UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, vs. Steve Kolbeck, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendants, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 **AFFIDAVIT OF PHILIP R. SCHENKENBERG IN SUPPORT OF MOTION IN LIMINE**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

My name is Philip R. Schenkenberg. I am one of the attorneys representing Verizon Wireless in the above matter. I make this affidavit in support of Verizon Wireless' motion in limine.

1. Attached as Exhibit A hereto is a true and correct copy of Mr. Larry Thompson's expert report provided to Verizon Wireless on September 1, 2005.

2. Attached as Exhibit B hereto is a true and correct copy of the Mr. Thompson's revised expert report provided to Verizon Wireless on January 16, 2007 (including Exhibit 5 thereto).

3. Attached as Exhibit C is a letter I sent to Ms. Rogers and Ms. Wiest dated December 7, 2006. Attached as Exhibit D is an email exchange between the parties that occurred the following week.

4. Attached as Exhibit E is a copy of correspondence sent to Ms. Rogers and Ms. Wiest on February 6, 2007 in which our office served Plaintiff's Third Set of Interrogatories and Second Set of Requests for Production of Documents.

5. Attached as Exhibit F hereto are the written discovery responses received in response to Plaintiff's Third Set of Interrogatories and Second Set of Requests for Production of Documents.

6. Attached as Exhibit G hereto is a true and correct copy of *S&S Communications v. Local Exchange Carriers Assoc*, No. Civ 02-1028, 2005 WL 2897045 (D.S.D. Nov. 3, 2005).

7. Attached as Exhibit H hereto is a true and correct copy of *Sheesley v. Cessna Aircraft Co.*, No. 02-4185 et al., 2006 WL 3042793 at *3 (D.S.D. Oct. 24, 2006).

8. Attached as Exhibit I hereto is a copy of written responses to Plaintiff's First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions. Intervenors have not supplemented these responses.

FURTHER THIS AFFIANT SAYETH NOT.

Philip R. Schenkenberg

Subscribed and sworn to before me
this 12 day of June, 2007.

JEFFREY A. ABRAHAMSON
Notary Public
Minnesota
My Commission Expires January 31, 2010

NOTARY PUBLIC

2038333v1

Expert Report

Prepared for

Civil No. 04-3014, U.S. District Court,
District of South Dakota, Central Division

Prepared by

Larry D. Thompson

Vantage Point

Customer Focused. Technology Driven.

September 1, 2005

Vantage Point Solutions
1801 North Main Street
Mitchell, SD 57301

Phone: (605) 995-1777 • Fax: (605) 995-1778
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Exhibit A

Expert Report of Larry Thompson

I am a Professional Engineer and Chief Executive Officer of Vantage Point Solutions (VPS). VPS is a telecommunications engineering and consulting company providing a full range of services including Professional Engineering, Outside Plant Engineering, strategic planning, technology evaluations, network architecture design, regulatory expertise, and feasibility studies. VPS is headquartered in Mitchell, South Dakota and employs approximately 65 fulltime staff.

I have been an active participant in the telecommunications industry since 1985. I received a Bachelors of Arts in Physics (1983) from William Jewell College, a Bachelors of Science in Electrical Engineering (1985) from the University of Kansas, and a Masters of Science in Electrical and Computer Engineering (1986) from the University of Kansas. Prior to Vantage Point Solutions, I was General Manager for the Telecom Consulting and Engineering (TCE) Business Unit of Martin Group and previous to this, was a consultant for CyberLink Corporation (Boulder, Colorado) and a satellite systems engineer for TRW (Redondo Beach, California).

I have not testified as an expert at trial or by deposition. I have testified before state regulatory commissions, but not within the last four years. I have been published in United States Telecom Association's "USTA Telecom Executive"[1] magazine and National Telecom Cooperative Association's "NTCA Rural Telecommunications

[1] "Look Who's Talking Now – Do Video and Voice Mix?", USTA Telecom Executive, September/October 2004, pg. 30-32.

Magazine."[2] I have also had my whitepapers included in various regulatory filings. I am being compensated for my work on an hourly basis at my regular billing rate of $115 per hour.

VPS provides engineering services to our clients for both their wireless and wireline networks. I have been involved in the design and implementation of many voice, data, video, and wireless networks. VPS provides engineering services for many of the rural local exchange carriers (RLECs) in South Dakota and I am familiar with their switching networks and capabilities.

I am familiar with South Dakota bill SB144 as well as South Dakota Codified Laws 49-31-109 through 49-31-115. On February 3, 2004, I provided testimony before the South Dakota State Senate committee regarding SB144. My handouts for this testimony have been attached as Exhibit 1. On February 17, 2004, I provided testimony before the South Dakota State House of Representative committee regarding SB144. My handouts have been attached as Exhibit 2.

I have assisted clients in identifying and quantifying telecommunications traffic into their company. I have done this by analyzing the System Signaling 7 (SS7) messages from the signaling network and the Automatic Message Accounting (AMA) records and Exchange Message Interface (EMI) records from various switching networks. I have assisted in identifying "phantom" traffic, so that our clients could properly bill the proper other carriers for use of their network.

I have performed numerous wireless InterMTA studies. These studies consist of processing thousands of records to determine the amount of InterMTA traffic that is

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[2] "A Technology for the Next Generation", NTCA Rural Telecommunications Magazine, November/December 2003, pg. 23-26.

being delivered to my landline clients. These studies have used the NPA-NXX in the SS7 messages to provide an estimate of the InterMTA as well as using Call Detail Records (CDRs) from the wireless networks that include the caller tower location for a more accurate determination of the InterMTA factor. The goal of these studies has been to determine the amount of InterMTA. As described in the FCC First Report and Order,[3] wireless calls originating in one Major Trading Area (MTA) and terminating in the same MTA are subject to reciprocal compensation. Wireless calls that originate in one MTA and terminate in another MTA are subject to access charges. To properly bill for wireless traffic, it is necessary to also determine the amount of the InterMTA traffic that is Interstate and Intrastate in nature.

I have reviewed the claims of Verizon Wireless in its propsed Stipulation of Facts. Verizon Wireless delivers both local and access traffic over both direct and indirect trunks. The indirect trunks between RLEC and Verizon Wireless are often common trunks and the Verizon Wireless traffic is intermixed with other carrier traffic. The South Dakota statues require carriers to "transmit signaling information in accordance with commonly accepted industry standards."[4]

The Ordering and Billing Forum (OBF) has been working to expand the SS7 signaling format to better identify telecommunications traffic so the terminating carrier can more accurately bill for the traffic. Many involved with the OBF would like to see the Jurisdictional Information Parameter (JIP) field in the SS7 used to identify the wireless caller's connecting tower at the start of the call. Earlier this year, the JIP was

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[3] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) (*"First Report & Order"*).

[4] South Dakota Codified Laws SDCL 49-31-110 and SDCL 49-31-111.

expanded to include information regarding the originating wireless switch.[5] This was certainly a step in the correct direction. I would expect that the use of the JIP will continue to be enhanced to provide more detailed information regarding the location of the originating wireless caller.

Because the commonly accepted industry standards for signaling continue to evolve and are not yet adequate to quantify nonlocal traffic, the South Dakota Codified Laws allow the originating carrier to "separately provide the terminating carrier with accurate information including verifiable percentage measurements that enables the terminating carrier to appropriately classify nonlocal telecommunications traffic as being either interstate or intrastate, and to assess the appropriate applicable access charges.[6] The form and substance of the accurate information required in this statue is not defined, except that it be adequate for the terminating carrier to appropriately classify the traffic and assess the applicable charges.

Because the commonly accepted industry standards for signaling may not today be adequate to determine the precise location of a wireless caller, wireless carriers often establish their delivered local and toll (interstate and intrastate) traffic ratios in an agreed upon contract. Normally the contract ratios are based on historical experience or using a special study. Since wireless carriers have the ability to determine the connecting tower of their wireless customer, a special study can accurately determine the local and toll (interstate and intrastate) mix for a given test period.

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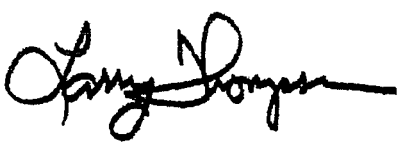
[5] Alliance for Telecommunications Industry Solutions, ATIS-0300011, Network Interconnection Interoperability (NIIF) Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks.

[6] South Dakota Codified Law SDCL 49-31-110.

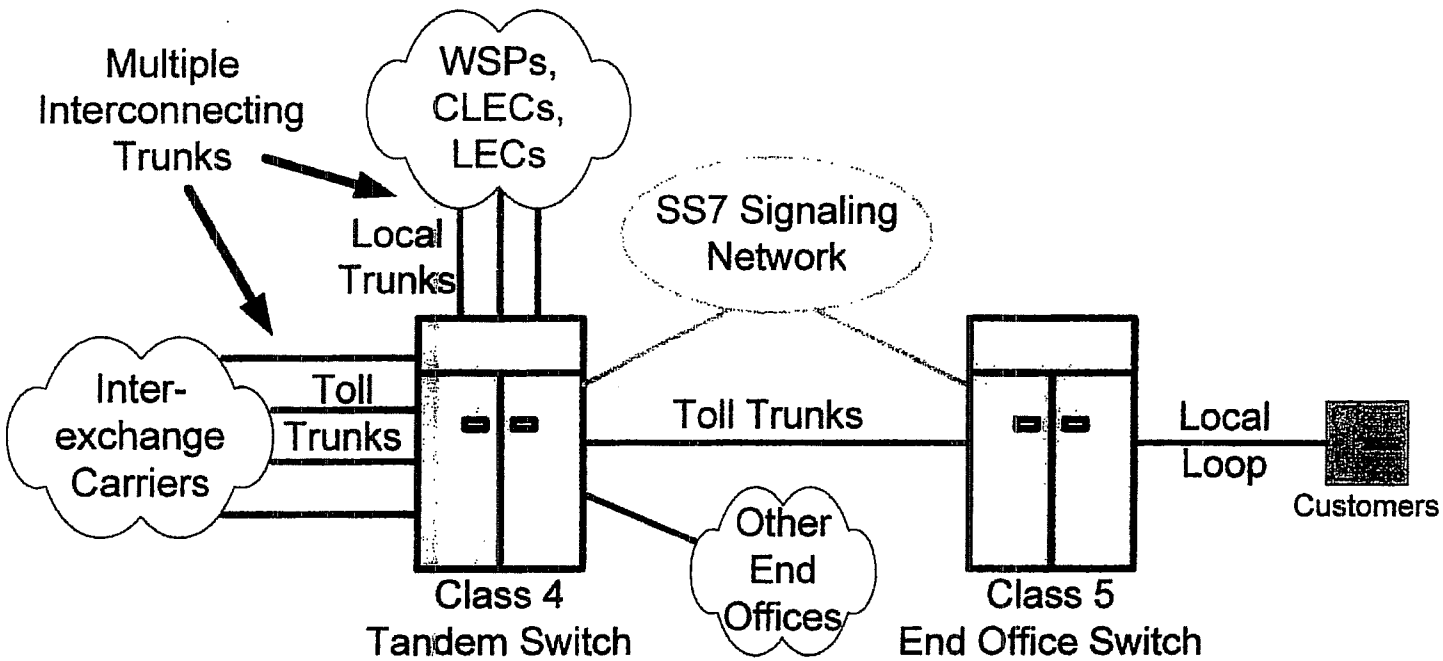
Proper classification of wireless traffic is especially important for carriers operating in South Dakota, since South Dakota has three different MTAs (Minneapolis, Denver, and Des Moines). This can be seen in Exhibit 3. In addition, much of the southern part of South Dakota borders the Omaha MTA. Because of this, South Dakota has a higher InterMTA factor than most other states. It is important for South Dakota carries to be able to accurately classify the terminating traffic to be properly compensated for the use of their network.



Larry Thompson, P.E.
Chief Executive Officer
Vantage Point Solutions, Inc.

September 1, 2005
Date

Switching Network



Switches Can Record Call Information Based on SS7, Trunk, and Switch Parameters

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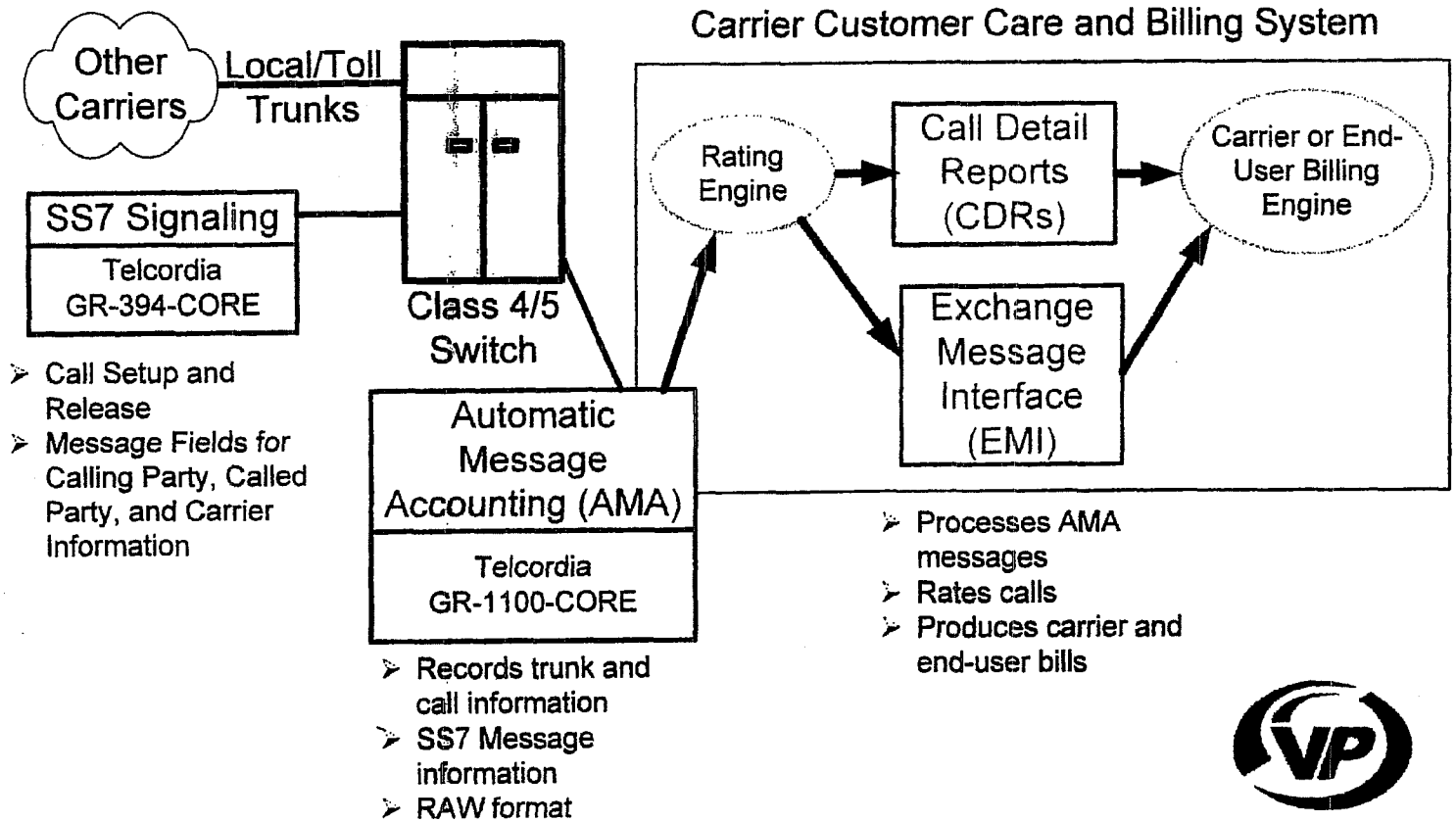
Carrier Call Information Processing



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SS7 Signaling Overview

- Signaling protocol used between switches in the PSTN
- Sets up and releases call paths
- Call setup messages has fields for
  - Calling party number
  - Called party number
  - Local Routing Number
  - Carrier Identification Number
  - Many other fields . . .

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Case 3:04-cv-03014-CBK Document 97-2 Filed 06/13/2007 Page 10 of 17

AMA Record Overview

- Records detailed information about each call
- SS7 Parameters
  - Calling and Called Number
  - Disconnect method
  - Jurisdiction Information, etc.
- Switch information
  - Trunk, etc.
- Call parameters
  - Duration
  - Time of day, etc.

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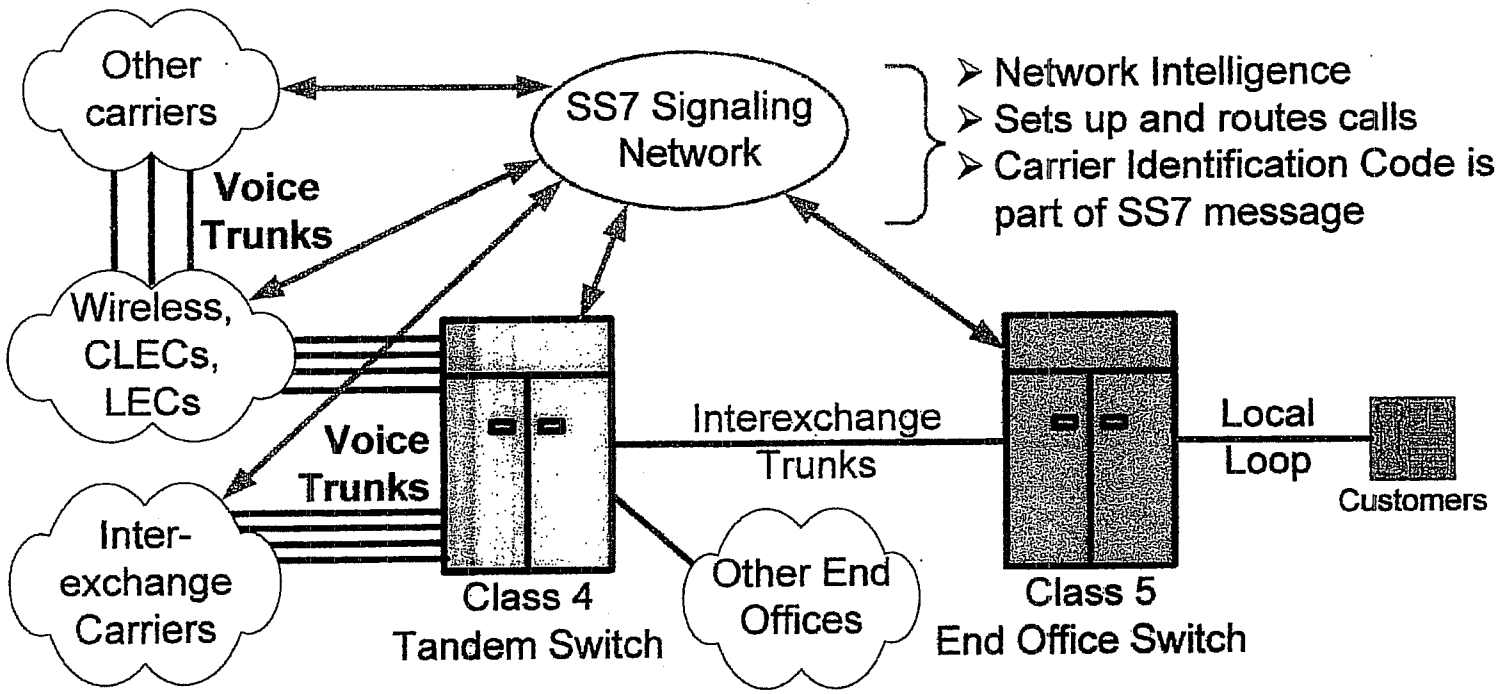
Switching Network



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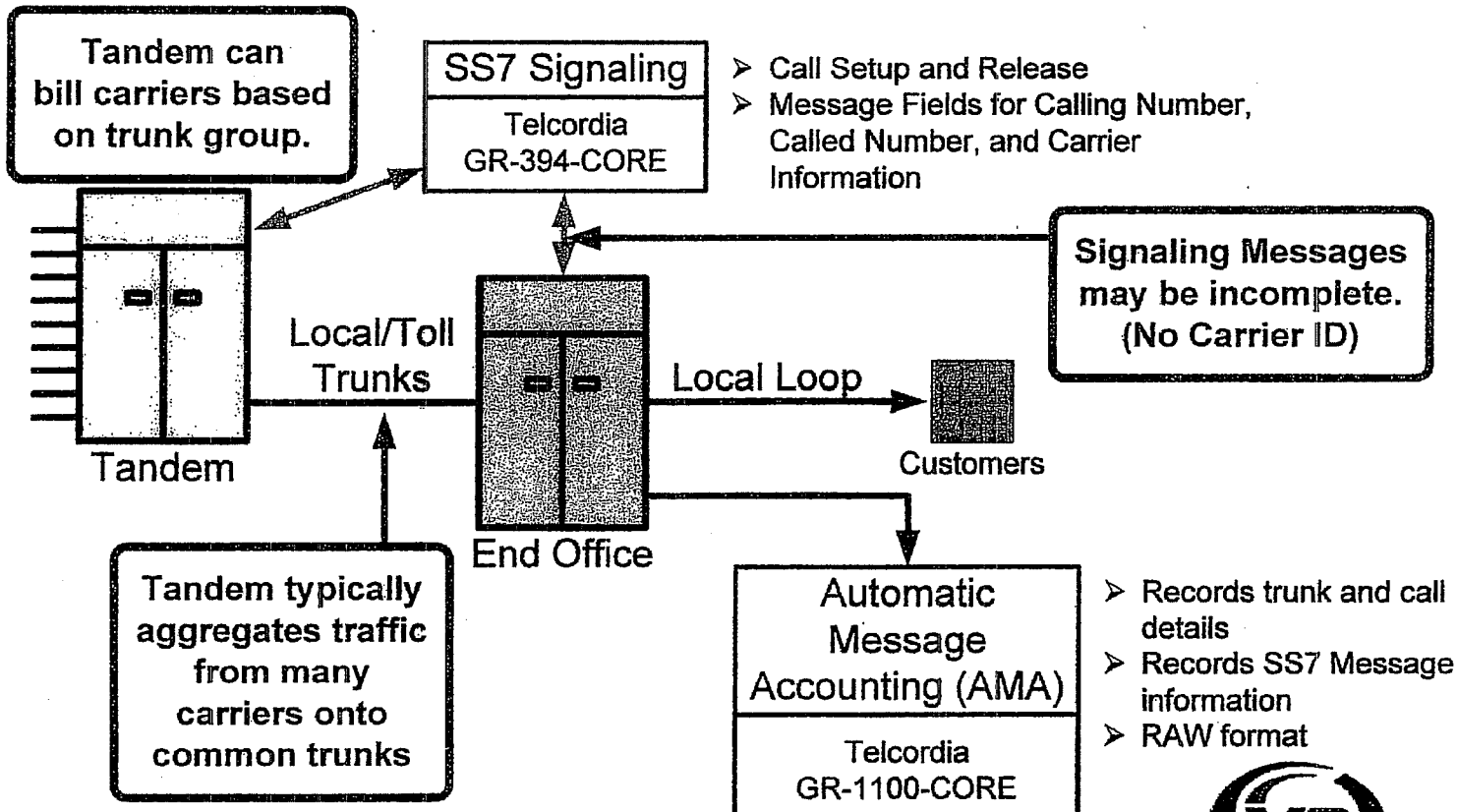
Call Recording



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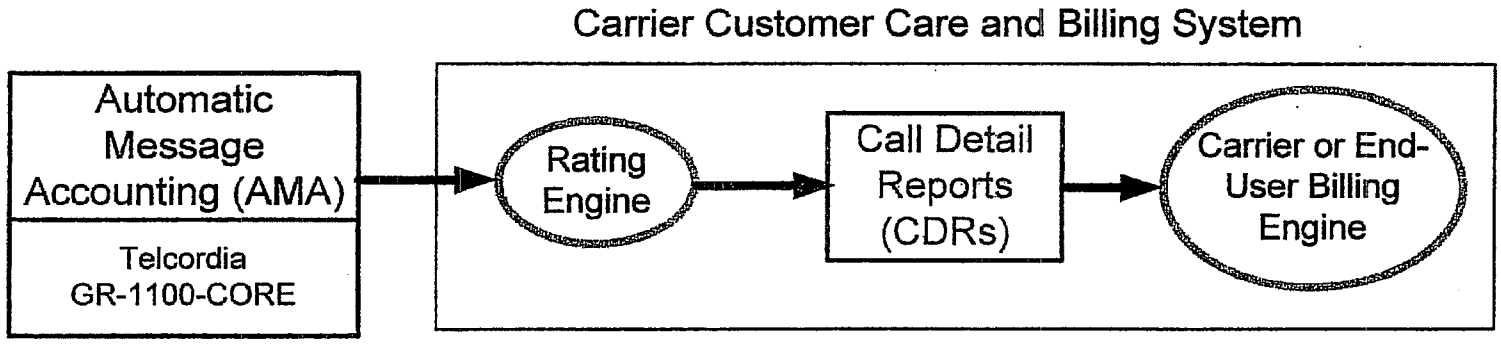
Call Processing and Billing



- Recorded on hard disk (or tape) in switch
- Records trunk group, call details, and SS7 message details

Determines WHO to bill based on:

- Carrier ID (preferred)
- Incoming trunk (not possible on common/shared trunks)
- Calling party number (difficult and not accurate)
- Records from transiting carrier (often incomplete)

Determines WHAT to bill based on:

- Type (Local or Toll)
- Jurisdiction (state or interstate)
- Specific carrier contracts
- Time of day
- Call duration

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Issue Summary

- Telephone company cannot properly bill for traffic on their networks
  - Common trunks: Cannot bill based on incoming trunk group
  - Carrier ID: Often missing in SS7 signaling message
- Tandem records may also be incomplete
- Solution: Carriers should be required to use industry standard methods of identifying their traffic so it can be measured and billed properly.

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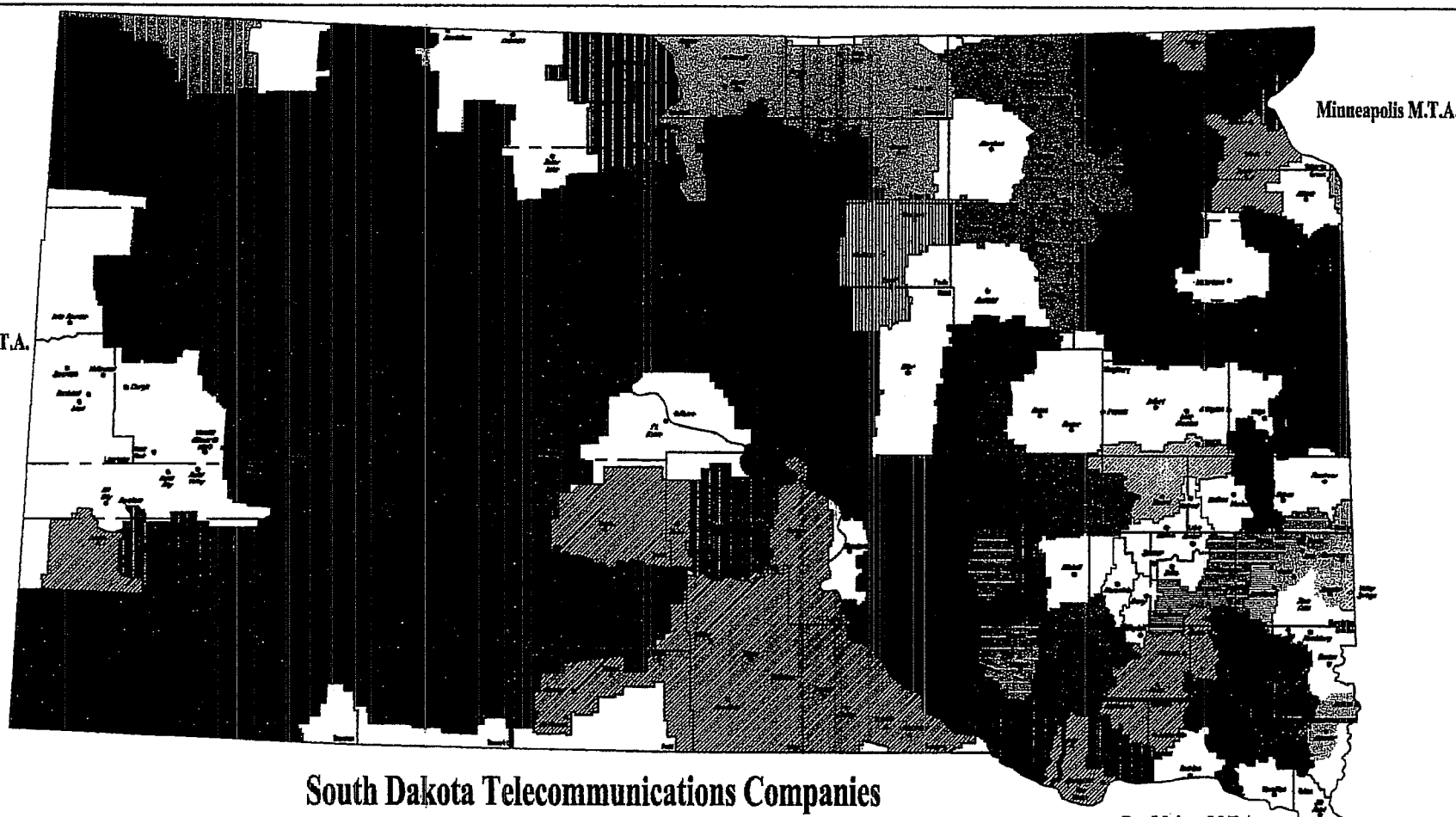

South Dakota Telecommunications Companies
September, 2004

- Alliance Communications Cooperative
- Alliance Communications
- Beresford Municipal Telephone Co.
- Cheyenne River Sioux Tribe Telephone Authority
- Consolidated Telephone Coop.
- Faith Municipal Telephone Co.
- Fort Randall Telephone Company
- Golden West Telecommunications Cooperative
- Armour Independent Telephone Co.
- Bridgewater-Canistota Telephone Company
- Kadoka Telephone Co.
- Sioux Valley Telephone Co.
- Union Telephone Co.
- Vivian Telephone Company
- GTE of Minnesota
- Interstate Telecommunications Cooperative
- James Valley Cooperative Telephone Co.
- Long Lines
- Kennebec Telephone Co.
- Midstate Communications, Inc.
- McCook Cooperative Telephone Company
- Mount Rushmore Telephone
- Prairie Wave Communications
- QWEST Communications
- Roberts County Telephone Cooperative Assn.
- RC Communications
- Santel Communications Cooperative
- Stockholm-Strandburg Telephone Co.
- Swiftel Communications
- Tri-County Telcom, Inc.
- Valley Telephone Co.
- Valley Telecommunications Coop., Inc.
- Venture Communications Cooperative
- West River Cooperative Telephone Company
- West River Telecommunications Cooperative
- Western Telephone Co.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, Vs. Bob Sahr, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendant, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the INTERVENORS' AND DEFENDANT'S EXPERT REPORT, prepared by Larry Thompson, Vantage Point, was served via the method(s) indicated below, on the first day of September, 2005, addressed to:

Rolayne Ailts Wiest, General Counsel South Dakota Public Utilities Commission 500 East Capitol Avenue Pierre, South Dakota 57501	(X) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail
Gene N. Lebrun Steven J. Oberg Lynn, Jackson, Shultz & Lebrun P. O. Box 8250 Rapid City, South Dakota 57709	(X) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail

Philip R. Schenkenberg Briggs and Morgan, P.A. 2200 IDS Center 80 South Eighth Street Minneapolis, MN 55402	(X) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail

Dated this first day of September, 2005.

Margo D. Northrup

Margo D. Northrup
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, South Dakota 57501
Telephone (605) 224-5825
Fax (605) 224-7102
Attorneys for Intervenors

Expert Report

Prepared for

Civil No. 04-3014, U.S. District Court,
District of South Dakota, Central Division

Prepared by

Larry D. Thompson

Vantage Point

Customer Focused. Technology Driven.

September 1, 2005
Revised January 16, 2007

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www.vantagepnt.com

Exhibit B

Expert Report of Larry Thompson

I am a Professional Engineer and Chief Executive Officer of Vantage Point Solutions (VPS). VPS is a telecommunications engineering and consulting company providing a full range of services including Professional Engineering, Outside Plant Engineering, strategic planning, technology evaluations, network architecture design, regulatory expertise, and feasibility studies. VPS is headquartered in Mitchell, South Dakota and employs approximately 75 fulltime staff.

I have been an active participant in the telecommunications industry since 1985. I received a Bachelors of Arts in Physics (1983) from William Jewell College, a Bachelors of Science in Electrical Engineering (1985) from the University of Kansas, and a Masters of Science in Electrical and Computer Engineering (1986) from the University of Kansas. Prior to Vantage Point Solutions, I was General Manager for the Telecom Consulting and Engineering (TCE) Business Unit of Martin Group and previous to this, was a consultant for CyberLink Corporation (Boulder, Colorado) and a satellite systems engineer for TRW (Redondo Beach, California).

I have not testified as an expert at trial or by deposition, but have been engaged as an expert witness in a dispute between Western Wireless License L.L.C. (WWC) and several telephone companies in South Dakota[1]. I have testified before state regulatory commissions, most recently in a complaint filed by WWC and the Golden West

[1] Alliance Communications Cooperative, Inc., Beresford Municipal Telephone Company, Kennebec Telephone Company, Inc., McCook Cooperative Telephone Company, Santel Communications Cooperative, Inc., and West River Cooperative Telephone Company, Inc. vs. WWC License, L.L.C.

Companies[2]. Within the last 10 years, I have been published in United States Telecom Association's "USTA Telecom Executive"[3] magazine and National Telecom Cooperative Association's "NTCA Rural Telecommunications Magazine."[4] Several of my white papers have been included in various regulatory filings. I recently published a white paper titled, "Demystifying VoIP: Rural America's Connection to the IP-Enabled National Telecommunications Network" as part of the Foundation for Rural Service's Rural Telecom Educational Series. These publications can be provided upon request. I am being compensated for my work on an hourly basis at my regular billing rate of $115 per hour.

VPS provides engineering services to our clients for both their wireless and wireline networks. I have been involved in the design and implementation of many voice, data, video, and wireless networks. VPS provides engineering services for many of the rural local exchange carriers (RLECs) in South Dakota and I am familiar with their switching networks and capabilities. I am also an associate member of the National Exchange Carrier Association (NECA) rate development task force and am familiar with the settlement process and cost separations used by the RLECs on both the state and interstate levels.

I am familiar with South Dakota bill SB144 as well as South Dakota Codified Laws 49-31-109 through 49-31-115. On February 3, 2004, I provided testimony before the South Dakota State Senate committee regarding SB144. My handouts for this

[2] CT05-001 In the Matter of the Complaint filed by WWC License LLC against Golden West Telecommunications Cooperative, Inc., Vivian Telephone Company, Sioux Valley Telephone Company, Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company and Kadoka Telephone Company Regarding Intercarrier Billings

[3] "Look Who's Talking Now – Do Video and Voice Mix?", USTA Telecom Executive, September/October 2004, pg. 30-32.

[4] "A Technology for the Next Generation", NTCA Rural Telecommunications Magazine, November/December 2003, pg. 23-26.

testimony have been attached as **Exhibit 1**. On February 17, 2004, I provided testimony before the South Dakota State House of Representative committee regarding SB144. My handouts have been attached as **Exhibit 2**. The South Dakota legislation was crafted in such a way so that it would not be limited by today's signaling standards. It is recognized in the legislation that signaling standards are constantly being changed and, furthermore, there are other provisions in the legislation that allow for originating carriers to provide separate information, regardless of actual signaling capabilities, that can assist in reasonably categorizing terminated telecommunications traffic.

During the past three years, I have assisted several RLECs in identifying "phantom" traffic, so that they could bill the proper carriers the correct amount for use of the RLEC's network. During this time South Dakota RLECs have increasingly expressed their concern regarding the difficulties they encounter trying to ensure that they are able to identify all of the traffic terminating onto their networks. Many of the South Dakota RLECs' networks are behind the SDN Centralized Equal Access Services (CEAS) Tandem in Sioux Falls, South Dakota. One of the original benefits for the SDN members connecting to the SDN CEAS tandem was that all of the access records needed for billing purposes came from one source, SDN, since all access traffic was to be terminated via SDN, per the Local Exchange Route Guide (LERG). This allowed for more ease of accounting and accurate billing of traffic. However, as the frequency of other carriers using indirect connections through the RBOC tandem or direct connections into the RLEC network has increased, it has made it more difficult for the RLECs to account for the traffic terminating to their networks and bill the appropriate carrier.

In assisting the RLECs with the identification of phantom traffic, I have analyzed the Signaling System 7 (SS7) messages from the signaling network and the Automatic Message Accounting (AMA) records and Exchange Message Interface (EMI) records from various switching networks to determine the amount and type of traffic that is terminating to their networks. Some of this traffic could not be properly identified and properly billed. This type of traffic is often referred to as phantom traffic.

Phantom traffic is commonly defined as traffic for which the terminating carrier is unable to determine either the carrier responsible for payment of the call or traffic for which the terminating carrier is not able to determine the appropriate jurisdiction for properly rating the call. Phantom traffic can originate from both landline and wireless carriers. If the wireless traffic, for example, can not be properly categorized by jurisdiction (intraMTA or interMTA and interstate, or interMTA and intrastate), then the wireless traffic would be considered phantom traffic.

In performing phantom traffic studies, VPS performs a matching process between Automated Message Accounting (AMA)[5] data recorded by the Local Exchange Carrier (LEC) switch and the Exchange Message Interface[6] (EMI) received from outside sources such as the Regional Bell Operating Company (RBOC) for billing purposes. If a LEC does not have the capability to record AMA data, the matching process is completed between Signaling System 7[7] (SS7) data received from the LEC's Signal Transfer Points

[5] The automatic collection, recording, and processing of information relating to calls typically used for billing purposes. In this report, AMA is referred to as the recording of the LEC's switch traffic.
[6] The standard format used for exchange of telecommunications message information among LECs for billable, non-billable, sample, settlement and study data. In this report, EMI is referred to as the information an outside source, such as the RBOC, supplies the LEC for billing purposes.
[7] The SS7 signaling system is a packet-switched data network that forms the backbone of the international telecommunications network. The SS7 network allows call control and transaction messages from the integrated voice and data network to be transferred on communications paths that are separate from the voice and data connections. It delivers out-of-band signaling that provides fast call setup by means of high-

(STPs) and the EMI data. In some cases, all three sources of data are utilized in the matching process. Figure 1.0 in **Exhibit 3**, which outlines the Phantom Traffic Study procedures, summarizes the call recording process of a SS7/AMA network. As stated in Exhibit 3, the goal of the phantom traffic analysis is to identify the various types of traffic that are present on the EMI, AMA, and SS7 recordings and to identify the traffic types on the EAS and toll routes between the connecting carriers and the LEC exchanges. Once the traffic types are identified, these analysis results are compared to the wireless terminating records that the LEC receives from the RBOC and/or the wireless carriers.

Multiple methods are used to analyze the traffic records. VPS has utilized a specialized software program for completion of the matching process in order to compare AMA and SS7 records to the EMI records. The matching criteria are based on the call date, FromNumber and ToNumber, call start and end time variances, conversation time duration variances, and trunk duration variances. A call record is considered a match when the call date time falls within a determined number of seconds and the conversation time/trunk duration falls within a determined number of tenths of a second.

After the matching process is complete, a summary of the unmatched AMA traffic is prepared. This summary categorizes the unmatched calls based on the various types of traffic remaining, i.e., whether the call's responsible carrier and jurisdiction can be identified to allow for proper billing and if so, which carrier and which jurisdiction.

Along with the above procedures, VPS has also performed numerous wireless InterMTA studies for our clients in South Dakota. There is no field in the signaling data that identifies whether a call should be categorized as interMTA or intraMTA, which can

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speed, circuit-switched connections and transaction capabilities which deal with remote database interactions.

often lead to miscategorization of the calls. Based on my understanding of the FCC First Report and Order,[8] Commercial Mobile Radio Service (CMRS)[9] calls originating in one Major Trading Area (MTA) and terminating in the same MTA are considered to be local calls and are subject to reciprocal compensation. Wireless calls that originate in one MTA and terminate in another MTA are considered to be toll calls and are subject to switched access charges. To ensure the landline carrier is properly compensated for terminating toll calls, it is important to determine the amount of interMTA traffic that is being delivered by the wireless carrier to the landline carrier. Proper classification of wireless traffic is especially important for RLECs operating in states that have multiple MTAs such as South Dakota. South Dakota has three different MTAs (Minneapolis, Denver, and Des Moines), which can be seen in **Exhibit 4**. In addition, much of the southern part of South Dakota borders the Omaha MTA, which also contributes to an increased InterMTA factor for South Dakota.

As mentioned above, VPS has performed numerous wireless InterMTA studies for our clients in South Dakota. The goal of these studies has been to determine the amount of interMTA traffic that is being delivered by a CMRS provider to a landline carrier, excluding the traffic that is delivered using an Interexchange Carrier (IXC). These studies consist of processing thousands of records to determine the amount of InterMTA traffic that is being delivered by a CMRS carrier to a landline carrier. The methodology for determining the interMTA amount is straightforward, as outlined in **Exhibit 5**. It consists of determining which wireless calls terminating to a given landline

[8] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) (*"First Report & Order"*).

[9] For purposes of this document, we assume that references to a wireless carrier or wireless provider mean a CMRS carrier.

carrier originated in the same MTA and which calls originated in a different MTA. For those that originated in a different MTA, it is also important to know which of these calls originated in the same state and which originated in a different state, so the landline carrier can apply the appropriate tariffed switched access rate to the call.

If the interMTA calls originate and terminate within South Dakota, the LEC's intrastate switched access tariffed rates would apply to these calls. For most of our South Dakota clients, the applicable tariff for intrastate switched access rates is the Local Exchange Carrier Association (LECA) Tariff No. 1. LECA is an association of approximately 30 South Dakota local exchange carriers, which acts as a switched access revenue-pooling, rate-averaging association. The current applicable switched access rates, approved by the South Dakota Public Utilities Commission, are shown in **Exhibit 6** and the complete tariff is accessible from the SDPUC website.[10] If the interMTA calls terminating in South Dakota originate from a different state, the LEC's interstate switched access tariffed rates would apply. For most of our clients, the applicable tariff for interstate switched access rates is the National Exchange Carrier Association, Inc. (NECA) Tariff FCC No. 5. The current applicable switched access rates are shown in **Exhibit 7** and the complete tariff is accessible from the NECA website.[11]

Since the CMRS caller can be mobile, the FCC recognized that it may be administratively more difficult to determine the exact location of the CMRS customer at the start of the call, so the FCC allowed the connecting tower location (connecting cell site) to be used. The First Report and Order states, "For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the

[10] http://www.state.sd.us/puc/commission/tariffs/telecommunications/telecommunication.htm
[11] http://www.neca.org/media/tariff5.pdf

geographic location of the mobile customer."[12] Thus, for purposes of categorizing traffic as either intraMTA or interMTA, it is only necessary to know the originating or connecting cell site location, not the physical location of the CMRS customer making the call.

Some of the interMTA studies performed by VPS have used the NPA-NXX in the SS7 messages to provide an estimate of the amount of InterMTA traffic. SS7 is the industry standard signaling method used by carriers to communicate call information. The SS7 network is separate from the voice network, and is used solely for the purpose of switching data messages pertaining to the business of connecting telephone calls and maintaining the signaling network. Packet switching is the method used for transferring messages through the network. SS7 automatically enables carriers to provide their subscribers with the calling party number because this information is carried in call setup messages.[13,14] Therefore, when using SS7 records, the calling party NPA-NXX and the called party NPA-NXX are used to estimate the location of the calling and the called party, respectively. The goal of these studies has been to determine the amount of InterMTA traffic delivered from a CMRS carrier to a landline RLEC. The interMTA studies performed by VPS also determine the amount of the InterMTA traffic that is Interstate and Intrastate in nature so the originating carrier can be billed the correct switched access tariff rate.

For some of the interMTA studies, VPS has been able to acquire the CDRs from the wireless carriers. The CDR data allows for a more accurate determination of the

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[12] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) (*"First Report & Order"*), para. 1044.

[13] Travis Russell, Signaling System #7, Third Edition. (McGraw-Hill, 2000) 79, 93.

[14] GR-246-CORE, *Telcordia Specification of Signaling System Number 7* (GR-246)

interMTA factor, since the location of the wireless caller at the start of the call (or the connecting tower location) can be provided by the CMRS carrier as part of the CDR records. As with most CMRS carriers, the caller location or initial cell site of the start of the call is available to Verizon with respect to each wireless originated call, but is not passed along in the SS7 message. One common switching platform used by CMRS carriers is the Lucent Technologies 5ESS wireless switch. This switch can identify the cell site number as part of the Automatic Message Accounting ("AMA") setup internal to the switching system per Lucent Table 2003 – Radio/Channel/Cell Information,[15] as illustrated in **Exhibit 8**. Another common switching platform for CMRS carriers is the Nortel Network MTX wireless switch, which identifies the originating trunk group from a specific cell location as a field in the AMA recording called the First Originating Trunk Common Language Location Identifier ("CLLI") field,[16] as illustrated in **Exhibit 9**. Because this information is not passed along to the landline carrier in the SS7 signaling, gathering the CDR data requires cooperation of the CMRS carrier to collect this data. **Exhibit 10** illustrates the process of extracting interMTA CDRs utilized by other wireless carriers we have worked with.

The interMTA studies that have been performed by VPS for RLECs in South Dakota, have found that more than half of the RLECs have interMTA factors that are estimated to be greater than 10%, several have interMTA factors that are estimated to be greater than 20%, and some have an interMTA factor of more than 30%. The interMTA (toll) traffic being terminated by other wireless carriers to most of the RLEC networks is

[15] Lucent Technologies Document 401-610-133 Issue 28 - Flexnet®/Autoplex® Wireless Networks Executive Cellular Processor (ECP) Release 24 pp 4-125 to 4-127

[16] Nortel Networks Document 411-2131-204 – MTX 12 (February 2004) – DMS-MTX CDMA/TDMA Billing Management Manual Standard Issue 11.11 p 6-147

primarily intrastate rather than interstate in nature. In fact, it is common for more than 85% of the CMRS originated interMTA traffic terminated to an RLEC in South Dakota to be intrastate in nature.

As CMRS carrier networks become larger and more complete, the amount of interMTA traffic delivered over the interconnection facilities becomes larger and the potential for phantom traffic also increases. When CMRS carrier networks grow, it is common for the CMRS carrier to interconnect their switches with Inter-Machine Trunks (IMTs). These IMTs allow the CMRS carrier to transport the traffic over large distances without the need of an Interexchange Carrier (IXC). The CMRS networks can transport the traffic across state boundaries and even across MTA boundaries. **Exhibit 11** shows a simplified diagram of two CMRS wireless switches in two separate MTAs which are not interconnected with IMTs. When the CMRS customer connected to Wireless Switch #1 calls the landline customer connected to the end office switch, the CMRS provider routes the call across the local interconnect facilities between Wireless Switch #1 and the landline end office. When the CMRS customer that is located near wireless switch #2, however, places a call to this same landline customer, there is no direct way for the CMRS carrier to route the traffic to the landline customer. Therefore, the CMRS provider often routes this call to an IXC for delivery to the landline provider. Since the wireless customer and the landline customer in this example are in different MTAs, the call would be a toll call. When the traffic is delivered to the landline customer using an IXC, the IXC is responsible for compensating the landline carrier for this toll traffic.

However, the CMRS provider may lease or build facilities to establish IMTs between Wireless Switch #1 and Wireless Switch #2 as shown in **Exhibit 12**. With this

IMT in place, the CMRS carrier would have the ability to route the call between the switches in the two MTAs without the use of an IXC. When the wireless customer near Wireless Switch #2 places a call to the landline customer in this example, the call can be routed from the Wireless Switch #2 to Wireless Switch #1 and then delivered to the landline provider over the local interconnection facilities. This toll traffic is most often intermixed with the local traffic. As the quantity of IMTs increase, so does the potential for phantom traffic.

I have reviewed the claims of Verizon Wireless in its proposed Stipulation of Facts. Verizon Wireless delivers both local and access traffic over both direct and indirect trunks. The indirect trunks between an RLEC and Verizon Wireless are often common trunks and the Verizon Wireless traffic is intermixed with other carrier traffic. The South Dakota statutes require carriers to "transmit signaling information in accordance with commonly accepted industry standards."[17]

The Ordering and Billing Forum (OBF) has been working to expand the SS7 signaling format to better identify telecommunications traffic so the terminating carrier can more accurately bill for the traffic. Many involved with the OBF would like to see the Jurisdictional Information Parameter (JIP) field in the SS7 used to identify the wireless caller's connecting tower at the start of the call. In May 2005, the JIP was expanded to include information regarding the originating wireless switch.[18] This was certainly a step in the correct direction. I would expect that the use of the JIP will

[17] South Dakota Codified Laws SDCL 49-31-110 and SDCL 49-31-111.
[18] Alliance for Telecommunications Industry Solutions, ATIS-0300011, Network Interconnection Interoperability (NIIF) Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks.

continue to be enhanced to provide more detailed information regarding the location of the originating wireless caller.

Because the commonly accepted industry standards for signaling continue to evolve and are not yet adequate to quantify nonlocal traffic, the South Dakota Codified Laws allow the originating carrier to "separately provide the terminating carrier with accurate information including verifiable percentage measurements that enables the terminating carrier to appropriately classify nonlocal telecommunications traffic as being either interstate or intrastate, and to assess the appropriate applicable access charges."[19] The form and substance of the accurate information required in this statute is not defined, except that it be adequate for the terminating carrier to appropriately classify the traffic and assess the applicable charges.

Because the current commonly accepted industry standards for signaling may not be adequate to determine the precise location of a wireless caller, wireless carriers often establish their delivered local and toll (interstate and intrastate) traffic ratios in an agreed upon contract. Normally the contract ratios are based on historical experience or using a special study. Since wireless carriers have the ability to determine the connecting tower of their wireless customer, a special study can accurately determine the local and toll (interstate and intrastate) mix for a given test period. This is the same process Verizon uses to determine their factors in their own contracts and tariffs.[20]

It also appears that Verizon Wireless would need to know the calling party or tower location to determine appropriate taxes and Universal Service Fund contributions. All intrastate, interstate and international providers of telecommunications within the

[19] South Dakota Codified Law SDCL 49-31-110.
[20] Verizon's Proposed Regulatory Action to Address Phantom Traffic, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92, December 20, 2005, Ex Parte, pg. 11-12.

United States are required to file the FCC Form 499-A (Telecommunications Reporting Worksheet). The worksheet and associated instructions are included as **Exhibit 13**. This form requires that these providers separately identify the portion of gross revenues that arise from interstate and international service. All filers must report the actual amount of interstate and international revenues for these services. For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.

To be clear, phantom traffic is not just a South Dakota issue; it is an industry-wide concern. The FCC has recognized that it is a significant problem, as evidenced by its effort to seek comments, attached as **Exhibit 14**, regarding the Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal (Proposal), attached as **Exhibit 15**. Even though the Proposal has been criticized by some carriers regarding specific details of the proposal, there is general support from a diverse group of commenters for the Proposal's call signaling rules.[21] Most ILECs, including SDTA members (see **Exhibit 16**), believe that phantom traffic is a serious concern, as evidenced by the overwhelming support of the Proposal. The need for call signaling rules such as the ones South Dakota legislators have passed are needed to stop the abuse of the RLECs who continue to lose compensation due them every day. VPS has found that phantom traffic could be as high as 15% of the total traffic studied. Based on the results of the wireless traffic studies, VPS has found that it is not uncommon for 10%-30% of the total terminating wireless traffic to be interMTA in nature. If, for example, Venture Communications' percentage

[21] Reply Comments of the Supporters of the Missoula Plan On Their Phantom Traffic Proposal, CC Docket No. 01-92.

of phantom traffic was only 5% of their total terminating traffic, Venture's lost revenue could be approximately $50,000 per year, with the potential to be much greater[22].

Even Verizon Wireless' sister company, Verizon Communications, which is a LEC headquarterd in New York, NY recognizes the significance of the phantom traffic problem. Craig Bellinghausen of Verizon included a statement in his September 24, 2004, presentation regarding Phantom Traffic in which Verizon acknowledges that it is a growing concern.[23] Mr. Bellinghausen states in his presentation that Verizon's "Measured Phantom Transit Traffic is in the 3% to 6% range. Phantom Calls Terminating on Verizon's network is in the 12% to 15% range. Bottom Line: Significant Issue at Verizon." Verizon has also publicly offered suggestions in this presentation as to how the industry should work together regarding phantom traffic. These suggestions included establishing industry standards, such as an interMTA record field, and seeking "legislation requiring that certain data legally must be passed on traffic." This presentation has been included as **Exhibit 17**.

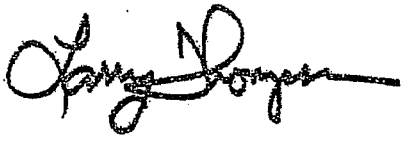
In Verizon's Ex Parte[24] to the FCC regarding phantom traffic, they claimed, "approximately 20% of the traffic that either transits over or terminates on Verizon's network either is missing calling party information entirely or contains plainly invalid calling party data in the Signaling system 7 (SS7) stream, affecting Verizon's ability to bill for both terminating and transit." In this Ex Parte, Verizon explains how they deal

[22] VPS is currently compiling data for a possible phantom traffic study for Venture Communications (Venture). If, or when, the decision is made to proceed with a phantom traffic study for Venture and the study is completed, I will supplement this report to include a copy of the completed phantom traffic study. This report would include an analysis of all traffic (wireline as well as wireless) terminating to Venture exchanges. (See Exhibit 3 for more details of the phantom traffic study process.)

[23] Craig Bellinghausen, Phantom Traffic Pennsylvania Telephone Association New York State Telecommunications Association, September 24, 2004 (note that Mr. Bellinghausen made these statements as a representative of "Verizon" and not "Verizon Wireless.")

[24] Verizon's Proposed Regulatory Action to Address Phantom Traffic, In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket 01-92, December 20, 2005, Ex Parte, pg. 11-12.

with carriers that deliver traffic that does not contain enough information in the signaling, such as the Calling Party Number (CPN), to properly bill for the traffic. They state, "If, however, traffic with missing or invalid CPN exceeds that threshold (again, usually 5% or 10%), the great majority of Verizon's agreements provide that Verizon will charge the originating carrier or IXC the highest possible rate for *all* traffic with missing or invalid CPN." This method is not significantly different than what is required by the South Dakota Codified Laws.



Larry Thompson, P.E.
Chief Executive Officer
Vantage Point Solutions, Inc.

January 16, 2007
Date

Expert Report of Larry Thompson

Prepared for

Civil No. 04-3014, U.S. District Court,
District of South Dakota, Central Division

EXHIBIT 5

Venture Communications

InterMTA Traffic Analysis
(Based on CDRs)

Analysis Summary & Results

Version 1.0

Prepared by

Vantage Point

Customer Focused. Technology Driven.

1801 N. Main Street
Mitchell, SD 57301

(605) 995-1777
(605) 995-1778 - fax

Submitted by:

Larry D. Thompson, PE
Londa Youngstrom
Wendy Harper

This document, including any attachments, appendices, and amendments is proprietary and is property of Vantage Point Solutions. This information is considered "Confidential Information" and is provided to the client as a planning tool for use in future projects. No use, joint use, ownership, or property rights of any kind are granted to any person or party except that which is specifically permitted in writing.

Table of Contents

1.0 Executive Summary

The purpose of this document is to detail the process Vantage Point Solutions (VPS) is using to analyze the wireless traffic terminating in the state of South Dakota to Venture Communications (Venture). These calls originate from a [redacted] mobile customer and terminate to a landline customer of Venture.

This document is prepared to assist the parties in determining the amount of InterMTA traffic that is delivered to Venture by [redacted]. This traffic may terminate to Venture via either a direct interconnection or an indirect interconnection (typically Qwest).

2.0 Calculations Based on CDR Records

The CDR records are the traffic records collected by [redacted] from their network that was delivered to Venture. The records were to not include traffic delivered via an interexchange carrier (IXC) and include only answered wireless to wireline calls. Appendix A shows the detail of how [redacted] gathered the CDRs for the analysis. The CDR records we received from [redacted] did include the MTA information of the initial cell site serving the wireless end user at the start of the call and the state as well.

The time period utilized in this study was from October 1, 2004 through October 15, 2004 and is based on minutes of use not via number of calls. The InterMTA factor calculated for Venture based on the criteria mentioned above is [redacted]%, as shown in Figure 2.1 below.

Based on Usage Period: 10/1-10/15/2004

	Total Mins
Based on Minutes:	[redacted]
IntraMTA	[redacted]
InterMTA Factor:	[redacted]%
InterMTA	[redacted]

Figure 2.1 Venture InterMTA Calculated Factor

2.0 Calculations Based on CDR Records (Continued)

We calculated the total minutes of use and then broke out via interstate and intrastate rates that would be applicable. Per our findings, listed in Figure 2.2 below for Venture, [redacted]% would be considered interstate billed at the current National Exchange Carrier Association (NECA) rates and [redacted]% would be considered intrastate and billed at the current Local Exchange Carrier Association (LECA) rates.

	Minutes	% Based on MOU
InterMTA - In South Dakota	[redacted]	[redacted]%
InterMTA - Not in South Dakota	[redacted]	[redacted]%
Total InterMTA	[redacted]	100.00%

Figure 2.2 Venture Access Rate Percentage Calculations

3.0 Goals

The goal of this analysis is to determine the volume of InterMTA calls that originate with a [redacted] customer and terminate to a Venture customer and to calculate the percentage of total InterMTA Traffic.

Major Trading Area (MTA) – Boundaries that segment the country for telecommunication licensing purposes. MTAs are based on Rand McNally's Commercial Atlas & Marketing Guide. Each MTA is named after one or more cities which are designated as Major Trading Centers. The FCC uses MTA boundaries for licensing services such as Personal Communications Services (PCS).

FCC – Federal Communications Commission

InterMTA – All wireless to wireline calls, which originate in one MTA and terminate in another MTA. For purposes of this report, as described above, we based the MTA on NPA-NXXs.

IntraMTA – All wireless to wireline calls, which originate and terminate in the same MTA. For purposes of this report, as described above, we based the MTA on NPA-NXXs.

Intrastate calls – Calls which originate and terminate within the same state.

Interstate calls – Calls which originate in one state, and terminate in another state.

4.0 Major Trading Areas (MTAs) for South Dakota

In Figure 4.1, we are showing South Dakota and its neighboring states. As indicated on the map, the Major Trading Areas assigned to this area are Denver (MTA 22), Minneapolis (MTA 12), Des Moines (MTA 32) and Omaha (MTA 45).

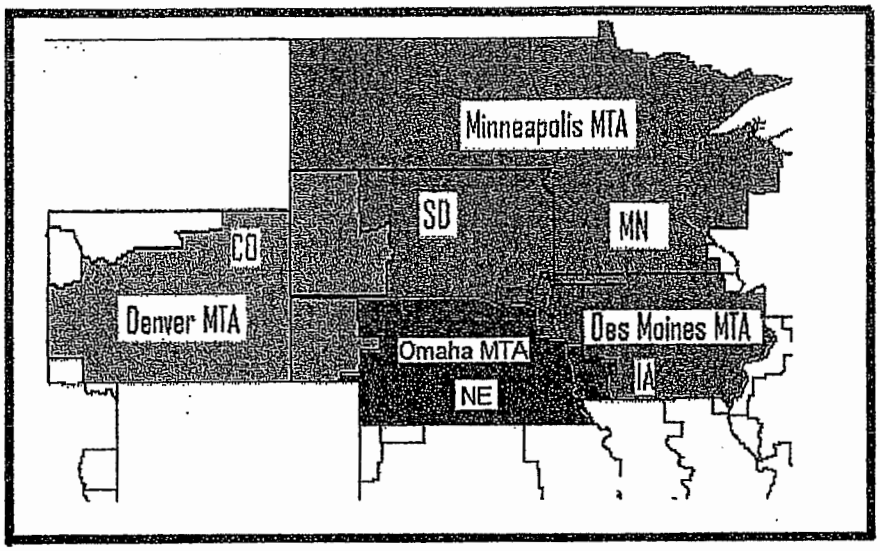


Figure 4.1 Major Trading Areas (MTAs) for South Dakota

As explained in section 3.0, the purpose of this study is to analyze the traffic of calls that terminate to one of the Venture customers, yet originated in another MTA. In the center of this map is South Dakota. South Dakota has three MTAs that stretch across its boundaries.

As we look at the map, it should be noted that South Dakota has a high amount of MTAs within its boundaries in comparison to the other states within the 51 Major Trading Areas.

5.0 Testing Methodology

5.1 Gathering the CDR call data

The following files were sent to Vantage Point from [redacted] via email.

MTA_CDR_extract_031505_2nd_run_1.zip
MTA_CDR_extract_031505_2nd_run_2.zip
MTA_CDR_extract_031505_2nd_run_3.zip
MTA_CDR_extract_031505_2nd_run_4.zip

5.2 Data Processing

We extract the received files and then import the data into a Microsoft SQL Server 2000 database with the help of a SQL Data Transformation Services (DTS) package.

The data from the CDR files were placed in a database which contains the following columns.

	Name	Type	Length	
1	called_num	char	17	1
0	dialed_num	char	17	1
0	billing_num	char	17	1
0	answer_start_datetime	char	20	1
0	answer_stop_datetime	char	20	1
0	duration	numeric	9	1
0	first_cell_site	char	12	1
0	trunk_group	char	12	1
0	trunk_member	char	12	1
0	switch_id	char	12	1
0	mta_number	char	12	1
0	state	char	12	1
0	called_num_npa_nxx	char	17	1

Each column in the file indicates information needed in the analysis such as **'Called_Num_NPA_NXX'**, **'MTA_Number'**, and **'State'**.

6.0 Venture NPA-NXX Index

Below is a list of the Venture NPA-NXXs incorporated in this study, which is grouped according to the MTA of the NPA-NXX.

Venture Minneapolis MTA NPA-NXXs

OCN	NPA	NXX	RATE CENTER	STATE	LATA	SWITCH
1680	605	258	ONIDA	SD	640	ONIDSDXCDS0
1680	605	264	ONIDA	SD	640	ONIDSDXCDS0
1680	605	266	HITCHCOCK	SD	640	HTCHSDXADS1
1680	605	285	BOWDLE	SD	640	BWDLSDXARS3
1680	605	287	ROSCOE	SD	640	ROSCSDXARS3
1680	605	325	PIERPONT	SD	640	BRTNSDXADS0
1680	605	436	SENECA	SD	640	SENCSDXARS0
1680	605	442	TOLSTOY	SD	640	TLSTSDXADS0
1680	605	447	ONAKA	SD	640	TLSTSDXADS0
1680	605	448	BRITTON	SD	640	BRTNSDXADS0
1680	605	458	WESSINGTON	SD	640	WSTNSDXADS1
1680	605	486	ROSLYN	SD	640	RSLNSDXADS0
1680	605	493	LANGFORD	SD	640	BRTNSDXADS0
1680	605	537	ROSHOLT	SD	640	SSTNSDCODS0
1680	605	539	WESIGTNSPG	SD	640	WSSPSDXADS0
1680	605	596	TULARE	SD	640	TULRSDXADS0
1680	605	649	SELBY	SD	640	SLBYSDXADS0
1680	605	698	SISSETON	SD	640	SSTNSDCODS0
1680	605	742	SISSETON	SD	640	SSTNSDCODS0
1680	605	765	GETTYSBURG	SD	640	GTBGSDXADS0
1680	605	768	LEBANON	SD	640	GTBGSDXADS0
1680	605	852	HIGHMORE	SD	640	HGHMSDXADS0
1680	605	875	HARROLD	SD	640	HGHMSDXADS0
1680	605	943	REEHEIGHTS	SD	640	REHGSDXADS0
1680	605	948	HOVEN	SD	640	HOVNSDXADS0
1680	605	962	BLUNT	SD	640	BLNTSDXADS0
1680	605	973	ONIDA	SD	640	ONIDSDXCDS0
1680	701	443	NO BRITTON	ND	640	BRTNSDXADS0

APPENDIX A

09/28/04 - Email [redacted]

Confidential Email Between the Parties

BRIGGS
BRIGGS AND MORGAN

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80 South 8th Street
Minneapolis MN 55402-2157
tel 612.977.8400
fax 612.977.8650

December 7, 2006

VIA EMAIL and U.S. MAIL

Darla Pollman Rogers
Ritter, Rogers, Wattier & Brown, LLP
319 South Coteau Street
P.O. Box 280
Pierre, South Dakota 57501-0280

Rolayne Ailts Wiest
South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57504-5070

Re: Verizon Wireless et al. v. State of South Dakota et al.
Court File No. 04-3014

Dear Darla and Rolayne:

As you are aware, the District Court denied Verizon Wireless' motion for summary judgment and expects this matter to proceed to trial. As we discussed with you earlier this year, the federal rules provide that an expert report must contain all opinions that will be expressed at trial, and must identify all data and other information considered by the expert. The affidavit provided by Mr. Thompson in opposition to our motion for summary judgment contains opinions that went well beyond his expert report. We advised you and the court that we believed that testimony was improper. Rather than move to strike, however, we indicated that if the matter was not disposed of on summary judgment, and if you proposed to amend Mr. Thompson's expert report, we would work to negotiate any necessary discovery and other supplementation to address Mr. Thompson's new opinions. At this time, you have not supplemented Mr. Thompson's report. If you intend for Mr. Thompson to express the opinions contained in his affidavit we will need to have a supplemental report and will need to have the opportunity to conduct appropriate discovery on these new issues.

In light of the upcoming holidays and the January scheduling conference, I would like to discuss these matters with you in the next few business days. Please let me know when you would be available.

Very truly yours,

Philip R. Schenkenberg
(612) 977-8246
pschenkenberg@briggs.com

PRS/smo
cc: Charon Phillips

1812758v8

Exhibit C

O'Neill, Sheri

From: Schenkenberg, Philip
Sent: Wednesday, December 13, 2006 8:08 AM
To: 'Rolayne.Wiest@state.sd.us'; richcoit@sdtaonline.com; dprogers@riterlaw.com
Subject: RE: Verizon Wireless v. State of South Dakota

I have followed up with Verizon Wireless on your suggestion of putting the case on hold for 6 months. Verizon Wireless does not believe it is reasonable to expect the FCC to act within 6 months and doesn't think we can represent otherwise to the judge.

I want to clarify one more point about our discussion of the update to the Thompson report. There are two sets of opinions Thompson has indicated he has. The first set is within the expert report, which was served during the discovery period and at the expert deadline. The second set was expressed in the affidavit filed in opposition to our motion for summary judgment. His report has not been updated to incorporate the opinions in the affidavit, he has not identified the data he relies on to support those opinions, and we had no opportunity to do discovery on those opinions. If you intend to update the report to incorporate the opinions in the affidavit we need to have that done and have the opportunity to do discovery we would have done had those opinions been expressed during the discovery period. We would not agree that Thompson can add new opinions or facts that we have not seen before at all.

If we update our Rule 26 disclosures or prior discovery responses as a result of Thompson's updated report, it would be appropriate for you to conduct necessary discovery on those updates. However I don't think at this point that we would agree to conduct another round of broad discovery that goes beyond those updates. We can, of course, discuss specific issues if you would like.

Phil

Phil Schenkenberg
Attorney

BRIGGS AND MORGAN

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2200 IDS Center | 80 South 8th Street | Minneapolis, MN 55402

From: Rolayne.Wiest@state.sd.us [mailto:Rolayne.Wiest@state.sd.us]
Sent: Monday, December 11, 2006 7:47 AM
To: richcoit@sdtaonline.com; Schenkenberg, Philip; dprogers@riterlaw.com
Cc: charon.phillips@verizonwireless.com
Subject: RE: Verizon Wireless v. State of South Dakota

How about Tuesday afternoon? I have a hearing that morning but it should not go all day.

Rolayne

-----Original Message-----
From: Rich Coit [mailto:richcoit@sdtaonline.com]
Sent: Friday, December 08, 2006 3:54 PM
To: 'Schenkenberg, Philip'; 'Darla Rogers'; Wiest, Rolayne

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February 6, 2007

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Rolayne Ailts Wiest
South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57504-5070

Re: Verizon Wireless et al. v. State of South Dakota et al.
Court File No. 04-3014

Dear Darla and Rolayne:

Enclosed and served upon you please find Plaintiff's Third Set of Interrogatories and Second Set of Requests for Production of Documents relating to the new information contained in the revised Expert Report of Larry D. Thompson.

Although the discovery deadline has passed, we are serving this discovery regarding Mr. Thompson's revised Expert Report as an alternative to objecting to the new information contained in the report. Moreover, much of the information requested should be provided to us automatically as you supplement your responses to our First Set of Interrogatories, Requests for Production of Documents and Requests for Admission. Document Request number 5 provided: Provide all documents exchanged between you and each and every expert that you have retained or consulted, including but not limited to, reports, opinions, charts, records, graphs, diagrams, photographs and technical publications." Document Request number 6 provided: "Provide any documents which may be relied on by each and every expert that you have retained or consulted, including but not limited to, reports, opinions, charts, records, graphs, diagrams, photographs and technical publications."

We would also like to discuss a time, after we have received responses to the enclosed discovery, when Mr. Thompson would be available for a deposition, and the location for such deposition.

Very truly yours,

Philip R. Schenkenberg

PRS/smo
Enclosure
cc: Gene Lebrun
Charon Phillips

1812758v9

Exhibit E

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, vs. Bob Sahr, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendants, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 **PLAINTIFFS' THIRD SET OF INTERROGATORIES AND SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS**

To: Defendants Bob Sahr, Gary Hanson, and Dustin Johnson, in there official capacities as the Commissioners of the South Dakota Public Utilities Commission and their attorney, Rolayne Ailts Wiest, Assistant Attorney General, South Dakota Public Utilities Commission, 500 East Capitol, Pierre, SD, 57501 and Intervenors South Dakota Telecommunications Ass'n and Venture Communications Cooperative and their attorneys, Darla Pollman Rogers and Margo D. Northrup, Riter, Rogers, Wattier & Brown, LLP, P.O. Box 280, Pierre, SD 57501.

PLEASE TAKE NOTICE that, pursuant to Rules 33 and 34 of the Federal Rules of Civil Procedure, Plaintiffs request that Defendants and Intervenors answer the following interrogatories and document requests within thirty (30) days hereof. Answers and responses should be provided to Gene N. Lebrun, Lynn, Jackson, Shultz & Lebrun, P.C., 909 St. Joseph

Street, P.O. Box 8250, Rapid City, SD 57709 and to Philip R. Schenkenberg, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402.

The following definitions and instructions apply to the discovery requests below:

DEFINITIONS

1. "Verizon Wireless" means the plaintiffs herein.

2. "SDTA" means the South Dakota Telecommunications Association.

3. "Venture" means Venture Communications Cooperative and/or an affiliate that provides service as an ILEC under operator carrier number 1680 in South Dakota.

4. "SDPUC" means the Commissioners of the South Dakota Public Utilities Commission, in their official capacities.

5. "VPS" means Vantage Point Solutions

6. "You" and "your" means the SDTA, Venture and the SDPUC collectively, as defined above.

7. "Thompson Report" means the Expert Report of Larry D. Thompson dated September 1, 2005 (as revised January 16, 2007).

8. "ILEC" means "incumbent local exchange carrier" as defined in 47 C.F.R. § 51.5.

9. "MSC" means "mobile switching center."

10. "MTA" means "major trading area" as defined in 47 C.F.R. § 24.202(a).

11. "SS7" means "Signaling System 7."

12. "CMRS" means "commercial mobile radio services" as defined in 47 C.F.R. § 20.3.

13. "FCC" means the Federal Communications Commission.

14. "Including" means "including, but not limited to."

15. "OCN" means the operating company number as used in the Local Exchange Routing Guide.

16. "Document" means the complete original, complete copy of the original, and each non-identical copy (whether different from the original because of notes made on the copy or otherwise) of any written, printed, typed, photocopied, photographic and graphic matter of any kind or character, and any recorded material, however produced or reproduced, in your possession or control, or known by you to exist, including, without limiting the generality of the

foregoing, all drafts, contracts, diaries, agreements, calendars, desk pads, correspondence, computer printouts, telegrams, teletypes, memoranda, notes, studies, reports, lists, minutes, maps, graphs and entries in books of account relating in any way to the subject matter of these discovery requests.

INSTRUCTIONS

1. These discovery requests are to be answered by Defendants and Intervenors unless it is otherwise indicated in the request itself.

2. Each interrogatory and request is to be answered separately.

3. For each discovery request, state the full name, address, job title and employer of each person answering the discovery request, and, if more than one person is so answering, identify which portion of the discovery request was answered by each person.

4. Each discovery request is intended to, and does, request that each and every particular and part thereof be answered with the same force and effect as if each part and particular were the subject of and were asked by a separate discovery request.

5. If you are unable to answer any discovery request completely, so state, answer to the extent possible, set forth the reasons for your inability to answer more fully, and state whatever knowledge or information you have concerning the unanswered portion.

6. If any act, event, transaction, occasion, instance, matter, course of conduct, course of action, person or document is mentioned or referred to in response to more than one of these discovery requests, you need not completely identify and describe it or him in every such instance, provided you supply a complete identification in one such instance and in each other such instance make a specific reference to the place in the answers to these discovery requests where it or he is fully identified and described, giving page number and the beginning and ending line numbers.

7. If you deem any interrogatory or request to call for privileged information, identify:

(a) The name and address of the speaker or the author of the document that contains any part of the information withheld;

(b) The date of the communication or document;

(c) The name and address of any person to whom the communication was made or the document was sent or received or to whom copies were sent or circulated at any time;

(d) The form of the communication or document (i.e., letter, memorandum, invoice, contract, etc.);

(e) The names and addresses of any person currently in possession of the document or a copy thereof; and

(f) A description of the subject matter of the communication or document; and the specific grounds for withholding the information and the nature of the privilege claimed.

8. Whenever you are asked for the identity of or to identify a person, please state with respect to each such person:

(a) The person's name;

(b) The person's last known address;

(c) The person's current business affiliation and title;

(d) The person's current business address; or if that be unknown, the person's last known business address;

(e) The business affiliation, business address and the correct title of such person with respect to the business, organization, or entity with which the person was associated and the capacity in which such person acted in connection with the subject matter of this interrogatory or request; and

(f) Whether such person has given a statement in writing, or in any other tangible or permanent form, which in any way bears upon or relates to the subject matter of the interrogatory or request.

9. Whenever you are asked the identity of or to identify an oral statement, or the answer to an interrogatory refers to an oral statement, state with respect to each such oral statement:

(a) The date and place each such oral statement was made;

(b) The identity of each person who participated in or heard any part of such oral statement;

(c) The substance of what was said by each person who made such oral statement; and

(d) The name and identity of the custodian of any written record or any mechanical or electrical recording that recorded, summarized or confirmed such oral statement.

10. Whenever you are asked the identity of or to identify a document, please state with respect to each such document:

(a) Its nature (*e.g.*, letter, memorandum, photograph, etc.)

(b) Its title or designation;

(c) The date it bears;

(d) The name, title, business affiliation, and business address of the person preparing it, and the person who signed it or over whose name it was issued;

(e) A statement of the subject and substance of the document, with sufficient particularity to enable the same to be identified;

(f) The addressee or addressees;

(g) A precise description of the place where such document is presently kept, including (a) the title or the description of the file in which such document would be found; and (b) the exact location of such file;

(h) The name, title, business affiliation, and business address of each person who presently has custody of such document; and

(i) Whether you claim any privilege as to such document, and if so, a precise statement of the facts upon which said claim of privilege is based.

11. Whenever you are asked to identify a document, or to identify information contained in or information about any document, you may respond by producing a copy of any document(s) responsive to the interrogatory or request.

12. The interrogatories and requests shall be deemed to be continuing under Rule 26 of the Federal Rules of Civil Procedure and should be supplemented in accordance with the Federal Rules of Civil Procedure.

13. Please be advised that your answers must include all information available not only to you, but to your agents, officers, representatives, employees, attorneys, insurers, or others who have information available to you upon inquiry to them.

INTERROGATORIES

11. Identify each wireless InterMTA study performed by VPS, specifying which of the studies Mr. Thompson relies upon to support the opinions in the Thompson Report, and for each wireless InterMTA study identified, provide the following:

(a) The name and OCN of VPS's client and any wireless carrier whose calls were part of the study;

(b) Complete, detailed results of the study, including a detailed description of the methodology utilized in the study;

(c) The number of hours spent by VPS representatives or employees performing the study, and the number of hours spent by VPS's client assisting VPS in performing the study;

(d) The amount billed to the client for performing the study.

12. For the software utilized in each of the wireless InterMTA studies identified in response to Interrogatory 11, identify the following:

(a) The name and cost of the software utilized, or if developed by VPS, the hours spent and amount spent to develop the software;

(b) Any modifications made to the software by VPS to perform the wireless InterMTA studies;

(c) The data points required for the software to be utilized (i.e., MTA of originating cell site, NPA-NXX, MTA of terminating switch, etc.).

13. On page 15 of the Thompson Report, Mr. Thompson states that "Venture's lost revenue could be approximately $50,000 per year, with the potential to be much higher." Provide a detailed explanation of the calculations that support this estimate, and identify how the assumptions would need to change for the lost revenue to be "much higher."

DOCUMENT REQUESTS

9. For each wireless InterMTA study performed by VPS in the state of South Dakota, provide unredacted copies of the following:

(a) The completed study as presented to the client (i.e., Analysis Summary & Results marked as Exhibit 5 to Thompson Report or similar documents);

(b) Copies of any additional documents and/or exhibits accompanying the study.

(c) All correspondence, draft reports, and other documents (excepting call record data) exchanged between VPS and its client which relate to the study.

10. Provide all studies on which Mr. Thompson relies to support the statement "VPS has found that phantom traffic could be as high as 15% of the total traffic studied."

11. Provide any documents referred to in your responses to the above interrogatory requests.

Dated: February 6, 2007

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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ATTORNEYS FOR PLAINTIFFS

AFFIDAVIT OF SERVICE BY FACSIMILE
AND FEDERAL EXPRESS

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Court File No. 04-3014

Jeffrey A. Abrahamson, being first duly sworn, deposes and states that on the 6th day of February, 2007, he served the attached PLAINTIFFS' THIRD SET OF INTERROGATORIES AND SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS upon:

Darla Pollman Rogers
Ritter, Rogers, Wattier & Brown, LLP
319 South Coteau Street
P.O. Box 280
Pierre, South Dakota 57501-0280
Facsimile No.: 605-224-7102

Rolayne Ailts Wiest
South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57504-5070
Facsimile No. 605-773-3809

(which is the last known facsimile number and address of said attorney) by transmitting to the above facsimile numbers and sending by Federal Express.

Jeffrey A. Abrahamson

Subscribed and sworn to before me this
6th day of February, 2007.

Notary Public

JOHNIE M. KELLY
Notary Public
Minnesota

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, Vs. Steve Kolbeck, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendant, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 DEFENDANT'S/INTERVENORS' RESPONSES TO PLAINTIFFS' THIRD SET OF INTERROGATORIES AND SECOND SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS

COMES NOW the South Dakota Telecommunications Association ("SDTA") and Venture Communications Cooperative ("Venture") (the "Intervenors" herein) and Commissioners, Steve Kolbeck, Gary Hanson, and Dustin Johnson in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, (collectively referred to as the "Defendant" herein) and hereby respond to Plaintiffs' ("Verizon Wireless") Third Set of Interrogatories and Second Set of Request for Production of Documents as follows:

INTERROGATORIES

General Objection: Intervenors and Defendant object to Interrogatories 11-13 because they were served outside of the date identified in the 8th Amended Scheduling Order dated on January 3, 2007, by the Court.

11. Identify each wireless InterMTA study performed by Vantage Point Solutions, ("VPS"), specifying which of the studies Mr. Thompson relies upon to support the opinions in the Thompson Report, and for each wireless InterMTA study identified, provide the following:

Objection: This Interrogatory is beyond the scope of the limited purpose of these discovery requests. In the original expert report provided by Larry Thompson, Mr. Thompson stated that VPS performed InterMTA studies. Therefore, this Interrogatory does not request information relative to new information provided in the revised report.

(a) The name and OCN of VPS's client and any wireless carrier whose calls were part of the study;

Objection: Defendant and Intervenors further object because the information requested seeks proprietary and competitive information that is highly confidential. VPS has executed confidentiality agreements with each of its clients which prohibits VPS from releasing the name of the client. In addition, the study includes confidential and proprietary information that is highly confidential as it relates to another wireless carrier that is not party to this proceeding and VPS does not have authority to release this information.

Response: Without waiving any Objections, refer to Exhibit Q11a.

(b) Complete detailed results of the study, including a detailed description of the methodology utilized in the study.

Objection: Defendant and Intervenors further object to the first part of question (b) because the information requested seeks proprietary and competitive information that is highly confidential. VPS has executed confidentiality agreements with each of its clients which prohibits VPS from releasing the name of the client. In addition, the study includes confidential and proprietary information that is highly confidential as it relates to another wireless carrier that is not party to this proceeding and VPS does not have authority to release this information.

Response: Without waiving any Objections, a detailed description of the methodology utilized in the study is included as Exhibits 3 and 5 of Larry Thompson's revised Expert Report (Revision date, January 16, 2007) and

refers to the client results provided in Exhibit Q11a. In addition, Exhibit Q11b1 shows the results of seven of VPS's clients using CDR and SS7 methodology. Also provided as Exhibit Q11b2, is a data confirmation email between a representative of a wireless carrier operating in South Dakota and Larry Thompson of VPS regarding the outcome of three client's InterMTA CDR studies.

(c) The number of hours spent by VPS representatives or employees performing the study, and the number of hours spent by VPS's client assisting VPS in performing the study;

Response: Without waiving any Objections, VPS reviewed previous billing records and calculated as accurately as possible the number of total hours per company based on timesheet descriptions. This is provided in Exhibit Q11c.

(d) The amount billed to the client for performing the study.

Response: Without waiving any Objections, VPS used the hours per employee from Question 11c and applied their current billing rate. This is also provided in Exhibit Q11c.

12. For the software utilized in each of the wireless InterMTA studies identified in response to Interrogatory 11, identify the following:

Objection: This Interrogatory is beyond the scope of the limited purpose of these discovery requests. In the original expert report provided by Larry Thompson, Mr. Thompson stated that VPS performed InterMTA studies. Therefore, this Interrogatory does not request information relative to new information provided in the revised report.

(a) The name and cost of the software utilized, or if developed by VPS, the hours spent and amount spent to develop the software;

Response: Without waiving any Objections, VPS did not use any "software" other than a standard SQL database. VPS already had a SQL database for other purposes, so there was no incremental cost associated with the SQL software. VPS used standard SQL queries to process the raw SS7 and CDR files as described in Exhibits 3 and 5 of Larry Thompson's Expert Report.

(b) Any modifications made to the software by VPS to perform the wireless InterMTA studies;

Response: Without waiving any Objections, refer to the response to Question 12(a).

(c) The data points required for the software to be utilized (i.e., MTA of the originating cell site, NPA-NXX, MTA of the terminating switch, etc.).

Response: Without waiving any Objections, below are the fields utilized for the SS7 and CDR studies.

For the SS7 analysis, VPS utilizes the Destination Point Code, Called Number, Disposition, Start Date Time, Calling Number, and Bill Seconds SS7 fields. For the CDR analysis, the fields required for the InterMTA analysis are the Duration, MTA Number, State, and Called Number NPA-NXX. VPS also requests the Called Number, Dialed Number, Billing Number, Answer Start Date Time, Answer Stop Date Time, First Cell Site Trunk Group, Trunk Member, and Switch ID for supporting information.

The information required for wireless carrier's CDRs are fields commonly used in the industry and stated to be available per the network switching manuals. Nortel and Lucent switches are common for the wireless carriers, see Exhibits Q12c1 and Q12c2 (one page excerpt from the manual for each switch). These exhibits show how the call record is acquired, recorded, and processed. A general overview of the process used to extract and analyze wireless InterMTA CDRs is shown in Exhibit Q12c3.

13. On page 15 of the Thompson Report, Mr. Thompson states that "Venture's lost revenue could be approximately $50,000 per year, with the potential to be much "higher". Provide a detailed explanation of the calculations that support this estimate, and identify how the assumptions would need to change for the lost revenue to be "much higher".

Response: Without waiving any Objections, the calculation is shown in Confidential Exhibit Q13a. In the confidential exhibit Q13a, a 5% phantom traffic percentage was applied. When wireless carriers do not utilize intermachine trunking ("IMT") and deliver a majority of their InterMTA traffic to an interexchange carrier ("IXC"), there is a potential for less phantom traffic. The routing of a wireless call without IMT is illustrated in Exhibit Q13b. As a wireless carrier's networks expand geographically, intermachine trunking is often used and can increase the InterMTA traffic delivered to a wireline carrier. An example of a wireless carrier's network utilizing IMTs is shown in Exhibit Q13c. As wireless carriers deliver more InterMTA traffic to a wireline carrier, the quantity of phantom traffic received by a wireline carrier will likely increase.

DOCUMENT REQUESTS

General Objection: Intervenors and Defendant object to Document Requests 9-11, because they were served outside of the date identified in the 8th Amended Scheduling Order dated on January 3, 2007, by the Court.

9. For each wireless InterMTA study performed by VPS in the state of South Dakota, provide unredacted copies of the following:

Objection: This Interrogatory is beyond the scope of the limited purpose of these discovery requests. In the original expert report provided by Larry Thompson, Mr. Thompson stated that VPS performed InterMTA studies. Therefore, this Interrogatory does not request information relative to new information provided in the revised report.

(a) The completed study as presented to the client (i.e., Analysis Summary & Results marked as Exhibit 5 to Thompson Report or similar documents);

Objection: Defendant and Intervenors further object because the information requested seeks proprietary and competitive information that is highly confidential. VPS has executed confidentiality agreements with each of its clients which prohibits VPS from releasing the requested information. In addition, the study includes confidential and proprietary information that is highly confidential as it relates to another wireless carrier that is not party to this proceeding and VPS does not have authority to release this information.

Response: Without waiving any Objections, the results presented by VPS to their clients are consistent with the results presented in Exhibit Q11a and Q11b1 previously provided. Exhibit 5 of the Thompson Report was delivered specifically to be an attachment to the Thompson Report, studies such as this were not provided to any client upon completion of an InterMTA study.

(b) Copies of any additional documents and/or exhibits accompanying the study.

Objection: Defendant and Intervenors further object because the information requested seeks proprietary and competitive information that is highly confidential. VPS has executed confidentiality agreements with each of its clients which prohibits VPS from releasing the requested information. In addition, the study includes confidential and proprietary information that is highly confidential as it relates to another wireless carrier

that is not party to this proceeding and VPS does not have authority to release this information.

(c) All correspondence, draft reports, and other documents (excepting call record data) exchanged between VPS and its client which relate to the study.

Objection: Defendant and Intervenors further object because the information requested seeks proprietary and competitive information that is highly confidential and unduly burdensome. VPS has executed confidentiality agreements with each of its clients which prohibits VPS from releasing the requested information. In addition, the study includes confidential and proprietary information that is highly confidential as it relates to another wireless carrier that is not party to this proceeding and VPS does not have authority to release this information.

Response: Without waiving any Objections, please see Exhibit Q11b2 and response to Document Request 9(a). In addition, please see Exhibit RFP 9c1.

10. Provide all studies on which Mr. Thompson relies to support the statement "VPS has found that phantom traffic could be as high 15% of the total traffic studied".

Response: Without waiving any Objections, there have been many industry publications regarding the quantity of Phantom Traffic effecting telephone carriers. Provided as Exhibits RFP 10a through 10f are five documents quantifying phantom traffic percentages. Below is a list of the highlights from each article of the RFP 10a through 10f exhibits.

- Michael J. Balhoff and Robert C. Rowe (Balhoff & Rowe, LLC), "Phantom Traffic: Problem and Solutions" (May 2005), 8-9 – as stated, "20%-30%"
- Bob Schoonmaker (GVNW Consulting), "The Missouri Experience", (April 7, 2004), 15 – as stated, "10-15% phantom traffic has reduced to 4-6%"
- Jason Meyers, *Telephony's Technology Update,* "Editor's Perspective, Revenue Recovery", (April 20, 2005), 5 – as stated at the end of the third paragraph, "Using an application from Tekelec, the company found it wasn't able to bill more than 50% of the traffic coming in, largely due to labeling errors by the originating carrier."
- Craig Bellinghausen (Verizon), "Phantom Traffic, Pennsylvania Telephone Association & New York State Telecommunications Association", (September 24, 2004), 5 – as stated, "Phantom Calls Terminating on Verizon's network is in the 12% to 15% range."
- Susana Schwartz, *Billing World and OSS Today*, "Phantom Traffic: Identifiable but Not Billable", (July 2005), 1 – as stated in the

third paragraph, "All that is known is that as much as 20 to 30 percent of terminating traffic is unbillable – a problem that is expected to get even worse with growing VoIP and wireless traffic."

- NECA Access, "Phantom traffic, A real problem requiring a real solution", (January/February, 2007), 1 & 4 – as stated in the second paragraph, "Rural company revenue losses annually stand somewhere between 10 and 15 percent."

11. Provide any documents referred to in your responses to the above interrogatory requests.

Response: Without waiving any Objections, with the exception of confidential information, all documents referred to in the responses to the above interrogatory requests have been provided.

Dated this 16th day of March, 2007.

RITER, ROGERS, WATTIER & BROWN, LLP

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ATTORNEYS FOR INTERVENORS
AND DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Responses to Plaintiffs' Third Set of Interrogatories and Second Set of Requests for Production of Documents was served via the method(s) indicated below, on the 16th day of March, 2007 addressed to:

Rolayne Ailts Wiest, General Counsel	( )	First Class Mail
South Dakota Public Utilities Commission	( )	Hand Delivery
500 East Capitol Avenue	( )	Facsimile
Pierre, South Dakota 57501	( )	Overnight Delivery
	(X)	E-Mail
Richard D. Coit	( )	First Class Mail
South Dakota Telecommunications Ass'n	( )	Hand Delivery
P. O. Box 57	( )	Facsimile
Pierre, SD 57501	( )	Overnight Delivery
	(X)	E-Mail
Gene N. Lebrun	( )	First Class Mail
Craig A. Pfeifle	( )	Hand Delivery
Lynn, Jackson, Shultz & LeBrun	( )	Facsimile
P. O. Box 8250	( )	Overnight Delivery
Rapid City, SD 57709	(X)	E-Mail
Philip R. Schenkenberg	( )	First Class Mail
David C. McDonald	( )	Hand Delivery
Briggs and Morgan, P.A.	( )	Facsimile
2200 IDS Center	( )	Overnight Delivery
80 South Eighth Street	(X)	E-Mail
Minneapolis, MN 55402		

Margo D. Northrup

Margo D. Northrup

Westlaw.
Not Reported in F.Supp.2d
Not Reported in F.Supp.2d, 2005 WL 2897045 (D.S.D.)
(Cite as: Not Reported in F.Supp.2d)

S & S Communications v. Local Exchange Carriers Ass'n.
D.S.D,2005.
Only the Westlaw citation is currently available.
United States District Court,D. South Dakota, Northern Division.
S & S COMMUNICATIONS, Plaintiff,
v.
LOCAL EXCHANGE CARRIERS ASSOCIATION, Inc., et al., Defendants.
No. Civ 02-1028.

Nov. 3, 2005.

John William Burke, Barker, Wilson, Reynolds & Burke, LLP, Belle Fourche, SD, for Plaintiff.
Darla Pollman Rogers, Riter, Rogers, Wattier & Brown, LLP, Pierre, SD, David U. Fierst, Stein, Mitchell & Mezines, LLP, Washington, DC, for Defendants.

OPINION AND ORDER ON DEFENDANTS' MOTION TO STRIKE
KORNMANN, J.

INTRODUCTION

*1 Plaintiff filed this action against the Local Exchange Carriers Association, Express Communications, and 28 member rural local telephone exchange carriers. Plaintiff claims that the individual local telephone carriers, acting on their own and through the two entities, conspired to monopolize the long distance carrier market through predatory price fixing, amounting to a restraint of trade, resulting in the limitation and elimination of plaintiff's ability to offer intrastate long distance services in South Dakota.

Defendants filed a motion (Doc. 143) to strike plaintiff's expert disclosures, precluding plaintiffs from offering any expert testimony at trial from Porter Childers or Dr. Mark Meitzen.[FN1] Alternatively, defendants request a *Daubert* hearing on Childers' qualifications to testify as to economic or anti-trust expertise. Defendants have filed a motion (Doc. 162) to supplement the record with excerpts from Childers' deposition transcript in support of their contention that Childers is not qualified to testify in those areas. Finally, defendants submit that Dr. Meitzen should be barred from testifying based upon the irrelevance of his opinions to the issues in this case.

FN1. Defendants contend in a separate motion that, failing the admissibility of the plaintiff's experts' testimony on material issues requiring expert testimony, defendants are entitled to summary judgment.

BACKGROUND

The Court's first Rule 16 scheduling order (Doc. 72) required the plaintiff to disclose its expert reports pursuant to Fed.R.Civ.P. 26(a)(2) by April 1, 2004. Two weeks prior to that date the plaintiff requested an extension of the deadline due to the delay in obtaining necessary documents from the defendants. The second Rule 16 scheduling order (Doc. 75) required the plaintiff to disclose its expert reports by July 1, 2004. One week prior to that date plaintiff again moved for an extension of the deadline on the same basis as previously requested. The new Rule 16 scheduling order (Doc. 88) required plaintiff to disclose its expert reports by October 1, 2004. Defendants' expert reports were required to be disclosed by December 1, 2004. Discovery continued between the parties and, on July 28, 2004, plaintiff filed a motion for a protective order. Defendants filed a cross-motion to compel discovery. On September 22, 2004, the plaintiff filed a motion to compel the defendants to make certain witnesses available for deposition and to extend the expert disclosure deadline pending resolution of the discovery disputes.

The disclosure deadline for all parties passed prior to this Court's ruling on the pending discovery disputes. The defendants, two days prior to the deadline for the disclosure of their responsive expert reports, filed a "designation of expert pursuant to F.R. ev. (sic) 26(a)(2)." The defendants designated Mark Shlanta "to present evidence pursuant to 702, 703, or 705 of the Federal Rules of Evidence." Defendants specifically reported that Mr. Shlanta is not a retained expert but instead an employee. The report set forth factual matters Mr. Shlanta was expected to testify about and also stated that, based upon the factual matters set forth, Mr. Shlanta would opine that the

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defendants are not charging each other rates below the applicable tariffs, that selling long distance service for less than the cost of switched access does not support the contention that defendants sold switched access below the applicable tariffs, that selling long distance service at rates below $.20/minute is not evidence of predatory pricing, and there is no danger of defendants achieving a monopoly. The defendants' designation did not comply with Fed.R.Civ.P. 26(a)(2) but defendants contend (1) they had no obligation to file their expert designation until plaintiff did so and (2) Rule 26(a)(2) does not apply to Mr. Shlanta because he is not a "retained" expert but instead a fact expert. If the opinions, at least in part, set forth above are "facts," there must be something not readily apparent to the court.

*2 The discovery disputes were resolved by this Court on January 3, 2005. The parties stipulated to new deadlines and another amended Rule 16 scheduling order (Doc. 134) issued requiring plaintiff to disclose its expert reports by June 13, 2005. Plaintiff served its expert disclosures on June 13, 2005, and defendants thereafter moved to strike the reports for failure to comply with Fed.R.Civ.P. 26(a)(2).

DISCUSSION

Rule 26(a)(2) provides, in part, that
(A) ... a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence [experts].
(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties an an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Clearly, plaintiff is required by the Rules of Civil Procedure to have its experts prepare and sign a written report (1) setting forth the expert's opinions, (2) setting forth the basis and reasons for the opinions, (3) setting forth the data or other information considered by the witness in forming the opinions, and (4) any exhibits which will be used to support or summarize the expert's opinions. (This is in contrast to the pre-1993 amendments practice of sandbagging your opponent by directing your expert to provide only an oral report so none need be provided in response to discovery requests.) No written report accompanied plaintiff's disclosure in this case. Plaintiff's counsel did disclose the experts' curriculum vitae, a list of publications, the witnesses' compensation, and the prior cases in which the witnesses had testified. However, the explanation of the factual matters and opinions held by the expert were set forth by plaintiff's attorney.

The disclosures made by plaintiff constitute "bare-bones" expert reports at best. Following the filing of the defendants' motion to strike, plaintiff filed affidavits by both of its witnesses setting forth that the experts hold all of the opinions attributed to them in the attorney's expert disclosure, that the opinions are based upon the witnesses' education, training, and experience, and after review of a voluminous number of documents produced during discovery. The only redeeming matter in the affidavits is that they, unlike the Rule 26(a)(2) disclosure, were signed by the experts. Neither the report filed by plaintiff nor the affidavits subsequently signed by the plaintiff's proposed experts comply with Fed.R.Civ.P. 26(a)(2).

*3 Plaintiff admits that it did not submit any expert reports but contends that defendants earlier submitted an equally deficient report. Defendants were under no obligation to submit a Rule 26(a)(2) report until after plaintiff submitted a report.

Plaintiff contends that defendants filed the motion to strike in violation of Fed.R.Civ.P. 37(a)(2)(A) and D.S.D. LR 37.1. The motion was also filed in violation of the Court's standard operating procedures. Defendants contend that any attempt to resolve the discovery controversy informally would have been futile, as evidenced by plaintiff's failure to remedy the deficiency in its expert disclosures. The motion was indeed made in violation of the rules.

Fed.R.Civ.P. 37(c)(1) provides, in pertinent part, that "[a] party that without substantial justification fails to

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disclose information required by Rule 26(a) ... is not, unless such failure is harmless, permitted to use as evidence" the information that was not disclosed. By its own clear language, for preclusion to apply, the failure to disclose must be both without "substantial justification" and not "harmless." *See Doblar v. Unverferth Manufacturing Co.*, 185 F.R.D. 258, 261 (D.S.D.1999) (stating that, under Rule 37(c), the court must "first consider whether the plaintiff has established substantial justification" for its failure and then determine "whether the failure to disclose was harmless").

In determining whether plaintiff can meet its burden of substantial justification, the court is mindful that this is a case of "bare-bones" disclosure, rather than complete non-disclosure. In assessing substantial justification and harm under Rule 37(c), courts have developed a four part test. *See Transclean Corp. v. Bridgewood Services, Inc.*, 77 F.Supp.2d 1045, 1063 (D.Minn.1999) (adapting the Eighth Circuit's four part test of analysis for the preclusion of fact witness testimony in *Citizens Bank v. Ford Motor Co.*, 16 F.3d 965, 966 (8th Cir.1994), to the Rule 37(c) and Rule 16(f) context), *affirmed in relevant part by Transclean Corp. v. Bridgewood Services. Inc.*, 290 F.3d 1364 (8th Cir.2002). I have used that test in *McCauley v. United States,* CIV 00-3019 (October 23, 2001, opinion), a case involving both late disclosure and an "anemic" expert report. In using that test, a court is to consider (1) the importance of the excluded testimony; (2) the explanation of the party for its failure to comply with the required disclosure; (3) the potential prejudice that would arise from allowing the testimony; and (4) the availability of a continuance to cure such prejudice. *Transclean*, 77 F.Supp.2d at 1063. The court, after reviewing those factors, believes that plaintiff's experts should not be precluded from testifying under Rule 37(c).

With respect to the first factor, the court notes that the experts whose testimony would be excluded are central to the plaintiff's case. In fact, defendants rely upon the exclusion of plaintiff's experts as a basis for an accompanying summary judgment motion. There is a strong policy "favoring a trial on the merits and against depriving a party of his day in court." *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989, 996 (8th Cir.1975). The "opportunity to be heard is a litigant's most precious right and should be sparingly denied." *Chrysler Corp. v. Carey*, 186 F.3d 1016, 1020 (8th Cir.1999) (quoting *Edgar v. Slaughter*, 548 F.2d 770, 773 (8th Cir.1977)). This important policy is reflected in the "distinct aversion" that courts have developed to the exclusion of important testimony absent evidence of extreme neglect or bad faith. *See In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 791-92 (3rd Cir.1994). As one commentator has concluded, "many judges are reluctant to exclude evidence that is important to the merits of the case without a showing of substantial and largely irremedial prejudice, as well as bad faith, willfulness or substantial fault." *Moore's Federal Practice,* § 37.60(2)(b) (Matthew Bender 3d ed.). The first factor favors the plaintiff.

*4 As to the second factor, the only justification given by plaintiff is the nature of the so-called expert designation made by defendants. Defendants were under no obligation to make a Rule 26(a)(2) disclosure and contend that their pleading is not an expert disclosure within the rule. This factor clearly does not fall in favor of plaintiff. Plaintiff still has not filed expert reports that comply with the rule.

The third factor requires the court to consider the potential prejudice to the defendants if the experts are allowed to testify. This factor falls in plaintiff's favor. A trial date has not yet been set in this case. The drastic sanction of preclusion should only be used in cases where the late disclosure occurs at the "eleventh hour" on the eve of trial. *See Transclean,* 101 F.Supp.2d at 796 (finding prejudice where the disclosure was made less than a week before trial was set to begin). Apparently both experts have been deposed. The basis, or lack thereof, for any expert opinions they hold has been discovered. Accordingly, the fourth factor does not even apply because no continuance of trial is necessary here.

The Eighth Circuit has cautioned:
"Discovery of expert opinion must not be allowed to degenerate into a game of evasion." *Voegeli v. Lewis*, 568 F.2d 89, 97 (8th Cir.1977). "[T]he purpose of our modern discovery procedure is to narrow the issues, to eliminate surprise, and to achieve substantial justice." *Mawby v. United States*, 999 F.2d 1252, 1254 (8th Cir.1993) (*quoting Greyhound Lines, Inc. v. Miller*, 402 F.2d 134, 143 (8th Cir.1968)).

Tenbarge v. Ames Taping Tool Systems, Inc., 190 F.3d 862, 865 (8th Cir.1999). Rule 26(a)(2), in conjunction with the Court's Rule 16 scheduling order, is essential to the judicial management of the case. *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 284 (8th Cir.1995). Courts do not enter scheduling orders "merely to create paperwork for the court's staff." *Rice v. Barnes*, 201 F.R.D. 549, 551 (M.D.Ala.2001). To the contrary, such orders provide a specific time frame enabling counsel to

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ensure "the expeditious and sound management of the preparation of cases for trial." *Id.* Court dockets are "simply too crowded for parties to treat scheduling orders as optional and to submit required court filings at their own conveniences." *Id.* quoting *Robson v. Hallenbeck*, 81 F.3d 1, 4 (1st Cir.1996). That is especially true in this court where the docket is primarily comprised of criminal cases, requiring the court to adhere to the strict timing requirements of the Federal Rules of Criminal Procedure and the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, effectively denying this court the docket flexibility enjoyed by other district courts in attending to their civil cases. Discovery disputes in this case have taken an inordinate amount of time. The court takes a dim view of what has transpired in this case to date. This case is already three years old.

*5 Plaintiff's expert disclosures failed to comply with either the letter or the spirit of Rule 26(a)(2). Plaintiff has not set forth any justification, let alone substantial justification. However, it appears that the only prejudice the defendants have incurred is frustration and delay. While the court frowns on parties causing needless frustration and casts a skeptical eye on the actions of counsel for plaintiff, this is not a case where the court will impute the sins of counsel to the client, as we are not yet on the very eve of trial. Thus, the court will not preclude plaintiff's experts from testifying at trial as a Rule 37(c) sanction.

The defendants contend that they have no obligation as to Mr. Shlanta to furnish a report meeting all the requirements of Rule 26(a)(2) because he is not retained or specially employed to provide expert testimony and his duties as an employee do not regularly involve giving expert testimony. Technically, this is correct. This court, however, does not permit trial by ambush by either side. The rule also provides that the court may otherwise direct disclosure. That is appropriate here and I do so direct. The report from Mr. Shlanta is deficient and clearly not in compliance with the rule. Defendants will be directed to remedy such problems by full compliance with the rule's disclosure requirements.

Further observations are appropriate. This is not a consumer lawsuit or a class action lawsuit on behalf of telecommunications users. No expert will be lecturing the jury on what the law is or the reasons for any such law's existence. I fully realize that the "ultimate issue rule" is no longer in force. However, I do not permit experts to "get into the jury box" or take over the obligations of the court to instruct the jury as to what principles of law are applicable and how they apply to the case at hand. I agree with the contentions of defendants that an expert cannot escape the requirements of the rule by contending that the documents in the lawsuit are voluminous. The opposing party is entitled to know the exact documents being used by the expert in forming his or her opinion. There is also no doubt that general conclusions in the expert's report are not sufficient. To state that the expert will express an opinion on some subject is never sufficient in itself.

ORDER

Now, therefore,

IT IS ORDERED:

1. Defendants' motion (Doc. 143) to strike expert summaries is denied.

2. Defendants' request for a *Daubert* hearing is denied, without prejudice.

3. Defendants' motion (Doc. 162) to supplement the record is granted.

4. All parties shall immediately fully comply with the requirements of Rule 26(a)(2) and the provisions of this opinion and order.

5. Any further violations of rules will result in monetary and other sanctions.

D.S.D,2005.
S & S Communications v. Local Exchange Carriers Ass'n.
Not Reported in F.Supp.2d, 2005 WL 2897045 (D.S.D.)

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Slip Copy, 2006 WL 3042793 (D.S.D.), 71 Fed. R. Evid. Serv. 724, Prod.Liab.Rep. (CCH) P 17,583
(Cite as: Slip Copy)

Sheesley v. Cessna Aircraft Co.
D.S.D.,2006.

United States District Court,D. South Dakota,Southern Division.
Stacie A. SHEESLEY, as personal representative of Shane D. Sheesley, deceased; and Deeann Vermeulen, as personal representative of Thomas J. Vermeulen, deceased, Plaintiffs,
v.
The CESSNA AIRCRAFT COMPANY, Defendant and Third-Party Plaintiff,
andRAM Aircraft Corporation and John Does 1 through 10 Inclusive, Defendants,
andCapital City Air Carrier, Inc., Third-Party Defendant.
Great Western Bank, as Personal Representative of the Estate of Robert Bielstein, Plaintiff,
v.
The Cessna Aircraft Company, Defendant and Third-Party Plaintiff,
andRAM Aircraft Corporation and John Does 1 through 10 Inclusive, Defendants,
andCapital City Air Carrier, Inc., Third-Party Defendant.
Stacie A. Sheesley, as personal representative of Shane D. Sheesley, deceased; Deeann Vermeulen, as personal representative of Thomas J. Vermeulen, deceased; and Great Western Bank, as personal representative of the estate of Robert Bielstein, Plaintiffs,
v.
FlightSafety International, Inc., a New York corporation, Defendant and Third-Party Plaintiff,
andRAM Aircraft Corporation and Capital City Air Carrier, Inc., Third-Party Defendants.
Civ. Nos. 02-4185-KES, 03-5011-KES, 03-5063-KES.

Oct. 24, 2006.

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Charles M. Thompson, May, Adam, Gerdes & Thompson, Pierre, SD, Timothy R. Schupp, Flynn Gaskins Bennett, Minneapolis, MN, for Third-Party Defendants.

ORDER REGARDING MOTIONS IN LIMINE
KAREN E. SCHREIER, Chief Judge.
*1 This case arises out of an airplane crash that occurred on August 23, 2000, that killed Shane Sheesley, Thomas Vermeulen, and Robert Bielstein (collectively referred to as plaintiffs). Plaintiffs filed suit against Cessna Aircraft Company (Cessna) and FlightSafety International, Inc. (FlightSafety). The trial is scheduled to begin on October 31, 2006. During the pretrial conference, the court reserved ruling on the following pending motions in limine:

Plaintiffs' motion in limine to preclude reference to Donald E. Sommer's settlement agreement with FAA (Docket 475)

Plaintiffs' oral motion to strike Ronald E. Smith's expert report dated August 28, 2006

Great Western Bank's motion in limine to exclude reference to Sean Bielstein's alleged use of illegal substances (Docket 483)

Cessna's motion in limine (GARA) (Docket 454)

Cessna's motion in limine to exclude evidence of other litigation (Docket 490)

Cessna's motion in limine (other incidents) (Docket 488)

Cessna's motion in limine (Richard McSwain) (Docket 486)

Cessna's oral motion to strike Donald Frankenfeld's supplemental report

I. Donald Sommer's Settlement Agreement with FAA

Plaintiffs move in limine to prevent defendants from cross-examining Donald E. Sommer regarding

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Sommer's settlement agreement with the Federal Aviation Administration (FAA). FlightSafety opposes the motion.

In 1987, the FAA commenced a certificate action against Sommer for alleged violations of federal aviation regulations. Sommer's inspection authorization certificate (IA) was initially revoked. Sommer appealed to an ALJ, who affirmed the revocation of Sommer's IA. Sommer ultimately appealed the ALJ's decision to the full National Transportation Safety Board (NTSB). The NTSB reversed the ALJ's decision and remanded in light of an evidentiary error. In 1991, pending remand, Sommer entered into a consent decree with the FAA, whereby Sommer admitted to violating federal aviation regulations by signing off on an aircraft as airworthy before guaranteeing that the aircraft's file contained all the necessary documentation. As a result of this agreement, Sommer's IA was suspended for ninety days. (Docket 476-2).

Plaintiffs argue that this evidence is inadmissible because it is not proper impeachment evidence under either Fed.R.Evid. 609 or 608. Rule 609 governs the admissibility of a witness's conviction of a crime to impeach the witness's credibility. The FAA's suspension of Sommer's IA, however, does not appear to be a criminal conviction. *See* 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6133, at 208 (1993) (stating that Rule 609 does not govern judgments in administrative proceedings). Even if this is a criminal conviction, there is no evidence that it is either a crime punishable by more than one year of imprisonment or a crime of dishonesty. Thus, the evidence is inadmissible under Rule 609(a). Further, the suspension of Sommer's IA occurred over ten years ago, which creates a rebuttable presumption against admissibility. *See* Fed.R.Evid. 609(b); *United States v. Keene*, 915 F.2d 1164, 1169 (8th Cir.1990). Evidence of a remote criminal conviction is only admissible if "the probative value of the conviction supported by specific facts and circumstances substantially outweigh its prejudicial effect." Fed.R.Evid. 609(b). Here, the court finds that Sommer's concession over fifteen years ago that he failed to verify whether an airplane's file was complete before Sommer concluded that the airplane was airworthy has virtually no probative value. As a result, the court finds that this evidence is not admissible under Rule 609.

*2 Nor is the evidence admissible under Rule 608, which governs the admissibility of specific acts by a witness to impeach the witness's credibility. Although Rule 608(b) generally prohibits introduction of extrinsic evidence of a witness's acts to impeach the witness, the rule permits the court, in its discretion, to allow cross-examination of the witness "regarding specific instances of a witness's own conduct if the past experiences are probative of a character for untruthfulness." *United States v. Beal*, 430 F.3d 950,956 (8th Cir.2005). Sommer's consent decree, however, is not probative of his character for truthfulness because nothing surrounding the facts of the consent decree indicate that Sommer is an untruthful person. *See United States v. Honken*, 378 F.Supp.2d 970, 983 (N.D.Iowa 2004); *see also* Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6118 (1993) (suggesting that Rule 608(b) only applies to conduct that raises questions about the witness's veracity or honesty). Further, even if the evidence is probative of Sommer's character for truthfulness, the court would not exercise its discretion to permit cross-examination on this issue because the consent decree is so remote in time that it has minimal, if any, probative value. *See Tracy v. Roper*, No. 4:04CV1104CEJ/MLM, 2005 WL 1703160, at *15 (E.D.Mo. July 20, 2005) (stating that trial courts have substantial discretion to exclude evidence under Rule 608(b) that is remote in time). Moreover, the Honorable David G. Larimer, United States District Judge for the Western District of New York, also concluded that Sommer's consent agreement with the FAA was not admissible under Rule 608. (Docket 476-2). The court concurs with Judge Larimer's reasoning and adopts it here.

FlightSafety argues that it can cross-examine Sommer regarding the consent decree because it affects his credentials as an expert. Even assuming, without deciding, that this does not violate Rule 608, the court prohibits cross-examination based on Fed.R.Evid. 403. Rule 403 permits the court to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." Under Rule 403, the court balances the probative value of the proffered evidence against the risk of unfair prejudice. *See United States v. Johnson*, 463 F.3d 803, 809 (8th Cir.2006). In determining the probative value of proffered evidence, the court should determine whether alternative evidence has "equal or greater probative value and poses a lower risk of unfair prejudice." *United States v. Sewell*, 457 F.3d 841, 844 (8th Cir.2006). Evidence is unfairly

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prejudicial when it would cause the jury to decide issues on an impermissible basis. *See* Cummings v. Malone, 995 F.2d 817, 824 (8th Cir.1993). "Generally, the balance of Rule 403 weighing should be struck in favor of admission." *Smith v. Tenet Healthsystem SL, Inc.*, 436 F.3d 879, 885 (8th Cir.2006).

*3 As noted above, the court finds that Sommer's settlement agreement with the FAA is so remote in time that it has little, if any, probative value. Additionally, the court finds that permitting inquiry into this issue will create an unnecessary mini-trial regarding what rules Sommer was charged with violating, what rules he in fact admitted to violating, and why he conceded to violating those rules. Thus, the court excludes the evidence because it finds its probative value is substantially outweighed by the risk of wasting time. *See* United States v. Milk, 447 F.3d 593, 600 (8th Cir.2006).

II. Ronald E. Smith

During the pretrial conference, plaintiffs orally moved to strike Ronald Smith's expert report dated August 28, 2006 (2006 Report). Plaintiffs argue that the 2006 Report is untimely because it discloses new opinions after the court's deadline for disclosure of expert testimony. Cessna opposes the motion and argues that the 2006 Report is a timely supplemental report.

Fed.R.Civ.P. 26(a)(2) governs the mandatory disclosure of expert testimony. According to Rule 26(a)(2)(A), "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Rule 26(a)(2)(B) provides that the disclosure of all retained experts shall be in the form of a written report signed by the witness. Among other things, the written report "shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor [and] the data or other information considered by the witness in forming the opinions." Unless modified by a court order, plaintiffs are obligated to disclose their retained experts' reports 90 days before trial, or 30 days before trial if the evidence is offered solely to rebut expert testimony of another party. *See* Fed.R.Civ.P. 26(a)(2)(C).

Here, the court's scheduling order required Cessna to disclose its expert reports by November 22, 2004. (Docket 144). The 2006 Report was not disclosed until August 28, 2006. Therefore, the report is untimely unless it qualifies as a Rule 26(e) supplemental report.

Rule 26(e) obligates parties to supplement previously disclosed reports "if the party learns that in some material respect the information disclosed is incomplete or incorrect...." At least in the expert testimony context, this duty to supplement applies to information previously disclosed in either the expert's report or the expert's deposition. *See* Fed.R.Civ.P. 26(e)(1). Rule 26(e) does not, however, "license parties to freely circumvent deadlines" for initial expert disclosures. *Bowman v. Hawkins*, No. Civ.A. 04-00370-CG-B, 2005 WL 1527677, at *2 (S.D. Ala. June 28, 2005). The purpose of supplemental reports is to supplement the experts' opinion in their initial report, not "to provide an extension of the deadline by which a party must deliver the lion's share of its expert information." *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 572 (5th Cir.1996). Rule 26(e) "permits supplemental reports only for the narrow purpose of correcting inaccuracies or adding information that was not available at the time of the initial report." *Minebea Co. v. Papst*, 231 F .R.D. 3, 6 (D.D.C.2005). If disclosed after the deadline for Rule 26(a)(2) disclosures, any wholly new opinions contained in a revised expert report are subject to the sanctions imposed by Rule 37(c). *See* Transclean Corp. v. Bridgewood Servs., Inc., 101 F.Supp.2d 788, 795-96 (D.Minn.2000); *see also* Trilogy Commc'ns, Inc. v. Times Fiber Commc'ns, 109 F.3d 739, 744 (Fed.Cir.1997).

*4 The court finds that Smith's 2006 Report contains new opinions, and thus, does not qualify as a supplemental report. The 2006 Report focuses entirely on the regulatory requirements and standard of care attributable to an FAA certified aviation mechanic. (Docket 532-3). Smith's original report does not discuss the standards imposed on aviation mechanics. Instead, the original report discusses the events leading up to the crash and opines that the crash was caused by pilot error. The only mention of maintenance in the original report is when Smith provides a brief, three-page list of the maintenance history of the aircraft that crashed in this case. The 2006 Report provides more detailed discussion of maintenance that spans 12 pages. Additionally, the 2006 Report focuses on generalized standards of care and educational requirements imposed on all FAA certified aviation mechanics. The 2006 Report does not discuss maintenance that was specifically performed on the accident aircraft.

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Because the 2006 Report does not qualify as a supplemental report, it is untimely. Untimely disclosure of an expert opinion triggers Rule 37(c)(1) sanctions, including the exclusion at trial testimony on undisclosed opinions. *See* Fed.R.Civ.P. 37(e)(1); *see also Tenbarge v. Ames Taping Tool Sys., Inc.*, 190 F.3d 862, 865 (8th Cir.1999). "While sanctions under Rule 37(c)(1) are mandatory ... exclusion of evidence should not apply if the offending party's failure was substantially justified or if the failure was harmless." *Transclean Corp.*, 101 F.Supp.2d at 795 (internal quotation omitted). Four factors determine whether exclusion is the proper sanction for undisclosed expert testimony: (1) the importance of the excluded expert testimony; (2) the party's explanation for failure to disclose; (3) the potential prejudice created by permitting use of the expert testimony at trial or on a pending motion; and (4) the ability to cure any prejudice by granting a continuance. *See id.; see also Citizens Bank of Batesville, Ark. v. Ford Motor Co.*, 16 F.3d 965, 966 (8th Cir.1994) (using four factors to determine whether the trial court can exclude witnesses not disclosed in compliance with the pretrial order). The trial court has great discretion in determining whether to strike expert testimony that is either undisclosed or disclosed in contravention of the court's scheduling orders. *See Sylla-Sawdon v. Uniroyal Goodrich Tire Co.*, 47 F.3d 277, 285 (8th Cir.1995).

As to the first factor, the court finds that Smith's testimony regarding information contained in the 2006 Report is not particularly important. This report is being created to rebut two assertions made by Donald Sommer, one of plaintiffs' experts: "(1) that FAA certified mechanics have little knowledge and training concerning the maintenance and operation of aircraft exhaust systems, and (2), that special training is required to inspect Cessna 340A exhaust system." (Docket 532-2, at 2). The majority of Smith's response, however, is a simple recitation of the federal regulations governing FAA certified aviation mechanics. Rather than have Smith opine on these regulations, Cessna can merely cross-examine Sommer on how the regulations affect FAA certified mechanics. Additionally, the court can take judicial notice of federal regulations. *See Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir.2003); *Holst v. Countryside Enters., Inc.*, 14 F.3d 1319, 1322 n. 4 (8th Cir.1994).

*5 Regarding the second factor, the court finds that Cessna has not offered a legitimate explanation for the late disclosure of the expert report. Smith's 2006 Report purports to rebut statements made in Sommer's second deposition. Sommers was deposed in July of 2005. Smith's 2006 Report was not disclosed until August of 2006. Cessna provides no just reason for waiting until over a year after Sommer's deposition to disclose this opinion.

Third, the court finds that plaintiffs are prejudiced by the late disclosure of Smith's 2006 Report because they have not been able to depose Smith regarding the new opinions. Finally, the court finds that this prejudice cannot be alleviated by granting a continuance because trial is scheduled to commence in a week. Additionally, a continuance would be inappropriate because this case has been pending for four years.

In sum, the court finds that Smith's 2006 Report is untimely. Additionally, the court finds that Cessna's failure to disclose the 2006 Report in a timely manner is neither harmless nor substantially justified. Thus, Smith is prohibited from testifying about opinions that were not included in his original report.

III. Sean Bielstein's Use of Illegal Substances

Great Western Bank, as personal representative of Robert Bielstein, moves in limine to prevent defendants from cross-examining Sean Bielstein regarding his history of substance abuse. Great Western Bank argues that the evidence should be excluded under Fed.R.Evid. 403 because the probative value of this evidence is substantially outweighed by the risk of unfair prejudice. Cessna opposes the motion.

As noted above, Rule 403 permits the court to exclude relevant evidence when its probative value is substantially outweighed by the risk of unfair prejudice. Cessna argues that evidence of Sean Bielstein's substance abuse is probative on the amount of wrongful death damages he can recover as a result of the death of his father, Robert Bielstein. According to SDCL 21-5-7, beneficiaries in a wrongful death action may recover damages "proportionate to the pecuniary injury" resulting from the death. Pecuniary injury includes "loss of companionship and society as expressed by, but not limited to, the words 'advice,' 'assistance' and 'protection,' without consideration for the survivors' grief and mental anguish." *Flagtwet v. Smith*, 393 N.W.2d 452, 454 (S.D.1986); *see also Welch v. Haase*, 672 N.W.2d 689, 698 (S.D.2003). Cessna argues that Sean Bielstein's substance abuse problem

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is relevant to show how much time he would have spent with his father, and thus, how much advice, assistance, and protection he lost as a result of the death.

The court concludes, however, that this evidence's probative value is substantially outweighed by the risk of unfair prejudice. The court acknowledges that the amount of time Sean Bielstein spent with his father before his father's death is probative on the amount of wrongful death damages. *See* Flagtwet, 393 N.W.2d at 455-56 (discussing the time and activities the decedent spent with his children in calculating wrongful death damages). Cessna has not offered evidence, however, on how Sean Bielstein's substance abuse affected his relationship with his father. The court does not know how much time Sean spent with his father, or how often he was gone. The court does not know whether Sean Bielstein still has a substance abuse problem, or whether he is now sober. The court does not even know what substances Sean Bielstein allegedly abused. Thus, based on the evidence disclosed to the court, the court finds that the evidence of Sean Bielstein's substance abuse has minimal probative value.

*6 The evidence does present a substantial risk of unfair prejudice, however. *See Cummings*, 995 F.2d at 824 (defining unfair prejudice). The court finds that there is a substantial risk that the jury will conclude that Sean Bielstein's substance abuse makes him a bad or unworthy person, and based on this impermissible consideration, refuse to award the appropriate amount of damages. *See Shawhan v. Polk County*, 420 N.W.2d 808, 810 (Iowa 1988) (discussing unfair prejudice associated with admitting evidence of past drug use); *see also Simco v. Ellis*, 222 F.Supp.2d 1139, 1141 (W.D.Ark.2000).

Further, the court notes that defendants have an evidentiary alternative that is just as probative without raising the same risk of unfair prejudice. Defendants can simply cross-examine Sean Bielstein about his relationship with his father and the amount of time they spent together. By doing so, defendants could reveal if Sean Bielstein and his father did not get along without delving into what caused that relationship to deteriorate, such as substance abuse.

In sum, the court finds that the probative value of the evidence of Sean Bielstein's alleged substance abuse is substantially outweighed by the risk of unfair prejudice. The court thus bars cross-examination of Sean Bielstein on this issue.

IV. GARA

Cessna moves in limine to exclude evidence of any defect in any component, system, subassembly, or part of the accident aircraft except the left wastegate elbow. Specifically, Cessna seeks to prevent plaintiffs from presenting evidence suggesting that either the aircraft's exhaust system or fuel system were defectively designed. Cessna contends that the statute of repose contained in the General Aviation Revitalization Act of 1994 (GARA), Pub.L. No. 103-298, 108 Stat. 1552, bars a cause of action for defective design of both the exhaust and fuel systems.

In 1994, Congress adopted GARA to revitalize the general aviation industry. *Wright v. Bond-Air, Ltd.*, 930 F.Supp. 300, 303 (E.D.Mich.1996). In relevant part, GARA provides an 18-year statute of repose applicable to a products liability action asserted against the manufacturer of either a general aviation aircraft or a part contained therein. *See* GARA, § 2. GARA also includes a "rolling provision," which restarts the repose period "with respect to any new component, system, subassembly, or other part which replaced another component system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused such death, injury, or damage...." GARA, § 2(a)(2).

It is undisputed that the left wastegate elbow was replaced in 1986. Because this was within 18 years of the accident, the replacement of the wastegate elbow rolled the statute of repose for a civil action based upon a defect in the wastegate elbow. *See* GARA, § 2(a)(2). Therefore, plaintiffs can assert a cause of action for a defect in the left wastegate elbow. Defendants contend, however, that GARA bars plaintiffs from recovering for a defective design of either the exhaust system or the fuel system. Specifically, defendants argue that the replacement of the left wastegate elbow only rolled GARA's 18-year statute of repose for the wastegate elbow, not the exhaust system as a whole or the fuel system.

*7 The California Court of Appeals decided this issue in *Hiser v. Bell Helicopter Textron, Inc.*, 4 Cal.Rptr.3d 249 (Cal.Ct.App.2003). In *Hiser*, the plaintiff alleged that a helicopter crashed when the engines lost fuel supply because of a defective fuel system. The defendant argued that the claim was barred by GARA because the helicopter was more than 18 years old. In response, the plaintiff argued that the replacement of some of the components in the fuel system created "an entirely new fuel transfer

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system, thereby commencing a new 18-year limitation period with respect to defects in any element or component of the reconfigured *system.*" *Id.* at 650 (emphasis in original). Relying on GARA's plain language, the California Court of Appeals disagreed. The court concluded that the replacement of a part only rolls GARA's limitations period for defects in that specific part, and it "does not trigger a new limitation period under GARA with respect to defects in components of the system not replaced." *Id* . at 651. The repose period only rolls for the entire system if every part within that system is replaced. *See id.* at 650; *see also Hinkle v. Cessna Aircraft Co.*, No. 247099, 2004 WL 2413768, at *8 (Mich.Ct.App. Oct. 28, 2004) (unpublished) (noting that allowing a plaintiff to assert a claim against "any manufacturer of a part whenever a sub-part (that is the actual cause of the accident) was replaced or added to it, even if the original part was over eighteen years of age" would effectively disregard GARA's statute of repose), *appeal denied,* 703 N.W.2d 809 (Mich.2005).

Similarly, the Ninth Circuit in *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155 (9th Cir.2000), indicated that a revision to a component to a system does not roll the statute of repose for the entire system. In *Caldwell,* the plaintiff argued that a defective revision to a flight manual rolled GARA's 18-year repose period. Although it held that a revised manual provision could trigger a new 18-year limitation period, the Ninth Circuit cautioned that the revision must be to the specific portion of the training manual that caused the accident: "Just as the installation of a new rotor blade does not start the 18-year repose period anew for purposes of an action for damages due to a faulty fuel system, a revision to any part of the manual except that which describes the fuel system would be irrelevant here." *Id.* at 1158. By doing so, the court indicated that replacement of a single part (one section of the training manual) does not roll the 18-year repose period for the system of which that part is contained (the whole training manual).

The court agrees with both the California Court of Appeals in *Hiser* and the Ninth Circuit in *Caldwell* in concluding that replacement of the left wastegate elbow only rolled GARA's statute of repose for defects in the wastegate elbow. It did not restart the 18-year repose period for the exhaust system as a whole, which contains parts that were older than 18 years when the crash occurred. Similarly, replacement of the wastegate elbow did not roll GARA's statute of repose for the fuel system. As such, GARA bars plaintiff from recovering for defects in either the exhaust system or the fuel system.

***8** Because the plaintiff cannot recover for defectively designed exhaust or fuel systems, the court must determine whether evidence of these alleged defects is relevant. *See* Fed.R.Evid. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence"). The court finds that the evidence is not relevant to establish liability. As noted, GARA prevents holding Cessna liable for these alleged defects. Additionally, evidence of a defective design of the exhaust or fuel systems is not relevant to whether the left wastegate elbow was defective.

Plaintiffs argue that the evidence is relevant to prove causation. Plaintiffs suggest evidence of *defects* in the design of the exhaust system and fuel system is relevant to explain how the defective wastegate elbow caused the plane to crash. The court disagrees. Plaintiffs' theory of causation is that a crack occurred in the left wastegate elbow, which released super hot gases into the engine compartment. These gases then heated a firewall, which in turn heated fuel lines on the other side of the firewall. The fuel lines ultimately melted, thereby causing a loss of fuel to the left engine and the plane to crash. To prove causation, plaintiffs can present evidence that this chain of events occurred, and thus, the allegedly defective left wastegate elbow was a substantial factor in causing the crash. *See Therkildsen v. Fisher Beverage,* 545 N.W.2d 834, 837 (S.D.1996). Evidence that Cessna defectively designed either the exhaust or fuel systems does not make this chain of events more likely to occur, however. Instead, "design defect" is a legal term of art that triggers a manufacturer's liability for harm caused by a product with an unreasonably dangerous design. *See Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909, 911 (S.D.1987). Whether Cessna's design of the exhaust or fuel systems was unreasonably dangerous has no effect on whether this chain of events in fact occurred.

Further, even if evidence of defective design of the exhaust or fuel systems is relevant, the court still excludes the evidence under Fed.R.Evid. 403. Under Rule 403, the court balances the probative value of the proffered evidence against the risk of unfair prejudice. *See Johnson,* 463 F.3d at 809. As noted above, evidence of defective design of the exhaust or

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fuel systems has little, if any, probative value. Further, there is substantial risk of unfair prejudice. There is a substantial risk that the jury will impermissibly infer that the left wastegate elbow is defective because Cessna defectively designed other components. *See* Fed.R.Evid. 404(b); *see also Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1117 (8th Cir.1999) (acknowledging risk that prior bad acts "often invite jury to base its decision upon sheer hostility toward a party or upon the impermissible inference that the party acted in conformity with its prior misdeeds"). Further, permitting this evidence will result in an unnecessary mini-trial regarding whether in fact the designs of the exhaust and fuel system are defective. *See Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820, 834 (8th Cir.2005) (affirming exclusion under Rule 403 when admission of the evidence would result in a trial within a trial that would not assist the jury). The court thus finds that the risk of unfair prejudice and waste of time substantially outweighs the probative value of this evidence, and the court excludes the evidence according to Fed.R.Evid. 403.

***9** Plaintiffs rely on *Carson v. Heli-Tech, Inc.*, No. 2:01-cv-643-Ft,-29SPC, 2003 WL 22469919 (M.D.Fla. Sept. 25, 2003), to support their position that evidence of defects in the exhaust and fuel systems are admissible to prove what caused the plane to crash. Like here, the plaintiff in *Carson* argued that a defective replacement part, which was not GARA protected, acted in conjunction with defectively designed, but GARA protected, parts to cause the crash. The court held that GARA prevented recovery for defective design of the GARA protected parts. *See id.* at 4. Nevertheless, the court held that GARA's rolling provision applied to the replacement part because the plaintiff presented evidence that this part caused the crash by exacerbating the problems associated with the GARA protected parts. This was sufficient evidence of causation to survive summary judgment.

The court finds that plaintiff's reliance on *Carson* is misplaced. First, *Carson* never discusses the admissibility of evidence of defects in the design of the GARA protected parts. Instead, the court merely determined that plaintiffs presented sufficient evidence that a non-GARA protected part caused the crash to survive summary judgment. Second, *Carson* states that replacement of one part did not roll GARA's repose period for additional, GARA-protected parts that were a part of the same system. Thus, *Carson* comports with the decision by the California Court of Appeals in *Hiser* and the Ninth Circuit in *Cadwell.*

In short, GARA prevents plaintiffs from recovering for defects in the design of the exhaust system as a whole or the fuel system. Because plaintiffs cannot recover for these alleged design defects, the court excludes evidence of such defects under Fed.R.Evid. 401 and 403. Plaintiffs can only offer evidence of defects in parts that were replaced within 18 years of the accident.

V. Other Litigation

Cessna moves in limine to prevent reference by plaintiffs to any other litigation. Plaintiffs do not oppose this motion, but they argue that defendants should not refer to plaintiffs' previous settlement of litigation with Capital City Air Carrier (CCAC) or RAM Aircraft Corporation (RAM). The court agrees.

Fed.R.Evid. 408 governs the admissibility of offers or agreements to settle a disputed claim. According to Rule 408, evidence of the settlement agreement is not admissible to prove "liability for or invalidity of the claim or its amount." The rule does not, however, prohibit offering the evidence "for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." Fed.R.Evid. 408; *see also Kraft v. St. John Lutheran Church of Seward, Neb.*, 414 F.3d 943, 947 (8th Cir.2005).

Here, FlightSafety wants to offer evidence of the previous settlements to assist the jury in determining the relative levels of fault among Cessna, FlightSafety, CCAC, and RAM for contribution purposes. FlightSafety argues that the jurors need to be apprised of the previous lawsuits to provide context. In response, plaintiffs argue that FlightSafety is attempting to offer this evidence to establish the level of FlightSafety's liability-an impermissible purpose under Fed.R.Evid. 408. The court refrains from deciding whether Rule 408 bars admission of this evidence, however, because even if admissible under Rule 408, the court would exclude the evidence based upon the Rule 403 balancing test. *See Wood v. Minn. Mining & Mfg. Co.*, 112 F.3d 306, 310 (1997) (excluding evidence under Rule 403 even though it may have been admissible under Rule 408).

***10** As discussed above, Fed.R.Evid. 403 permits the court to exclude evidence whenever its probative value is substantially outweighed by the risk of unfair

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prejudice. The court finds that the fact that plaintiffs commenced and settled their claims against CCAC and RAM has limited probative value. First, the jury does not need to know that plaintiffs filed claims against CCAC and RAM to evaluate CCAC's and RAM's level of fault for contribution purposes. Second, defendants can effectively cross-examine plaintiffs' experts regarding their testimony at the state trial without revealing where the testimony took place. For instance, defendants could ask them about a previous time that they testified under oath. *See Sewell*, 457 F.3d at 844 (evidentiary alternative that is equally probative but less prejudicial weighs against admissibility under Rule 403). In short, informing the jury about plaintiffs' settlements with CCAC and RAM does not help defendants prove any part of their case.

The court does find, however, that evidence of previous settlements has a high risk for unfair prejudice. As noted above, there is a risk of unfair prejudice whenever the jury may decide an issue for an impermissible reason. *See Cummings*, 995 F.2d at 824. In this case, there is a substantial risk that the jury might impermissibly infer from the settlements that either CCAC or RAM, rather than Cessna or FlightSafety, caused the accident. *Cf. First Premier Bank v. Kolcraft Enters., Inc.*, 686 N.W.2d 430, 443-44 (S.D.2004) (stating risk that jury will infer that the settling co-party is the culpable party), *superseded on other grounds by* SDCL 19-9-3. Additionally, the jury may conclude that plaintiffs have recovered enough already, and thus, refuse to award an appropriate level of damages. *See Ensing v. Vulcraft Sales Corp.*, 830 F.Supp. 1017, 1019 (W.D.Mich.1993). As a result, after completing the Rule 403 balancing test, the court finds that the risk of unfair prejudice substantially outweighs any probative value associated with informing the jury that plaintiffs previously filed and settled claims against CCAC and RAM, or that plaintiffs went to trial with CCAC. The court thus excludes all such evidence.

VI. Other Incidents

Cessna moves in limine to prevent plaintiffs from offering evidence of prior incidents of wastegate elbow malfunctions in Cessna aircraft. Cessna argues that five Service Difficulty Reports (SDRs) are inadmissible because: (A) the statements contained in the SDRs are hearsay; (B) the incidents reported in the SDRs are not substantially similar to the accident in this case; and (C) the probative value of the evidence is substantially outweighed by the risk of wasted time. Plaintiffs oppose the motion.

A. Hearsay

Cessna argues that the statements contained in the SDRs are inadmissible hearsay. Fed.R.Evid. 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." Cessna argues that SDRs contain customer complaints indicating that Cessna designed wastegate elbows crack, and that these complaints are hearsay. In response, plaintiffs argue that they are not offering the SDRs to prove the truth of the matter asserted. Instead, plaintiffs proffer the SDRs to prove that Cessna had notice that the left wastegate elbow cracked, and thus, it acted negligently in ordering more frequent inspections instead of redesigning the exhaust system.

*11 The United States District Court for the District of North Dakota in *Olson v. Ford Motor Co.*, 410 F.Supp.2d 855 (D.N.D.2006), recently discussed whether customer complaints constitute inadmissible hearsay. In *Olson*, the plaintiff was injured when the brakes on a Ford truck did not work properly. Ford apparently maintained a business record that included all complaints from customers regarding its trucks, including complaints of brake failure. Plaintiff obtained records of the complaints and offered them as evidence at trial. Ford argued that the complaints were inadmissible hearsay.

The court in *Olson* concluded that admissibility turned on the purpose for which plaintiff offered the evidence. The court stated that the complaints are hearsay if offered to prove that Ford's brakes are defective. When offered for this purpose, the plaintiff relies on the truth of the underlying complaint, *i.e.*, that the brakes failed. *See id.* at 861-62. The court held that plaintiff could offer the evidence, however, to prove that Ford had notice of the defective brakes. In this instance, the evidence was not hearsay because it was not offered for the truth of the matter asserted. *See id.* at 862.

Olson is factually identical to this case. Like the plaintiff in *Olson*, plaintiffs here want to offer evidence indicating that other pilots or mechanics complained that Cessna's wastegate elbow cracked to prove that Cessna was on notice of the defect. The veracity of the underlying complaints has no effect on Cessna's notice, and thus, the SDRs are not offered to prove the truth of the matter asserted. As

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such, the SDRs are not inadmissible hearsay.

B. Substantially Similar Incidents

Defendants argue that the SDRs are not admissible to prove notice because the incidents reported in the SDRs are not substantially similar to the accident in this case. Evidence of prior incidents or accidents is admissible in a products liability case to prove "the defendant's notice of defects, the defendant's ability to correct known defects, the magnitude of the danger, the product's lack of safety for intended uses, or causation." *Lovett ex rel. Lovett v. Union Pac. R.R.*, 201 F.3d 1074, 1080 (8th Cir.2000). The evidence is only admissible, however, if the prior incidents are "substantially similar" to the facts of this case. *Id.* The prior incidents " 'must be sufficiently similar in time, place or circumstance to be probative.' " *First Sec. Bank v. Union Pac. R.R.*, 152 F.3d 877, 879 (quoting *Thomas v. Chrysler Corp.*, 717 F.2d 1223, 1225 (8th Cir.1983)). The proponent bears the burden of establishing that the "facts and circumstances of the other incident" are substantially similar to this case. *Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 508 (8th Cir.1993).

Cessna argues that plaintiffs fail to establish that the prior incidents reported in the SDRs are substantially similar to the case. The court agrees that it cannot determine from the short factual summaries contained within the SDRs whether the incidents reported therein are substantially similar to the accident in this case. The court finds, however, that plaintiffs should have the opportunity to lay foundation to establish that the incidents contained in the SDRs are factually similar. *See Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1108 (8th Cir.1988) (indicating that a party must lay foundation establishing that prior incidents are substantially similar). As a result, the court finds that Cessna's objection based upon lack of factual similarity is denied as premature. Cessna can reassert this objection at trial, however, if Cessna believes that plaintiffs have failed to lay sufficient foundation.

C. Fed.R.Evid. 403

***12** Finally, defendant argues that the SDRs are inadmissible because their probative value is substantially outweighed by the waste of time attributable to engaging in an unnecessary "mini-trial" on each of the complaints in the SDRs. According to Fed.R.Evid. 403, the court can exclude evidence if its probative value is substantially outweighed by risk of wasting time in an unnecessary trial within a trial. *See Milk*, 447 F.3d at 600.

Here, the court finds that the complaints contained in the SDRs are highly probative on whether Cessna was negligent in refusing to redesign the wastegate elbow. Cessna's knowledge of defects in the design of the wastegate elbow go directly to facts at issue in this case. *See Peterson*, 400 N.W.2d at 912 (stating that a products liability action sounding in negligence requires the plaintiff to prove "that the manufacturer or seller failed to exercise reasonable care"). Additionally, the court disagrees that admitting the SDRs will result in an unnecessary mini-trial on whether the wastegate elbows contained in the SDRs were in fact broken. The court thus finds that SDRs' probative value is not substantially outweighed by the risk of wasting time and refuses to exclude the SDRs under Rule 403.

VII. Richard McSwain

Cessna moves in limine to exclude Dr. Richard McSwain from testifying in place of Dr. Ramsay. Substantively, this motion is identical to plaintiffs' motion in limine to substitute Dr. McSwain for Dr. Ramsay. Although the court denied plaintiffs' motion at the pretrial conference, it did not explicitly rule on Cessna's motion. Accordingly, the court grants Cessna's motion in limine to prevent the substitution of Dr. McSwain for Dr. Ramsay for the same reasons that the court stated at the pretrial conference in denying plaintiffs' motion in limine seeking to substitute Dr. McSwain for Dr. Ramsay.

VII. Donald Frankenfeld

At the pretrial conference, Cessna orally moved to strike the expert report of Donald Frankenfeld dated September 28, 2006, as untimely. In response, plaintiffs withdrew this expert report. Accordingly, Cessna's oral motion is granted.

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion (Docket 475) in limine to prevent reference to Donald E. Sommer's settlement agreement with the FAA is granted.

IT IS FURTHER ORDERED that plaintiffs' oral motion to strike expert report of Ronald E. Smith is granted.

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IT IS FURTHER ORDERED that Great Western Bank's motion (Docket 483) in limine to exclude reference to Sean Bielstein's use of illegal substances is granted.

IT IS FURTHER ORDERED that Cessna's motion (Docket 454) in limine (GARA) is granted.

IT IS FURTHER ORDERED that Cessna's motion (Docket 490) in limine to exclude evidence of other litigation is granted.

IT IS FURTHER ORDERED that Cessna's motion (Docket 488) in limine (other incidents) is denied.

IT IS FURTHER ORDERED that Cessna's motion (Docket 486) in limine (Richard McSwain) is granted.

*13 IT IS FURTHER ORDERED that Cessna's oral motion to strike the supplemental report of Donald Frankenfeld is granted.

D.S.D.,2006.
Sheesley v. Cessna Aircraft Co.
Slip Copy, 2006 WL 3042793 (D.S.D.), 71 Fed. R. Evid. Serv. 724, Prod.Liab.Rep. (CCH) P 17,583

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, Vs. Bob Sahr, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendant, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 INTERVENORS' AND DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION

COME NOW South Dakota Telecommunications Association and Venture Communications Cooperative, Intervenors in the above-named docket ("Intervenors"), and Defendants Bob Sahr, Gary Hanson, and Dustin Johnson in their official capacities as the Commissioners of the South Dakota Public Utilities Commission (collectively "Defendant"), by and through their undersigned attorneys, and respond to PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION as follows:

INTERROGATORIES

1. Identify all persons furnishing information used in responding to these interrogatories.

Larry Thompson, Professional Engineer
Chief Executive Officer
Vantage Point Solutions
1801 N. Main St.
Mitchell, SD 57301

Keith Senger, PUC Analyst
South Dakota Public Utilities Commission
State Capitol Building
320 East Capitol Ave.
Pierre, SD 57501

Dawn Haase, Legal Administrative Asst.
Prairie Wave Communications
5100 South Braodband Lane
P.O. Box 88835
Sioux Falls, SD 57109-8835

2. For Venture and each ILEC member company of the SDTA, identify the rates it charges other carriers for reciprocal compensation, interstate access, and intrastate access. If a range of rates is charged (based on mileage, for example) provide the range within each category. This request does not apply to the SDPUC.

Answer: See attached Appendix 1 for information on reciprocal compensation rates (Exhibit 1), interstate access rates (Exhibit 2), and intrastate access (Exhibit 3).

(a) In reference to Exhibit 1 regarding the request for reciprocal compensation rates, the only rates provided are those charged to carriers other than Verizon. Intervenors and the SDPUC object to providing the rates charged to Verizon. This information should be within Verizon's possession and, insofar as this information is requested, the request is unduly burdensome.

(b) In reference to Exhibit 2 with respect to interstate access rates, all companies listed except Alliance Communications, James Valley Telecommunications and Union Telephone Company participate in the NECA tariff in all rate categories. Alliance, James Valley and Union are not participants in the NECA traffic sensitive pool and, thus, charge their own company specific access rates for transport functions. The Alliance, James Valley, and Union interstate tariffs are being provided electronically.

Also, with respect to the interstate access transport rates, please note that the rate listed is only the per-minute rate per facility mile. Additional information is being collected to determine the transport rate range for each of the SDTA member companies. This answer will be supplemented as soon as possible, when all "rate range" information is gathered.

(c) In reference to Exhibit 3 regarding the provided intrastate access rates, please note that all SDTA member companies other than Prairie Wave Community Telephone, Fort Randall Telephone, Mt. Rushmore Telephone, and Kadoka Telephone Company are members of the Local Exchange Carrier's Association ("LECA") and thus charge LECA tariffed

rates for intrastate access. The LECA transport rate is non-distance sensitive.

3. For Venture and each ILEC member company of the SDTA, identify the companies' interstate and intrastate access rates. This request does not apply to the SDPUC.

Answer: See answer to Interrogatory No. 2, above.

4. For Venture and each ILEC member company of the SDTA, identify the MTA(s) in which it terminates calls. This request does not apply to the SDPUC.

Answer: See attached Appendix 2.

5. For Venture and each ILEC member company of the SDTA, state whether the trunks on which it receives traffic from Verizon Wireless are SS7 capable. This request does not apply to the SDPUC.

Answer: All trunks upon which Venture receives wireless traffic from Verizon Wireless, either directly through a Type 2 connection or indirectly through the Qwest or SDN access tandem, are SS7 capable. All trunks upon which each SDTA member company receives wireless traffic from Verizon Wireless, either directly through a Type 2 connection, or indirectly through the Qwest or SDN access tandem, are SS7 capable with the exception of Tri County Telecom (Emery, South Dakota). Tri County Telecom will be upgraded to have SS7 capability this year.

6. For Venture and each ILEC member company of the SDTA, state whether terminating switches are capable of receiving, processing and billing based on information in SS7 messages. This request does not apply to the SDPUC.

Answer: The switching systems utilized by Venture and the SDTA member companies rely on the information in the SS7 message to determine information about the call to ensure that the correct carrier is billed and the carrier is billed the correct amount. The SS7 message fields, along with other information, are used to generate an Automatic Message Accounting ("AMA") record on the end office switch and/or the access tandem in accordance with Telcordia (formerly Bellcore) GR317 record formats. Venture and each of the SDTA member companies use the AMA records from their end office switch, the access tandem, or both to properly bill the carriers, provided that all of the appropriate fields (Carrier ID, JIP, etc.) have been data filled properly.

7. Identify all experts retained or consulted by you, including employees who may provide expert testimony, that are likely to be called to testify by you with respect to this litigation, and specify the following:

Larry Dean Thompson

Current business affiliation and title – Chief Executive Officer of Vantage Point Solutions.

Business address – 1801 N. Main St., Mitchell, South Dakota, 57301.

(a) His or her experience and qualifications as an expert;

Answer: Larry is a registered professional engineer and CEO of Vantage Point Solutions. He holds a Bachelor of Arts degree in Physics from William Jewell College and both a Bachelor and Master of Science degree in Electrical and Computer Engineering from the University of Kansas. Larry has been working in the telecommunications industry for over 20 years. He has designed many voice, data, and video networks, including state and regional networks.

(b) The date you retained him as an expert;

Answer: Larry has worked on various projects for SDTA over the last several years. Larry has been consulted as part of this litigation since the beginning.

(c) The purpose for which you retained him as an expert (e.g., whether for trial or otherwise);

Answer: For several years, Larry and his firm has provided engineering and regulatory services to SDTA, many SDTA member companies, including Venture Communications. Larry was retained as a consultant, and to provide testimony at trial.

(d) The identity of any document prepared by him for you;

Answer: Larry prepared handouts for the presentation of Senate Bill 144 to both the South Dakota House of Representatives and South Dakota Senate. (See Appendix 4.)

(e) The subject matter upon which the expert is expected to testify;

Answer: Larry will provide details regarding telecommunications system signaling, industry standards and practices, wireline and wireless network and operational capabilities, wireline-wireless interconnections, and traffic rating and routing issues.

(f) The substance of the facts and opinions to which the expert is expected to testify; and

Answer: The information will be provided in the Expert's Report.

(g) A summary of the grounds of each opinion.

Answer: The information will be provided in the Expert's Report.

Mark Shlanta

Current business affiliation and title – Chief Executive Officer of South Dakota Network, LLC ("SDN").

Business address – 2900 W. 10th Street, Sioux Falls, South Dakota 57104.

(a) His or her experience and qualifications as an expert;

Answer: Mark's background includes degrees in mechanical engineering and engineering management. Mark has over 17 years of experience in network planning and optimization with the telecommunications industry.

(b) The date you retained him as an expert;

Answer: Mark has been the CEO of SDN since July of 2000. In his capacity as the CEO, he has worked closely with SDTA and Venture. SDTA consulted with Mark Shlanta on the drafting of Senate Bill 144, and he has remained involved in the issues in this case.

(c) The purpose for which you retained him as an expert (e.g., whether for trial or otherwise);

Answer: Not Applicable. Mark is not a retained expert, but will be utilized as a consultant on this matter and to testify at trial.

(d) The identity of any document prepared by him for you;

Answer: None of which we are aware at this time.

(e) The subject matter upon which the expert is expected to testify;

Answer: This information will be provided in the Expert's Report.

(f) The substance of the facts and opinions to which the expert is expected to testify; and

Answer: The information will be provided in the Expert's Report.

(g) A summary of the grounds of each opinion.

Answer: The information will be provided in the Expert's Report.

8. Identify each person you expect to call as a non-expert witness and for each non-expert witness, please state the facts to which you expect each non-expert to testify.

Answer:

(a) Randy Houdek. Randy Houdek is the General Manager of Venture. He will testify from his company's perspective about why Senate Bill 144 is important to his company. He will testify to the importance of traffic identification and will provide information concerning traffic handled by the Venture network. He will also provide testimony concerning Venture's billing methods and practices.

(b) Randy Olson. Randy Olson is the Assistant Manager of Venture. He will also testify to the importance of traffic identification issues, how traffic is exchanged between carriers, and how Venture does its billing.

(c) Chuck Fejfar. Chuck Fejfar is the Network Operations Manager of SDN. If this witness testifies, he will identify how companies can comply with the requirements of Senate Bill 144. He will provide information related to signaling standards and practices and related to the exchange of traffic between wireline and wireless carriers.

REQUESTS FOR ADMISSION

1. Admit that SS7 is the most common signaling protocol currently used in the telecommunications industry.

Answer: Deny. This statement is true, provided that the signaling protocols we are referring to are limited to those used for intercarrier signaling.

2. Admit that for calls originated through a cell tower that serves more than one MTA, Verizon Wireless is not capable today of determining the originating MTA for purposes of reciprocal compensation or populating SS7 fields.

Answer: Deny. The cell tower location, rather than the actual location of the caller, is an adequate method for determining the MTA of the caller. This is consistent with FCC statements set forth in its *First Report and Order In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Paragraph 1044(CC Docket No. 96-98 and 95-185).* We believe that Verizon Wireless is capable of determining the originating caller's tower location.

3. Admit that based on current industry standards neither the information in the header for the SS7 message nor the mandatory SS7 fields will tell the terminating carrier whether a wireless call is IntraMTA, InterMTA and interstate, or InterMTA and intrastate.

Answer: Deny. It is true that, based on current industry standards, the precise location of the originating caller at the time of the call is not presently being populated in the SS7 message or fields. However, pursuant to the provisions of Senate Bill 144, originating carriers are not limited to the use of SS7 signaling information in provid-

ing the terminating carrier with information that allows for the appropriate classification of traffic. Further, the Jurisdictional Information Parameter ("JIP") field within the SS7 message may be utilized to provide information that can be utilized to gain some information concerning the originating caller location and can assist in developing a reasonable method of identifying and classifying originated wireless telecommunications traffic.

4. Admit that there is no industry-standard SS7 field that Verizon Wireless could use to identify whether a call is intraMTA, InterMTA and intrastate, or IntraMTA and interstate, and because of this, there is no way Verizon Wireless could format such information in an SS7 message that would be understood by other telecommunications providers.

Answer: Deny. See Answer to Request Number 3 above.

5. Admit that the industry standards for populating SS7 fields have been developed through the Alliance for Telecommunications Industry Solutions ("ATIS") Network Interoperability Forum ("NIIF"), and ATIS-0300011, *Network Interconnection Interoperability (NIIF) Reference Document, Part III, Installation and Maintenance for SS7 Links and Trunks*, represents the current industry standard with regard to the population of the jurisdictional information parameter ("JIP") field.

Answer: Deny. We admit that the standards for populating SS7 developed by ATIS and NIIF currently are consistent with the current industry standard. However, the current written industry standard may not at all times conform with actual industry practice. Also, even though current written standards with respect to populating the JIP field may not be adequate to identify the precise location of the originating caller, these standards as well as actual industry practice are always evolving. Moreover, the provisions of Senate Bill 144 are not limited to addressing "signaling" information. The provisions also require carriers to "separately provide" other available traffic data or information if it will assist in the appropriate classification of terminated traffic by the terminating carrier.

6. Admit that the majority of the telecommunications trunks that deliver calls to the SDTA companies have not been upgraded to utilize SS7 information and that the majority, if not all, SDTA companies do not have the capability to receive, process and bill based on SS7 messages.

Answer: Deny. Please refer to Answers to Interrogatories 5 and 6.

RESPONSES TO DOCUMENT REQUESTS

1. Provide all documents exchanged between SDTA and one or more of its member companies related to Senate bill No. 144 and SDTA's support for the bill as set forth in the SDTA and Venture petition for intervention in this case. This request does not apply to the SDPUC.

Answer: See Appendix 3 attached.

2. Provide all documents exchanged between SDTA and one or more elected officials related to Senate Bill 144.

   Answer: See Appendix 4 attached.

3. Provide any portions of interstate access tariffs that on their terms apply to calls Verizon Wireless originates, delivers to Qwest in its role as transit provider, and terminated to Venture or ILEC member companies of the SDTA.

   Answer: Copies of interstate access tariffs currently utilized by SDTA member companies, which apply to the provision of interstate interexchange, or interstate non-local termination services will be provided in electronic format.

4. Provide any portions of intrastate access tariffs that on their terms apply to calls Verizon Wireless originates, delivers to Qwest in its role as a transit provider, and terminated to Venture or ILEC member companies of the SDTA.

   Answer: A copy of the LECA intrastate access tariff that is utilized by many of the SDTA member companies, which applies to the provision of intrastate interexchange, or intrastate non-local termination services will be provided in electronic format. Copies of the intrastate access tariffs of other SDTA member companies that do not participate in the LECA tariff are attached as Appendix 5. Please note that Mt. Rushmore and Ft. Randall Telephone use the same intrastate tariff.

5. Provide all documents exchanged between you and each and every expert that you have retained or consulted, including, but not limited to, reports, opinions, charts, records, graphs, diagrams, photographs and technical publications.

   Answer: None at this point in time. This answer will be supplemented as needed.

6. Provide any documents which may be relied on by each and every expert that you have retained or consulted, including but not limited to, reports, opinions, charts, records, graphs, diagrams, photographs and technical publications.

   Answer: This information will be provided in the Expert's Report and supplemented as needed.

7. Provide copies of documents identified in Paragraph B of your rule 26(a) disclosures. Provide information in electronic format if available.

   Answer: Objection, this request is unduly burdensome. Much of the information provided in Paragraph B of the Rule 26(a) disclosures is public information available on the Internet. If Plaintiffs can identify any specific documents they are unable to access, we will either identify a proper source for the document, or provide an electronic format of it.

8. Provide any documents referred to in your responses to the above interrogatory requests.

Answer: All are provided.

Dated this seventeenth day of August, 2005.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, Vs. Bob Sahr, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendant, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the INTERVENORS' AND DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES, REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUESTS FOR ADMISSION was served via the method(s) indicated below, on the seventeenth day of August, 2005, addressed to:

Rolayne Ailts Wiest, General Counsel South Dakota Public Utilities Commission 500 East Capitol Avenue Pierre, South Dakota 57501	(X) ( ) ( ) ( ) (X)	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail
Gene N. Lebrun Steven J. Oberg Lynn, Jackson, Shultz & Lebrun P. O. Box 8250 Rapid City, South Dakota 57709	(X) ( ) ( ) ( ) (X)	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail