

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE AMENDED )  
COMPLAINT OF SOUTH DAKOTA )  
NETWORK, LLC, AGAINST SPRINT )  
COMMUNICATIONS COMPANY, L.P. )

DOCKET NO. TC09-098

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

**REPLY TO NORTHERN VALLEY  
COMMUNICATIONS, LLC'S  
OPPOSITION TO RESCHEDULE  
AUGUST 28, 2012 HEARING DATE**

COMES NOW, Sprint Communications Company, LP ( "Sprint"), by and through its counsel of record, Talbot J. Wieczorek of Gunderson, Palmer, Nelson & Ashmore, LLP of Rapid City, South Dakota, and Philip R. Schenkenberg, Briggs and Morgan, P.A., 80 South 8<sup>th</sup> Street, 2200 IDS Center, Minneapolis, Minnesota, and hereby submits this Reply to Northern Valley Communications, LLC's Opposition to Reschedule August 28, 2012 Hearing Date.

**ARGUMENT**

Northern Valley Communications, LLC ("Northern Valley") erroneously submits that the proper standard by which Sprint's Motion to Reschedule the August 28, 2012 Hearing should be judged is SDCL § 15-6-56(f). (Opposition Pg. 3.) Rule 56(f) provides:

Opposing summary judgment when affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

SDCL § 15-6-56(f) (emphasis added). Rule 56(f) applies when the party opposing summary judgment cannot present facts supporting his position and needs additional time to obtain those

facts, usually through discovery. Wright, Miller & Kane *Federal Practice and Procedure: Civil* 3d § 2740 (1998).

Thus Rule 56(f) allows a party who has no specific material contradicting his adversary's presentation to survive a summary-judgment motion by presenting valid reasons justifying his failure of proof. . . . If the court is satisfied with the reasons presented in the Rule 56(f) affidavit as to why the party is not able to oppose the summary-judgment motion on the merits, the usual practice is to deny summary judgment without prejudice . . . or to grant a continuance of the summary-judgment hearing. The difference between these two approaches does not appear significant; in both of them the purpose of the delay is to allow the opposing party more time to use discovery or obtain the affidavits or other evidence that were unavailable at the time of the original motion.

Federal Practice and Procedure § 2740 (emphasis added).

Sprint is not requesting additional time to use discovery or obtain evidence, rather, it is merely requesting its time to respond to Northern Valley's motion and the hearing date be continued to allow Sprint adequate time to present its opposition. Accordingly, SDCL § 15-6-6(b) is the applicable rule by which to determine Sprint's Motion to Reschedule. Rule 6(b) provides in part:

Enlargement of time. When by this chapter or by a notice given thereunder or by an order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) With or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order;


SDCL § 15-6-6(b) (emphasis added). Sprint has demonstrated good cause for its motion to reschedule and made the motion before its time to respond has expired allowing the South Dakota Public Utilities Commission ("Commission") to grant the extension in its discretion. No affidavit pursuant to Rule 56(f) is required to support Sprint's motion. Nevertheless, Affidavit of Talbot Wiczorek in Support of Continuing Hearing Date on Motion for Summary Judgment is being filed contemporaneously with this Reply.

In addition to SDCL § 6-6-6(b), the South Dakota Administrative Rules governing the general rules of practice for the Commission provide: “Adjournments and extensions of time may be granted upon application of a party, in the discretion of the commission.” ARSD 20:10:01:14 (emphasis added). Accordingly, it is entirely within the Commission’s discretion to grant Sprint’s Motion to Reschedule.

Sprint’s good cause for its Motion to Reschedule has been demonstrated in its original Motion to Reschedule the August 28, 2012 Hearing Date filed July 27, 2012 and supported with Affidavit of Talbot Wieczorek in Support of Continuing Hearing Date on Motion for Summary Judgment filed contemporaneously with this Reply. Essentially, Sprint needs additional time to respond to the voluminous statement of material facts and supporting exhibits. Additionally, Sprint needs to consult with its expert, who has been unavailable due to personal medical issues, in formulating a response and providing an affidavit in opposition. While expert testimony on legal matters is not admissible, “[c]ourts have frequently recognized the value of expert testimony defining terms of a technical nature and testifying as to whether such terms have acquired a well-recognized meaning in the business or industry.” *Nucor Corp. v. Nebraska Pub. Power Dist.*, 891 F.2d 1343, 1350 (8th Cir.1989). *Accord Sancom, Inc. v. Qwest Communications, Corp.*, 683 F.Supp.2d 1043, 1052 (8th Cir. 2010), see attached. In this matter, expert assistance is needed to respond to the Motion and alleged facts submitted by Northern Valley.

Dated this 30th day of July 2012.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 30th day of July, 2012, I served a true and correct copy of **SPRINT'S REPLY TO OPPOSITION TO RESCHEDULE AUGUST 28, 2012 HEARING** and the **AFFIDAVIT OF TALBOT J. WIECZOREK**, in the above-entitled matter, electronically to:

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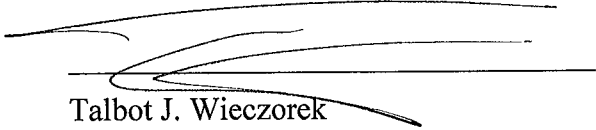
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