

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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)

DOCKET NUMBER TC 09-098

**MOTION TO RESOLVE DISCOVERY DISPUTE
BETWEEN SPRINT AND SANCOM**

I. SUMMARY OF DISPUTE AND SPRINT REQUEST FOR RELIEF

Sprint Communications Company L.P. (“Sprint”) respectfully requests the Commission resolve a discovery dispute between Sprint and Sancom, Inc. (“Sancom”). Earlier this year, Qwest Communications Company (“Qwest”) filed a Federal Communications Commission (“FCC”) complaint against Sancom in furtherance of the federal district court’s referral of issues to the FCC (“Qwest/Sancom FCC Complaint”). Sprint’s counsel Phil Schenkenberg requested and obtained permission from Sancom’s counsel Jeff Larson to receive that document in discovery in this docket (the “PUC Case”), and he committed to hold that document subject to the restrictions contained in the Confidentiality Agreement approved by the Commission in this PUC Case.

Now, Sancom’s Washington DC counsel, who appeared as counsel of record in this PUC Case after that permission was granted, has accused Sprint and its PUC counsel of violating the FCC’s Protective Order by doing that which Mr. Larson agreed to. Sprint respectfully requests

an order that will clarify that Sprint has acted appropriately and did in fact receive permission from Mr. Larson to obtain discovery of this document in the PUC Case. In particular, Sprint requests an order from the Commission determining that:

- 1) Mr. Schenkenberg asked Mr. Larson, orally and in writing, for purposes of facilitating discovery in this case, to authorize him to receive a copy of the Qwest/Sancom FCC Complaint, subject to the Confidentiality Agreement in this PUC Case.
- 2) Jeff Larson, then sole counsel of record for Sancom, had the authority respond to Sprint's request.
- 3) Mr. Larson consented to Sprint's request on behalf of his client
- 4) 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 the terms of that Confidentiality Agreement.
- 5) That the Qwest/Sancom FCC Complaint is discoverable in this proceeding.
- 6) Sprint may supply the Qwest/Sancom Complaint to other parties in this action where it is responsive to a discovery request and noted as confidential.

II. FACTS

The facts related to this Motion, including the relevant correspondence, are set forth in the Affidavit of Philip R. Schenkenberg. As described therein, the parties had negotiated regarding informal discovery production and had reached an agreement that Sprint could hold and utilize discovery obtained by Qwest from Sancom in the related federal case for purposes of this PUC Case. Schenkenberg Aff. ¶ 3; *see also* Sancom and Northern Valley's proposed procedural schedule, ¶ 20. Qwest incorporated information from that discovery into an FCC Complaint that was filed on January 14, 2011. Because of the overlap of issues, Sprint sought to obtain a copy of the Qwest/Sancom FCC Complaint in discovery in this PUC Case, and so made an informal request to its counsel Mr. Larson. That request was made both orally and in writing. Schenkenberg Aff. ¶¶ 5-8 and Ex. A.

Mr. Larson granted Sprint's request, saying it was "no problem" for Mr. Schenkenberg to receive the document in this PUC Case. Schenkenberg Aff. ¶ 11 and Exhibit C. Mr. Schenkenberg received it from Sprint and has held it subject to the terms of the Confidentiality Agreement in this PUC Case. Schenkenberg Aff. ¶ 5. Sprint considers that document to have been part of the discovery produced by Sancom in this case and, as such, intended on providing it in response to discovery served on Sprint by SDN. Schenkenberg Aff. ¶ 15.

Now, Sancom's out of state counsel has taken the position that Mr. Larson did not authorize Mr. Schenkenberg's receipt of the Qwest/Sancom FCC Complaint subject to the Confidentiality Agreement in this PUC Case, and that both Sprint and Mr. Schenkenberg are therefore in violation of the FCC's Protective Order. Sprint needs to have this dispute resolved so it can continue to proceed to conduct discovery and prepare its case.

III. ARGUMENT

Mr. Schenkenberg's Affidavit and the January 14, 2011, email he sent to Mr. Larson make clear that Sprint, through its counsel of record, asked for permission to obtain and hold the Qwest/Sancom FCC Complaint for purposes of this PUC Case. The document had just been filed at the FCC, and contained information related to Sancom's traffic pumping activities in South Dakota, which were and continue to be at issue in this PUC Case. In addition, the parties had agreed to use other discovery from the Qwest/Sancom federal court case without need for Sprint to serve a formal discovery request. It was perfectly reasonable and consistent with standard practice before the Commission for Sprint to make this informal request.

Sancom's counsel Mr. Buntrock has suggested to Mr. Schenkenberg that Sancom's sole counsel of record at the time, Jeff Larson, had no authority to grant Sprint's request to obtain the Qwest/Sancom FCC Complaint for purposes of this PUC Case. Schenkenberg Aff. ¶ 19. As Sancom's counsel of record, Mr. Larson has both actual and ostensible authority to enter into

agreements regarding discovery matters. *See, e.g.*, ARSD 20:10:01:02 (party may appear by an attorney); *Fed. land Bank of Omaha, v. Sullivan*, 430 N.W.2d 700 (S.D. 1988) (party in case held to settlement made by its counsel of record). It would be quite extraordinary for the Commission to find that a counsel of record could not bind his client with respect to discovery matters within the scope of his representation.

Sancom's counsel responded to Sprint's clear request by stating it was "no problem" for Sprint to receive the document in this PUC Case. Mr. Schenkenberg reasonably understood Mr. Larson's response to grant Sprint's request to allow him to receive the document in this PUC Case, subject to the restrictions in the Confidentiality Agreement in this PUC Case. Therefore, Sprint has acted reasonably and consistent with Mr. Larson's authorization by holding that document as part of the discovery record in this PUC Case.

Not only does Sancom's current position try to undo its counsel's actions in January, it is contrary to common sense. Sancom's confidential information within the Qwest/Sancom FCC Complaint is already in Sprint's possession as part of the discovery in this case. Schenkenberg Aff. ¶¶ 3, 23. The FCC complaint is a discoverable document in this proceeding. As such, there is no claim that Sprint or its counsel improperly possesses any facts they could not otherwise access. Nor has any of the underlying information been disclosed – it has been held by Sprint and continues to be held by Sprint as confidential. Moreover, Sprint has not sought to admit the document into the evidentiary record, only to hold it for discovery purposes. Sprint's request was reasonable, the use of an informal request was efficient, and there was no potential harm to be caused to Sancom as Sprint's counsel agreed to be bound by the protective order in this proceeding. This further supports an order granting Sprint its requested relief.

CONCLUSION

For the above reasons, Sprint respectfully requests it resolve the above discovery dispute in its favor.

Dated: July 12, 2011

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 12th day of July 2011, I served a true and correct copy of **MOTION TO RESOLVE DISCOVERY DISPUTE BETWEEN SPRINT AND SANCOM** in the above-entitled matter, by email to:

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