

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

DOCKET NUMBER TC 09-098

IN THE MATTER OF THE COMPLAINT)
OF SOUTH DAKOTA NETWORK, LLC,)
AGAINST SPRINT COMMUNICATIONS)
COMPANY LP)

)
IN THE MATTER OF THE THIRD PARTY)
COMPLAINT OF SPRINT)
COMMUNICATIONS COMPANY LP)
AGAINST SPLITROCK PROPERTIES,)
INC., NORTHERN VALLEY)
COMMUNICATIONS, INC., SANCOM,)
INC., AND CAPITAL TELEPHONE)
COMPANY)

AFFIDAVIT OF PHILIP R. SCHENKENBERG

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Philip R. Schenkenberg, being first duly sworn, states as follows:

1. I am a shareholder with the law firm Briggs and Morgan, P.A., and am counsel of record for Sprint Communications Company L.P. (“Sprint”) in this matter.

2. In January of 2011, the parties were negotiating a procedural schedule, and I began drafting and serving initial discovery requests in this case.

3. There was little need to conduct formal discovery with Sancom, Inc. (“Sancom”) because the parties had agreed informally that Sprint could use the discovery Qwest Communications Co. (“Qwest”) had obtained in the federal court case to prepare its case in this docket. That agreement is reflected at ¶ 20 of Sancom and Northern Valley’s proposed procedural schedule, which says “Sancom has already provided to Sprint discovery responses,

documents and deposition transcripts it previously provided to Qwest, to the extent that they have not already been provided. Sprint may utilize those materials ... in its case.” Because Sancom was no longer engaged in traffic pumping, there was no need to “update” that prior discovery.

4. Following the federal court’s referrals to the Federal Communications Commission (“FCC”), Qwest filed an FCC complaint against Sancom (“Qwest/Sancom Complaint”). I have been told by Sprint representatives that this was in accordance with an understanding among Sancom, Qwest, Sprint, and FCC Staff that Qwest would be lead complainant on the Sancom matter. The Complaint was filed on January 14, 2011.

5. On January 14, 2011, I spoke with Jeff Larson by phone and told him Sprint wanted to receive a copy of the Qwest/Sancom Complaint in discovery for purposes of this case (the “PUC Case”). I advised him that Sprint had a copy of the confidential version, but that it was being held in accordance with a Protective Order specific to the Qwest/Sancom FCC case. I did not intend to receive that document for purposes of the FCC case because I was not Sprint’s counsel in that case, and the FCC’s Protective Order would not allow Sprint to use that document for purposes of related litigation (like this PUC Case). In other words, I asked to receive the Qwest/Sancom FCC Complaint for purposes of the PUC Case because receiving it subject to the Protective Order in the FCC case would do me no good in this PUC Case.

6. I told Mr. Larson I felt this was more efficient than having me sending him a document request and waiting 30 days for his response. In addition, it was consistent with the parties’ agreement that Sprint would be allowed to use the Qwest discovery materials in this case without need to serve a formal discovery request in this PUC Case.

7. Mr. Larson asked me why I did not simply get the document from someone at Sprint. I told him I could do that so long as we had an understanding that was being done in accordance with the confidentiality order in this docket.

8. I followed up my phone call with an email on January 14, 2011, stating:

Jeff,

This is a follow up to our phone conversation. I would like you, on behalf of Sancom, to authorize my receipt of the Qwest-Sancom FCC complaint, with my receipt subject to the confidentiality agreement the parties have negotiated in the PUC proceeding. If that's acceptable to Sancom, I can get it from someone at Sprint, or from you informally. Thanks.

See Exhibit A hereto.

9. On January 19, 2011, Mr. Larson responded, stating: "Have you signed the protective order yet Phil?" *See Exhibit B.* I understood his question to relate to the Confidentiality Agreement in this PUC Case. I responded by indicating that the SD PUC confidentiality agreement (which had been agreed to by the parties and filed for approval that very day) did not require outside counsel to execute an Exhibit A, but that I did agree to abide by that agreement. I also indicated that I could also sign the attachment to FCC's Protective Order "if you want."

10. Shortly thereafter I followed up with another email saying "And obviously I won't send it on to anyone at Sprint until they sign the Exhibit A for this case." *See Exhibit C.*

11. On January 25, 2011, Mr. Larson responded as follows:

Sorry I didn't get back to you sooner there is no problem with you obtaining a copy of the FCC Complaint in the Qwest matter. I will have Ross Buntrock get that to you.

See Exhibit C.

12. I did not receive the document from Mr. Buntrock, but since I had permission to obtain it, and since Mr. Larson and I had discussed my getting it directly from Sprint, I obtained it from Sprint directly.

13. I have held the Qwest/Sancom FCC Complaint subject to the terms and conditions of the Confidentiality Agreement in this case, and have not disclosed it to any unauthorized persons.

14. In March 2011, after this all happened, Mr. Buntrock and Mr. Carter entered appearances in this action on behalf of Sancom.

15. On July 7, 2011, I copied the service list on a letter to Darla Rogers in which I identified documents being produced in response to SDN's discovery requests to Sprint. One of those documents was the Qwest/Sancom FCC Complaint, which was responsive to SDN's request that Sprint produce information it had received from Third Party Defendants. I intended to produce that document on a disk marked "Confidential," and subject to the Confidentiality Agreement in this case.

16. Mr. Carter responded to my email and questioned my production of the Qwest/Sancom FCC Complaint, as he was not apparently aware that Mr. Larson had authorized my receipt of that document in this case. I provided Mr. Carter, Mr. Buntrock and Mr. Larson with the relevant correspondence. *See* Exhibit D.

17. On July 8, 2011, I spoke with Mr. Buntrock and Mr. Carter about this issue. I attempted to explain Sprint's position that I had received the document with Mr. Larson's permission, subject to the terms of the Confidentiality Agreement in this case.

18. Mr. Buntrock took the position that I had received the document (and was holding the document) in violation of the FCC Protective Order. He told me that Mr. Larson had no

recollection of my phone call with him in January, and that his January 25 email to me did not provide me with permission to receive the document subject to the Confidentiality Agreement in this case.

19. Mr. Buntrock even told me that Mr. Larson had no authority to grant my request to obtain the Qwest/Sancom FCC Complaint for purposes of this case. He analogized this to having Mr. Larson authorize me to run all of the stop lights in the Minneapolis area.

20. Mr. Buntrock accused me personally of violating the FCC Protective Order by accessing the Qwest/Sancom Complaint for purposes of this case.

21. Mr. Buntrock accused Sprint of violating the FCC Protective Order by providing the Qwest/Sancom Complaint to me, and followed up with an email saying I had admitted such a violation.

22. I believe I acted appropriately, in good faith, and with the permission of Mr. Larson at all times with respect to my receipt and use of the Qwest/Sancom FCC Complaint. In January 2011, I made a clear request to Mr. Larson, both orally and in writing, when Mr. Larson was Sancom's only counsel of record. He granted my request. I have maintained the confidentiality of the document, and Sprint was producing the document to SDN only because it was responsive to a document request.

23. Moreover, I understand that all of Sancom's confidential information in the Qwest/Sancom FCC Complaint is contained within the discovery materials that Sprint already has and can use in this case.

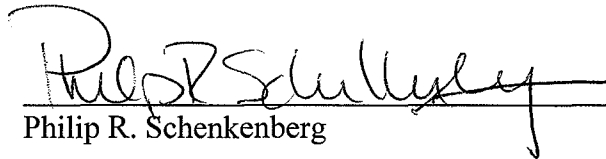
24. On July 11, 2011, in an abundance of caution, Sprint served written discovery asking for the Qwest/Sancom FCC Complaint. That document request is attached as Exhibit E hereto.

25. Through this motion, Sprint requests an order finding:

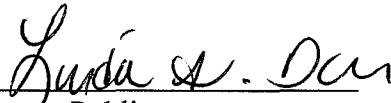
- (a) That I asked Mr. Larson, orally and in writing, for purposes of facilitating discovery in this case, to authorize me to receive a copy of the Qwest/Sancom FCC Complaint, subject to the Confidentiality Agreement in this PUC Case.
- (b) That Jeff Larson, then sole counsel of record for Sancom, had the authority respond to the request I made by phone and in my January 14, 2011, email.
- (c) That Mr. Larson consented to my request on behalf of his client.
- (d) That as a result, Sprint (and its counsel in this case) properly possess that document subject to the terms of the Confidentiality Agreement governing this case, and it may only be disseminated and used in accordance with its terms.

26. Sprint is not asking for an order that this document be admitted into the evidentiary record. In the event Sprint proposes to introduce the Qwest/Sancom FCC Complaint as part of its direct case (subject to the terms of the Confidentiality Agreement), Sancom will have the right to object on relevance or other grounds. In other words, Sprint is not asking the Commission to determine that the Qwest/Sancom FCC Complaint is admissible – that issue would not be before the Commission unless and until it is offered into evidence.

AFFIANT SAYS NOTHING FURTHER.


Philip R. Schenkenberg

Subscribed and sworn to before
me this 12th day of July, 2011.


Notary Public

