

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

ATTORNEYS AT LAW

J. CRISMAN PALMER
JAMES S. NELSON
DANIEL E. ASHMORE
DONALD P. KNUDSEN
PATRICK G. GOETZINGER
TALBOT J. WIECZOREK
JENNIFER K. TRUCANO
DAVID E. LUST
THOMAS E. SIMMONS

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, NEBRASKA
COLORADO, WYOMING & MINNESOTA

TERRI LEE WILLIAMS
SARA FRANKENSTEIN
AMY K. KOENIG
JASON M. SMILEY
MATTHEW E. NAASZ
QUENTIN L. RIGGINS
JEFFREY R. CONNOLLY

WYNN A. GUNDERSON
Of Counsel

August 11, 2008

E-FILING

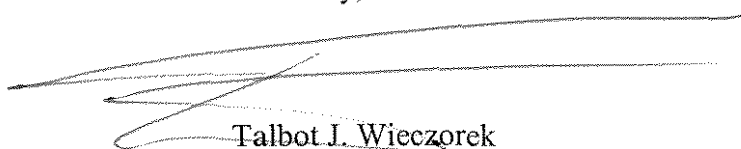
Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre SD 57501-5070

RE: In the Matter of the Petition of Sprint Communications Company, LP Petition for
Authority to Provide Local Exchange Service in Certain Rural Areas Served by
Brookings/Swiftel – Dockets TC06-178 GPNA File No. 08509.0003

Dear Ms. Van Gerpen:

Enclosed is Sprint's short brief regarding the non-disclosure of the redacted material in the
above-entitled matter.

Sincerely,



Talbot J. Wieczorek

TJW:klw

Enclosure

c: Service List
Bret Lawson via e-mail
Diane Browning via e-mail

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF SPRINT) DOCKET No. TC06-178
COMMUNICATIONS COMPANY L.P.'s)
PETITION FOR AUTHORITY TO PROVIDE)
LOCAL EXCHANGE SERVICE IN CERTAIN)
RURAL AREAS SERVED BY CITY OF)
BROOKINGS D/B/A/ SWIFTEL)

IN THE MATTER OF THE APPLICATION OF) DOCKET No. TC06-188
MCC TELEPHONY OF THE MIDWEST, INC.)
D/B/A MEDIACOM FOR A CERTIFICATE OF)
AUTHORITY TO PROVIDE INTEREXCHANGE)
AND LOCAL EXCHANGE SERVICES IN THE)
BROOKINGS EXCHANGE)

**Brief and Argument on Redacted Sections of
MCC Telephony, Inc. and Sprint Communications' Agreement**

Comes now, Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLP, attorney of record for Sprint Communications and hereby submits this brief on Sprint's position that the redacted portions of the agreement between MCC Telephony (hereinafter "MCC") and Sprint Communications (hereinafter "Sprint") should not be disclosed after in camera review.¹

BACKGROUND

This matter has been argued before the Commission on two occasions. After the first occurrence, MCC and Sprint provided additional parts of the agreement to Swiftel Communications (hereinafter "Swiftel"). In the redacted portions of the agreement, Sprint and MCC sought to simply redact portions that were not relevant nor likely to lead to any admissible evidence in the proceedings for those two companies' approval to provide local service in the Swiftel area and that contained proprietary information regarding their contractual relationship.

¹ Counsel for MCC has joined in the filing of this brief.

Six areas of contention remain. Sprint and MCC's position is that these areas have nothing to do with approving MCC and Sprint's entry into the Swiftel market and are not relevant to determine services or the quality of service to be provided to end users.

ARGUMENT

South Dakota law has acknowledged that there are limits on discovery. Public Entity Pool for Liability v. Score, 2003 SD 17, ¶ 20, 658 N.W.2d 64. In looking to those limitations, the court often looks to SDCL § 15-6-26(b)(1) which describes that discovery is only allowed in matters "relevant to the subject matter involved in the pending action." From this, the South Dakota Supreme Court has recognized that it is appropriate to deny a motion to compel that seeks subject matter that is not related or relevant to a subject matter involved in the pending action. Kaarup v. St. Paul Fire & Marine Insurance Co., 436 N.W.2d, 17, 20 (SD 1989).

As discussed in the previous hearings on this matter and in the previous filing on this matter, the information contained in the redacted portion of this agreement have no relationship to the subject matter of the CLEC proceedings. Because of this, the general discovery statutes recognize the motion to compel should be denied.

Additionally, South Dakota law recognizes a trade secret. SDCL § 37-29-1(4) provides the definition of trade secret. Trade secret includes any pattern or program that might have an economic value or information another person can use to obtain economic value. In this situation, the information on how two companies combine to compete with a third, Swiftel in this case, if known by Swiftel could harm the activities of the competitors. Therefore, even assuming some relevancy to the information the trade secret aspect of the information should protect it from disclosure.

Federal Courts have recognized similar protection even when a specific trade secret statute does not apply. The federal courts have upheld and determined that discovery should not be had to compel competitively sensitive information under the "business strategy doctrine." *See*

for example, Temple Holding Ltd v. Sea Containers Ltd., 131 FRD 360(D.D.C. 1989) (holding that a party seeking to take over another corporation was not entitled to information on the business strategies to avoid the take over), *see also* Stena Finance B.V. v. Sea Containers Ltd., 131 FRD 361 (D.D.C. 1989) (holding that a company trying to take over another is not entitled to subpoena information from the targeted company's financial advisors under the business strategy doctrine). Similarly, the pricing strategy that exists between MCC and Sprint is not relevant to these proceedings in that they provide business strategy information that could be used against it by its competitor, Swiftel.

Area of contention 1 concerns Attachment A to the letter, pages 1 and 2. The redacted information concerns the term of the agreement. The term of an agreement is critical to the parties to the agreement. The main competitor's knowledge of the term of the agreement, especially when taken with the other terms that have been disclosed, provides road maps to counter competition in the market place. A competitor could develop a particular strategy to outlast the agreement. Moreover, the term of the agreement does not address how end users are handled in the event the agreement is terminated. In the event of a termination, the agreement contains detailed transition provisions for ensuring end users do not experience an interruption of service, as described in the agreement on page 45. These transition provisions on page 45 of the agreement were never redacted and were made available to Swiftel as part of the original disclosure of the agreement.

Area of contention 2 deals with transport for commercial business. This redaction appears on Attachment A, page 20. This section was redacted because it contemplates a possible future arrangement between MCC and Sprint where MCC might provide certain services to Sprint. The arrangement would be separate from and unrelated to the provisioning of service to end users by MCC, the focus of the certification proceedings. In regards to a possible future arrangement for transport of commercial business, this information is highly confidential and

proprietary between Sprint and MCC. The information is not related to the provisioning of voice service to business or residential end users and, therefore, should not be disclosed.

Area of contention 3 involves the redaction on Attachment A, page 25. The redacted information on page 25 is pricing information between MCC and Sprint. It does not impact the end users. Providing pricing information between MCC and Sprint to its primary competitor would be providing highly confidential, proprietary and trade secret information that would directly harm MCC's and Sprint's ability to compete in the marketplace.

Area of contention 4 involves Attachment A at page 43. This is a liquidated damages section that calculates liquidated damages between MCC and Sprint. Obviously, the information is highly confidential. What liquidated damages might occur between Sprint and MCC are not relevant to the provision of voice service to end users or the CLEC applications and could provide information to a competitor that it could use against these companies. It would be unfair for a competitor to know the liquidated damages provision that exists between these companies.

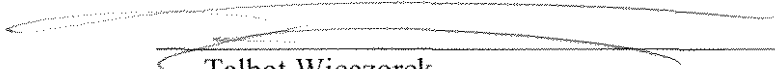
Area of contention 5 involves the service quality levels as set forth in Appendix A to Attachment A, at pages 3 and 4. The terms as set forth in the unredacted portion of the agreement require Sprint to meet the PUC service quality requirements. No further disclosure is necessary to consider the CLEC application. These additional service quality standards, to improve and enhance services being provided to end user beyond PUC service quality requirements, can only be used by competitors to try to match that type of service to compete with the MCC/Sprint offering.

Area of contention 6 involves Appendix 1 to Attachment A. Swiftel believes it needs the listing of initial markets and new markets. What initial markets and new markets MCC and Sprint have agreed to and whether Swiftel's territory is an initial market has no bearing on the provision of voice service or the CLEC applications. Both MCC and Sprint have already provided information as to when they will be network ready in these proceedings.

CONCLUSIONS

For the reasons set forth above, the redacted materials should not be provided.

Dated this 11th day of August, 2008.



Talbot Wieczorek
Gunderson, Palmer, Nelson & Ashmore, LLP
440 Mt Rushmore Road
PO Box 8045
Rapid City, South Dakota 57709
Phone: 605-342-1078
Fax: 605-342-0480
E-mail: tjw@gpna.com

ATTORNEYS FOR
SPRINT COMMUNICATIONS COMPANY, L.P.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 11th day of August 2008, a copy of **Sprint's Brief and Argument on Redacted Sections of MCC Telephony, Inc. and Sprint Communications' Agreement** was served electronically to:

kara.semmler@state.sd.us

MS KARA SEMMLER
STAFF ATTORNEY
SOUTH DAKOTA PUBLIC UTILITIES
COMMISSION
500 EAST CAPITOL
PIERRE SD 57501

Richcoit@sdtaonline.com

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

Koenecke@magt.com

Brett Koenecke
PO Box 160
Pierre, SD 57501

Harlan.best@state.sd.us

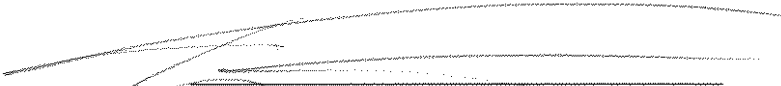
MR HARLAN BEST
STAFF ANALYST
SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION
500 EAST CAPITOL
PIERRE SD 57501

rjh1@brookings.net

Richard J. Helsper
Glover & Helsper, P.C.
415 8th Street South
Brookings, SD 57006

mjs@bloostonlaw.com

bhd@bloostonlaw.com
Benjamin H. Dickens, Jr.
Mary J. Sisak
Blooston, Mordkosfsky, Dickens, Duffy
& Prendergast, LLP
2120 L Street NW, Suite 300
Washington, DC 30027



Talbot J. Wiczorek