

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

IN THE MATTER OF THE PETITION OF)	
CELLCO PARTNERSHIP AND ITS)	
SUBSIDIARIES AND AFFILIATES TO)	TC10-090
AMEND AND CONSOLIDATE ELIGIBLE)	
TELECOMMUNICATIONS CARRIER)	
DESIGNATIONS IN THE STATE OF)	
SOUTH DAKOTA AND TO PARTIALLY)	
RELINQUISH ETC DESIGNATION)	

**MOTION TO COMPEL DISCOVERY RESPONSES FROM JAMES VALLEY
WIRELESS**

Cellco Partnership d/b/a Verizon Wireless (“Cellco”), on behalf of itself and its subsidiaries and affiliates offering commercial mobile radio services (“CMRS”) in the State of South Dakota (collectively, “the Petitioners”), and pursuant to A.R.S.D. 20:10:01:22.01 and SDCL 15-6-37(a), hereby files this motion to compel intervenor James Valley Wireless, LLC (“James Valley Wireless”) to respond to certain discovery requests.

I. BACKGROUND

In this proceeding, Petitioners seek to amend and consolidate the ETC designations currently held separately in the name of WWC License, LLC (“WWC”) and RCC Minnesota, Inc. (“RCC”) to reflect Cellco and its affiliated legal entities as the designated entity.¹ The purpose of the relief requested in the Petition is so that the Commission, Staff and, most importantly, consumers understand that the collective Verizon Wireless operations are responsible for compliance with the universal service requirements and obligations throughout the entire area where WWC and RCC are designated as ETCs (the “Designated Area”) and that all customers served by Verizon Wireless are treated exactly the same for universal service

¹ Petition, p. 1. The Petition further requested the partial relinquishment of ETC status in the study area of Golden West Telecommunications Cooperative, Inc. The Commission approved that relinquishment by Order dated November 16, 2010.

purposes. The Petition was supported with information demonstrating that Petitioners continue to satisfy all of the applicable eligibility requirements for designation as a federal ETC, as well as information explaining why it is in the public interest to grant the requested amendment and consolidation.²

James Valley Wireless filed a petition to intervene in this proceeding on October 14, 2010. As its basis for seeking intervention, James Valley Wireless alleged that as a competitive ETC, it “has a direct and immediate pecuniary interest in this Commission’s decision in this docket.”³ James Valley Wireless’ petition was granted by Commission Order dated October 29, 2010. Based on the pre-filed testimony sponsored by James Valley Wireless,⁴ Petitioners understand that James Valley Wireless opposes the Petition for at least two reasons: (1) James Valley Wireless questions Petitioners’ satisfaction of some or all of the eligibility requirements for designation as a federal ETC; and (2) James Valley Wireless’ receipt of high-cost universal service support (“USF”) allegedly has been impaired or will be impaired by Petitioners’ past actions or by granting of the Petition. Petitioners anticipate that James Valley Wireless will seek to present evidence at hearing relating to these topics.

To better evaluate James Valley Wireless’ claim relating to Petitioners’ continued satisfaction of ETC eligibility requirements, Petitioners seek information relating to James Valley Wireless’ level of satisfaction of these requirements. If Petitioners’ satisfaction of the disputed requirements equals or exceeds James Valley Wireless’ satisfaction, that will demonstrate that James Valley Wireless’ arguments are unpersuasive or disingenuous. As to James Valley Wireless’ claims relating to the alleged effect of the approval of the Petition on the

² Petition, pp. 5-6 and Ex. D (Certification of Linda Stevens), pp. 3-12.

³ Petition to Intervene, ¶ 4.

⁴ Direct Testimony of Peter Bluhm on behalf of James Valley Wireless, LLC, filed (with errata) March 25, 2011.

distribution of USF to competitive ETCs, such as James Valley Wireless, Petitioners seek information relating to James Valley Wireless' receipt and use of USF to support its provision of service as a competitive ETC. Petitioners anticipate that such information will demonstrate that James Valley Wireless' claims about the distribution of USF are without a solid factual basis.

In order to gather potential evidence relating to these arguments, Petitioners served discovery requests on James Valley Wireless on February 10, 2011. The discovery requests consisted of 22 interrogatories and six (6) requests for production of documents. James Valley Wireless served its Responses on Petitioners on February 24, 2011. James Valley completely refused to answer eight (8) of the interrogatories and five (5) of the document production requests, objecting that the responsive information was irrelevant. James Valley Wireless' relevance objection is misplaced, as the information sought is relevant to the arguments identified above. Petitioners' counsel have corresponded with, and had a telephone conference with, James Valley Wireless' counsel.⁵ Thereafter, James Valley Wireless provided supplemental responses. But, James Valley Wireless still refuses to respond to some important requests. Accordingly, Petitioners have no choice but to move to compel responses. In an effort to minimize unnecessary arguments, Petitioners have not moved to compel responses to every interrogatory and document production request to which James Valley Wireless has failed to respond, but have restricted this motion to only the specific interrogatories and document production requests discussed in detail below.

II. STANDARD FOR A MOTION TO COMPEL

The Commission "may issue an order to compel discovery" "for good cause shown by a party." A.R.S.D. 20:10:01:22.01. The South Dakota Rules of Civil Procedure relating to

⁵ Petitioners hereby certify that as described above, they in good faith conferred or attempted to confer with James Valley Wireless in an effort to secure the requested information without Commission involvement, as required by SDCL 15-6-37(a)(2).

discovery apply in this proceeding. *Id.* Under the civil procedure rules, a party may move for an order compelling an answer if a party fails to answer an interrogatory or request for production of documents. SDCL 15-6-37(a)(2).

The Commission specified that James Valley Wireless' response to Petitioners' discovery requests were due February 24, 2011.⁶ Although James Valley Wireless has provided objections to the interrogatories and requests for production of documents that are the subject of this motion, it has failed to provide substantive responses and its objections are meritless. This is unacceptable – the “statutory mandate and court order [establishing the time period for responding to discovery requests] are not invitations, requests, or even demands; they are mandatory.” *Schwartz v. Palachuk*, 1999 SD 100, ¶ 23, 597 N.W.2d 442, 447.

As to most of the discovery requests at issue in this motion, James Valley Wireless' sole objection is that the requested information “has no relevance” to the Petition. But, relevance is defined very broadly for purposes of permissible discovery. SDCL 15-6-26(b) provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. (emphasis added)

The South Dakota Supreme Court has explained that “the scope of pretrial discovery is, for the most part, broadly construed.” *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 16, 19 (S. Dakota, 1989). “A broad construction of the discovery rules is necessary to satisfy the three distinct purposes of discovery: (1) narrow the issues; (2) obtain evidence for use at trial; (3) secure information that may lead to admissible evidence at trial.” *Id.* The wording of SDCL 15-

⁶ Second Amended Order for and Notice of Procedural Schedule and Hearing (rel. Feb. 18, 2011), p. 2.

6-26(b) itself “implies a broad construction of ‘relevancy’ at the discovery stage because one of the purposes of discovery is to examine information that may lead to admissible evidence at trial.” *Id.*, 436 N.W.2d at 20.

III. JAMES VALLEY WIRELESS MUST PROVIDE SUBSTANTIVE RESPONSES TO PETITIONERS’ DISCOVERY REQUESTS

A. James Valley Wireless Must Describe Its Process For Responding to Requests for Service (Interrogatory No. 6)

Petitioners request an order compelling James Valley Wireless to respond to Interrogatory No. 6, which states:

6. Describe how James Valley determines whether a request for telecommunications service from a consumer residing within James Valley’s Designated Service Areas qualifies as a reasonable request for service in accordance with the requirements of 47 C.F.R. § 54.202.

Produce all Documents describing or relating to James Valley’s procedures for responding to requests for telecommunications services from consumers within James Valley’s Designated Service Areas, and all Documents describing or relating to James Valley’s procedures for determining whether a request qualifies as a reasonable request for service in accordance with the requirements of 47 C.F.R. § 54.202.

James Valley Wireless provided no response, stating only the following objection:

James Valley objects to Interrogatory No. 6. The question has no relevance to the merits of Verizon Wireless’ ETC amendment application.

In its supplemental responses, James Valley Wireless stated:

....Without waiving its objections, James Valley states that it has extensive coverage in its service area and can meet all requests for service. Occasionally, James Valley will augment service with an in-home repeater.

James Valley Wireless’ objection is meritless and its supplemental response is incomplete. Responding to requests for service in accordance with 47 C.F.R. § 54.202 is a requirement for an ETC in South Dakota. A.R.S.D. 20:10:32:43.01. James Valley Wireless’ witness, Peter Bluhm, has alleged in pre-filed testimony that there are some problems or deficiencies relating to Petitioners’ process for responding to requests for service (Bluhm 40:4-16). Even though

Petitioners are confident that their process for responding to requests for service is in full compliance with all applicable requirements, Petitioners are entitled to information about James Valley Wireless' own process for doing so – if James Valley Wireless' process is less robust or effective than Petitioners', that will demonstrate the hypocrisy of James Valley Wireless' argument. The issue of a wireless ETC's processes for responding to requests for service in accordance with 47 C.F.R. § 54.202 and A.R.S.D. 20:10:32:43.01 is plainly relevant to issues that are presented in the Petition and that will be discussed at the hearing.

James Valley Wireless' supplemental response is incomplete and not responsive to the question asked. The Interrogatory asks how James Valley Wireless determines how to respond to a request for service, whereas the supplemental response addresses whether James Valley Wireless has had a need to do so. James Valley Wireless states that it sometimes augments service with a repeater – the point of the Interrogatory is to ask how James Valley Wireless decides when a repeater is appropriate. Moreover, the Interrogatory asks for documents describing James Valley Wireless' procedures for doing so, and James Valley Wireless has neither produced any documents nor acknowledged that no such documents exist. James Valley Wireless must be compelled to provide a substantive response to Interrogatory No. 6, and also to produce the requested documents.

B. James Valley Wireless Must Identify and Produce Its ETC Compliance Documents (Interrogatory No. 7)

Petitioners request an order compelling James Valley Wireless to respond to Interrogatory No. 7, which states:

7. Identify each of James Valley's ETC-related compliance filings, annual reports, periodic progress reports, tariffs, and other Documents submitted to the Commission since January 1, 2009.

James Valley Wireless provided no response, stating only the following objection:

James Valley objects to Interrogatory No. 7. The question has no relevance to the merits of Verizon Wireless' ETC amendment application.

Interrogatory No. 7 should be read in conjunction with Petitioners' Request for Production of Documents No. 1, which states:

1. Produce any and all Documents identified or used in answering the above Interrogatories or which contain or relate to any of the information requested in the Interrogatories.

In its supplemental responses, James Valley Wireless stated:

Without waiving its objections, James Valley states that except for confidential information, this information is publicly available from the South Dakota Public Utilities Commission and that James Valley has been involved in the following dockets since January 2009: TC09-024, TC09-044 and TC10-56.

James Valley Wireless did not produce any of the documents requested in Interrogatory No. 7, as required by Request for Production of Documents No. 1.

James Valley Wireless should be compelled to produce its ETC-related compliance filings as requested in Interrogatory No. 7 and Request for Production of Documents No. 1. James Valley Wireless' witness has alleged in pre-filed testimony that Petitioners' compliance filings and certifications provided to the Commission are inadequate, incomplete, or misleading. (Bluhm 28:4-29:11, 29:13-16, 29:20-30:2, 30:4-14; 40:8-15). Petitioners anticipate that James Valley Wireless' analogous filings and certifications are substantially similar to those of Petitioners. Petitioners may seek to introduce James Valley Wireless' filings at the hearing, if necessary, to rebut allegations made by James Valley Wireless' witness. The issue of a wireless ETC's certifications and compliance filings to the Commission is plainly relevant to issues that are presented in the Petition and that will be discussed at the hearing.

Petitioner acknowledge that much of the information sought in Interrogatory No. 7 and Request for Production of Documents No. 1 is publicly available on the Commission's website. The most important information, though, was filed confidentially with the Commission. James

Valley Wireless' supplemental response specifically objects to providing these materials because of confidentiality. This objection is meritless, because a Protective Order is already in place in this proceeding, having been issued on November 16, 2010. James Valley Wireless should be compelled to produce the confidential filings submitted in Dockets TC09-024, TC09-044 and TC10-56.

C. **James Valley Wireless Must Identify The Amount of USF It Anticipates Receiving (Interrogatory No. 13)**

Petitioners request an order compelling James Valley Wireless to respond to Interrogatory No. 13, which states:

13. Identify what you estimate to receive in USF Support for calendar year 2011, 2012 and 2013, including an explanation of the facts and methodology used in making the estimate.

James Valley Wireless provided no response, stating only the following objection:

James Valley objects to Interrogatory No. 13. The question has no relevance to the merits of Verizon Wireless' ETC amendment application. The information being requested is also competitively sensitive and would enable Verizon Wireless to estimate James Valley's anticipated subscribership figures through 2013.

In its supplemental response, James Valley Wireless reiterated its relevance and confidentiality objections, and provided generalized argument, instead of the specific factual information requested in the Interrogatory.

James Valley Wireless' objections are absolutely meritless, and it must be compelled to provide a response to Interrogatory No. 13. First, the information sought is directly relevant to James Valley Wireless' intervention: James Valley Wireless has alleged that as a competitive ETC, it had a "pecuniary interest" in this proceeding. Verizon Wireless is entitled to learn the extent of James Valley Wireless' alleged pecuniary interest, *i.e.*, the amount of USF it anticipates receiving. In addition, much of the prefiled testimony sponsored by James Valley Wireless

relates to an allegation that granting the Petition will have an adverse effect on the receipt of USF by competitive ETCs in South Dakota (*see, e.g.*, Bluhm, 43:5-16). To rebut this and related allegations, Petitioners are entitled to discover the facts about James Valley Wireless' anticipated receipt of USF. Finally, James Valley Wireless' objection based on the information being competitively sensitive is meritless, because of the Protective Order that has already been issued by the Commission.

D. James Valley Wireless Must Produce Its Subscriber Line Count Reports (Request for Production of Documents No. 4)

Petitioners request an order compelling James Valley Wireless to respond to Request for Production of Documents No. 4, which states:

4. Produce copies of all subscriber line reports submitted to USAC by or on behalf of James Valley pursuant to 47 C.F.R. § 54.307 and/or 47 C.F.R. § 54.802 since January 1, 2009.

James Valley Wireless provided no response, stating only the following objection:

James Valley objects to Request for Production of Documents No. 4. The question has no relevance to the merits of Verizon Wireless' ETC amendment application and is competitively-sensitive.

In its supplemental response, James Valley Wireless reiterated its relevance and competitively-sensitive objections, and provided the number of subscribers it reported (information that is publicly available from USAC).

James Valley Wireless should be compelled to produce the subscriber line reports it has submitted to USAC. Petitioners' position is that issues relating to the contents or submission of subscriber line reports submitted by a competitive ETC to USAC are irrelevant to the Petition, because line count reporting is regulated and governed exclusively by the FCC. But, James Valley Wireless seeks to raise issues at the hearing relating to Petitioners' line count reports. For example, James Valley Wireless' witness has alleged that Petitioners' subscriber line reports

were improper. (Bluhm 19:19-20:9, 20:12-21:6, 21:9-21:17, 21:19-22:2, 23:15-24:7). There may be information in James Valley Wireless' line count reports that Petitioners can use to rebut these allegations. The competitive sensitivity of James Valley Wireless' line count reports should not preclude a full response to these requests, because of the previous issuance of the Protective Order in this proceeding.

IV. CONCLUSION

There is no legitimate justification for James Valley Wireless' failure to respond to Petitioners' discovery requests. James Valley Wireless' relevance and confidentiality objections are meritless, and should be ignored. The Commission should compel James Valley Wireless to respond to Petitioners' discovery requests so that Petitioners have a fair opportunity to discover facts as necessary to present a full defense to James Valley Wireless' allegations and arguments.

Respectfully submitted,

GUNDERSON, PALMER, NELSON &
ASHMORE, LLP

Dated: April 21, 2011

By _____

Talbot J. Wiczorek

Assurant Building
440 Mt. Rushmore Road
P.O. Box 8045
Rapid City, SD 57709-8045
Telephone: (605) 342-1078
Facsimile: (605) 342-0480

Mark J. Ayotte (MN # 166315)
Matthew A. Slaven (MN #288226)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2157
Telephone: (612) 977-8400
Fax: (612) 977-8650
mayotte@briggs.com
mslaven@briggs.com

*COUNSEL FOR CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS AND ITS
SUBSIDIARIES AND AFFILIATES*

CERTIFICATE OF SERVICE

The undersigned certifies that on the 21st day of April, 2011, I served a true and correct copy of **CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS's Motion to Compel Discovery Responses from James Valley Wireless** in the above-entitled matter, via electronic mail to:

KARA SEMMLER
STAFF ATTORNEY
SDPUC
500 EAST CAPITOL
PIERRE SD 57501
karen.cremer@state.sd.us

BRIAN ROUNDS
STAFF ANALYST
SDPUC
500 EAST CAPITOL
PIERRE SD 57501
brian.rounds@state.sd.us

DARLA POLLMAN ROGERS
ATTORNEY AT LAW
RITER ROGERS WATTIER & NORTHRUP LLP
PO BOX 280
PIERRE SD 57501-0280
dprogers@riterlaw.com

MARGO D NORTHRUP
ATTORNEY AT LAW
RITER ROGERS WATTIER & NORTHRUP LLP
PO BOX 280
PIERRE SD 57501-0280
m.northrup@riterlaw.com

JAMES M. CREMER
ATTORNEY AT LAW
BANTZ GOSCH & CREMER LLC
PO BOX 970
ABERDEEN SD 57402-0970
jcremer@bantzlaw.com

RICHARD D. COIT
SDTA
PO BOX 57
PIERRE SD 57501
richcoit@sdtaonline.com



Talbot J. Wiczorek