

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE APPLICATION OF )</b>	<b>ORDER TO COMPEL</b>
<b>QWEST CORPORATION TO RECLASSIFY )</b>	<b>DISCOVERY AND</b>
<b>LOCAL EXCHANGE SERVICES AS FULLY )</b>	<b>PROTECTIVE ORDER</b>
<b>COMPETITIVE )</b>	<b>TC03-057</b>

**PROCEDURAL HISTORY**

On March 14, 2003, the South Dakota Public Utilities Commission (Commission) received the complaint of Qwest Corporation (Qwest) to reclassify local exchange and other related services as fully competitive in all Qwest exchanges in South Dakota (Complaint). On March 20, 2003, the Commission electronically transmitted notice of the filing and the intervention deadline of April 4, 2003, to interested individuals and entities.

Black Hills FiberCom, L.L.C. (Black Hills) filed a Petition for Leave to Intervene on March 26, 2003, Northern Valley Communications, L.L.C. (NVC) filed a Petition to Intervene on March 28, 2003, Midcontinent Communications, Inc. (Midcontinent) filed a Petition to Intervene on April 2, 2003, PrairieWave Telecommunications, Inc. and PrairieWave Community Telephone, Inc. (PrairieWave) filed a Petition to Intervene on April 3, 2003, and Midstate Telecom, Inc. (Midstate), South Dakota Telecommunications Association (SDTA) and WorldCom (WorldCom) filed Petitions to Intervene on April 4, 2003. On April 24, 2003, the Commission issued its Order Granting Intervention to Black Hills, NVC, Midcontinent, PrairieWave, Midstate, SDTA and WorldCom.

Qwest filed a Motion to Apportion Deposit on May 22, 2003. WorldCom filed a Response to Qwest's Motion to Apportion Deposit on May 28, 2003. Midcontinent, SDTA and Black Hills filed Responses to Qwest's Motion to Apportion Deposit on May 30, 2003, and Midstate filed a Response to Qwest's Motion to Apportion Deposit on June 2, 2003. Qwest filed a Motion to Compel Discovery and Motion to Reduce Time to Respond to Discovery on June 24, 2003. PrairieWave filed a Motion for a Protective Order on June 26, 2003. Black Hills filed a Response to Qwest's Motion to Compel Discovery and Motion for Protective Order on June 30, 2003. Midcontinent filed a Motion for a Protective Order on July 1, 2003. PrairieWave filed a Motion to Dismiss on July 3, 2003. Midstate and NVC filed Motions for Protective Orders on July 3, 2003. On July 7, 2003, the Commission issued its Order Requiring Deposit and Denying Motion to Apportion Deposit. On July 8, 2003, Midcontinent filed a Second Motion for a Protective Order.

On July 1, 2003, at a regularly scheduled meeting, the Commission considered Qwest's Motions to Compel and to Reduce Time to Respond to Discovery and PrairieWave's, Black Hills's, and Midcontinent's Motions for Protective Orders. The Commission voted unanimously to grant Qwest's Motion to Reduce Time to Respond to Discovery but deferred action on Qwest's Motion to Compel and the Motions for Protective Orders to afford the parties an opportunity to attempt to reach agreement on an acceptable confidentiality agreement and discovery limitations. On July 7, 2003, at an ad hoc meeting, the Commission considered Qwest's Motion to Compel and the Motions for Protective Order of PrairieWave, Black Hills, Midcontinent, NVC and Midstate. On July 14, 2003, the Commission issued its Order Granting Qwest's Motion to Reduce Time to Respond to Discovery.

On July 9, 2003, at an ad hoc meeting, the Commission again considered Qwest's Motion to Compel and the Motions for Protective Order filed by PrairieWave, Black Hills, Midcontinent, NVC and Midstate. Based upon the representations made by the parties and their attorneys in their respective motions and before the Commission at the July 1, 2003, and July 7, 2003 meetings, the

Commission at its July 9, 2003 ad hoc meeting voted unanimously to grant in part and deny in part Qwest's Motion to Compel, to grant in part and deny in part the Motions for Protective Order of PrairieWave, Black Hills, Midcontinent, NVC and Midstate and to order additional reciprocal protective provisions to minimize the risk to the parties of public disclosure or improper use of the protected materials and of the evidentiary consequences of the limitations imposed by the Commission on disclosure. The Commission therefore finds, concludes and orders as follows:

### GENERAL

1. The Commission finds and concludes that it has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31, specifically SDCL 49-31-3, 49-31-3.2 and 49-31-44 and ARSD 20:10:24:11 through 20:10:24:19 and 20:10:01:39 through 20:10:01:44.

2. SDCL 49-1-11(4) gives the Commission authority over "[r]egulation of proceedings before the commission, . . . all of which shall conform to those used in South Dakota courts." Pursuant to this authority, the Commission promulgated ARSD 20:10:01:22.01 which states in pertinent part:

. . . The commission at its discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be in the same manner as in the circuit courts of this state.

The provisions of SDCL 15-6-26(c) are accordingly applicable to discovery conducted in connection with proceedings before the Commission.

3. The applicant seeking reclassification of a telecommunications service has the burden of proof to demonstrate, based upon the factors set forth in SDCL 49-31-3.2, 49-31-1.1 and 49-31-1.3 and ARSD 20:10:24:11, that a reclassification of the service is justified.

4. By definition, the provisions of SDCL 49-31-1.1, 49-31-1.3 and 49-31-3.2 involve the status of competition between or among telecommunications companies serving a market in South Dakota. The factors set forth in SDCL 49-31-3.2 and ARSD 20:10:24:11 necessarily involve consideration of information having competitive significance for both the applicant and its competitors.

5. An applicant's burden to prove the relevant market's compliance with the factors set forth in SDCL 49-31-3.2 places the applicant in the position of having to demonstrate the competitive position of its competitors. Of necessity, this involves obtaining and presenting information concerning the capability of competitors to provide the level of competition in the marketplace that is required to meet the standards of SDCL 49-31-3.2, 49-31-1.1 and 49-31-1.3.

6. SDCL 49-1-11(6) authorizes the Commission to promulgate rules concerning "[p]rocedures and requirements for handling confidential information and determining whether information should be protected as confidential." In ARSD 20:10:01:39 through 20:10:01:44 the Commission has set forth its general rules regarding the treatment of confidential information. SDCL 15-6-26(c) authorizes the Commission to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Information need not meet the technical definition of a trade secret to be protectable as "other confidential . . . research, . . . or commercial information" under SDCL 15-6-26(c).

7. These statutes and rules place upon the Commission the obligation to balance the applicant's legitimate need to obtain the information about its competitors that it requires to attempt to prove its case against its competitors' legitimate interests in protecting their confidential and valuable information from disclosure and improper use by either the applicant or others. This balancing test is appropriate to determine both whether information should be required to be revealed and what special measures should be taken to protect information that is determined to be subject to disclosure. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (1992); *Northrop v. Inventive Communications, L.L.C.*, 199 F.R.D. 334 (D. Neb., 2000); *Oregon Health & Science University v. Vertex Pharmaceuticals, Inc.*, 2002 WL 31968995 (D.Or.).

#### ORDER TO COMPEL AND RESTRICT DISCOVERY

8. The Commission finds and concludes that the following information is sufficiently probative that denial of it to Qwest would be prejudicial to Qwest and that subject to the protective provisions of the Protective Order, the competitive risk to intervenors PrairieWave, Black Hills, Midcontinent, NVC and Midstate ("Respondents") will be sufficiently mitigated. Accordingly, subject to Qwest's and its attorneys' and representatives' compliance with the provisions of the Protective Order set forth below, Respondents shall, to the extent they have not previously done so, respond to Qwest's discovery requests and produce to Qwest in the manner set forth in the Protective Order the specific items of discovery set forth below in paragraphs a and b, inclusive:

a. Interrogatory #8 - Respondents shall provide the information requested in Interrogatory #8.

b. Interrogatory #9 - Respondents shall provide the information requested in Interrogatory #9. As an entity that has had a continuous existence despite a change of control and a change of name, PrairieWave Telecommunications, Inc. shall comply with this order to the extent that it is in possession of such information, but it shall not be required to obtain or attempt to obtain such information from McLeodUSA. PrairieWave shall not be required to comply with this order with respect to the incumbent local exchange operations of PrairieWave Community Telephone, Inc. as such information is not part of the "relevant market."

9. The Commission believes that the relevance and probative value of the following information is outweighed by the competitive risk of its disclosure, and the Commission is therefore denying Qwest's Motion to Compel with respect to this information. Respondents shall not be required to provide the following information to Qwest:

a. Request for Production #3 - Respondents shall not be required to provide the documents requested by this Request. This general market information is obtainable by Qwest from its own market research. To the extent that a Respondent does not provide such documents, however, it shall be precluded from offering any such documents or evidence concerning them as evidence in the proceeding.

b. Request for Production #4 - Respondents shall not be required to provide the documents requested in this Request for the reasons set forth in a. This general market information is obtainable by Qwest from its own market research. To the extent that a Respondent does not provide such documents, however, it shall be precluded from offering any such documents or evidence concerning them as evidence in the proceeding.

c. Request for Production #5 - Respondents shall not be required to provide the documents requested in this Request for the reason that the factors set forth in SDCL 49-31-3.2 involve the current state of competition and not forecasted events, and Request for Production #5 calls for forward-looking forecasts. Furthermore, the general marketing information called for by this Request is obtainable by Qwest from its own market research. To the extent that a Respondent does not provide such documents, however, it shall be precluded from offering any such documents or evidence concerning them as evidence in the proceeding.

### PROTECTIVE ORDER

10. All information disclosed by Respondents pursuant to paragraph 8 shall be treated as confidential information pursuant to ARSD 20:10:01:39 through 20:10:01:44, except that access to and use of such information by Qwest for purposes of preparation for the proceeding and use in the proceeding shall be permitted subject to the provisions of this Protective Order.

11. All information produced by a Respondent pursuant to the Order to Compel shall be provided to the attorney of record for Qwest in this proceeding, who shall be responsible for limiting disclosure only to authorized recipients and use, return and destruction of the disclosed information as provided by this Protective Order. Qwest's counsel of record in this proceeding may disclose the information provided pursuant to the Order to Compel Discovery to the following persons: David Teitsel, Marti Gude, Bradley Yerger and Starla Rook ("Qwest Authorized Recipients").

12. Each Respondent shall be authorized to appoint one or more representatives to receive confidential information disclosed by Qwest (the "Respondent Authorized Recipients"). The Respondent shall limit its Authorized Recipients to the minimum number of persons necessary to analyze the information and prepare for present its evidence in this proceeding, which shall if possible be one person. All information produced by Qwest to a Respondent shall be provided to the attorney of record for the Respondent, who shall be responsible for limiting disclosure only to the parties' Authorized Recipients and use, return and destruction of the disclosed information as provided by this Protective Order.

13. Documents disclosed by the Respondents pursuant to the Order to Compel and other documents disclosed by any party to another for which the disclosing party seeks confidential treatment shall be stamped or sealed as "Confidential." Before any disclosure of confidential information shall occur to a Qwest Authorized Recipient or a Respondent Authorized Recipient, the attorney of record for the party shall assure himself that the Authorized Recipient to whom the confidential information is to be disclosed has read and understands this Protective Order, has agreed to abide by its terms, and understands that unauthorized disclosure or use of the confidential documents are prohibited.

14. The Commission shall afford confidential documents produced pursuant to the Order to Compel and other confidential information disclosed in connection with this proceeding as confidential information subject to ARSD 20:10:01:39 through 20:10:01:44, provided that such confidential information is clearly marked as confidential. The Commission shall conduct all hearings involving confidential information in camera with only Commission employees, the parties' attorneys and their Authorized Recipients present during the portion of the hearing in which such information is offered or discussed. Any person other than Commission employees or the parties' Authorized Recipients who desires to have access to confidential information shall comply with the procedures of ARSD 20:10:01:42 and 20:10:01:43.

15. Persons obtaining access to confidential documents under this order shall use the information only in the conduct of this proceeding and any judicial proceeding arising therefrom, and shall not use such information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings. Persons obtaining access to confidential information under the terms of this order may disclose, describe, or discuss the confidential information in any pleading filed in this proceeding, provided that such pleading is stamped confidential and filed under seal, and provided that a separate public version is filed in which all confidential information is redacted. Persons filing pleadings under seal based on confidential information provided by others shall serve such pleadings by hand, fax or overnight delivery on the party originally requesting confidential treatment of the underlying information.

16. If a court or another administrative agency subpoenas or orders production of confidential documents which a party has obtained under terms of or subject to this order, such party shall promptly notify the party and any other person who designated the document as confidential of the pendency of such subpoena or order.

17. Nothing in this order shall prevent or otherwise restrict counsel from rendering advice to their clients regarding this proceeding and, in the course thereof, relying generally on examination of stamped confidential documents submitted in that proceeding; provided, however, that in rendering such advice and otherwise communicating with such client, counsel shall not make disclosure of any confidential fact or assertion except to the Authorized Recipients of such party and only in accordance with the procedures set forth in this Protective Order.

18. The provisions of this order shall not terminate at the conclusion of this proceeding.

19. The attorneys of record are responsible for employing reasonable measures to control, consistent with this order, duplication of, access to, and distribution of copies of confidential documents. Parties shall not duplicate any stamped confidential document except working copies and for filing at the Commission under seal.

20. The parties, their Authorized Recipients and their other employees, agents, consultants and representatives shall be subject to a standard of good faith in their disclosure, receipt, custody and use of the confidential information.

21. Within two weeks after final resolution of this proceeding (which includes administrative or judicial review), parties that have received confidential documents shall return all copies of such documents and all analyses or other compilations which contain any of the confidential information in their possession to the party that submitted the documents, or destroy all such confidential documents and certify, under penalty of perjury, that such destruction has occurred. In the case of analyses or compilations containing confidential information, all confidential information set forth in such document shall be redacted if the document is to be retained and a copy of the redacted version shall be served on the disclosing party(ies) at least ten (10) days before disclosure of the redacted version is made to anyone other than the Authorized Recipients.

It is therefore,

ORDERED, that the above stated Order to Compel Discovery and Protective Order is issued.

Dated at Pierre, South Dakota, this 15<sup>th</sup> day of July, 2003.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Maline Kelbo

Date: 7/15/03

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Robert K. Sahr  
ROBERT K. SAHR, Chairman

Gary Hanson  
GARY HANSON, Commissioner

James A. Burg  
JAMES A. BURG, Commissioner