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, and South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Defendant Intervenors.	Civil No. 04-3014 **PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. INTRODUCTION

This matter was tried to the Court on August 15-16, 2007. Plaintiffs ("Verizon Wireless") challenge the application of certain provisions of 2004 S.D. Session Laws Chapter 284 ("Ch. 284") to wireless carriers. Ch. 284 was codified at SDCL 49-31-109 through 49-31-115.

Before trial the parties filed a Stipulation of Fact, Document No. 104 ("Stip."). At trial Verizon Wireless called three witnesses: John Clampitt, Ed Harrop, and Abelkader Benaouda. Randy Olson, general manager of one of the Intervenors, was called as a joint witness by the Defendants and the Intervenors. The Intervenors also presented testimony of Larry Thompson, CEO of Vantage Point Systems, a consulting firm. The Court also received various exhibits into evidence.

After considering the Stipulation, testimony, documentary evidence, and post-hearing filings, I have prepared the following Findings and Conclusions.

II. FINDINGS OF FACT

A. PARTIES

1. Plaintiffs are entities operating in South Dakota and provide wireless service, referred to as commercial mobile radio service ("CMRS"), under the name "Verizon Wireless." Stip. ¶¶ 1-6, 14-15.

2. Defendants are the Commissioners of the South Dakota Public Utilities Commission ("PUC") and are named as defendants in their official capacity. Stip. ¶ 7-9.

3. Intervenor South Dakota Telecommunications Association ("SDTA") is a South Dakota corporation whose members consist of rural incumbent local exchange carriers ("LECs") in South Dakota. Stip. ¶ 10.

4. Intervenor Venture Communications Cooperative ("Venture") is an incumbent LEC, a member of SDTA, and a non-profit cooperative organization that provides telecommunication services in central and northeastern South Dakota. Stip. ¶ 11.

B. VERIZON WIRELESS' NETWORK AND SERVICES

5. Verizon Wireless provides service in accordance with its licenses by using network facilities that include cell sites, leased transmission facilities, and switches. A call made by a Verizon Wireless customer is picked up by a cell site, delivered to a switch, and then routed directly or indirectly to the carrier serving the person being called. Stip. ¶ 16.

6. Verizon Wireless operates approximately 90 cell sites that are physically located in South Dakota. Some South Dakota cell sites that are near a state border serve portions of other states. Verizon Wireless also operates cell sites in neighboring states, and some cell sites in other states serve portions of South Dakota. Stip. ¶ 18.

7. Verizon Wireless operates a switch in Sioux Falls, South Dakota (referred to as a "mobile switching center" or "MSC") that processes all calls originated or terminated through Verizon Wireless cell sites that are physically located in South Dakota. The Sioux Falls switch also processes calls originated or terminated through a number of cell sites located in northwest Iowa, one cell site located in northeast Nebraska, and a number of cell sites located in Minnesota. Stip. ¶ 19.

8. Verizon Wireless is interconnected with Qwest Communications, the largest incumbent LEC in the state. These physical connections with Qwest allow Verizon Wireless to deliver calls to Qwest customers. This is referred to as direct interconnection. Stip. ¶ 21. These physical connections with Qwest also allow Verizon Wireless to deliver calls destined to customers of other carriers who are also connected to Qwest. This is referred to as indirect interconnection. In the case of indirect interconnection, Qwest performs what is referred to as a "transit" function, and acts as an intermediary between the originating and terminating carrier. Stip. ¶ 22.

9. Verizon Wireless also maintains direct connections with several incumbent LECs in South Dakota other than Qwest. Where these direct connections are maintained, Verizon Wireless may deliver its calls without using Qwest as an intermediary. Stip. ¶ 27.

10. This case involves network functions and compensation for wireless calls dialed by a wireless subscriber and received by a LEC's end user customer. Such calls are "originated" by the wireless carrier and "terminated" by the LEC. For such calls to occur, the two networks need to communicate with each other via network signaling (described below) and the call is then delivered over network facilities. The jurisdiction of such a call, and thus the per-minute rate to be billed by the LEC, varies based on where the call is originated and terminated.

C. INTERCARRIER COMPENSATION

11. Parts of South Dakota lie in three different major trading areas, or MTAs. MTA-12 (Minneapolis) covers roughly the eastern and central two-thirds (2/3) of South Dakota but also

includes all of North Dakota and almost all of Minnesota. MTA-22 (Denver) covers roughly the western one-third (1/3) of South Dakota but also includes much of Colorado, most of Wyoming, western Nebraska, and a small portion of Kansas. MTA-32 (Des Moines) covers the southeast corner of South Dakota, most of Iowa, the northeast corner of Nebraska, western Illinois, and small portions of Wisconsin and Missouri. Stip. ¶ 28.

12. There are SDTA Companies within all three of the above MTAs. Stip. ¶ 29.

13. Verizon Wireless has cell sites that serve in all of these MTAs, and that serve across MTA and state boundaries. Stip. ¶ 30.

14. Due to Verizon Wireless' network, its service areas, the MTA boundaries, and the LEC areas, Verizon Wireless may deliver wireless originated traffic to South Dakota LECs-that is a) inside the MTA, b) outside the MTA and inside the state, and c) outside the MTA and outside the state. Stip. ¶ 31.

15. MTA boundaries are important because the FCC has provided that calls between a CMRS provider and a LEC that originate and terminate inside the MTA are subject to reciprocal compensation governed by 47 U.S.C. § 251(b)(5) instead of access charges governed by state and federal access tariffs. 47 C.F.R. § 51.701.

16. InterMTA calls may be either intrastate or interstate, and are subject to applicable state or Federal Communications Commission ("FCC") access tariffs as the case may be.

17. Reciprocal compensation rates and access charges are subject to different regulatory costing standards. The members of the SDTA have negotiated per-minute reciprocal compensation rates between $0.007 and $0.053 per minute. Stip. ¶ 32. Their interstate access rates range between $0.015 and $0.071 per minute. Stip. ¶ 33. Their intrastate access rates are the highest and range between $0.072 and $0.125 per minute. *Id.*

D. SIGNALING

18. Before calls are delivered between carriers, their networks must communicate with each other to ensure that there are facilities available to complete the call. This is done through "signaling." Verizon Wireless witness Benaouda was qualified to provide expert testimony on signaling and industry standards for signaling. Trial Transcript ("Tr.") 206-208. Intervenors' witness Thompson was asked no foundational questions that would have qualified him to speak as an expert on signaling, and in any case offered no testimony on signaling that contradicted Mr. Benaouda's testimony.

19. The commonly accepted industry standard protocol for delivering signaling information between telecommunications service providers is referred to as Signaling System 7 or "SS7." SS7 is the most common signaling protocol used in the industry. Verizon Wireless and the SDTA companies utilize SS7 throughout their South Dakota networks. Stip. ¶ 35.

20. SS7 provides carriers the ability to exchange information necessary for call establishment, billing, and routing. Before a call can be established, the networks communicate with each other to determine whether and how the call will be delivered. As this is done, SS7 signaling messages are created by the originating carrier, and are carried on a separate circuit from the voice circuit. Stip. ¶ 36.

21. It is undisputed that Verizon Wireless complies with commonly-accepted industry standards with regard to its signaling practices in South Dakota. Tr. 221 (Benaouda); Tr. 330-331 (Thompson).

22. Even though it complies with commonly-accepted industry standards, Verizon Wireless' SS7 messages will not tell a terminating carrier whether a call is intraMTA, interMTA and intrastate, or interMTA and interstate. Tr. 211 (Benaouda), Tr. 323 (Thompson agreeing that no

wireless traffic can be separated into the various jurisdictional buckets as it comes into LEC networks).

23. There is no signaling field that today, in accordance with commonly accepted industry standards, can be used to tell a terminating carrier whether a call is intraMTA, interMTA and intrastate, or interMTA and interstate. Tr. 212 (Benaouda). This is true in South Dakota, and nationwide. Tr. 222 (Benaouda).

24. It is not technologically possible for Verizon Wireless to transmit signaling information to LECs that would identify whether a call is intraMTA, interMTA and intrastate, or interMTA and interstate. Tr. 222, 224 (Benaouda). Verizon Wireless could not simply begin to use one of the signaling fields to try to communicate this information because that would be contrary to accepted industry standards and would not be understood by other carriers. Tr. 217, 222-223 (Benaouda).

25. Signaling messages delivered by Verizon Wireless identify that Verizon Wireless originated the call (Tr. 40 (Clampitt)), and identify the Verizon Wireless switch through which the call was originated. Tr. 214 (Benaouda). While this does provide some geographic information, it will not identify the MTA or state where a call originated because a call originated through a cell site connected to Verizon Wireless' Sioux Falls switch could have come from one of several MTAs or states. Tr. 215 (Benaouda); Tr. 31 (Clampitt); Stip. ¶ 19.

26. Even if it were possible to use signaling to communicate the jurisdiction of a wireless call, Verizon Wireless' network cannot identify the MTA in which a call is originated as a call is made. Tr. 139 (Harrop). This is because wireless callers are mobile. *Id.*

27. All parties agree that industry standards for signaling develop over time through the operation of various industry bodies. Stip. ¶ 41. This process of developing industry consensus is

necessary so that carriers are able to understand signaling messages sent between switches all over the country. Tr. 213, 223 (Benaouda).

28. If new industry standards were to be adopted regarding signaling, Verizon Wireless would be expected to comply with such standards. Tr. 222-223, 225 (Benaouda).

E. REPORTS OF ACCURATE AND VERIFIABLE INFORMATION

29. Verizon Wireless does not have the capability to communicate to terminating LECs accurate and verifiable information, including verifiable percentages, that would categorize calls as intraMTA, interMTA and intrastate, or interMTA and interstate. There are a number of reasons for this.

30. First, no software system or vendor solution exists that would categorize wireless calls for intercarrier compensation purposes based on the location of a cellular handset when a call is originated by a wireless customer. Tr. 138-139, 142-143 (Harrop). Wireless callers are mobile, and some cell sites serve areas that cross state or MTA boundaries. Stip. ¶ 30.

31. Second, Verizon Wireless is not capable of measuring its outbound calls, in an accurate and verifiable manner, for this purpose. Tr. 141-143 (Harrop). Verizon Wireless has no need to measure inbound or outbound calls for intercarrier compensation purposes in any jurisdiction in the country. Such capability is not required by the FCC, and is not required by any other state. Tr. 141, 150-151 (Harrop); Tr. 268 (Thompson).

32. Verizon Wireless could, by hiring a third-party vendor and purchasing various software solutions, develop the capability to measure and report calls by using the originating cell site to estimate the MTA and state in which the cellular handset was located. Tr. 144-147 (Harrop). To do this, Verizon Wireless would need to 1) engage a third party vendor; 2) establish facilities to the vendor and deliver all call records for all calls to the vendor, 3) provide for the enhancement of call records, 4) build reference tables correlating cell sites to MTAs, and 5) purchase software to map

terminating phone numbers to MTAs. These systems and databases would need to be updated over time. Tr. 144-148 (Harrop).

33. Verizon Wireless did not demonstrate the cost of implementing these systems. Mr. Harrop did testify, however, that the Company has no business or regulatory need to implement such systems at present, and that this kind of change could never be made practically or efficiently on a state-by-state basis. Tr. 143-144. In addition, the Company is presently not implementing any measurement systems in light of current regulatory requirements and the potential that the FCC is considering intercarrier compensation reform that would make all measuring systems unnecessary. Tr. 143 (Harrop). The cost of implementing such systems outweighs any benefits to be gained from it. Tr. 182 (Harrop).

34. While Verizon Wireless does have a database that contains information from call detail records, including the cell site through which a particular call originates, this database cannot be used to generate and transmit reports of accurate and verifiable information showing how much traffic is intraMTA, interMTA and intrastate, or interMTA and interstate. Tr. 150-151 (Harrop). That system is not accurate and verifiable for billing purposes and does not correlate cell sites or terminating numbers to MTAs. Tr. 196 (Harrop).

35. It would be an undue economic burden for Verizon Wireless to be forced to implement systems that could produce reports based on accurate and verifiable information, including percentage measurements, showing the amount of traffic that is intraMTA, interMTA and intrastate, and interMTA and interstate. In addition, such systems would be accurate and verifiable only if the cell site were used as the location where a call originates. As noted below, Ch. 284 separates calls into the various jurisdictional categorizes based on the location of origination, not the cell site being accessed by the end user. *See* SDCL 49-31-109(2) – (3).

36. The evidence also demonstrates that parties commonly negotiate interconnection agreements that include billing percentages for interMTA traffic, and that these percentages are used during a contract term in lieu of "accurate and verifiable" information. Tr. 23, 34-35 (Clampitt); Tr. 339 (Thompson). As a result, there would be little or no benefit associated with developing the capability to measure and report accurate and verifiable information to offset the undue burden imposed of doing so.

37. Mr. Thompson testified that he has conducted studies that have estimated the amount of interMTA traffic during a particular period of time. Tr. 278 (Thompson). Such studies might look at "a couple of weeks worth of data" and he acknowledged that one could never have perfect measurements in light of the "sheer volumes of records" to be dealt with. Tr. 300 (Thompson). The results of such studies estimates and are not "accurate and verifiable." The fact that Mr. Thompson has conducted these studies is beside the point. SDCL 49-31-110 and 49-31-111 do not direct carriers to use studies and do not provide for the use of estimates. Those provisions require information that is accurate and verifiable. While such studies may be used by parties during the negotiation process, they are not sufficient to meet the requirements of SDCL 49-31-110 and 49-31-111.

38. Mr. Thompson's testimony regarding the use of traffic studies and implementation of SDCL 49-31-110 and 49-31-111 is suspect due to his bias and lack of credibility. Mr. Thompson assisted in drafting Ch. 284 and lobbied in favor of its passage. Tr. 229 (Thompson). His company Vantage Point markets itself as a supporter of the interests of small telephone companies (Tr. 309-310 (Thompson)), and obtains approximately one-third of its revenue from the SDTA and its member companies. Tr. 344 (Thompson). Mr. Thompson has served as a negotiator on behalf of a number of SDTA companies (Tr. 310 (Thompson)) and obtains compensation from SDTA

companies for performing the kinds of studies he (incorrectly) believes satisfy the requirements of the SDCL 49-31-110 and 49-31-111. Tr. 339 (Thompson).

39. Mr. Thompson's credibility is also suspect. He testified twice that he assisted in the drafting of Ch. 284 (Tr. 229, 235), but then testified that SDTA simply had him "review" the legislation after it was drafted. Tr. 308. He testified that Verizon Wireless and Verizon Communications share a CEO and COO. Tr. 249. That is not true. Tr. 352-353; Court's Ex. A and B. He testified that he obtained his information on that point from a document he printed from the Verizon website. Tr. 251. That turned out not to be true. Compare Court's Ex. A with Ex. 353. And, it was demonstrated that Mr. Thompson was responsible for the Defendants' and Intervenors' denial of a request for admission that clearly should have been admitted. Tr. 328-329. The request read:

> 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.

Id. It was undisputed at trial that this statement is true.

F. THE NEGOTIATION AND ARBITRATION PROCESS

40. It is undisputed that under the FCC's Rules, compensation for intraMTA traffic between a CMRS provider and a LEC is due only in accordance with an interconnection agreement negotiated between parties. Tr. 24 (Clampitt); Tr. 322 (Thompson). It is also undisputed that the FCC directed that compensation for interMTA traffic should be addressed in these negotiations because it is not possible or necessary for wireless carriers to determine the exact location of a mobile caller:

> CMRS customers may travel from location to location during the course of a single call, which could make it difficult to determine the applicable transport and termination rate or access charge. We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location. This could complicate the computation of traffic flows and the applicability

> of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples. For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer. As an alternative, LECs and CMRS providers can use the point of interconnection between the two carriers at the beginning of the call to determine the location of the mobile caller or called party.

First Report & Order, ¶ 1044 (emphasis added) (footnotes omitted).

41. The evidence in this case shows that the negotiation and arbitration process has been used in South Dakota, and has allowed the SDTA companies to obtain interconnection agreements with wireless carriers that provide compensation for traffic delivered.

42. Verizon Wireless has interconnection agreements with all (or nearly all) of the SDTA companies. Tr. 27, 79 (Clampitt); Tr. 306 (Thompson); Ex. 201-231. Mr. Thompson testified that any one of the SDTA companies with "significant" levels of traffic with Verizon Wireless has an agreement in place with Verizon Wireless. Tr. 305-306, 341-342 (Thompson). Mr. Clampitt testified that Verizon Wireless negotiates when requested to do so, and is unaware of any Intervenor that is dissatisfied with its current contractual arrangement. Tr. 123 (Clampitt). The LECs operating with Verizon Wireless under Exhibits 201-231 have the right to terminate and seek renegotiation but have not done so. Tr. 28 (Clampitt).

43. When Verizon Wireless negotiates interconnection agreements, it negotiates terms of payment for interMTA traffic. Tr. 23 (Clampitt). In doing this Verizon Wireless looks at available network information for the purpose of negotiating a percentage of traffic that will be deemed to be outside the MTA and billed at access rates. Tr. 31-32 (Clampitt). Generally such negotiations are

successful. Tr. 38 (Clampitt). If parties are unable to reach a negotiated resolution, the Commission can resolve the issue in an arbitration. Tr. 38-39 (Clampitt).

44. Exhibit 226 shows how an interMTA billing percentage would work. Section 7.2.3 of Exhibit 226 specifically provides that if either party is "unable to classify on an automated basis the traffic delivered by CMRS as local traffic or interMTA traffic, a Percent InterMTA Use (PIU) factor will be used, which represents the estimated portion of interMTA traffic delivered by CMRS provider." That section then goes onto identify the negotiated percentage (20% in this case) and provide a mechanism for the parties to modify the percentage if necessary during the course of the term. The application of this contract term would allow the LEC to bill 80% of minutes at the local reciprocal compensation rate, and 20% at access rates. This provides appropriate compensation to the LEC for 100% of minutes delivered to its network.

45. Exhibits 227-229 also demonstrate how the negotiation process allows parties to resolve these issues. Those agreements provide that intraMTA traffic will be compensated at local rates, and that a certain percentage of traffic will be billed at access rates. There is a mechanism for the parties to modify the percentage over time based on a "mutually agreed-to traffic study analysis" designed to "provide a reasonable measurement of terminated interMTA traffic." *See, e.g.*, Ex. 229, ¶ 7.2.3.

46. The evidence demonstrates that the negotiation and arbitration process established by Congress and the FCC provides carriers like the SDTA companies with full compensation for wireless calls delivered to their networks. Tr. 127 (Clampitt); Tr. 190-192 (Harrop). Mr. Thompson himself was unaware of any cases in which an Intervenor was operating without an interconnection agreement with a wireless carrier with whom it exchanged significant levels of traffic. Tr. 312 (Thompson).

47. Because Verizon Wireless cannot provide information in the signaling field identifying traffic as intraMTA, interMTA and intrastate, or interMTA and interstate, and because Verizon Wireless cannot provide accurate and verifiable information that allows terminating carriers to classify calls as intraMTA, or interMTA and intrastate, or interMTA and intrastate, LECs would be authorized to bill all traffic at intrastate access rates. SDCL 49-31-110, 49-31-111. This risk has kept Verizon Wireless from seeking to renegotiate existing agreements, even those agreements that contain rates for intraMTA traffic that are higher than the rates paid by other wireless carriers. Tr. 36-37, 44 (Clampitt); Stip. ¶ 32. Mr. Clampitt testified that the penalty provision in SDCL 49-31-110 and 49-31-111 would change the balance of negotiations from what it would otherwise be.

48. Verizon Wireless' Exhibit 3, which was discussed by Mr. Harrop, demonstrates why the penalty provision would have such an impact on negotiations. Exhibit 3 uses reasonable assumptions to show that a mid-tier usage level of 270,000 minutes of use per month might generate a bill of approximately $3,240 when broken down into various jurisdictional components based on negotiated traffic factors. Under the penalty provision, those same minutes would generate a bill of $33,740 – more than ten times higher. The possibility of this penalty being enforced would clearly impact parties' negotiations.

49. Mr. Thompson admitted that Chapter 284 would have the effect of changing the relative strength of the parties during negotiations, making it more likely that small local telephone companies would be able to reach resolution without having to utilize the arbitration process: He testified that SDCL 49-31-110 and 49-31-111 would "help influence the carriers to negotiate" with rural LECs (Tr. 296), to "provide an incentive for the interconnecting carriers to pay the correct amount for the landline carriers to terminate their traffic" (Tr. 298), and to serve as "motivation to get a contract complete" (Tr. 347) without having to use the "expensive process" of arbitration established by Congress. Tr. 314.

G. PHANTOM TRAFFIC AND UNIDENTIFIED TRAFFIC

50. The Intervenors assert that SDCL 49-31-110 and 49-31-111 are intended to prevent LECs from losing revenue due to "phantom traffic" delivered to LEC networks. SDCL 49-31-110 and 49-31-111 do not serve this purpose as applied to wireless traffic.

51. Mr. Thompson asserted that phantom traffic is traffic for which the terminating carrier does not know either the identity of the originating carrier or the jurisdiction of the call. Tr. 318 (Thompson). These two concepts will be addressed in turn.

52. Mr. Thompson admitted that his clients can already identify the originating carrier for wireless calls, regardless of whether the call is delivered directly, indirectly, or via a long distance carrier. Tr. 319-321 (Thompson). As a result, 49-31-110 and 49-31-111 are not necessary to allow LECs to identify the originating carrier for a wireless call, and does not serve that purpose.

53. As for jurisdiction, SDCL 49-31-110 and 49-31-111 do not allow LECs to identify the jurisdiction of traffic received from wireless carriers. It is undisputed that the jurisdiction of a wireless call will be unknown as the call is delivered under commonly-accepted industry standards. Tr. 323 (Thompson). In addition, as noted above, signaling fields do not identify the jurisdiction of a wireless call, and Verizon Wireless cannot provide accurate and verifiable information, including percentage measurements, identifying the jurisdiction of wireless calls. As a result, 49-31-110 and 49-31-111 do not provide LECs with information allowing them to know the jurisdiction of wireless calls sent to them.

54. All witnesses in this case agreed that the way to provide for the compensation of wireless calls that include intraMTA, interMTA and intrastate, and interMTA and interstate, is for parties to negotiate estimated billing percentages to be used for billing purposes. Verizon Wireless witness Clampitt testified that this is commonly done and has been done in South Dakota. Tr. 23. Verizon Wireless witness Harrop testified that the use of negotiated factors allows telephone

companies to obtain fair compensation for all minutes delivered. Tr. 90. Even the Intervenors' witness Mr. Thompson testified that the only way for wireless traffic to cease being "phantom traffic" is for the wireless carrier and the LEC to exchange traffic pursuant to an interconnection agreement that includes estimated billing percentages. Tr. 318-319. Thus, Mr. Thompson's solution to the phantom traffic problem (at least as to wireless traffic) is to negotiate contracts, something already provided for by Congress, and not the outcome directed by SDCL 49-31-110 and 49-31-111.

55. It is also worth noting that the FCC has sought comment from the industry on the best way to address phantom traffic. The record reflects that the industry proposal supported by both Defendants and Intervenors would not solve these problems by imposing the requirements of SDCL 49-31-110 and 49-31-111 on a national basis. *See* Ex. 15 (proposed phantom traffic proposal of supporters of Missoula Plan); Ex. 16 (SDTA comments supporting Missoula Plan); Ex. 18 (South Dakota Commission's comments supporting Missoula Plan).

56. In fact, it appears that no commenter nationwide has recommended that the FCC adopt a solution that would implement SDCL 49-31-110 and 49-31-111 nationwide. Tr. 351-352 (Thompson). It is difficult to conclude that SDCL 49-31-110 and 49-31-111 are intended to solve problems associated with phantom traffic when the provisions are absent from the national discussion. It is more likely that these provisions were intended to provide one consistency with leverage against other carriers while legitimate and realistic solutions were reserved for the FCC.

57. Because SDCL 49-31-110 and 49-31-111 do not facilitate the identification of the originating carrier or the jurisdiction of wireless calls, these provisions do not serve the purpose of allowing LECs to recover compensation for wireless "phantom traffic."

III. CONCLUSIONS OF LAW

58. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, and venue is proper in this Court.

59. Verizon Wireless claims that portions of Ch. 284 are preempted as applied to wireless carriers. Preemption may be express or implied. A state law is impliedly preempted where: (1) Congress has legislated comprehensively, thus "occupying the field" and leaving no room for states to supplement federal law; or (2) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *La. Pub. Serv. Comm'n*, 476 U.S. 355, 368-69 (1986). Preemption may result from action taken by either Congress or a federal agency acting within the scope of its Congressionally delegated authority. *Id.* at 369; *see also Qwest Corp. v. Scott*, 380 F.3d 367, 371-72 (8th Cir. 2004).

60. Ch. 284 is not clearly written, and much of the Parties' disagreement in this case relates to differing understandings as to what the statute requires Verizon Wireless to do. In interpreting this statute, it is the function of the Court to effectuate the intent of the Legislature, which is done by giving effect to the words the Legislature used. *Am. Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 915-16 (D.S.D. 1999). I am not at liberty to construe a state statute narrowly in order to save the statute from a constitutional challenge. *Id.* at 917.

A. SDCL 49-31-110 AND 49-31-111

61. SDCL 49-31-110 and 49-31-111 require that "an originating carrier of local telecommunications traffic shall, in delivering its traffic, transmit signaling information in accordance with commonly accepted industry standards giving the terminating carrier" identifying a call as "local," "nonlocal" and interstate, or "nonlocal" and intrastate. SDCL 49-31-110 and 49-31-111 (emphasis added). "Local" wireless traffic is that which originates and terminates within an MTA. SDCL 49-31-109(2). The Defendants and Intervenors concede that commonly accepted industry signaling does not today identify wireless traffic in this manner, and claim this requirement applies only sometime in the future when industry standards change. While such a construction of

SDCL 49-31-110 and 49-31-111 would make those provisions less objectionable, it is simply not a realistic interpretation of the language approved by the Legislature.

62. SDCL 49-31-110 and 49-31-111 further require that carriers "shall separately provide the terminating carrier with accurate and verifiable information, including percentage measurements" placing traffic into the three jurisdictional categories. SDCL 49-31-110 and 49-31-111 (emphasis added). Verizon Wireless reads this language to impose an obligation on it to provide reports for all traffic, and for those reports to be accurate (i.e., auditable). Defendants and Intervenors read this provision to require carriers to conduct one-time studies to determine estimates of traffic levels that would then be incorporated into agreements that would not require any ongoing transmission of information. Again, while such a construction of SDCL 49-31-110 and 49-31-111 would make those provisions less objectionable, it is simply not what the Legislature has mandated. Estimates are not "accurate and verifiable" and nothing in SDCL 49-31-110 and 49-31-111 suggests that undertaking one-time studies would eliminate any further obligation to measure and report traffic based on its jurisdiction.

63. There are other disagreements about what Ch. 284 means. Verizon Wireless reads Ch. 284 to require that its signaling information and reports would have to identify whether a call is interMTA based on the physical location of the cellular handset, because that is where a call is "originated" under SDCL 49-31-119(2). Defendants and Intervenors argue that the point of originating is deemed to be the originating cell tower, even though there is no reference to a cell tower in Ch. 284. Finally, Verizon Wireless sees nothing in SDCL 49-31-110 and 49-31-111 that would allow contracts negotiated between carriers to supersede the obligations imposed by the Legislature. Defendants and Intervenors suggest that these provisions accommodate and are subservient to such agreements, but they cannot be construed to achieve such a result.

B. AUTHORIZATION TO BILL INTRAMTA TRAFFIC AT ACCESS RATES

64. SDCL 49-31-110 would authorize local exchange carriers in some situations to bill all traffic received from CMRS providers at access rates. If a CMRS provider did not comply with the requirements of SDCL 49-31-110, the LEC "may classify all unidentified traffic terminated for the originating carrier as nonlocal [i.e., interMTA] telecommunications traffic for service billing purposes." SDCL 49-31-110. By doing so, the LEC would clearly be authorized to bill some intraMTA calls at access rates. The FCC has prohibited the application of access charges to intraMTA traffic. *See In the Matter of Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325, First Report and Order, ¶ 1036 (1996) ("*First Report & Order*") ("traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) [i.e., reciprocal compensation], rather than interstate and intrastate access charges"). This prohibition applies to preempt states from authorizing LECs to bill CMRS providers access rates for intraMTA calls. *WWC License, L.L.C. v. Boyle*, 459 F.3d 880 n. 6 (8th Cir. 2006) (undisputed that a wireless provider's MTA is the local area for the purpose of reciprocal compensation); *Iowa Network Servs., Inc. v. Qwest*, 466 F.3d 1091, 1096-97 (8th Cir. 2006) ("In this case, the calls originate and terminate within the same local MTA; therefore, they are considered to be "local" calls. According to the FCC's ruling, because these calls are "local," they are to be governed by reciprocal compensation arrangements."); *Ronan Tel. Co. v. Alltel Communications, Inc.*, 2007 WL 433278, at *2 (D. Mont. Feb. 2, 2007) (federal law preempts application of state law to impose access charges on wireless traffic that is within an MTA); *3 Rivers Tel. Coop., Inc., et al. v. U.S. West Comm., Inc.*, 2003 U.S. Dist. LEXIS 24871 (D. Mont. Aug. 22, 2003); *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n*, 183 S.W.3d 575, 577-78 (Mo. 2006). As a result, to the extent it would authorize local exchange carriers to bill access charges to wireless carriers for intraMTA traffic, SDCL 49-31-110 conflicts with and is preempted by federal law.

C. BILLING OF CMRS TRAFFIC IN THE ABSENCE OF AN INTERCONNECTION AGREEMENT

65. SDCL 49-31-110 and 49-31-111 appear to authorize LECs to bill for traffic they receive from wireless carriers whether or not a contract is in place. In 2005 the FCC adopted *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, 20 F.C.C.R. 4855, Declaratory Ruling and Report and Order (Feb. 24, 2005) (the "*T-Mobile Order*"). The *T-Mobile Order* provides that no compensation is owed for call termination in the absence of an agreement or a formal request to negotiate an agreement. *T-Mobile Order*, ¶ 14 fn. 57.

66. A state law authorizing a LEC to bill for call termination in the absence of an agreement (or a request) would directly conflict with, and is preempted by, the FCC's *T-Mobile Order*. *See Ronan Tel. Co. v. Alltel Communications, Inc.*, 2007 WL 433278, at *3-4 (dismissing state claims that would impose compensation obligations in the absence of an interconnection agreement). SDCL 49-31-110 and 49-31-111 cannot be enforced to authorize LECs to bill CMRS providers in the absence of an agreement or a request for an agreement made under 47 C.F.R. § 20.11(e). Neither the Defendants nor the intervenors dispute that the *T-Mobile Order* preempts SDCL 49-31-110 and 49-31-111 from authorizing billing for call termination in the absence of an agreement (or a formal request under 47 C.F.R. § 20.11(e)). Tr. 322 (Thompson).

D. ABILITY TO DETERMINE MTA OF CALLS ACCURATELY

67. The FCC decided in 1996 that CMRS providers did not need to implement the technical capability to determine whether particular calls are inside the MTA or outside the MTA:

> We recognize that, using current technology, it may be difficult for CMRS providers to determine, in real time, which cell site a mobile customer is connected to, let alone the customer's specific geographic location. This could complicate the computation of traffic flows and the applicability of transport and termination rates, given that in certain cases, the geographic locations of the calling party and the called party determine whether a particular call should be compensated under transport and termination rates established by one state or another, or under interstate or intrastate access charges. We conclude, however, that it is not necessary for incumbent LECs and CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected. We conclude

> that parties may calculate overall compensation amounts by extrapolating from traffic studies and samples.

First Report & Order, ¶ 1044 (footnotes omitted).

68. Thus when the FCC established the MTA as the area for local traffic it recognized that CMRS providers would be unable to separate calls out by jurisdiction, and decided that CMRS providers were not required to do so. There is no question that the FCC had the jurisdiction and authority to relieve CMRS providers of this obligation. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (FCC has authority to issue rules of "special concern" applicable to CMRS providers), *rev'd on other grounds*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Instead, CMRS providers were to resolve these issues by negotiating "overall compensation amounts by extrapolating from traffic studies and samples." *First Report & Order*, ¶ 1044. The FCC has never modified this directive.

69. SDCL 49-31-110 and 49-31-111 would require Verizon Wireless to have the capability to transmit signaling information and provide accurate and verifiable information categorizing calls as intraMTA, intraMTA and intrastate, or interMTA and interstate. This is in direct conflict with paragraph 1044 of FCC's *First Report & Order* and is therefore preempted.

70. In addition, FCC orders cannot simply be disregarded by states, as the Hobbs Act requires FCC orders to be challenged directly to the federal Courts of Appeal. 28 U.S.C. § 2342(1); *see, e.g., Consol. Tel. Coop. v. Western Wireless Corp.*, 637 N.W.2d 699, 707 (N.D. 2001) (rejecting attempt to have state reach different conclusion than FCC; only federal courts of appeal can review the FCC's rulings, policies, practices and regulations). A state law purporting to implement 47 U.S.C. § 251(b)(5) that imposes an obligation the FCC declined to impose is essentially a collateral attack on the FCC order, which violates the Hobbs Act.

E. IMPACT ON THE NEGOTIATION PROCESS

71. Congress and the FCC have adopted substantive requirements regarding the compensation for telecommunications traffic between carriers, and procedural mechanisms to implement those substantive requirements. These procedural mechanisms – including the mechanics of negotiation and arbitration, are important parts of the new competitive national telecommunications policy. States have been given the job of implementing 47 U.S.C. §§ 251-252 by approving negotiated interconnection agreements and arbitrating agreements where negotiations are not successful. 47 U.S.C. § 252(a) – (b). States are not at liberty, however, to change this process or to give one class of carriers a leg up in the negotiation process. As the Seventh Circuit Court of Appeals has pointed out, a state requirement that "places a thumb on the negotiating scales" interferes with the procedures in the Act and thus undermines federal law. *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003).

72. Here, the clear impact of SDCL 49-31-110 and 49-31-111 is to tip the scales of intercarrier negotiations in favor of terminating LECs to the detriment of CMRS providers. It compels CMRS providers to do that which they cannot do, and subjects them to a penalty provision that would increase their bills by a factor of ten. A CMRS provider would have little choice but to sign a contract rather than be at risk of being subjected to the penalty provision. In fact, as noted above, Mr. Thompson admitted that SDCL 49-31-110 and 49-31-111 would make it easier for rural LECs to negotiate acceptable contracts without resulting to arbitration.

73. I have found that Verizon Wireless cannot today meet the requirements of SDCL 49-31-110 and 49-31-111 because 1) there are no commonly-accepted industry standards for signaling that will allow a CMRS provider to communicate whether a call is intraMTA, interMTA and intrastate or interMTA and interstate, and 2) Verizon Wireless cannot provide "accurate and verifiable" information as required by the statute. Because of this, SDCL 49-31-110 and 49-31-111

serves only to authorize the imposition of penalties, not to facilitate the identification of CMRS traffic. By imposing requirements that cannot be met, and authorizing penalties that conflict with the federal scheme for intercarrier compensation, the state has clearly undermined federal law.

74. SDCL 49-31-110 and 49-31-111 are preempted because they impermissibly tip the scales of intercarrier negotiations in a way that undermines decisions made by Congress and the FCC. If the SDTA companies are unable to negotiate compensation issues with CMRS providers, their remedy is to seek arbitration under 47 U.S.C. § 252(b), not to use a state law to force a negotiated resolution that would otherwise not occur.

75. Furthermore, SDCL 49-31-110 and 49-31-111 conflict with the FCC's clear policy decision that issues such as these are to be resolved through negotiation, not by state mandate. This policy decision is evident in ¶ 1044 of the *First Report & Order* and ¶ 9 of the *T-Mobile Order* ("we amend our rules to make clear our preference for contractual arrangements") and reflects the Congress' decision that the telecommunications industry operate in a de-regulatory framework. Pub. L. No. 104-104, 100 Stat. 56 (purpose of Act to "promote competition and reduce regulation"). *See also Rural Iowa Independent Tel. Assoc. v. Iowa Utils. Bd.*, 476 F.3d 572, 577 (8th Cir. 2007) (*T-Mobile Order* reaffirms FCC's stated desire to use registration and arbitration to facilitate market competition).

76. As a result, 49-31-110 and 49-31-111 are preempted as applied to CMRS providers.

F. REGULATION OF INTERSTATE COMMUNICATIONS

77. SDCL 49-31-110 and 49-31-111 impose obligations on the delivery of interstate traffic. That provision applies to require certain information to be contained in signaling fields for all "local" and "nonlocal" traffic. "Local" CMRS traffic is all intraMTA traffic, which includes traffic that originates in Minnesota, North Dakota, Wisconsin, Iowa, Colorado, Wyoming, Kansas or

Utah. *See* Stip. Attachment A. "Nonlocal" CMRS traffic is all interMTA traffic, which includes traffic that could have originated in any state in the country.

78. The FCC has regulatory authority over interstate communications, while states regulate only intrastate communications. 47 U.S.C. §§ 151-152 (assuming authority over "all interstate and foreign commerce in communication by wire or radio, and reserving only certain intrastate authority to states). *Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968); ("[Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law . . . states are precluded from acting in this area."); 47 U.S.C. § 261(c) (Act does not preempt states from imposing requirements for intrastate services if necessary for competition and no inconsistent with FCC Rules). The state of South Dakota has no authority to tell carriers how to perform signaling functions for interstate calls, yet this is exactly what SDCL 49-31-110 and 49-31-111 does.

79. States do have some authority in implementing the 1996 Act, and that authority does extend into the interstate realm in some cases. States can, for example, arbitrate contract terms that apply to interstate traffic, subject to review in federal court. 47 U.S.C. § 252(b)(4), 252(e)(6). States can approve statements of generally available terms applicable to regional Bell operating companies. 47 U.S.C. § 252(f). States cannot, however, take new regulatory authority over interstate communications that they did not have before. *Cf.* 47 U.S.C. § 251(d)(3) (preserving some historic access regulations that impose obligations on LECs).

80. This improper extension of state authority over interstate matters is also problematic in the application of the penalty provisions of SDCL 49-31-110 and 49-31-111. A carrier unable to comply with these provisions would be at risk of having all local traffic billed as nonlocal, and all nonlocal billed at state access rates. SDCL 49-31-110 provides that if a carrier does not comply with the requirements of that provision, the LEC "may classify all unidentified traffic terminated for the

originating carrier as nonlocal telecommunications traffic for service billing purposes." SDCL 49-31-111 then provides that if a CMRS provider does not comply with the requirements of that provision, the LEC "may classify all unidentified nonlocal telecommunications traffic terminated for the originating carrier as intrastate telecommunications traffic for service billing purposes." Together, these statutes take all interstate traffic and re-categorize it as intrastate traffic billable under state tariffs. States, however, do not have the authority to determine rates at which interstate traffic is billed.

81. For these reasons, SDCL 49-31-110 and 49-31-111 cannot be enforced to modify the regulatory treatment and compensation owed for interstate traffic that is subject to the FCC's jurisdiction.

G. APPLICATION TO PARTIES WITH CONTRACTS

82. Verizon Wireless has asked for a declaration that SDCL 49-31-110 and 49-31-111 are preempted if they would be read to apply even as to carrier who have reached agreements regarding intercarrier compensation matters. Defendants and Intervenors concede that those provisions should not supersede terms and conditions in individual contracts. Tr. 132.

83. SDCL 49-31-110 and 49-31-111 impose affirmative obligations on carriers regarding intercarrier compensation matters, and contain no language suggesting that their obligations can be contracted away. This is contrary to the federal intercarrier compensation scheme, which allows parties broad leeway to negotiate terms "without regard" to the standards in 47 U.S.C. § 251(b) and (c). 47 U.S.C. § 252(a). State commissions are obligated to approve such agreements unless they are discriminatory or inconsistent with the public interest. 47 U.S.C. § 252(e)(2). Only where parties fail to reach a negotiated resolution is a state commission directed to impose terms that are not the productory negotiations.

84. By mandating a mechanism for identifying, measuring and billing traffic without regard to negotiated solutions, SDCL 49-31-110 and 49-31-111 would undermine the regulatory scheme established by Congress and are thereby preempted.

H. AUTHORITY TO IMPLEMENT THE ACT VIA STATE STATUTE

85. SDCL 49-31-110 is on its face designed to implement 47 U.S.C. § 251(b)(5). While the state has a role in implementing the 1996 Act, that role is specific and limited. States review and approve negotiated agreements under 47 U.S.C. § 252(e)(2)(A), and resolve open issues in expedited arbitration proceedings subject to 47 U.S.C. § 252(e)(2)(B). This state action must be consistent with federal law and is subject to review in federal court. 47 U.S.C. § 252(e)(2), 252(e)(6). States have not been given the authority by Congress to adopt statutes of general applicability to resolve intercarrier compensation issues outside the negotiation process.

86. The Ninth Circuit Court of Appeals has explained that the state's role in implementing the Act is limited to specific procedural mechanisms: "It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252 – that of arbitrating, approving, and enforcing interconnection agreements." *Pacific Bell v. PacWest Telecomm, Inc.*, 325 F.3d 1114, 1126 (9th Cir. 2003). Similarly, the Third Circuit has held:

> Under the Act, there has been no delegation to state commissions of the power to fill gaps in the statute through binding rulemaking ... State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement.

MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 516 (3d Cir. 2001). *See also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) (1996 Act carefully delineates specific roles for states in implementing Sections 251 and 252, and that where Congress did not provide a state role, none can be inferred).

87. I find that the state of South Dakota does not possess the authority to resolve intercarrier compensation issues in accordance with the mechanisms in SDCL 49-31-110 and 49-31-111. As a result, the enforcement of those provisions is preempted as conflicting with federal law.

I. INJUNCTIVE RELIEF

88. Verizon Wireless seeks injunctive relief against the Defendants, prohibiting them from enforcing the provisions of SDCL 49-31-110 and 49-31-111 through complaint proceedings under SDCL 49-31-114 and 49-31-115.

89. Because the substantive obligations and penalty provisions in SDCL 49-31-110 and 49-31-111 are preempted as to CMRS providers, it is appropriate for the Defendants to be enjoined from enforcing those provisions through complaint proceedings or otherwise.

ORDER

Verizon Wireless is granted the declaratory and injunctive relief requested. SDCL 49-31-110 and 49-31-111 are preempted and unenforceable as to CMRS providers, and the Defendants are enjoined from enforcing the preempted provisions as to CMRS providers or CMRS traffic.

Dated this 26th day of September, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2007, I electronically filed a true and correct copy of **Plaintiffs' Proposed Findings of Fact and Conclusions of Law**, relative to the above-entitled matter, with the United States District Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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