

Carter, David

From: Schenkenberg, Philip [PSchenkenberg@Briggs.com]
Sent: Wednesday, May 04, 2011 12:36 PM
To: Buntrock, Ross
Cc: James Cremer; Carter, David; Talbot J. Wiczorek; Lawson, William [GA]; Browning, Diane C [GA]
Subject: RE: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098: Sprint's Discovery Responses

Follow Up Flag: Follow up
Flag Status: Flagged

Ross, after my email below you indicated you intended to file this afternoon if you didn't hear from us. I have been out for the last two days, and Mike Fingerhut has been out of town and has not been available. Mike needs to be included in this because of the issues related to what has been referred to the FCC by the Court.

At this point, we think the parties should talk further about this after our group has a chance to talk to Mike. We really should involve other parties as well. We don't yet have final agreement on the language of the procedural order, and the Commission has never even been advised of the referral. Query whether the referral is even before them at this point. In addition, while Sprint intends for the parties to do discovery at the PUC with respect to the interstate and intrastate issues subject to the referrals, we have a disagreement about what is relevant to the issues referred. I don't believe Sprint will agree that the Commission should be the body deciding what discovery is relevant for purposes of the FCC complaint. I'm not sure the Commission would agree to undertake that role even if we asked it to.

I would suggest that this be something that gets raised on our scheduling call. Obviously, I can't stop you from filing a motion if you so choose.

Phil

Phil Schenkenberg
Briggs and Morgan, P.A.
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2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402

-----Original Message-----

From: Schenkenberg, Philip
Sent: Saturday, April 30, 2011 11:43 AM
To: 'Buntrock, Ross'
Cc: James Cremer; Carter, David; Talbot J. Wiczorek; Lawson, William [GA]; Browning, Diane C [GA]
Subject: RE: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098: Sprint's Discovery Responses

You misinterpret my response. I do think we should talk, but only after I've discussed your email with my client.

Phil

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-----Original Message-----

From: Buntrock, Ross [mailto:Buntrock.Ross@ARENTFOX.COM]
Sent: Saturday, April 30, 2011 11:42 AM
To: Schenkenberg, Philip
Cc: James Cremer; Carter, David; Talbot J. Wieczorek; Lawson, William [GA]; Browning, Diane C [GA]
Subject: Re: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098: Sprint's Discovery Responses

Phil
I interpret your response to mean that we should proceed to file. If that's not the case let me know. I am available to speak today as well since you appear to be working.

Sent while mobile.

On Apr 30, 2011, at 11:29 AM, "Schenkenberg, Philip"
<PSchenkenberg@Briggs.com<mailto:PSchenkenberg@Briggs.com>> wrote:

Ross, I am out of the office Monday and Tuesday and won't be able to get back to you before later in the week.

Phil

Phil Schenkenberg
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From: Buntrock, Ross [mailto:Buntrock.Ross@ARENTFOX.COM]
Sent: Friday, April 29, 2011 5:14 PM
To: Schenkenberg, Philip
Cc: James Cremer; Carter, David; Talbot J. Wieczorek; Lawson, William [GA]; Browning, Diane C [GA]
Subject: RE: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098: Sprint's Discovery Responses

Phil:

In light of the agreement between the parties to consolidate discovery in order to effectuate the referrals to the FCC and PUC, the discussion regarding General Objection No. 3 appears to be predominately academic in determining the central question of whether the discovery sought by Northern Valley is appropriate. Nevertheless, I note that Northern Valley has agreed in principle that it would withdraw its demand for an award of money damages in the PUC case (assuming that the remaining stipulation is ultimately submitted), but that the

“issues related to claims for intrastate traffic in the federal court proceedings will nonetheless be litigated in this docket...” Thus, we believe that the line you attempt to draw between “this case” and the federal case is erroneous.

With regard to the import of the referral order, we restate that which is already clear: Judge Schreier has referred “issues” that relate to unjust enrichment, even though she did not refer the unjust enrichment “claim” itself. The quote set forth in your email, when viewed in context, rather than isolation, establishes this exact point:

Here, the court does not intend to refer Northern Valley’s unjust enrichment claim, the question of whether Northern Valley can recover under an unjust enrichment theory, or the question of whether this theory is barred by the filed rate doctrine. Rather, the court seeks the FCC’s guidance on the issues of whether the services Northern Valley provided in this case are subject to the tariff requirements, where these services fall into the regulatory regime, and how Northern Valley can obtain compensation for these services if its access tariff does not apply. While the FCC’s answer to these questions may implicate the court’s determination of whether the filed rate doctrine bars recovery pursuant to an unjust enrichment theory, the court does not ask the FCC to make this legal determination.

Thus, we reject your assertion that issues related to the unjust enrichment claim are not before the Commission. We also do not agree with your suggestion that we need to “point to South Dakota statutes or rules (or federal statutes or rules)” in order to demonstrate that the information is “relevant to a rate-setting procedure.” Traditional rate setting procedures are not applicable to CLECs and the FCC has recognized that “the Commission has broad discretion in selecting methods to evaluate the reasonableness of rates” and that, with regard to CLECs, “there is no single regulatory formula required in assessing the justness and reasonableness of a carrier’s rates.” AT&T Corp. v. Business Telecom, Inc., 16 FCC Rcd. 12312 (FCC 2001). Moreover, the FCC has recognized that payment for the use of the LEC’s network in “necessarily imputed” into the rates the IXC charges its long-distance subscribers. See Petitions of Sprint PCS & AT&T Corp., 17 FCC Rcd. 13192, 13198 (discussing the distinctions between wireline and wireless network plans and noting that, unlike the calling party’s network pays (CPNP) compensation regime applicable to the wireline network, access charges are not “necessarily imputed” into the wireless carrier’s charges). Thus, we believe that the information that we seek is clearly among the data that the PUC can and should consider in addressing the issues that have been referred by Judge Schreier, including whether Northern Valley is entitled to compensation if its tariff does not apply and a reasonable rate for such compensation. Thus, we again call on Sprint to provide this relevant and discoverable information.

As I stated in my prior letter, if we cannot reach agreement on this issue, Northern Valley intends to proceed promptly in bringing this issue to the Commission’s attention for resolution. If you believe that a call or discussion would be productive in resolving this issue, then please let me know your available for such a conversation on Monday or Tuesday of next week. If not, we will proceed to file, as you have delayed resolution of this matter long enough.

Respectfully,

Ross

Ross Buntrock
Partner

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From: Schenkenberg, Philip [mailto:PSchenkenberg@Briggs.com]
Sent: Friday, April 29, 2011 3:57 PM
To: Buntrock, Ross
Cc: James Cremer; Carter, David; Talbot J. Wiczorek; Lawson, William [GA]; Browning, Diane C [GA]
Subject: RE: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098: Sprint's Discovery Responses

Ross,

I am responding to your April 25, 2011 letter regarding Sprint's objections to Northern Valley's discovery responses (attached).

With respect to Sprint's General Objection No. 2, the parties apparently disagree about the meaning of the referral order. The Court stated: "Here, the court does not intend to refer Northern Valley's unjust enrichment claim..." We believe this means that discovery related to the unjust enrichment claim is not before the Commission. To the extent the Court directed the agencies to provide guidance on a "reasonable rate" in the event the service is not subject to tariffed compensation, we are unaware of any rate-setting standard that would utilize the Sprint information you have requested to set a rate for a service provided by Northern Valley. If you can point to South Dakota statutes or rules (or federal statutes or rules) that would make such information relevant to such a rate-setting procedure we would be happy to review them.

With respect to Sprint's General Objection No. 3, I believe you misread our objection and thought we were referring to the unjust enrichment claim Northern Valley asserted in the federal case. Northern Valley asserted an unjust enrichment claim in this case (the case before the South Dakota Commission), which Sprint moved to dismiss based on the state's election of remedies statute. That motion remains pending. The most current version of the stipulated procedural schedule (which was in near final form subject to setting dates) provided that Northern Valley and Sancom would withdraw their demand for money damages in this case, which would moot Sprint's motion. We would ask that you review these facts and revisit your response to our General Objection No. 3, which we don't believe contains a "wildly inaccurate representation."

We look forward to your response.

Phil

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From: Carr, Edilma [mailto:Carr.Edilma@ARENTFOX.COM] On Behalf Of Buntrock, Ross
Sent: Monday, April 25, 2011 1:20 PM
To: Schenkenberg, Philip
Cc: James Cremer; Carter, David; Buntrock, Ross
Subject: In the Matter of Complaint of South Dakota Network, LLC, Against Sprint, TC 09-098:
Sprint's Discovery Responses

Dear Phil:

Please see the attached correspondence.

Sincerely,

Ross Buntrock
Partner

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