell's rebuttal testimony at page 8, lines 15-22 and page 9, lines 1-13, directly addresses and refutes the testimony of Mr. Burt at page 36, concerning the authority of the Commission under the Act to arbitrate issues in dispute.

Ms. Shotwell's rebuttal testimony at page 9, lines 14-23 and page 10, lines 1-13, directly addresses and refutes Sprint witness Farrar's contention that Sprint is entitled under the Act to establish one point of interconnection at any point in the LATA. Ms. Shotwell's rebuttal testimony at page 10, lines 14-23 and page 11, lines 1-6 provides additional support for her rebuttal of Mr. Farrar's contention.

Ms. Shotwell's rebuttal testimony at page 11, lines 11-21 and page 12, lines 1-2, directly addresses and refutes the testimony of Mr. Burt concerning the proper resolution of Swiftel's petition for suspension or modification of certain Section 251(b) requirements.

Ms. Shotwell's rebuttal testimony at page 12, lines 3-23 and page 13, lines 1-3, directly addresses and refutes Mr. Burt's argument that Swiftel's suspension petition would delay Sprint's ability to enter Swiftel's service area.

Ms. Shotwell's rebuttal testimony at page 13, lines 4-16, directly addresses and refutes Mr. Burt's argument that an unfavorable ruling on Arbitration issue 1 will keep Sprint and MCC from entering the market.

Ms. Shotwell's rebuttal testimony at page 13, lines 17-23 and page 14, lines 1-8, directly addresses and refutes Mr. Burt's statements concerning Sprint's status under the Act. Ms. Shotwell's rebuttal testimony at page 14, lines 9-23 and page 15, lines 1-9, provides further support for her response.

Ms. Shotwell's rebuttal testimony at page 15, lines 10-19, directly addresses and refutes Mr. Burt's characterization of the Sprint's arrangement with MCC.

Ms. Shotwell's rebuttal testimony at page 15, lines 20-23 and page 16, lines 1-4, directly addresses and refutes Mr. Burt's testimony concerning UNE-P and resale.

Ms. Shotwell's rebuttal testimony at page 16, lines 5-11, directly addresses and refutes Sprint's request for reciprocal compensation based on Mr. Burt's description of services provided by Sprint. Ms. Shotwell's rebuttal testimony at page 16, lines 12-23 and page 17, lines 1-21, provides further support for her response.

As argued by Sprint, "[r]ebuttal evidence is that which explains, contradicts, or refutes the defendant's evidence. Its purpose is to cut down defendant's case and not merely confirm that of the plaintiffs." Motion at 4, citing *Schrader v. Tjarks*, 522 N.W.2d 205 (S.D. 1994). Clearly, Ms. Shotwell's rebuttal testimony meets this test.

#### **Sprint is not prejudiced by allowing the testimony**

There is no prejudice to Sprint caused by Ms. Shotwell's rebuttal testimony. Sprint argues that the South Dakota Supreme Court has recognized the ability to strike rebuttal testimony where it is not truly rebuttal testimony and not properly, timely, disclosed. Sprint cites the case of *Lagge v. Corsica Co-Op*, 2004 SD 32, 677 N.W.2d 569 (*Lagge*) to support its argument. *Lagge* involved a case in which Mr. Lagge sought

worker's compensation benefits from his employer Corsica Co-Op. There was no pre-filed testimony in the proceeding. Further, the Prehearing Order required the parties to disclose all of their evidence, including witnesses, and specifically stated that "No changes will be allowed after [September 15, 1999] except in the case of unforeseen exigencies." *Lagge* at 19, citing Prehearing Order.

On the day of trial, after Mr. Lagge provided his testimony and rested. Corsica Co-Op and its insurer, Travelers Insurance Company (hereinafter jointly referred to as Corsica), called two private investigators as witnesses, with surveillance tapes, to refute Lagge's evidence on the extent of his injury. Neither the tapes nor the private investigators had been included in the Prehearing Order. Lagge objected to the admission of the private investigators and the tapes. The Hearing Officer sustained the objection and did not permit the witnesses to testify.

On review, the Court upheld the ruling of the Hearing Officer for four reasons. First, the Court found that the Prehearing Order required pre-disclosure from both sides and there was no exception for impeachment witnesses and rebuttal witnesses. Second, the Court found that most jurisdictions require the disclosure of surveillance tapes to the opposing party as part of discovery and prior to trial. Third, the Court noted that Co-Op "had almost a year from the time of the Prehearing Order to the time of the hearing itself in which they could have made a motion to the Department to amend the Prehearing Order to include the private investigators and videotapes." According to the Court, "Discovery rules are designed to compel the production of evidence and to promote, rather than stifle, the truth finding process." *Lagge* at 24, citing *Dudley v. Huizenga*, 2003 SD 84, P11, 667 N.W.2d 644, 648. Fourth, the Court found that allowing Co-Op to

present evidence that was not disclosed in the Prehearing Order would contradict the intent of the Worker's Compensation Act "to provide injured employees a remedy that is expeditious and relatively inexpensive." *Lagge* at 24.

This case clearly does not support Sprint's request in the proceeding before this Commission. First, the Commission's Procedural Order allows the filing of rebuttal testimony and specifically addresses the issue of alleged new evidence and witnesses presented in rebuttal testimony. Pursuant to the Procedural Order, which was inserted at the request of Sprint, a party is allowed to present testimony in response to rebuttal testimony from witnesses that have not prefiled testimony. According to the Order:

B. Witnesses. No witness shall be allowed to testify at the hearing unless that witness has prefiled testimony pursuant to this procedural schedule with the exception of witnesses offering live testimony regarding issues first raised in rebuttal testimony. Such testimony shall not be duplicative of prefiled testimony. In the event that a party determines that it will present testimony in response to rebuttal testimony from one or more witnesses that have not prefiled testimony, the names and personal resumes of such witnesses, and a general description of the facts and testimony to be offered by such witnesses shall be provided to the other party and the Commission on or before the deadline.

Pursuant to the Order amending the procedural schedule, the Parties are required to designate additional witnesses to rebuttal and exchange additional exhibits for use by rebuttal witnesses by April 17, 2007. Accordingly, unlike *Lagge*, the Procedural Order does not bar Ms. Shotwell's rebuttal testimony and, in fact, it provides the remedy allowed to Sprint if it believes Ms. Shotwell's testimony is "new." For this reason alone, Sprint's Motion must be denied.

Second, Ms. Shotwell's rebuttal testimony was filed almost two months ago, on February 16, 2007, and not presented the day of trial as in *Lagge*. Accordingly, unlike in *Lagge*, Sprint has had time to prepare in connection with Ms. Shotwell's rebuttal

testimony. In this context, Sprint's claim that Swiftel is attempting to "sandbag" Sprint's case holds no water. On the contrary, by sitting on its objection for almost two months and then filing this motion on the eve of the hearing, it appears that Sprint's primary motive is to "sandbag" Swiftel and interfere with Swiftel's preparation for hearing.

**Sprint's testimony suffers from the same failing as alleged against Ms. Shotwell's Rebuttal Testimony**

Sprint argues that Ms. Shotwell's testimony concerning Section 251(a) and 251(c) of the Act should be stricken, even if it is proper, because it is legal argument that can be argued in briefs. In connection with this contention, Swiftel notes that Ms. Shotwell's rebuttal testimony responds to the testimony of Sprint's witnesses on these same points. Therefore, if the Commission finds that Ms. Shotwell's testimony is not proper because it is legal argument, in fairness, the Commission must strike the testimony of Sprint's witnesses on the same basis.

Swiftel believes, however, that the better course of action is for the Commission to allow the testimony and rebuttal testimony. The resolution of the matters before the Commission will have a tremendous impact on Swiftel and its ability to provide service to its customers. Swiftel believes that it is in the best interest of the public, and the parties, for the Commission to have complete information while it considers these important questions. In this regard, and to paraphrase the Court in *Lagge*, Swiftel seeks to promote the truth finding process—not stifle it.

However, if the Commission grants Sprint's request, then Swiftel reluctantly reserves the right to file a motion to strike numerous portions of the testimony of Sprint's

witnesses. Swiftel does so reluctantly, because it does not wish to further burden the Commission with such motions.

**Conclusion**

Based on the foregoing, Swiftel respectfully requests that the Commission deny Sprint's motion in all aspects.

Respectfully submitted,

BROOKINGS MUNICIPAL UTILITIES  
D/B/A/ SWIFTEL COMMUNICATIONS

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