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 RESPONSE TO VERIZON WIRELESS' MOTION IN LIMINE

Plaintiffs Verizon Wireless (VAW) LLC, Comm Net Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS (collectively, "Verizon Wireless" or "Verizon") have moved the Court *in limine* under Fed.R.Civ.P. 7(b)(1) for an order precluding Intervenors' expert witness Larry Thompson from providing testimony that relies on or relates to interMTA traffic studies performed by Vantage Point Solutions ("VPS") that have not been provided to Verizon Wireless.

Verizon Wireless further seeks an order excluding testimony regarding interMTA traffic studies that are based on the phone number of the originating caller.

Defendants/Intervenors response to Plaintiffs' Third Set of Interrogatories and Second Set of Requests for Production of Documents was sent on March 16, 2007. In that response, Defendants/Intervenors objected to some of Verizon's discovery because the requests sought proprietary and competitive information that is highly confidential. VPS has executed confidentiality agreements with each of its clients which prohibit VPS from releasing information related to VPS' consulting services. In addition, the studies include 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.

A. FACTS

Defendants/Intervenors would urge the Court to take a step back from the current evidentiary skirmish and focus on the real merits or issues of this case. The current litigation is about phantom traffic. Phantom traffic comes about when local or access traffic is delivered to the terminating carrier without sufficient information to identify, measure, and appropriately charge the originating carrier for services provided in terminating that traffic. This results in loss of revenues to the terminating carrier.

Intervenor SDTA member companies (rural incumbent local exchange carriers (ILECs)) have been experiencing increasing revenue losses from phantom traffic. SDTA presented a possible statutory solution to the problem of phantom traffic to the South Dakota Legislature. In 2004, the Legislature enacted Session Law Chapter 284, later codified as SDCL § 49-31-109 to 49-31-115. SDCL § 49-31-110 and 49-31-111 require the originating carrier to transmit signaling information in accordance with commonly accepted industry standards that will give

the terminating carrier sufficient information to identify, measure, and appropriately charge the originating carrier for services provided in terminating the traffic. One example of a commonly accepted industry standard protocol for delivering signaling information between telecommunication service providers is Signaling System 7 (SS7). The referenced statutes also allow for other methods, such as traffic studies, to develop verifiable information (including percentage measurements) to be used if industry signaling standards or actual signaling practices do not provide adequate information to allow for carrier billing.

In the current action, Verizon is challenging the validity of the Chapter 284 requirements. The case was filed initially on August 6, 2004. The issues in the case include whether the reporting obligations and classification provisions imposed by the South Dakota Legislature are lawful (terminating carrier may classify all unidentified traffic as non-local if appropriate identifying information is not provided by the originating carrier). SDTA named Larry Thompson of VPS as an expert witness, and Mr. Thompson's initial expert report was filed by the September 1, 2005 deadline imposed by this Court's scheduling order.

In November of 2005, Verizon moved for summary disposition of the case. In opposition to Verizon's Summary Judgment motion, Defendants/Invervenors filed an Affidavit of Mr. Thompson that addressed the points raised by Verizon in its motion for Summary Disposition. Verizon objected to Mr. Thompson's Expert Report, claiming it did not cover all of the issues contained in Mr. Thompson's Affidavit. After this Court denied Verizon's Motion for Summary Judgment and pursuant to Agreement of the parties, Defendants/Intervenors filed a Revised Expert Report on January 16, 2007, and Verizon was afforded the opportunity to conduct discovery with regard to said revised report. Verizon served a third round of Interrogatories (accompanied by a second set of Request for Production of Documents) on

Defendants/Intervenors on February 6, 2007. Defendants/Intervenors filed responses on March 16, 2007.[1]

In the months following service of these responses, Verizon failed to take any action to indicate that the responses were objectionable. Instead of filing a motion to compel in March, April, or May, which would have ensured a timely ruling from the Court on what Defendants/Intervenors were required to provide to Verizon and place appropriate restrictions on highly confidential and sensitive data, Verizon filed the current Motion *in Limine* and is requesting the Court to impose the harsh sanctions of Rule 37 by not allowing Mr. Thompson to testify to certain things contained in his Expert Report. Verizon's Motion *in Limine* should be denied, first because Verizon failed to file a Motion to Compel, which is the appropriate forum in which to argue unresolved discovery disputes, and secondly, because Defendants/Intervenors actions in not producing certain studies relied upon by Mr. Thompson in his Revised Export Report were proper under the applicable rules and tests.

B. INTERVENORS ARE NOT OBLIGATED TO PROVIDE THE STUDIES ON WHICH MR. THOMPSON RELIES

1. Exclusion of Studies from Revised Expert Report was Proper

Plaintiff moves the Court *in limine* to preclude Larry Thompson from providing testimony at trial that relies on or relates to interMTA traffic studies. This matter has not yet come before this Court. Plaintiff claims the basis of Mr. Thompson's opinions have not been

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[1] Because of the Agreement between the parties, the case of *Sheesley v. Cessna Aircraft Co.*, No. 02-4185 et al., 2006 WL 3042793 at *3 (D.S.D. Oct. 24, 2006) cited by Plaintiff (court did not allow an expert to provide "wholly new opinions" in a revised expert report that was filed nearly two years after the disclosure of expert reports deadline) is not applicable to the current case. Plaintiff concedes that it is not seeking to have testimony excluded because the Revised Report was served out of time of the scheduling order. Plaintiff's Memorandum in Support of Motion in Limine p. 2 ("Memo of Verizon"). Verizon Wireless indicated to Intervenors in December 2006 that it would not challenge the late-filed report so long as 1) all required disclosures were properly made, and 2) Verizon Wireless was allowed to conduct necessary and appropriate discovery. Defendant/Intervenors have complied with both requirements of the agreement to the fullest extent possible.

fully disclosed pursuant to Fed.R.Civ.P. 26(a)(2)(B). However, all information not subject to confidentiality agreements has been provided and Defendants/Intervenors are in full compliance with Rule 26(a)(2)(B). Plaintiff failed to file a Motion to Compel Defendants/Intervenors to provide the traffic studies. Thus, Defendants/Intervenors have not been compelled by the Court to provide the studies and VPS must adhere to the confidentiality agreements between VPS and each of its clients, which prohibits VPS from releasing the traffic studies in their entirety and unredacted[2]. Furthermore, because the studies include confidential and proprietary information that is highly confidential as it relates to another wireless carrier that is not party to this proceeding, VPS does not have authority to release the information. Therefore, without an Order by this Court to Compel the release of such information, VPS does not have the authority to release the information[3].

2. Exclusion of InterMTA Traffic Studies was Proper Pursuant to Discovery Requests

Defendants/Intervenors agreed to allow Verizon an additional round of discovery on Mr. Thompson's revised report. Fed.R.Civ.P. 26(e) applies to responses to a request for discovery. Under this rule, a party is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court. *See e.g., 3M Innovative Properties Company v. Tomar Electronics*, No. 05-756, 2006 WL 2670038 *2 (D.Minn Sept. 18,

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[2] VPS Consulting Services Agreement provides that "information related to the services provided hereunder, or other data or information which has been obtained by the Consultant from Owner in connection with the performance of this Agreement shall be deemed confidential information. . . the Consultant shall not use or otherwise disclose such confidential information to any other party for any purpose. . . without the prior written approval of the Owner." In addition, VPS is bound by the South Dakota Administrative Rules governing professional conduct of licensed professional engineers, which provide, "Licenses shall regard as confidential any information obtained about the business affairs and technical methods or processes of a client or employer." ARSD 20:38:20:01(6).

[3]Some of this information, because it relates to the network usage of a particular wireless carrier, may also fall subject to the federal regulations addressing "Customer Proprietary Network Information" (CPNI). See CFR §§ 64.2003 – 64.2009. As CPNI, certain carrier/customer specific usage information would be protected from disclosure absent consent from the carrier/customer.

2006) (Defendant under the obligation imposed by Fed.R.Civ.P. 26(e) to supplement discovery responses *as appropriate* and is also under obligation to comply with *court's discovery order*) (emphasis added). Again, without an order by the court, Defendants/Intervenors cannot provide the interMTA traffic studies in response to the discovery requests. Defendants/Intervenors made every effort to respond to the third round of discovery without violating confidentiality restraints. VPS did not have the authority to release the information. In addition to VPS not having the authority of SDTA member companies to release studies, Defendants/Intervenors were further restricted by a Protective Order entered into among some of the companies and another wireless carrier in the context of another legal proceeding. Even under such restraints, Defendants/Intervenors made every effort to respond to Verizon's discovery requests by providing a redacted study of Intervenor Venture, and providing "Company X" results of the interMTA studies (see Exhibit 5 attached to Revised Expert Report and Exhibits Q11a-b, attached to Defendants/Intervenors Responses to Plaintiff's Third Round of Discovery.)[4].

Verizon failed to file a Motion to Compel, which would have afforded this Court the opportunity to determine and order the release of further information, where appropriate. The appropriate remedy for a party's belief that discovery responses are inadequate is a Motion to Compel.

C. THE COURT SHOULD NOT EXCLUDE TESTIMONY THAT RELIES ON OR REFERS TO THE INTERMTA STUDIES

The interMTA traffic studies and supporting data should not have been produced to Verizon for reasons set forth above. Plaintiff urges the application of a "four-part test to determine whether failure to provide information required by Rule 26(a) should result in the

[4] In fact subsequent to the filing of the current Motion in Limine, Defendants/Intervenors have consulted with Verizon and offered to provide other redacted studies in an effort to resolve this dispute. To date, the parties have been unable to reach a resolution.

excusion of expert testimony" as set forth in *S & S Communications*, 2005 WL 2897045, at *3; *see also Transclean Corp. v. Bridgewood Service, Inc.*, 77 FSupp.2d1045, 1063 (D. Minn. 1999). Memo of Verizon, pg. 6.

Defendants/Intervenors assert that their actions in not providing the interMTA traffic studies were not only proper, but indeed the only actions available in light of the existing restraints of disclosure imposed on Defendants/Intervenors. The appropriate question before this Court is whether Defendants/Intervenors should be compelled or ordered to disclose the studies, and with what restrictions, not whether Mr. Thompson should be precluded from testifying about the results of the interMTA studies[5] and how they support Mr. Thompson's opinion that phantom traffic is a substantial problem for South Dakota ILECs. Accordingly, this Court does not need to reach the four-part test set forth in *S&S Communications*. It is significant to note that in the *S & S Communications* case, both parties had previously filed motions to compel. The court ultimately resolved the discovery disputes and only later addressed Rule 37 violations. *Id.* at *1-3. Under the four part test, the Court in *S & S Communications* found that plaintiff's expert should not be precluded from testifying under Fed.R.CivP. 37(c). The current case before the Court has had no such discovery disputes resolved by the Court. Hence, it is premature for the Court to entertain or rule on Plaintiff's Motion *in limine* based on the *S & S Communications* test proposed by Plaintiff.

Notwithstanding the foregoing, Defendants/Intervenors will address the four-part test. Under the test, the Court considers (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

[5] It should be noted that a redacted version of the report of one interMTA study was attached to Mr. Thompson's Revised Expert Report (Exhibit 5) and a generic version of the results of the studies was provided to Verizon pursuant to the third round of discovery.

to cure such prejudice. *Id.* at *3. This four-part test should not be applied, but even if the Court decides it is applicable, the testimony that refers to or relies on the interMTA studies should not be excluded.

1. The InterMTA Studies are Necessary to the Litigation of this Case.

Plaintiff argues that the interMTA traffic studies "will not turn this case," and that Mr. Thompson's Revised Expert Report fails to establish a link between the results of the interMTA studies and "any expert opinion he purports to hold." (Memo of Verizon, pg. 7). Plaintiff's arguments are incorrect.

Addressing Verizon's second contention first, there is no disconnect in Mr. Thompson's report between the interMTA studies and Mr. Thompson's opinion, which is that phantom traffic is a significant problem for rural ILECs in South Dakota:

> 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 RLECs 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. . . . 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.
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> 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. (Revised Expert Report, pgs 4 & 5).

It is hard to determine how Mr. Thompson could have more clearly articulated his opinion that phantom traffic is an increasingly significant problem for SDTA member companies, and that Mr. Thompson relied in part upon his experience with interMTA traffic studies to form that opinion. The interMTA studies Verizon seeks to exclude from testimony are an integral part of the basis of Mr. Thompson's expert opinion, and Mr. Thompson's opinion on the importance of phantom traffic and the appropriateness of the action taken by the South Dakota Legislature in adopting Chapter 284 is relevant to this litigation.

Furthermore, it is important to note the reluctance of courts to exclude important testimony. "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))." *S & S Communications*, 2005 WL 2897045, at *3.

2. Intervenors are Substantially Justified in Not Disclosing the Information

Verizon argues that Defendants/Intervenors were not justified in failing to provide all of the disclosures because Mr. Thompson's contractual obligation not to disclose all of the information is insufficient reason. As demonstrated below, Defendants/Intervenors nondisclosure of some of the information goes far beyond Verizon's statement that "[t]he Association's members could authorize Mr. Thompson to release much of the information if they chose to do so." (Memo of Verizon, pg. 8).

(a) Context of studies: Many of the studies conducted by Mr. Thompson were done to fulfill the requirements of an Interconnection Agreement with a wireless carrier not a party to this action. The terms of the Agreement called for a traffic study to be done to

determine and adjust the default interMTA factor established as a baseline in the Agreement. Therefore, the reason for nondisclosure is not only a contractual obligation between Mr. Thompson and his clients, it is also the existence of sensitive and highly competitive data of another wireless carrier that justified Defendants/Intervenors' actions of not disclosing interMTA studies. In an effort to comply with disclosure rules, however, Defendants/Intervenors sought and received permission from Venture to disclose an interMTA study, and Defendants/Intervenors provided that study to Verizon, but redacted competitive data from the other carrier. In a continuing effort to satisfy Verizon's concerns and informally resolve the current Motion, Defendants/Intervenors have offered to do the same for other interMTA studies.

(b) Protective Agreement. The interMTA studies from some of Mr. Thompson's clients were the subject of other litigation before the South Dakota Public Utilities Commission. The parties to that litigation entered into a Protective Agreement that prohibited disclosure of "trade secret, privileged or confidential" documents, data, information, studies and other matters filed or served on the parties to the action. The terms of the Protective Agreement would thus only be waived as to any information that was introduced or testified to in open court, not specified as confidential. Defendants/Intervenors have attempted to sort through the records of that complex proceeding in order to provide information to Verizon that does not violate the terms of the Protective Agreement.

In light of the foregoing, Defendants/Intervenors had more than adequate justification for their cautious disclosure of information to Verizon. While competitive data of other carriers could not be disclosed, Defendants/Intervenors were able to provide VPS's methodology in conducting the studies, and a generic version of the results. Defendants/Intervenors are also working on providing redacted versions of certain member company phantom traffic studies,

which would at least include aggregate traffic numbers. Defendants/Intervenors' actions clearly meet the second prong of the *S & S Communications* test.

3. Verizon Wireless Will Not be Prejudiced if the Testimony is Allowed

Verizon argues that it is prejudiced because Verizon has no way of evaluating whether VPS's interMTA studies were properly conducted and produced accurate results. Verizon's argument must fail, for several reasons.

First, Defendants/Intervenors would point out that Verizon's argument of potential prejudice is inconsistent with its argument contained under the first prong of the *S & S Communications* test, i.e., that the interMTA studies are not necessary to the litigation of this case. In fact Verizon admits the inconsistency of its arguments. (Memo of Verizon, pg. 9, footnote 3) If Verizon is seriously contending that it will be prejudiced if the Court allows Mr. Thompson to testify that interMTA studies and the results thereof are (a) an example of phantom traffic and (b) an example of how traffic studies can be utilized to comply with Chapter 284, then Verizon cannot argue that the information is not necessary in the litigation. The alternative is also true: if Verizon is seriously contending that the interMTA study testimony is not important to the litigation, then Verizon cannot argue that it is prejudiced by Mr. Thompson's testimony.

The appropriate application of the test is that the information sought to be precluded from the testimony is necessary to the case, but Verizon cannot show prejudice if the testimony is admitted into evidence. The testimony Verizon seeks to exclude goes to the credibility of the evidence and Mr. Thompson's testimony, not its admissibility. "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination."

Loudermill v Dow Chemical Company, 863 F.2d 566, 570 (8th Cir. 1988); *see also Twin City Plaza, Inc. v. Central Surety & Ins. Corp.,* 409 F.2d 1195, 1203 (8th Cir. 1969).

While Verizon downplays its role and ability to effectively cross-examine Mr. Thompson on the interMTA study results, Defendants/Intervenors have no doubt about Verizon's ability to conduct a thorough and effective cross-examination of Mr. Thompson. Furthermore, this is a trial to the Court, not to a jury. The Court is clearly capable of determining the credibility of the testimony and affording it the weight it deserves.

4. The availability of a continuance to cure such prejudice.

In addressing this prong of the test, Verizon basically concedes that prong 2 of the test, that Defendants/Intervenors were justified in limiting the information provided to Verizon, has been met. "Verizon Wireless understands that this information cannot be provided . . . by Mr. Thompson." (Memo of Verizon, pg. 9). Verizon's conclusion that it was prejudiced and that a continuance to cure the prejudice is not available is incorrect.

First of all, Verizon has failed to show it will be prejudiced if Mr. Thompson is allowed to testify concerning his reliance on the interMTA studies to form his opinions on phantom traffic. As noted above, to the extent the interMTA studies and their results support Mr. Thompson's expert opinion, they present a <u>factual</u> basis for the opinion. This goes to the <u>credibility</u> of the testimony, not the admissibility. Verizon can examine Mr. Thompson concerning the factual basis for his opinion on cross-examination, and the Court can also determine the appropriate weight to be given to the testimony. Therefore, Verizon cannot show it is prejudiced by Mr. Thompson's testimony on interMTA studies.

Defendants/Intervenors would also note that had Verizon properly cleared up these issues in a Motion to Compel, the Court could have timely ruled on what must be disclosed and under

what conditions, and this Motion *in Limine* would not be necessary. If the Court would choose at this time to conduct an in camera hearing to determine if additional disclosure is necessary, that can be accommodated. The issue before the Court is the constitutionality of Chapter 284. A continuance of the trial date would not harm any of the parties, and if deemed necessary by the Court, that option is available.

D. THE COURT SHOULD NOT EXCLUDE TESTIMONY ON THE STUDIES THAT USE THE TELEPHONE NUMBER TO IDENTIFY THE ORIGINATING MTA

Verizon argues that Mr. Thompson should be precluded from testifying about interMTA studies that utilized SS7 information, because SS7 information looks to the "NPA-NXX" of the originating wireless caller to determine the MTA in which the call was made. Verizon contends that such information is not reliable, and Mr. Thompson's testimony should be excluded.

Once again, it is important to look at Mr. Thompson's Revised Expert Report and the context in which Mr. Thompson utilized the SS7 studies. Mr. Thompson expressed his opinion on the importance of phantom traffic early in his report.

> 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 RLECs 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.

Then Mr. Thompson went on to explain how and in what instances he used SS7 data:

> 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 network. . . In performing phantom traffic studies, VPS performs a matching process between Automated Message Accounting (AMA) data recorded by the Local Exchange Carrier (LEC) switch and the Exchange Message Interface (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 System7 (SS7) data received from the LEC's Signal Transfer Points (STPs) and the EMI data. In some cases, all three sources of data are utilized in the matching process.

It is clear that Mr. Thompson utilized several types of data and methods to analyze phantom traffic, including SS7 records. Mr. Thompson should not be precluded from testifying concerning all of these studies, regardless of the data and methodology used.

In addition, Mr. Thompson explained in his Report that he utilized SS7 messages for interMTA studies when he was not "able to acquire the CDR's from the wireless carrier." (Revised Expert Report, pg. 9). Mr. Thompson also made it clear in his report that when CDRs were not provided, he used the SS7 records to "provide an estimate of the amount of interMTA traffic." (Revised Expert Report, pg. 9) (emphasis added).

Mr. Thompson carefully explained the methodology he utilized for each study. Mr. Thompson does not contend in his report that any methodology is perfect, but he is certainly justified in relying upon all methodologies he utilized, dependent upon availability of data, to support his opinion that phantom traffic is a significant problem not just to South Dakota companies, but industry-wide (Revised Expert Report, pg. 14).[6] The different methodologies utilized by Mr. Thompson go to the credibility of the factual basis upon which Mr. Thompson relies. This Court can weigh that credibility, and exclusion of testimony based upon one certain methodology is neither necessary nor appropriate, especially in a Court trial.

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[6] It is also clear from Mr. Thompson's Revised Report that he relied on other reports and documents to support his conclusion that phantom traffic is a significant problem, and that Chapter 284 is an appropriate solution to deal with the problem.

E. CONCLUSION

For all the foregoing reasons, Verizon's Motion *in Limine* should be denied in its entirety.

Dated this 3rd day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Response to Verizon Wireless' Motion in Limine was served via the method(s) indicated below, on the 3rd day of July, addressed to:

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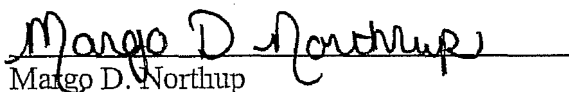

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