GUNDERSON, PALMER, GOODSELL & NELSON, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
G. VERNE GOODSELL
JAMES S. NELSON
DANIEL E. ASHMORE
TERENCE R. QUINN
DONALD P. KNUDSEN
PATRICK G. GOETZINGER
TALBOT J. WIECZOREK
MARK J. CONNOT
JENNIFER K. TRUCANO
DAVID E. LUST

ASSURANT BUILDING
440 MT. RUSHMORE ROAD
POST OFFICE BOX 8045
RAPID CITY, SOUTH DAKOTA 57709-8045

TELEPHONE (605) 342-1078 • FAX (605) 342-0480
www.gundersonpalmer.com

ATTORNEYS LICENSED TO PRACTICE IN
SOUTH DAKOTA, NORTH DAKOTA, IOWA, NEBRASKA
COLORADO, MONTANA, WYOMING & MINNESOTA

THOMAS E. SIMMONS
TERRI LEE WILLIAMS
PAMELA SNYDER-VARNS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
SHANE C. PENFIELD
JONATHAN M. OOSTRA
MATTHEW E. NAASZ

WYNN A. GUNDERSON
Of Counsel

November 13, 2006

E-FILING
Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre SD 57501-5070

RE: Sprint Communications Company, L.P. – Arbitration Consolidation
Brookings Municipal Utilities d/b/a Swiftel TC06-176

Dear Ms. Van Gerpen:

Attached for filing is Sprint's Opposition to SDTA's Petition to Intervene in the above-entitled matter. By copy of this correspondence, I am intending service by email on attorneys Mary Sisak, Ben Dickens, Rich Helsper and Rich Coit

Please note last week I filed the letter requesting the Commission defer deciding the Petitions to Intervene until the Commission's next regularly scheduled meeting on November 28, 2006. While Sprint is filing its Opposition to Intervene, Sprint still requests the deferral to grant the parties time to review the response filings and to supplement the record on this issue if necessary after reviewing those filings.

Please let me know if you have any questions.

Sincerely,

Talbot J. Wieczorek

TJW:klw
Enclosure
c: Mary Sisak
Ben Dickens
Rich Helsper
Rich Coit

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration Pursuant to the Telecommunication Act of 1996 to Resolve Issues Relating to an Interconnection Agreement with Brookings Municipal Utilities d/b/a Swiftel Communications	))))))))	**DOCKET TC06-176**

SPRINT'S OPPOSITION TO SDTA PETITION TO INTERVENE

Sprint Communications Company L.P. ("Sprint") by and through its attorneys, files its opposition to the South Dakota Telecommunications Association's ("SDTA") Petition to Intervene in this Arbitration Proceeding which is being conducted pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S.C. Section 151 *et seq.*, (the "Act"). Based on the fact that SDTA has no "pecuniary interest [that] would be directly and immediately affected" by any decision made, SDTA may not intervene. **See** SDCL 1-26-17.1. Moreover, under the Act, Congress provided a statutory procedural framework to facilitate rapid entry into local markets. Allowing SDTA to intervene in this proceeding would undermine this framework in favor of the historical regime where all interested persons were able to participate in proceedings involving a regulated utility. It would also be prejudicial to Sprint in that SDTA companies would have access to advice and knowledge about Sprint's operations even though Sprint has not requested to negotiate an agreement with most of SDTA's

members. Accordingly, Sprint urges the South Dakota Public Utilities Commission ("SDPUC" or "Commission") to deny SDTA's Petition, as explained more fully below.

I. INTRODUCTION

To facilitate a swift transition from monopoly provision of local Telecommunications service to a system based upon competition, Congress, in Section 252 of the Act, provided a process to ensure that incumbent and competing carriers fulfill their respective obligations through interconnection agreements. The Act establishes a preference for negotiated interconnection agreements. Section 252(a) of the Act allows an ILEC and a requesting carrier to negotiate and enter into voluntary interconnection agreements without regard to the standards set forth in Section 251(b) and (c) of the 1996 Act. 47 U.S.C. § 252(a)(1). Any party negotiating an agreement may ask a State commission to participate in the negotiation and to mediate any differences arising in the negotiation. 47 U.S.C. § 252(a)(2).

In contrast to voluntary agreements, if the parties cannot agree, the Act provides for a process of compulsory arbitration before a State commission such as the SDPUC. 47 U.S.C. § 252(b). Any "party *to the negotiation* may petition a State commission to arbitrate any open issues" within certain time frames set forth in Section 252(b)(1) of the Act. (Emphasis supplied.) The requesting carrier is required to file a petition setting forth the unresolved issues, the last-known positions of the parties on such issues, and documentation relating thereto. 47 U.S.C. § 252(b)(2)(A)-(B). The non-petitioning party is permitted to respond, and to provide additional information to the State commission. 47 U.S.C. § 252(b)(3). When acting on a party's petition for compulsory arbitration of an interconnection agreement, the State commission must limit its consideration to the issues

set forth in the petition, and in the response, if any, of the non-petitioning party. 47 U.S.C. § 252(b)(4)(A).

II. SDTA's PETITION

On November 3, 2006, SDTA filed its Petition to Intervene in this docket which was opened to address Sprint's Petition to arbitrate with Brookings Municipal Utilities d/b/a) Swiftel Communications ("Swiftel"). SDTA asserts that it should be allowed intervention "based on the interest of Swiftel, an SDTA member, and also the pecuniary interests of other SDTA member LECs that are likely to be 'bound and affected either favorably or adversely' by the outcome of the proceeding." **See** Petition to Intervene, paragraph 4, citing A.R.S.D. § 20:10:01:15.05. SDTA asserts there are numerous unresolved interconnection issues that have not been previously addressed by the Commission and that it is concerned that the Commission decisions on these issues may affect not just Swiftel but the other SDTA member companies. **Id.** at 3.

Despite SDTA's arguments to the contrary, SDTA is not entitled to intervene in this arbitration proceeding under either South Dakota or Federal law.

A. South Dakota Law

As has been established by the Administrative Rules of this Commission, a petition for arbitration pursuant to 47 U.S.C. § 252 and SDCL § 49-31-81 is conducted as a contested case. **See** A.R.S.D. § 20:10:32:31. The standard for intervention in a contested case is set forth in the state Administrative Procedures and Rules statutes. Specifically, SDCL § 1-26-7.1 states:

> A person who is not an original party to a contested case and whose pecuniary interests would be directly and immediately affected by an agency's order made upon the hearing may become a party to the hearing by intervention, if timely application therefore is made.

This Commission has adopted administrative rules that generally address petitions to intervene. Under those rules, the petitioner filing the intervention must show

> "that the petitioner is specifically deemed by statute to be interested in the matter involved, that the petitioner specifically declared by statute to be an interested party to the proceedings, or that by the outcome of the proceedings the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general."

The standards to intervene under the state statute versus the regulation are slightly different; however, the Commission has deemed arbitrations to be contested cases. Thus, the statutory intervention standard SDCL § 1-26-17.1, controls.[1] In either case, SDTA fails to meet the standards to be allowed to intervene.

First, it should be noted that Swiftel currently represented several counsel in this proceeding and, therefore, Swiftel does not need the SDTA to intervene on its behalf. Moreover, as a party to this action, Swiftel does not need SDTA to defend its pecuniary interest or any other interest Swiftel may have in the arbitration proceedings. This is not a situation where Swiftel is, for some reason, to be deemed incompetent to make its own case. Swiftel is a successful telecommunications company who has retained counsel from three different states to represent it in this action.

Because Swiftel can represent itself, SDTA cannot use Swiftel's interest as grounds to allow intervention of SDTA. That leaves SDTA's claim that its intervention is necessary to protect the "pecuniary interests of other SDTA member LECs." SDTA cannot claim another's interest as ground to support intervention.

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[1] It is noted that in the Commission's proposed changes to its procedural rules the intervention rules are being changed to apply only to contested cases.

SDCL § 1-26-17.1 is specific that before a person is allowed to intervene there must be a showing that the person's "pecuniary interest would be directly and immediately affected" by the Commission's decision. By its own admissions, SDTA has no direct interest in this proceeding. SDTA only claims to be possibly representing an unnamed member of its organization. There is no representation that actual members of its organization are interested in intervening or have a concern that their interests are at risk. Moreover, if such a member did have a concern, SDCL § 1-26-17.1 requires that member to intervene, not a surrogate.

The same conclusion is reached under the analysis of this Commission's rules. A.R.S.D. § 20:10:01:15.05 requires that the person seeking intervention show that the intervening petitioner's interests will be "bound and affected" and that the intervener's interest is "peculiar" to the intervenor. SDTA will not be bound or affected by these decisions. It only argues that some of its members may be bound and affected. SDTA has no direct interest in this action as it does not provide telecommunication services, is not subject to interconnection agreements, and makes no claim that it has any direct rights impacted by these proceedings.

Also, given the fact that the issues presented by the petition are specific to Swiftel, Sprint finds it highly questionable whether any LEC but Swiftel could be bound or affected by this decision making. Any interconnection agreement with any other ILEC in the state would be subject to the negotiation and arbitration procedures found under 47 U.S.C. § 252. Under the procedures outlined therein, only parties to the negotiations will be bound by the arbitration and the contract that results from the arbitration.

B. Federal Law

Upon review of the procedures for negotiations and arbitrations outlined in the Act, it is clear that only those parties involved in the negotiations are entitled to request arbitration and participate in the arbitration resulting from such request. There is no mechanism, intervention or otherwise, by which an entity that was not a party to the negotiations may participate. In this regard, arbitrations conducted pursuant to the Act are limited to the issues raised by the immediate parties to the negotiations. Indeed the Act is clear: "The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3). See 47 U.S.C. § 252(b)(4)(A). As the Florida Public Service Commission has recognized,

> "[a]rbitration proceedings under the Act are limited to the issues raised by *the immediate parties to the particular negotiations. The outcome of the* arbitration proceedings is an agreement between those parties that is binding only on them. The Act does not contemplate participation by other entities who are not parties to the negotiations and who will not be parties to the ultimate interconnection agreement. Entities not party to the negotiations are not proper parties in arbitration proceedings, even though they may, in some indirect way, be affected by a particular decision. See Order No. PSC-98-0454-PCO-TP (March 31, 1998).

Not allowing third-party entities to intervene is consistent with Congress' intent to foster rapid entry by would-be competitors into local markets. Allowing third-party intervenors, on the other hand, would inhibit competition by forcing a market newcomer to attempt to enter numerous service areas at the same time or risk being prejudiced by parties discovering information contained in earlier arbitrations. In this regard, parties to negotiations and subsequent arbitrations exchange a substantial amount of information which includes confidential and competitively sensitive information. If the Commission

were to allow an industry association like SDTA to intervene in these arbitrations, the association could then feed sensitive information back to its members, including Sprint's negotiation positions, market analysis, and network information. These other members could then use the information against Sprint in subsequent negotiations as Sprint attempts to expand its markets.

Intervention would also complicate the proceedings that are subject to a statutory timeframe for decision making under the Act. **See** 47 U.S.C. § 252. The arbitration between Sprint and Swiftel should concentrate on the issues as they exist for Sprint's and Swiftel's networks, and should not be overshadowed by an entity that was not at the negotiating table and who has no pecuniary interest that will be directly and immediately affected by the Commission's decision in the arbitration.

III. CONCLUSION

SDTA is not entitled to intervene in the arbitration between Sprint and Swiftel either under South Dakota or Federal law. SDTA has failed to establish that it has a "pecuniary interest that would be directly and immediately affected" by the Commission's decision in this arbitration or that it will be bound and affected either favorably or adversely with respect to an interest peculiar to the SDTA. Further, SDTA has failed to identify any provision in the Act that permits a third-party entity that was not a party to the negotiations to participate in the resulting arbitration. Accordingly, SDTA's Petition to Intervene should be denied.

Respectfully submitted this 13 day of November 2006,

Talbot J. Wieczorek

Gunderson, Palmer, Goodsell & Nelson, LLP
PO Box 8045
Rapid City SD 57709
Phone: 605-342-1078 Ext. 139
Fax: 605-342-0480
Email: tjw@gpgnlaw.com

Diane C. Browning
Attorney, State Regulatory Affairs
Mailstop: KSOPHN0212-2A411
6450 Sprint Parkway
Overland Park, Kansas 66251
Voice: 913-315-9284
Fax: 913-523-0571
Email: diane.c.browning@sprint.com

AND

Monica M. Barone
Senior Counsel
6450 Sprint Parkway
Mailstop: KSOPHN0212-2A521
Overland Park, Kansas 66251
Voice: 913-315-9134
Fax: 913-523-2738
Email:monica.barone@sprint.com

ATTORNEYS FOR
SPRINT COMMUNICATIONS COMPANY L.P.

CERTIFICATE OF SERVICE

The undersigned certifes that on this 15th day of November 2006, a copy of Sprint's Opposition to SDTA Petition to Intervene was served via email and first class mail to:

Rich.coit@sdtaonline.com

Richard D. Coit
Attorney at Law
South Dakota Independent Telephone Coalition
P.O. Box 57
Pierre, South Dakota 57501

kara.vanbockern@state.sd.us

MS Kara Van Bockern
Staff Attorney
SD PUBLIC UTILITIES COMMISSION
500 East Capitol
Pierre SD 57501

harlan.best@state.sd.us

MR HARLAN BEST
Staff Analyst
SD PUBLIC UTILITIES COMMISSION
500 East Capitol
Pierre SD 57501

mjs@bloostonlaw.com
bhd@bloostonlaw.com
Mary J. Sisak
Ben Dickens
Blooston, Mordkofsky
2120 L Street, NW - #300
Washington, DC 20037

pschudel@woodsaitken.com
jovercash@woodsaitken.com
tmoorman@woodsaitken.com

Paul M. Schudel
James A. Overcash
Thomas J. Moorman
Woods & Aitken, LLP
301 S. 13th Street, Suite 500
Lincoln NE 68508

rjh1@brookings.net
Richard Helsper
415 8th Street South
Brookings, SD 57006

Talbot J. Wieczorek