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' POST HEARING BRIEF**

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Verizon Wireless brings this action seeking an order that federal law preempts various provisions of SDCL 49-31-109 through 49-31-115 ("Chapter 284"). This Post Hearing Brief is submitted in conjunction with, and as a supplement to, Verizon Wireless' Proposed Findings of Fact and Conclusions of Law.

SDCL 49-31-110 and 49-31-111 impose certain requirements on telecommunications carriers to identify the jurisdiction of calls made by wireless subscribers. As the Court described in its Opinion and Order on Plaintiffs' Motion for Summary Judgment ("Summary Judgment Order"), wireless calls are treated differently depending on whether they are intraMTA,[1] interMTA and intrastate, or interMTA and interstate. Doc. 80, p. 14. The Legislature, by enacting SDCL 49-31-110 and 49-31-111, mandated that wireless providers transmit signaling information identifying the jurisdictional category of each call, and separately provide accurate and verifiable information identifying how much total traffic falls into each category. These provisions also include penalty clauses that authorize a local exchange carrier ("LEC") to bill all traffic at the highest rate if the information required by the statute is not provided. *Id.*

Chapter 284 conflicts with and is preempted by federal law for the following reasons:

- It authorizes LECs to bill intraMTA traffic at access rates, in direct conflict with Federal Communications Commission ("FCC") Rules and Orders;
- It authorizes LECs to bill commercial mobile radio service ("CMRS") providers for call termination in the absence of an interconnection agreement;
- It requires CMRS providers to implement the capability to determine whether calls are interMTA or intraMTA, in direct conflict with an FCC Order;
- It impermissibly impacts the negotiation process established by Congress and the FCC;
- It regulates the transmission of and rates charged for interstate communications;
- It does not accommodate the use of contracts to establish compensation obligations between carriers, contrary to 47 U.S.C. §§ 251-252; and

[1] An MTA is a "major trading area." Stipulation of Fact, Document No. 104 ("Stip") ¶¶ 24-28.

- It imposes compensation obligations via statute instead of through the negotiation and arbitration process.

The Court should grant Verizon Wireless' requested relief, declare portions of Ch. 284 to be preempted as to CMRS providers, and enjoin the Defendants from enforcing those provisions.

I. STANDARDS FOR PREEMPTION

Federal preemption arises out of the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . [the] Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Preemption takes two basic forms. Express preemption occurs "when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law . . . ." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Even in the absence of express preemption, state action may still be barred by the doctrine of implied preemption where: Congress has legislated comprehensively, thus "occupying the field" and leaving no room for states to supplement federal law; or 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. at 368-69. 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). The focus of this case is on implied preemption.

While the states and the FCC historically had independent responsibility over intrastate and interstate communications respectively, that changed with the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"). The 1996 Act created a national competitive regulatory regime for telecommunications that extended into the intrastate realm. In 1999 the Supreme Court held that the 1996 Act applies to intrastate communications and gives the FCC rulemaking authority over intrastate matters within its scope. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

In essence, then, FCC action lawfully implementing the 1996 Act preempts inconsistent state action. *Id.* at 378 n.6 ("This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew.").

When a state acts to regulate matters subject to the 1996 Act, a reviewing court must determine whether that state action is inconsistent with the federal regime (as implemented by the FCC) and thus stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See La. Pub. Serv. Comm'n*, 476 U.S. at 368-69. For example, in *Wisconsin Bell v. Bie* the Seventh Circuit Court of Appeals reviewed a state requirement that an incumbent LEC file a tariff as a way to provide interconnection and services to competing carriers that did not go through the negotiation and arbitration process in the 1996 Act. 340 F.3d 441, 444-45 (7th Cir. 2003). The Court found that such an alternate procedure interfered with the negotiation and arbitration process mandated by Congress and the FCC, and was therefore preempted, finding that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law." *Id.* at 443.

Similarly, both the Eighth and Tenth Circuit Courts of Appeal have decided that allowing a telecommunications carrier to recover compensation for telecommunications traffic under a state common law claim would undermine the federal regulatory regime for intercarrier compensation. The Eighth Circuit Court of Appeals determined that because "the regulatory process contemplates that an express contract will ultimately result," recovery under unjust enrichment and implied contract claims was preempted. *Iowa Network Servs. v. Qwest*, 466 F.3d 1091 (8th Cir. 2006). The Tenth Circuit Court of Appeals held that similar unjust enrichment claims would "frustrate the federal regulatory mechanism" that calls for negotiation followed by arbitration before the state commission. *Union Tel. Co. v Qwest Corp.*, __ F.3d __, 2007 WL 2153231 (10th Cir. July 27, 2007).

Courts have also determined that state action that interferes with specific FCC decisions regarding intercarrier compensation is impliedly preempted. For example, the FCC's *First Report & Order*[2] implementing intercarrier compensation provisions of the 1996 Act established the MTA rule, which provides that CMRS traffic originated and terminated within an MTA is subject to reciprocal compensation rates under 47 U.S.C. § 251(b)(5) instead of interstate or intrastate access rates. *First Report & Order*, ¶ 1036; *see* 47 C.F.R. § 51.701(a)(2) (defining local telecommunications traffic exchanged between a LEC and CMRS carrier as traffic that "at the beginning of the call, originates and terminates within the same Major Trading Area.").

Court have held that state law cannot be used as a vehicle to undermine the MTA rule because the MTA rule reflects the FCC's implementation of the intercarrier compensation provisions of the 1996 Act. *Ronan Tel. Co. v. Alltel Communications, Inc.*, 2007 WL 433278, at *2 (D. Mont. Feb. 2, 2007) (federal law impliedly preempts application of state law to impose access charges on intraMTA wireless traffic); *3 Rivers Tel. Coop., Inc., et al. v. U.S. West Comm., Inc.*, 2003 U.S. Dist. LEXIS 24871, at *56-68 (D. Mont. Aug. 22, 2003) (principle of implied preemption applies to preempt application of state access tariffs to impose access charge for intraMTA CMRS traffic); *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n*, 183 S.W.3d 575, 577-78 (Mo. 2006) (state tariffs preempted as to intraMTA traffic).

The impact of the implied preemption doctrine is strong in this area in part because states have been given specific limited roles. State commissions are directed to approve negotiated interconnection agreements and to arbitrate contract terms in a manner consistent with federal law when negotiations fail. 47 U.S.C. § 252 (a)-(e). Thus, the Ninth Circuit Court of Appeals rejected the California Commission's issuance of generic orders to address intercarrier compensation issues

[2] *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 (1996) ("*First Report & Order*").

because the Act requires a commission to review, arbitrate and approve interconnection agreements, not issue orders of general applicability. *Pac. Bell v. Pac-W. Telecomm, Inc.*, 325 F.3d 1114, 1125-26 n.10 (9th Cir. 2003); *see also MCI Telecomm. Corp. v. Bell Atl.-Pa.*, 271 F.3d 491, 516 (3d Cir. 2001).

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

The parties are in disagreement regarding what SDCL 49-31-110 and 49-31-111 mean. Verizon Wireless reads the plain language of the statue as imposing clear obligations on it and other carriers to communicate the jurisdiction of a wireless call (whether it is intraMTA, interMTA and intrastate, or interMTA and interstate) within the signaling information delivered to other carriers. Defendants and Intervenors, on the other hand, propose to read the statute in that way that simply does not make logical sense. *See* VZW Prop. Find., ¶¶ 61-63. Whether the Court opts for a straightforward interpretation of Ch. 284 proposed by Verizon Wireless or the more creative interpretation proposed by the Defendants and Intervenors, this interpretation will play a significant role in the Court's determination of whether those provisions conflict with federal law.

III. FACTS PROVEN AT TRIAL

Verizon Wireless has provided the Court with its proposed findings of fact, along with citations to the record supporting those proposed findings, and will not repeat those facts here. Verizon Wireless does, however, wish to highlight the key facts that were proven at trial.

A. The Provisions of SDCL 49-31-110 and 49-31-111 are Not Necessary to Allow Intervenors to Obtain Full Compensation for Every Wireless Minute Delivered to Their Networks

At the start of the trial, Verizon Wireless told the Court that it would prove that the negotiation and arbitration process established by Congress and the FCC provides small LECs with the ability to obtain appropriate compensation for all minutes of use terminated on their networks. Tr. 7. This is an important point because the Court's Summary Judgment Order stated Verizon Wireless' position to be that "originating carriers are not required to identify their traffic, and the

traffic is considered local, which is billed at the lower reciprocal rate." Doc. 80, p. 14 (emphasis added). This is not Verizon Wireless' position. Verizon Wireless' position is that total minutes delivered should be separated into the three jurisdictional categories through the application of a contract term that contains negotiated or arbitrated billing percentages to determine total compensation amounts. Not only is this exactly what the FCC has directed parties to do, it is exactly the way this is done in South Dakota, and the way that the Intervenors claim traffic should be billed.

1. Negotiated or Arbitrated Billing Percentages Are Used to Determine Total Compensation Levels

When parties begin negotiating an interconnection agreement, there are many issues on the table. One of those issues is compensation for interMTA traffic. Mr. Clampitt testified that Verizon Wireless negotiates regarding how payment for interMTA traffic will be made. Tr. 23. During these negotiations, Verizon Wireless and the other party look at available network information and negotiate a percentage of traffic that will be deemed to be interMTA and billed at access rates. Tr. 31-32 (Clampitt). If this issue is resolved successfully through negotiations, the parties then simply apply the billing percentage every month to determine total compensation due to the LEC. Tr. 23-24 (Clampitt); Tr. 313-314 (Thompson). If parties are unable to reach a negotiated resolution, the Commission can resolve the issue in arbitration by looking at available evidence and setting the appropriate billing percentages. Tr. 38-39 (Clampitt); Tr. 314 (Thompson). Whether resolved through negotiation or arbitration, the result is a billing percentage that allows total minutes to be separated in the appropriate jurisdictional categories and billed at the appropriate rates. *See* VZW Prop. Find., ¶¶ 44-45.

Mr. Thompson testified that billing percentages are an appropriate way – in fact the only way – to identify total compensation amounts. Tr. 299-301 (Thompson). In addition, he admitted that once this is done, wireless traffic cannot be considered "phantom traffic" because the parties know the appropriate rate to bill for all minutes delivered. Tr. 313-319 (Thompson).

The evidence thus demonstrates that the use of billing percentages, determined via negotiation or arbitration, allows LECs to obtain appropriate levels of compensation for all minutes of use delivered to them.

2. All Intervenors Have Contracts with Verizon Wireless and Other Wireless Carriers

The Court questioned various witnesses as to why these compensation issues had not been resolved via negotiation. *See, e.g.*, Tr. 305. The answer provided was that contracts are in place. In fact, the evidence clearly shows that the SDTA companies have interconnection agreements in place today with Verizon Wireless and with all other wireless carriers that deliver significant amounts of traffic. Tr. 27, 79 (Clampitt); Tr. 305-306, 341-342 (Thompson); Ex. 201-231. What this means is that the SDTA companies are today obtaining compensation under agreements for effectively 100% of traffic delivered to their networks by wireless carriers. In addition, if any SDTA company is unhappy with its current contractual relationship with Verizon Wireless, it has the ability to terminate its contract and renegotiate under the 1996 Act. Tr. 28; *see, e.g.*, Ex. 201, § 10 (providing for 60 days' notice of termination). In light of the fact that the SDTA companies are obtaining compensation for all wireless traffic via the negotiation process established by the 1996 Act, SDCL 49-31-110 and 49-31-111 are not necessary to allow SDTA companies to obtain such compensation.

3. SDCL 49-31-110 and 49-31-111 Tilt the Scales of Negotiations

The Intervenors do not claim that SDCL 49-31-110 and 49-31-111 are intended to replace the negotiation and arbitration process, but instead claim that those provisions make it more likely that parties would enter into agreements that would incorporate billing percentages. Tr. 345-347 (Thompson). In fact, however, the evidence reflects that the penalty provisions in SDCL 49-31-110 and 49-31-111 actually serve to make it more likely that a CMRS provider will agree to terms that are acceptable to the LEC. This was the testimony of Mr. Clampitt (Tr. 44) as well as Mr. Thompson. *See* VZW Prop. Find., ¶ 49.

B. Verizon Wireless Cannot Comply with SDCL 49-31-110 and 49-31-111 as they are Written

At the start of trial Verizon Wireless stated that it would prove that it cannot do the two things that SDCL 49-31-110 and 49-31-111 require, i.e., provide signaling information that identifies the jurisdiction of the traffic, and provide reports of accurate and verifiable information regarding the number of minutes in each jurisdictional category. Tr. 5-6. Verizon Wireless proved these facts at trial.

1. Signaling Information

The evidence is undisputed that under current industry standards, there is no way for a carrier to use signaling to identify whether a wireless call is intraMTA, interMTA and intrastate, or interMTA and interstate. VZW Prop. Find., ¶ 23. The only signaling field that incorporates any jurisdiction or geographic information identifies Verizon Wireless' Sioux Falls switch, which will not tell a terminating carrier whether a call is intraMTA, interMTA and intrastate, or interMTA and interstate. *Id.* ¶ 25. As a result, neither Verizon Wireless nor any other wireless carrier can provide signaling information under commonly accepted industry standards that will identify the jurisdiction of calls as required by SDCL 49-31-110 and 49-31-111.

2. Accurate and Verifiable Information

Verizon Wireless introduced evidence that it cannot today provide reports of accurate and verifiable information that identify the amount of traffic that is intraMTA, interMTA and intrastate, or interMTA and interstate. *See* VZW Prop. Find., ¶¶ 29-39. Verizon Wireless lacks the database, the software, and the mechanisms to accomplish this, and could never efficiently implement such a solution for traffic delivered to a single state. Tr. 143-144. It is undisputed that South Dakota has imposed requirements that exist nowhere else in the nation. Tr. 141, 150-151 (Harrop); Tr. 268 (Thompson). In addition Verizon Wireless would need to use the originating cell cite to estimate the

point where the call originated to develop the ability to provide any reports, which is not something that is provided for in SDCL 49-31-110 and 49-31-111.

Defendants and Intervenors offered no evidence that could support a finding that Verizon Wireless can today comply with the obligation to provide accurate and verifiable reports.

C. <u>SDCL 49-31-110 and 49-31-111 are Not Solutions to Alleged Problems of Wireless Phantom Traffic</u>

The Defendants and Intervenors have taken the position in this case that the application of SDCL 49-31-110 and 49-31-111 is a necessary and appropriate way to address problems related to "phantom traffic." *See* Doc. 80, p. 12. In its Summary Judgment Order, the Court suggested that SDCL 49-31-110 and 49-31-111 might be "necessary to fix an emerging problem and fill a gap in the intercarrier compensation rules." Doc. 80, p. 18. Ultimately, the evidence demonstrated that SDCL 49-31-110 and 49-31-111 do nothing to facilitate the identification of wireless traffic for billing purposes, and that no such "gap" exists for wireless traffic.

Mr. Thompson testified that phantom traffic is traffic for which the terminating carrier cannot identify the originating carrier or the jurisdiction of the call. Tr. 318. The evidence shows, however, SDCL 49-31-110 and 49-31-111 do not result in any further identification of the originating carrier for wireless traffic and would incorrectly designate all wireless traffic as interMTA and intrastate. As a result, SDCL 49-31-110 and 49-31-111 do not facilitate the identification or categorization of wireless traffic.

1. LECs Can Already Identify the Carrier Originating a Wireless Call

According to Mr. Thompson, traffic for which the originating carrier is unknown is considered phantom traffic. Tr. 318. The evidence is clear – in fact undisputed – that terminating LECs can already identify the carrier originating a wireless call even in the absence of SDCL 49-31-110 and 49-31-111.

There are three ways for a wireless call to reach a LEC network. First, if a wireless call is handed to a long distance carrier, the long distance carrier becomes responsible for payment of access charges to the LEC, and no further identification is necessary. Stip. ¶ 23.[3] Second, if calls are delivered indirectly using Qwest as a transit provider (as described at ¶ 22 of the Stip.), Qwest provides records identifying the originating carrier. Tr. 320 (Thompson). Third, wireless calls delivered to a LEC via direct connection can be measured and identified by the LEC because all of the minutes on that facility come from the same wireless carrier. Tr. 321 (Thompson). None of these three scenarios is dependant on a wireless carrier complying with SDCL 49-31-110 and 49-31-111 for identification to occur. As a result, SDCL 49-31-110 and 49-31-111 do not serve a purpose or fill a "gap" with regard to the identification of the originating carrier of wireless traffic.

2. SDCL 49-31-110 and 49-31-111 do Not Serve to Place Wireless Traffic Accurately in the Three Jurisdictional Categories

Under Mr. Thompson's definition, "phantom traffic" is also traffic for which the originating carrier is identified, but the proper jurisdiction is unknown. Tr. 318 (Thompson). The facts at trial prove that SDCL 49-31-110 and 49-31-111 do not serve to accurately categorize wireless traffic as intraMTA, interMTA and intrastate, or interMTA and interstate. This is true because commonly accepted industry standards do not provide for the use of signaling to accomplish such categorization. *See* VZW Prop. Find., ¶¶ 21-24. In addition, because Verizon Wireless cannot provide reports of accurate and verifiable information regarding the amount of traffic in each category, SDCL 49-31-110 and 49-31-111 would categorize all traffic as interMTA and intrastate, which would result in a dramatic mis-categorization of the vast majority of wireless traffic. *Id.* ¶¶ 29-39.

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[3] This happens on a call from outside the region to South Dakota as explained by Mr. Clampitt (Tr. 24). The parties agree that a wireless carrier is not required to further identify calls that the wireless carrier pays a long distance carrier to deliver. Tr. 319-320 (Thompson).

could not be applied to intraMTA wireless traffic. *See also Iowa Network Servs., Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 878, 890 (S.D. Iowa 2005). The Eighth Circuit affirmed both decisions. *Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd.*, 476 F.3d 572, 578 (8th Cir. 2007); *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1096-97 (8th Cir. 2006). In these cases, then, the FCC's MTA rule governed and superseded state law that might have otherwise applied to allow the application of access charges as to intraMTA wireless traffic.

In Montana, wireless traffic is delivered to small ILECs just as it is in South Dakota – wireless carriers generally deliver calls to Qwest, which acts as a "transit carrier" and delivers the calls to the terminating LEC. Several years ago, a group of small incumbent LECs in Montana sued US WEST (now Qwest) claiming they were entitled to access charge payments under state law for wireless calls transited through Qwest in this manner. *3 Rivers Tel. Coop., Inc.*, 2003 U.S. Dist. LEXIS 24871. Qwest had refused to pay the rural ILECs' access rates, claiming that the FCC's rules and orders preempted the application of access rates to intraMTA wireless traffic. *Id.* at *20-21.

The Court began by analyzing the ILECs' tariffs, and found that the tariffs on their terms applied to the calls in question. *Id.* at *41-42. As a result, under state law, access charges would be due. *Id.* at *42. The Court then analyzed the preemptive effect of the FCC's MTA rule, and held these tariffs were preempted by the FCC's prohibition on charging access for intraMTA calls. *Id.* at *52. Because the FCC had held that "traffic between an LEC and a CMRS provider that originates and terminates within the same MTA is local traffic and is, therefore, not subject to terminating access charges, but rather to reciprocal compensation," a state could not lawfully give LECs the right to charge access rates for these calls. *Id.* at *65. Under *3 Rivers*, Federal law preempts a state compensation mechanism that subjects intraMTA wireless calls to access rates.

More recently, two small incumbent LECs in Montana sued Verizon Wireless and Alltel directly seeking to impose the terms of state access tariffs on wireless traffic. *Ronan Tel. Co.*, 2007 WL 433278. The Court affirmed the reasoning in the *3 Rivers* case and dismissed all such claims

because "the combination of 47 U.S.C. § 251(b) and FCC rulings such as the *1996 First Report and Order (In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCCR 15499, FCC 96-325 (1996)) dictate the state access tariffs are preempted by federal law." *Id.* at *2.

2. SDCL 49-31-110 Unlawfully Authorizes LECs to Bill IntraMTA Traffic at Access Rates

SDCL 49-31-110 conflicts with the MTA rule because it establishes circumstances under which LECs can charge access rates for intraMTA traffic. SDCL 49-31-110 specifically provides that if the originating carrier does not meet the requirements set forth therein, the terminating LEC can bill <u>all</u> traffic (including "local" intraMTA traffic) at access rates.

The Court should find that the FCC has prohibited the application of access rates to intraMTA wireless traffic, that states are preempted from creating exceptions to that prohibition, and that SDCL 49-31-110 would create a state-law exception to the MTA rule. This is consistent with FCC Rules and Orders as well as the Iowa and Montana cases described above.

3. Relief Requested

Verizon Wireless requests that the Court enter an order declaring that SDCL 49-31-110 is preempted by 47 C.F.R. § 51.701 and the FCC's *First Report & Order* because it authorizes LECs to charge access rates for CMRS calls that originate and terminate in the same MTA; and enjoining the Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 115.

B. <u>SDCL 49-31-110 and 49-31-111 are Preempted Because They Conflict with the FCC's Regulation of CMRS-LEC Compensation Under FCC Rule 20.11</u>

1. The FCC Has Prohibited LECs From Billing CMRS Providers for IntraMTA Traffic Under Tariff or Absent an Agreement

In 2005 (after Ch. 284 was enacted), the FCC issued the *T-Mobile Order*[4] in which it amended FCC Rule 20.11. In doing so, the FCC barred LECs from imposing compensation obligations for intraMTA traffic via tariff and established that in the absence of an interconnection agreement or a request to enter into an interconnection agreement, "no compensation is owed" for the termination of intraMTA traffic. *T-Mobile Order*, ¶ 14, fn. 57. Instead, intercarrier compensation is due (if at all) pursuant to contract, and disputes must be resolved through the negotiation and arbitration process established by Congress. The Court has recognized the impact of the *T-Mobile Order*. Doc. 80, pp. 16, 18 ("Absent an interconnection agreement or a request for an agreement, LECs cannot bill for call termination.").

Because the FCC has plenary regulatory authority in these matters, conflicting state action that stands as an obstacle to federal goals or undermines an FCC order is subject to federal preemption. *La. Pub. Serv. Comm'n*, 476 U.S. at 368-69 (describing standards for preemption). Several courts have recently relied on the *T-Mobile Order* to hold that state law cannot provide a party with intercarrier compensation payments outside of the negotiation and arbitration process. *Ronan Tel. Co.*, 2007 WL 433278, at *4 (dismissing unjust enrichment claims that were a possible effort to "get around the federal regulatory scheme, including the provisions of the *T-Mobile Order*"); *Union Tel. Co.*, __ F.3d __, 2007 WL 2153231, at *3 (LEC cannot demand compensation for IntraMTA traffic in the absence of an agreement following the *T-Mobile Order*). *See also Rural Indus. Tel. Ass'n*, 476 F.3d. at 576 ("The primary import of T-Mobile was to amend an FCC rule to

[4] *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 (2005) ("*T-Mobile Order*").

prohibit local exchange carriers (like the RIITA's members) from collecting payment for wireless intraMTA calls via access charges.").

2. Chapter 284 Authorizes LECs to Bill a CMRS Provider for IntraMTA Traffic Under Tariff and Absent an Agreement

SDCL 49-31-110 and 49-31-111 conflict with FCC Rule 20.11(d) and the *T-Mobile Order* in two ways. First, SDCL 49-31-110 establishes conditions under which LECs are authorized to classify intraMTA traffic as "nonlocal" traffic. Once classified as "nonlocal," intraMTA traffic would then be billed pursuant to state or federal tariffs. *Id.* Because Verizon Wireless delivers intraMTA and interMTA traffic to South Dakota LECs but does not provide the signaling information or separate reports called for by SDCL 49-31-110, the terminating LEC would be authorized to bill all traffic – including intraMTA traffic – under an access tariff. *Id.* This conflicts with the FCC's prohibition on billing intraMTA traffic under tariff.

Second, SDCL 49-31-110 and 49-31-111 authorize LECs to bill for call termination even if the parties have no interconnection agreement and neither party has requested such an agreement. This conflicts with the compensation regime established in the *T-Mobile Order*, which prohibits LECs from billing for call termination except after requesting an agreement. *T-Mobile Order*, ¶ 14 fn 57 ("in the absence of a request for an interconnection agreement, no compensation is owed for termination").

There is an irreconcilable conflict between the authorization under SDCL 49-31-110 and 49-31-111 for LECs to bill for intraMTA traffic under tariff and in the absence of a request for an agreement, and the FCC's prohibition on doing so. This is a conflict as to when compensation is owed, how compensation is billed, and how to achieve the goals and policies of the 1996 Act. Under principles of preemption, this conflict must be resolved by giving effect to federal law. *See Rose v. Arkansas State Police*, 479 U.S. 1, 4 (1986) ("The state statute authorizes the precise conduct that Congress sought to prohibit and consequently is repugnant to the Supremacy Clause."); *see also*

Wisconsin Bell, 340 F.3d at 443 ("A conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's supremacy clause to resolve the conflict in favor of federal law....").

3. Relief Requested

Verizon Wireless requests that the Court enter an order declaring that SDCL 49-31-110 and 49-31-111 are preempted by 47 C.F.R. § 20.11 and the *T-Mobile Order* to the extent they would allow a South Dakota LEC to bill a CMRS provider under its tariffs for calls that originate and terminate in the same MTA; declaring that SDCL 49-31-110 and 49-31-111 are preempted by 47 C.F.R. § 20.11 and the *T-Mobile Order* to the extent they would authorize a South Dakota LEC to bill a CMRS provider for call termination in the absence of an interconnection agreement or request for agreement under 47 C.F.R. § 20.11(e); and enjoining the Defendants from taking action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

C. SDCL 49-31-110 and 49-31-111 are Preempted Because they Conflict With Procedures in 47 U.S.C. §§ 251-252 and the FCC's Implementing Rules and Orders With Regard to Compensation for InterMTA Traffic

1. The FCC Has Determined That Carriers Should Negotiate Traffic Factors Because it is Difficult to Measure InterMTA Traffic

Under the 1996 Act, parties are directed to negotiate rates and terms related to the exchange of traffic between each party's network. If parties are unable to reach a resolution, the state commission is directed to arbitrate a resolution based on the standards in the 1996 Act and the FCC's rules. 47 U.S.C. § 252(b).

When it implemented the 1996 Act and established the MTA rule, the FCC specifically contemplated that CMRS providers would in some cases deliver both intraMTA and interMTA traffic. *First Report & Order*, ¶ 1044. Having recognized the issue, the FCC then decided that CMRS providers would not be required to implement measurement technology, and instead directed that this issue be subject to negotiations between carriers:

> 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.

Id. The FCC thus established a specific regulatory construct to address commingled interMTA/intraMTA traffic.

2. SDCL 49-31-110 and 49-31-111 are in Direct Conflict with Paragraph 1044 of the *First Report & Order*

SDCL 49-31-110 and 49-31-111 directly conflict with the FCC's determination regarding how carriers should address commingled interMTA and intraMTA traffic. The FCC ordered that it was not necessary to determine the physical location of a call on a real time basis. *First Report & Order*, ¶ 1044. The South Dakota Legislature disagreed, mandating that a CMRS provider include such information within signaling fields that are transmitted as a call is being delivered. SDCL 49-31-110. The FCC determined that parties should extrapolate from traffic samples to determine compensation amounts. *First Report & Order*, ¶ 1044. The South Dakota Legislature deemed that to be insufficient and instead demanded that all information be calculated based on accurate and verifiable information. Finally, while the FCC has made this an issue for negotiation between carriers, the South Dakota Legislature has imposed a result that does not rely on intercarrier negotiations under the 1996 Act. In short, the South Dakota Legislature has sought to bypass the FCC's decision on this very significant intercarrier compensation issue.

As described above, Verizon Wireless cannot meet the requirements of SDCL 49-31-110 and 49-31-111. *See supra*, § III(B). It cannot perform the required signaling (and no other wireless carrier can), and it cannot provide the required reports of accurate and verifiable information. *Id.*

The State of South Dakota has created state standards and requirements that Verizon Wireless cannot meet, and that are in direct conflict with the *First Report & Order* on how interMTA traffic should be addressed. This direct conflict must be resolved through the preemption of the state requirement.

3. Relief Requested.

Verizon Wireless requests that the Court enter an order declaring that SDCL 49-31-110 and 49-31-111 are preempted because they require a CMRS provider to implement technology to identify, measure, and report calls that are interMTA, instead of negotiating or arbitrating total compensation amounts; and enjoining the Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

D. SDCL 49-31-110 and 49-31-111 are Preempted Because They Impermissibly Impact the Negotiation Process Under the 1996 Act.

1. States Cannot Interfere with Negotiations Under the 1996 Act

The cases implementing the 1996 Act have been abundantly clear – the negotiation and arbitration process established by Congress is one of the fundamental characteristics of the new federal regime for telecommunications. *See, e.g., AT&T Corp.*, 525 U.S. at 373; *Iowa Network Servs. v. Qwest Corp.*, 466 F.3d 1091, 1098 (8th Cir. 2006).

The seminal case addressing how state action can lawfully impact this negotiation and arbitration process is *Wisconsin Bell v. Bie*. In that case the Wisconsin Commission attempted to require a LEC to file a tariff that could be used as an alternative way to obtain interconnection and services. 340 F.3d at 442-43. The Court found that action to be preempted because it impermissibly tipped the scales of negotiations:

> The district court was right to hold that the state's tariffing requirement is preempted. The requirement has to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiation, the local phone company, but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there.

Id. at 444 (citations omitted). The Court went on to say:

> The tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement.

Id. at 445. Thus, State action that changes the result that would otherwise occur under the federal procedures interferes with federal law and is preempted.

2. The Evidence Shows that the Penalty Provisions of SDCL 49-31-110 and 49-31-111 Would Impermissibly Tip the Scales of Negotiations

The evidence at trial demonstrated clearly that the penalty provisions of SDCL 49-31-110 and 49-31-111 have the effect of changing the dynamics of negotiations between parties as they negotiate interconnection agreements under the 1996 Act. *See supra*, § III(A)(3); *see also* VZW Prop. Find., ¶¶ 47-49.

The Court asked Mr. Thompson a question that gets to the heart of the problem with regard to the impact of the penalty provisions in SDCL 49-31-110 and 49-31-111:

> THE COURT: Did your clients make the decision that it was cheaper and quicker to have the Legislature write these contracts, rather than try to negotiate and then go before the PUC, if necessary?
>
> THE WITNESS: None of them that I know of were looking at this as a replacement for having a contract. It was more motivation to get the contract complete.

Tr. 347. Whether SDCL 49-31-110 and 49-31-111 "write these contracts" or instead "motivate" CMRS providers to reach agreements to avoid the penalty provisions, the result is one that is different than what would otherwise occur under the rules adopted by Congress and the FCC. It is simply not up to the state to provide incumbent LECs with a leg up in negotiations with competitive wireless providers. *See* Doc. 80, p. 13 ("Courts should be wary of interpretations that simultaneously expand costs for competitors ... and limit burdens on incumbents .... If a cost is imposed on a competitor, it becomes a barrier to entry and rewards the company who previously benefited from monopoly protection."). South Dakota has interfered in the federal regime just like the Wisconsin did with the tariff requirement in *Wisconsin Bell v. Bie*. The Court should find that by imposing the

obligations in SDCL 49-31-110 and 49-31-111 the Legislature has impermissibly impacted the negotiation and arbitration process called for by Congress and the FCC.

3. Relief Requested

Verizon Wireless requests that the Court enter an order declaring that SDCL 49-31-110 and 49-31-111 are preempted because they impermissibly impact the negotiation and arbitration process established in the 1996 Act; and enjoining the Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

E. SDCL 49-31-110 and 49-31-111 Are Preempted Because They Regulate Interstate Communications

1. States Have no Authority to Regulate Interstate Telecommunications

Historically, states have been responsible for regulating intrastate telecommunications services, and the FCC was responsible for regulating interstate telecommunications services. Under the Act, while states maintain some authority over intrastate services, they remain prohibited from extending their reach to interstate services.

When it enacted 47 U.S.C. § 151, Congress assumed authority over all "interstate and foreign commerce in communication by wire and radio." 47 U.S.C. § 151. Congress also enacted Section 152(b), which is a savings clause that reserved to the states authority to regulate only "intrastate communications service." *See* 47 U.S.C. § 152(b). This regulatory distinction has been enforced aggressively for decades. *See Ivy Broad. Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968); *AT&T Communications of the Mountain States, Inc. v. Pub. Serv. Comm'n*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985) ("It is beyond dispute that interstate telecommunications service in normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC.").

2. Chapter 284 Impermissibly Regulates Interstate Services

Chapter 284 plainly applies to interstate telecommunications services. SDCL 49-31-109 defines "local telecommunications traffic" to include wireless calls originating and terminating in the

same MTA, which, by definition, would include some calls originating in the states of Minnesota, Iowa, Missouri, Wisconsin, North Dakota, Wyoming, Nebraska, and Colorado, and terminating in South Dakota. *See* Stip. Attachment A. "Nonlocal telecommunications traffic" is defined to include calls originating and terminating in different MTAs, so that term could include calls originating in any of the United States and terminating in South Dakota. SDCL 49-31-110 and 49-31-111 apply on their terms to all "local" and "nonlocal" calls, and specifically reference the fact that these calls may be "interstate."

Here, the state has imposed regulation without respecting the interstate/intrastate distinction, and as a result, undoubtedly regulates calls that are interstate. Because the state of South Dakota has no authority to regulate interstate services, SDCL 49-31-110 and 49-31-111 cannot be enforced as to interstate traffic.

3. Relief Requested

Verizon Wireless requests an order declaring that SDCL 49-31-110 and 49-31-111 are preempted because they reach interstate traffic that is subject to exclusive jurisdiction of Congress and the FCC; and enjoining the Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

F. <u>SDCL 49-31-110 and 49-31-111 Are Preempted Because They Apply Without Regard to Negotiated Terms Between Parties</u>

Verizon Wireless seeks a declaration that SDCL 49-31-110 and 49-31-111 are preempted if they would be read to apply even as between carrier who have entered into contracts regarding intercarrier compensation matters. Defendants and Intervenors concede that those provisions should not supersede items in contracts. Tr. 132. Yet, the Legislature did not enact language that would accomplish such a result. Instead, those obligations simply apply to all carriers. Because the federal regime for intercarrier compensation relies on the use of contracts to resolve compensation matters,

the South Dakota Legislature's attempt to set traffic delivery and compensation terms outside of the contract process is preempted.

1. The 1996 Act Requires Intercarrier Compensation Obligations To Be Established by Contract

The federal intercarrier compensation regime relies primarily on contracts to establish terms for intercarrier compensation within the scope of the 1996 Act. Section 252 allows parties broad leeway to negotiate contract terms "without regard" to the standards in Section 251(b) and 251(c). 47 U.S.C. § 252(a). State commissions are obligated to approve such negotiated terms 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 force a result. Even then, that result becomes part of a contract – an interconnection agreement – that applies between the parties as any other agreement would. 47 U.S.C. § 252(c)(3).

Many courts have held that state action that takes these matters out of contracts and simply impose them on all carriers undermine the federal intercarrier compensation regime and are preempted. *Iowa Network Servs. v. Qwest Corp.*, 466 F.3d 1091, 1098 (8th Cir. 2006) ("[T]he regulatory process contemplates that an express contract will ultimately result, and for this reason the district court did not err in dismissing INS's state law claims of unjust enrichment and implied contract."); *Union Tel. Co.*, __ F.3d __, 2007 WL 2153231, at *8 ("Because federal law requires parties such as Qwest and Union to set rates through interconnection agreements, 47 U.S.C. § 252, allowing Union to recover damages under a theory of unjust enrichment or quantum meruit would frustrate the federal regulatory mechanism."); *Wisconsin Bell*, 340 F.3d at 445 ("The tariff procedure short-circuits negotiations, making hash of the statutory requirement that forbids requests for arbitration until 135 days after the local phone company is asked to negotiate an interconnection agreement.").

2. SDCL 49-31-110 and 49-31-111 Apply Regardless of Whether Parties Have Contracts and are Thereby Preempted

SDCL 49-31-110 and 49-31-111 impose affirmative obligations on carriers and contain no language suggesting that their duties can be contracted away. While Verizon Wireless understands that the Defendants and Intervenors support a reading of the statute that would allow those obligations to be overridden by contracts, the words of these provisions simply do not accomplish such a result. And, the Court is not allowed to rewrite a state statute in order to save it from a constitutional challenge. *Am. Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 915-16 (D.S.D. 1999). As a result, the Court should find that SDCL 49-31-110 and 49-31-111 impose traffic and identification and compensation requirements on carriers without regard to parties' contractual agreements, plainly undermining the federal regime and violating federal law.

3. Relief Requested

Verizon Wireless requests an order declaring that SDCL 49-31-110 and 49-31-111 are preempted because they impose traffic identification and compensation obligations on carriers without regard to negotiated contracts that may exist; and enjoining Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

G. Chapter 284 is Preempted Because It Implements Intercarrier Compensation Through a Statute Rather Than the Negotiation and Arbitration Process

1. States Have Been Given Specific Procedural Mechanisms to use to Implement the 1996 Act

Congress gave states a specific role in implementing the intercarrier compensation provisions of the 1996 Act. The 1996 Act directs states to review and approve negotiated agreements under 47 U.S.C. § 252(e)(2)(A), and resolve open issues raised in arbitration proceedings subject to 47 U.S.C. § 252(e)(2)(B). Procedurally, then, state authority is exercised through the negotiation and arbitration process, not by adopting statutes of general application that apply outside of that process.

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." *Pac. Bell*, 325 F.3d at 1126. 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., 271 F.3d at 516. The Seventh Circuit has described states as "'deputized' federal regulators" as they implement the 1996 Act instead of independent actors. *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). These procedural limitations are especially important because Congress ensured that any state decisions in the negotiation and arbitration process would be subject to review in federal court subject to federal standards. *Wisconsin Bell*, 340 F.3d at 444 (noting the importance of the federal court appeal process in determining whether the state commission order conflicts with the 1996 Act).

2. SDCL 49-31-110 and 49-31-111 Impose Compensation Requirements Outside of the Negotiation and Arbitration Process

By passing a statute that establishes intercarrier compensation obligations outside of the procedural mechanisms in the 1996 Act, the South Dakota Legislature has acted beyond its authority. The compensation standards in SDCL 49-31-110 and 49-31-111 are intended to implement the 1996 Act, yet there are no carrier negotiations, and no commission resolutions of open issues subject to federal court review. The Court should find that the process of passing a statute to resolve compensation disputes conflicts with the state's limited and specific role outlined by Congress in the 1996 Act. The Court should declare that the matters addressed in SDCL 49-31-110 and 49-31-111

must be resolved through the negotiation and arbitration process, and consistent with FCC rules and orders as required by 47 U.S.C. § 252.

3. Requested Relief

Verizon Wireless requests the Court enter an order declaring that SDCL 49-31-110 and 49-31-111 are preempted because they impose traffic identification and intercarrier compensation obligations on carriers outside of the negotiation and arbitration process Congress enacted in 47 U.S.C. § 252 and the FCC's rules; and enjoining the Defendants from taking any action to enforce or implement the preempted provisions under SDCL 49-31-114 and 49-31-115.

CONCLUSION

For the above reasons, Verizon Wireless respectfully requests that the Court accept its proposed Findings and Conclusions and grant its relief requested herein.

Dated: September 26, 2007

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2007, I electronically filed a true and correct copy of **Plaintiffs' Post Hearing Brief**, 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:

Ms. Rolayne Ailts Wiest
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and that a true and correct copy was sent by first class mail, postage prepaid, to:

Mr. Richard D. Coit
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/s/ Craig A. Pfeifle
Craig A. Pfeifle

APPENDIX OF CASES

3 Rivers Tel. Coop., Inc., et al. v. U.S. West Comm., Inc., 2003 U.S. Dist. LEXIS 24871 (D. Mont. Aug. 22, 2003)	Exhibit A
Ronan Tel. Co. v. Alltel Communications, Inc., 2007 WL 433278 (D. Mont. Feb. 2, 2007)	Exhibit B
Union Tel. Co. v Qwest Corp., __ F.3d __, 2007 WL 2153231 (10th Cir. July 27, 2007)	Exhibit C

LEXSEE 2003 U.S. DIST. LEXIS 24871

3 RIVERS TELEPHONE COOPERATIVE, INC.; RANGE TELEPHONE COOPERATIVE, INC.; BLACKFOOT TELEPHONE COOPERATIVE, INC.; NORTHERN TELEPHONE COOPERATIVE, INC.; INTERBEL TELEPHONE COOPERATIVE, INC.; CLARK FORK TELECOMMUNICATIONS, INC.; LINCOLN TELEPHONE COMPANY; RONAN TELEPHONE COMPANY; and HOT SPRINGS TELEPHONE COMPANY, Plaintiffs, vs. U.S. WEST COMMUNICATIONS, INC., Defendant.

CV 99-80-GF-CSO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

2003 U.S. Dist. LEXIS 24871

August 22, 2003, Decided
August 22, 2003, Filed

PRIOR HISTORY: *3 Rivers Tel. Coop. Inc. v. U.S. West Communs., Inc., 45 Fed. Appx. 698, 2002 U.S. App. LEXIS 18196 (2002)*

DISPOSITION: Motions ruled upon.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff local exchange carriers (LECs) filed an action against defendant long-distance carrier (LDC), seeking to recover damages for, inter alia, breach of tariff. The LDC moved for summary judgment. The LECs moved for summary judgment as to counts I, II, and III. The LDC move to strike affidavits.

OVERVIEW: Count I was for breach of tariff and switched access agreements, count II for unjust enrichment, and count III for estoppel. The LECs provided local telephone service to subscribers. The LDC carried calls from originating LECs to terminating LECs in the same local access and transport area (LATA). Prior to this action, the LDC, as the designated intra-LATA carrier for the LECs' subscribers, paid the LECs terminating carrier access charges. The LECs alleged that the LDC breached filed tariffs by refusing to pay terminating carrier access charges for all interexchange calls to the LECs for delivery to the LECs' subscribers. The court concluded that *47 U.S.C.S. § 251*(b), as implemented by the Federal Communication Commission's 1996 Local Competition Order, preempted the tariffs in this case to the extent that the reciprocal compensation scheme applied to wireless service traffic that originated and terminated in the same major trading area (MTA), regardless of whether it flowed over the facilities of other carriers along the way to termination. Thus, the LDC was not liable for terminating access charges on wireless traffic that both originated and terminated in the same MTA.

OUTCOME: The LECs' motions for summary judgment were granted as to count I, except as to terminating access charges on wireless traffic that originated and terminated in the same MTA. The motions were denied as moot at to counts II and III. The LDC's motion for summary judgment was granted as to charges on wireless traffic. The LDC's motions to strike were denied, except to the extent one motion related to an individual's supplemental affidavit.

LexisNexis(R) Headnotes

Energy & Utilities Law > Utility Companies > Utility Rates
[HN1] Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the exclusive source of the terms and conditions governing the

EXHIBIT A

provision of service of a common carrier to its customers. A filed tariff obtains the force of law binding the utility and its customers to its terms and may be interpreted and enforced by a court in a breach of tariff action.

Energy & Utilities Law > Utility Companies > Utility Rates
Civil Procedure > Jury Trials > Province of Court & Jury
[HN2] The construction of a tariff, including the threshold question of ambiguity, ordinarily presents a question of law for the court to resolve.

Energy & Utilities Law > Utility Companies > Utility Rates
Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem
[HN3] Tariffs are considered to be contracts; thus, general principles of contract law apply. Claimed ambiguities or doubts as to the meaning of a rate tariff must have a substantial basis in light of the ordinary meaning of the words used.

Constitutional Law > Supremacy Clause
[HN4] The preemption doctrine, which derives from the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, allows federal law to preempt and displace state law under certain circumstances.

Constitutional Law > Supremacy Clause
Energy & Utilities Law > Utility Companies > Utility Rates
[HN5] Tariffs are as susceptible to federal preemption as any other state law.

Civil Procedure > Preclusion & Effect of Judgments > Law of the Case Doctrine
[HN6] Application of the law of the case doctrine necessarily hinges on the threshold question of whether the appellate court actually decided the operative issue. If the appellate court does not decide an issue, there is no law of the case. Further, an issue does not become the law of the case merely because the appellate court could have decided it.

Constitutional Law > Supremacy Clause
[HN7] Under the Supremacy Clause, federal law can preempt state law in three ways. First, Congress may expressly preempt state law by enacting a statute with an explicit statutory command that state law be displaced (i.e., "express" preemption). Second, Congress may impliedly preempt state law by establishing a scheme of federal regulation that is sufficiently comprehensive to make reasonable the inference that Congress left no room for supplementary state regulation (i.e., "field" or "complete" preemption). Third, federal law may impliedly preempt state law where a conflict exists between federal and state law (i.e., "conflict" preemption).

Constitutional Law > Supremacy Clause
[HN8] Implied conflict preemption exists where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Determining whether conflict preemption exists requires courts to imply Congress' intent from the statute's structure and purpose. If a statute or agency regulation does not specifically address the issue, courts are to look to the goals and policies of the statute or agency regulation to determine its potentially preemptive effect.

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits
[HN9] The court may grant leave to file "further affidavits." Fed. R. Civ. P. 56(e).

Civil Procedure > Summary Judgment > Supporting Papers & Affidavits
[HN10] Fed. R. Civ. P. 56(e) requires that supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

COUNSEL: [*1] For 3 RIVERS TELEPHONE COOPERATIVE, INC., RANGE TELEPHONE COOPERATIVE, INC., BLACKFOOT TELEPHONE COOPERATIVE, INC., NORTHERN TELEPHONE COOPERATIVE, INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., plaintiffs: William A. Squires, ATTORNEY AT LAW, Missoula, MT.

For LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, plaintiffs: Ivan C. Evilsizer, ATTORNEY AT LAW, Helena, MT.

For U.S. WEST COMMUNICATIONS, INC., defendant: John L. Alke, HUGHES KELLNER SULLIVAN & ALKE, Helena, MT.

For U.S. WEST COMMUNICATIONS, INC., counter-claimant: John L. Alke, HUGHES KELLNER SULLIVAN & ALKE, Helena, MT.

For 3 RIVERS TELEPHONE COOPERATIVE, INC., RANGE TELEPHONE COOPERATIVE, INC., BLACKFOOT TELEPHONE COOPERATIVE, INC., NORTHERN TELEPHONE COOPERATIVE, INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., counter-defendants: William A. Squires, ATTORNEY AT LAW, Missoula, MT.

For LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, counter-defendant: Ivan C. Evilsizer, ATTORNEY AT LAW, Helena, MT.

JUDGES: Carolyn S. Ostby, United State Magistrate Judge.

OPINIONBY: Carolyn S. Ostby

OPINION:

ORDER

Plaintiffs, nine Montana independent local telephone companies, instituted this action to recover damages for breach of tariff and other related state law causes of action against Defendant U.S. West Communications, now known as Qwest (Qwest). n1 Plaintiffs generally allege that Qwest breached filed tariffs by refusing to pay terminating carrier access charges for all interexchange calls Qwest transported to Plaintiffs for delivery to Plaintiffs' telephone service subscribers. n2

n1 The Court refers to Defendant as Qwest throughout this Order.

n2 The nine Plaintiffs are divided into two groups. The first group, represented by William A. Squires, includes 3 Rivers Telephone Cooperative (3 Rivers), Range Telephone Cooperative (Range), Blackfoot Telephone Cooperative (Blackfoot), Northern Telephone Cooperative (Northern), Interbel Telephone Cooperative (Interbel) and Clark Fork Telecommunications (Clark Fork). The second group of Plaintiffs, represented by Ivan C. Evilsizer, includes Ronan Telephone Company (Ronan), Hot Springs Telephone Company (Hot Springs) and Lincoln Telephone Company (Lincoln). John Alke represents Qwest.

[*3]

Before the Court are the following motions:

1. The motion of Ronan, Hot Springs and Lincoln for summary judgment on Counts One, Two and Three of the Complaint; n3

2. Qwest's Motion for Summary Judgment; n4

3. The motion of 3 Rivers, Range, Blackfoot, Northern, Interbel and Clark Fork for summary judgment on Counts One, Two and Three of the Complaint; n5

4. Qwest's motion to strike the affidavit of Jan Reimers; n6 and

5. Qwest's motion to strike the supplemental affidavit of Jan Reimers and the reply affidavit of Joan Mandeville. n7

n3 Court's Doc. No. 66.

n4 Court's Doc. No. 73.

n5 Court's Doc. No. 79.

n6 Court's Doc. No. 87.

n7 Court's Doc. No. 110.

Having reviewed the record, together with the parties' arguments in support of their respective positions, the Court is prepared to rule.

I. PROCEDURAL BACKGROUND

On February 5, 1999, Plaintiffs filed a complaint with the Montana Public Service Commission (PSC). The PSC dismissed the [*4] complaint for lack of subject matter, jurisdiction. n8 On April 6, 2000, Montana's First Judicial District Court affirmed the PSC's final agency decision dismissing the complaint for lack of subject matter jurisdiction. n9

n8 In the Matter of US WEST Communications, Inc., Complaint by Clark Fork Telecommunications, Inc., et al., Pertaining to Terminating Access Charges, Montana PSC Docket No. D99.2.26, Order No. 6185 (July 2, 1999) (attached as App. 2 to *Qwest's Reply Brief* (Court's Doc. No. 109)).

n9 Central Montana Communications, Inc., et al. v. U.S. West Communications, Inc., and the Montana PSC, Cause No. BDV 99-551 (April 6, 2000) (attached as App. 3 to *Qwest's Reply Brief* (Court's Doc. No. 109)).

On July 8, 1999, Plaintiffs filed the instant action in Montana's Ninth Judicial District Court alleging four claims: breach of tariff and switched access agreements (Count One); unjust enrichment (Count Two); estoppel (Count Three); and breach of the implied covenant of good faith and [*5] fair dealing (Count Four). n10 On August 16, 1999, Qwest removed the matter to this Court. n11

n10 This claim is incorrectly designated as "Count Five" in the Complaint and Jury Demand.

n11 Court's Doc. No. 1.

On December 11, 2000, then-Magistrate Judge Richard F. Cebull n12 granted Qwest's motion for summary judgment. n13 On December 13, 2000, the Clerk of Court entered Judgment. n14 On January 9, 2001, Plaintiffs appealed. n15 On August 27, 2002, the Ninth Circuit Court of Appeals filed an unpublished Memorandum reversing Judge Cebull's decision, and remanding the matter "for further proceedings on the interpretation and application of the [Plaintiffs'] tariffs." n16

n12 Judge Cebull is now a U.S. District Court Judge.

n13 Court's Doc. No. 47.

n14 Court's Doc. No. 48.

n15 Court's Doc. No. 49.

n16 Court's Doc. No. 57 *(3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 Fed. Appx. 698 (9th Cir. 2002)* (unpublished)).

[*6]

On November 12, 2002, Chief U.S. District Judge Donald W. Molloy ordered that the case be reassigned to the undersigned. n17 On January 30, 2003, upon the parties' consent, U.S. District Judge Sam E. Haddon assigned the case to the undersigned for all purposes. n18

n17 Court's Doc. No. 59.

n18 Court's Doc. No. 64.

On February 20, 2003, the Court held a status hearing at which counsel for the parties advised the Court that a stay of this matter to allow declaratory proceedings before the Montana PSC, as suggested by the Ninth Circuit in its remand order, would not be appropriate in this case. n19 Thus, on February 24, 2003, with the parties' agreement, the Court issued an Order setting a briefing schedule for summary judgment motions.

n19 It appears, in any event, that a stay pending declaratory proceedings before the Montana PSC would be foreclosed by the PSC's prior determination that it lacks subject matter jurisdiction over this case, as well as by the Montana state court's affirmance of that decision. See *supra* notes 8 and 9.

[*7]

II. FACTUAL BACKGROUND

A. Plaintiffs

Plaintiffs are rural telephone companies registered with the Montana PSC as telecommunications carriers. n20 Plaintiffs, not being part of the original Bell system, are at times referred to as "Independents." n21 Plaintiffs are local exchange carriers (LECs) that provide local telephone service to their subscribers or "end users," *i.e.*, customers at the "ends" of telephone lines.

n20 On January 1, 2003, Clark Fork, a wholly-owned subsidiary of Blackfoot, merged into its parent and ceased operating as Clark Fork Telecommunications. As the successor in interest to Clark Fork, Blackfoot remains a concurring carrier, and "Telephone Company" under the MILEC tariff (discussed *infra*), as of January 1, 2003, for the prior Clark Fork service areas. *Plaintiffs' Statement of Uncontroverted Facts* (Court's Doc. No. 68) [hereafter *Pltf.s' Stmt. of U.F.*] PP27 and 28; *Qwest's Statement of Genuine Issues* (Court's Doc. No. 89) [hereafter *Qwest's Stmt. of G.I.*] P1.

n21 *Pltf.s' Stmt. of U.F.* P1; *Qwest's Stmt. of G.I.* P1.

[*8]

B. Qwest

Qwest is one of the Regional Bell Operating Companies (RBOCs) established, in the 1982 antitrust breakup of the Bell system, n22 an event generally known as "Divestiture." Following Divestiture, Qwest

and the other RBOCs were primarily limited to providing local exchange service, n23 and intra-local access and transport area (intra-LATA) n24 long distance service, n25 which is sometimes referred to as "local long distance." n26

n22 *Pltf.s' Stmt. of U.F.* P2; *Qwest's Stmt. of G.I.* P1.

n23 Thus Qwest, in addition to the other services it provides, is also an LEC. *Qwest's Statement of Uncontroverted Facts* (Court's Doc. No. 76) [hereafter *Qwest's Stmt. of U.F.]* P3.

n24 LATAs are "geographically based service islands created by the divestiture decree, marking the boundaries beyond which a Bell company may not carry telephone calls." Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* 1374 (2d ed., Aspen L. & Bus. 1999) [hereafter *Huber]*.

n25 *Qwest's Stmt. of U.F.* P3.

n26 That portion of Montana within which Qwest operates was split into two LATAs. On December 20, 2002, the Federal Communications Commission (FCC) authorized Qwest to enter the inter-LATA long distance market in Montana. *Qwest's Stmt. of U.F.* P5.

[*9]

C. Relationship Between Plaintiffs and Qwest

Telephone calls between LECs are long distance calls that travel over long distance trunk groups. Long distance carriers provide long distance service for such calls.

Plaintiffs and Qwest historically have been interconnected in Montana in that Qwest has carried calls from originating LECs to terminating LECs in the same LATA - calls known as intra-LATA (local long distance) calls. Generally, when a carrier such as Qwest carries an intra-LATA call from one LEC to another, it pays the LEC that owns the local exchange in which the call originated an "originating carrier access charge." Further, it pays the LEC that owns the local exchange in which the call terminated a "terminating carrier access charge." These "access charges" n27 are for the use of the LECs' local telephone networks, and for services rendered in completing the calls on the LECs' facilities. n28

n27 Plaintiffs note, and Qwest does not dispute, that, "in the telecommunications industry, "carrier access charges (CAC)," "access service," "exchange access," and "switched access service/charges" are used interchangeably." *Brief in Support of Motion for Summary Judgment* of Ronan, Hot Springs and Lincoln [hereafter *Ronan et al.'s Opening Brief]* at 10, n.9. In this Order, the Court also uses the terms interchangeably. [*10]

n28 *Pltf.s' Stmt. of U.F.* P3; *Qwest's Stmt. of G.I.* P2; *Qwest's Stmt. of U.F.* P7.

Under applicable tariffs, n29 Qwest purchased from Plaintiffs Feature Group C (FGC) access services, a network configuration allowing the commingling of traffic that may be originated by various carriers, but which is delivered entirely by Qwest to Plaintiffs for termination on their local networks. The FGC connection between Plaintiffs and Qwest does not provide for the identification of the originating carrier on a call transmitted to Plaintiffs by Qwest. n30

n29 The tariffs at issue herein are as follows: (1) the Telephone Carriers of Montana (TECOM) tariff, which was approved by the Montana PSC on December 21, 1995, and which has remained unchanged since that time; (2) the Montana Independent Local Exchange Carriers (MILEC) tariff, which was approved by the Montana PSC effective March 10, 1994, and which had remained unchanged since that time; and (3) the Ronan Telephone Company tariff (Ronan tariff), and (4) the Hot Springs Telephone Company tariff (Hot Springs tariff), both of which the Montana PSC approved effective January 1, 1988, and both of which have remained unchanged in their basic service and rate provisions since PSC approval. *Pltf.s' Stmt. of U.F.* PP6-8; *Qwest's Stmt. of G.I.* P1. Also, Qwest has never challenged the tariffs, nor sought any amendment or change to the tariffs. *Id.* [*11]

n30 *Pltf.s' Stmt. of U.F.* P23; *Qwest's Stmt. of G.I.* P1.

D. Dispute in the Instant Action

For a time prior to the events giving rise to this action, n31 Qwest, as the designated intra-LATA carrier for Plaintiffs' subscribers, paid Plaintiffs terminating

carrier access charges. n32 During that time, when Plaintiffs' subscribers made intra-LATA long distance calls, Qwest was automatically the intra-LATA long distance carrier. Plaintiffs billed Qwest's intra-LATA long distance charges to their subscribers, collected the money for Qwest, and then charged Qwest a billing and collection fee. n33 Plaintiffs charged Qwest originating carrier access charges on the intra-LATA long distance calls placed by their subscribers (as measured by Plaintiffs' call records), and charged Qwest terminating carrier access charges for the intra-LATA long distance calls to their subscribers based upon a ratio of terminating to originating minutes (known as a "T/O ratio"). n34

n31 Qwest characterizes this time as "prior to the enactment of the Federal Telecommunications Act of 1996, Public Law 104-104, the implementation of intra-LATA equal access dialing parity, and Qwest's withdrawal as the designated intra-LATA carrier for [Plaintiffs], ..." Qwest's *Brief in Support of Motion for Summary Judgment* [hereafter *Qwest's Opening Brief*] at 3. [*12]

n32 *Id.* (citing *Qwest's Stmt. of U.F.* PP13-18).

n33 *Id.* (citing *Qwest's Stmt. of U.F.* P15).

n34 *Id.* (citing *Qwest's Stmt. of U.F.* PP10-11, 17-18).

Sometime later, Qwest ceased to act as designated intra-LATA carrier for all of Plaintiffs' subscribers. Qwest then reasoned that if it was not originating traffic in the Plaintiffs' exchanges, its liability for terminating carrier access charges became zero under a T/O ratio. n35 Thus, in late 1998 and early 1999, Qwest notified Plaintiffs that it would begin paying them terminating carrier access charges only for its own customers' long distance calls into Plaintiffs' exchange. n36 In other words, Qwest advised Plaintiffs that it would no longer pay terminating carrier access charges for telecommunications traffic it delivered to Plaintiffs for termination that did not originate from Qwest subscribers. A short time later, Qwest stopped paying Plaintiffs the terminating carrier access charges. Plaintiffs' initiation of this action followed. n37

n35 *Id.* at 3 (citing *Qwest's Stmt. of U.F.* P19). Plaintiffs disagree with Qwest's reasoning. They argue that Qwest continues to originate toll traffic from the Lincoln exchange, even though Qwest is no longer the "designated intra-LATA carrier," and that Lincoln continues to use a T/O ratio to calculate terminating access minutes for purposes of billing Qwest. *Pltf.s' Stmt. of G.I.* PP1 and 6. Plaintiffs also argue that Ronan and Hot Springs used a T/O ratio to calculate terminating access minutes for billing Qwest until October of 1999, after which they billed Qwest based upon actual measured minutes of terminating traffic. *Pltf.s' Stmt. of G.I.* P2. Further, Plaintiffs argue that Qwest is still capable of originating toll traffic from an exchange even though it is no longer the designated intra-LATA carrier in that exchange, *Pltf.s' Stmt. of G.I.* P6, and still is, therefore, liable under the applicable tariffs for terminating carrier access charges on all traffic it carriers to Plaintiffs for termination. [*13]

n36 *Id.* (citing *Qwest's Stmt. of U.F.* P34).

n37 A development in the telecommunications industry occurred during the years immediately preceding initiation of this action. From January of 1996 until December of 1999, Type 2 wireless traffic in Montana increased from 2.12 million minutes to 11.79 million minutes. *Qwest's Stmt. of U.F.* P23. During the same period, the increase in wireless traffic being terminated in Plaintiffs' exchanges increased from approximately 287,000 minutes of Type 2 usage to approximately 2,900,000 minutes of Type 2 usage. *Qwest's Stmt. of U.F.* P24. Because of this increase in wireless communications, a significant amount of the intra-LATA traffic carried through Qwest's facilities is wireless traffic. *Qwest's Opening Brief* at 4 (citing *Qwest's Stmt. of U.F.* PP23-25; 37).

Generally, Plaintiffs maintain that Qwest is liable for the terminating carrier access charges under filed tariffs that govern the relationships between the parties. n38 Plaintiffs argue that Qwest is liable for these types of charges under the applicable tariffs regardless [*14] of whether the traffic originates as wireline or wireless. n39

n38 *Ronan et al.'s Opening Brief* at 10-15; *Plaintiffs' Brief in Support of Motion for*

Summary Judgment [hereafter *3 Rivers et al.'s Opening Brief*] at 7-14.

n39 *Id.*

Qwest generally maintains, *inter alia,* that it is not liable under the filed tariffs for the terminating carrier access charges, as they are measured by Plaintiffs, because Plaintiffs' access tariffs do not apply to Qwest as a transit carrier. n40 Qwest argues that the tariffs follow the industry standard for such charges, *i.e.,* that the carrier selected by the calling party pays both originating and terminating access charges. Thus Qwest, as a mere transit carrier for calls, is not responsible for terminating carrier access charges for calls that its subscribers do not originate. n41

n40 *Qwest's Opening Brief* at § § I and II.

n41 *Id.*

[*15]

E. Judge Cebull's Decision and the Ninth Circuit's Remand

In granting Qwest's prior summary judgment motion, Judge Cebull determined, *inter alia,* that federal law, as interpreted by the FCC, relieved Qwest of any obligation to pay terminating carrier access charges for telecommunications traffic that its subscribers did not initiate. n42 Judge Cebull further determined that the filed tariff doctrine (also known as the filed rate doctrine) had no application because the case does not involve a dispute about rates. n43 On appeal, the Ninth Circuit reversed and remanded holding, *inter alia,* that Judge Cebull "erred in failing to interpret the tariffs at issue in this case." n44

n42 Court's Doc. No. 47.

n43 *Id.*

n44 Court's Doc. No. 57.

III. DISCUSSION

A. The Parties' Arguments

1. *Plaintiffs*

Plaintiffs cite the Ninth Circuit's remand order in urging the Court to apply the filed tariff doctrine, interpret the language [*16] of the applicable tariffs and apply that language to the facts of this case. n45 Plaintiffs predict that when the Court interprets the tariffs, it will become clear that they have met their obligation of providing Qwest with terminating access service, which involves accepting and terminating *(i.e.,* transmitting to local telephones) interexchange (typically between two cities or towns) telephone calls sent to them by other telephone companies such as Qwest. n46

Plaintiffs further argue that the tariffs also impose upon Qwest an obligation which Qwest has failed to meet. Specifically, Plaintiffs argue that the tariffs require Qwest to pay them terminating access charges for the access service that Plaintiffs provide. Plaintiffs maintain that the tariffs require payment of access charges regardless of whether Qwest is the originating carrier for a call made by one of its own subscribers, or whether the subscriber of some other LEC originated the call, and Qwest then transported the traffic to Plaintiffs for termination. Plaintiffs also argue that the tariffs require Qwest to pay terminating carrier access charges regardless of whether the originating carrier that transmits the traffic [*17] to Qwest is a wireline or wireless carrier. n47 In sum, Plaintiffs maintain that Qwest unilaterally decided not to pay the terminating carrier access charges required by the tariffs, and has failed, since January of 1999, to pay Plaintiffs a large portion of the required charges for provision of the terminating access service. n48

n45 *Ronan et al.'s Opening Brief* at 4-5; *3 Rivers et al.'s Opening Brief* at 3-4.

n46 *3 Rivers et al.'s Opening Brief* at 3-4.

n47 *Ronan et al.'s Opening Brief* at 4-5.

n48 *Ronan et al.'s Opening Brief* at 4-5; *3 Rivers et al.'s Opening Brief* at 3-4.

Plaintiffs advance equitable claims in the alternative to their breach of tariff claim. n49 First, Plaintiffs argue that Qwest has been unjustly enriched at their expense, and that Qwest is, therefore, liable to them for compensation for services rendered. n50 Second, Plaintiffs argue that they are entitled to relief under the promissory estoppel doctrine. They argue that Qwest promised to [*18] abide by the rates, terms and conditions of the applicable tariffs, Plaintiffs relied on Qwest's promises, their reliance was reasonable and foreseeable and Plaintiffs suffered injury as a result of their reliance. n51

49 *Ronan et al.'s Opening Brief* at 16-17; *3 Rivers et al.'s Opening Brief* at 14-18.

n50 *Id.*

n51 *3 Rivers et al.'s Opening Brief* at 16-18.

2. Qwest

Qwest advances a markedly different interpretation of the tariffs from that of Plaintiffs. According to Qwest, the tariffs under which Plaintiffs claim entitlement to terminating carrier access charges "clearly and unequivocally apply" a practice standard in the telecommunications industry known as "calling party's network pays" (CPNP). n52 CPNP, Qwest argues, requires the originating carrier, whomever it may be, to pay the terminating carrier access charges. n53 Qwest argues that the CPNP standard "is part of a national paradigm that has existed since Divestiture," n54 and is reflected in [*19] the tariffs' structures. n55

n52 *Qwest's Opening Brief* at 9.

n53 *Id.* at 5-7

n54 *Id.* at 4.

n55 *Id.* at 7-9

For example, Qwest argues, each tariff contains a general applicability provision for carrier access service that specifies that the originating carrier is responsible for paying the access charge. Further, Qwest maintains, certain definitions in the tariffs indicate applicability of the CPNP standard, and the tariffs' administrative provisions use language that contemplates that the originating carrier is responsible for both originating and terminating access charges. n56 Also, Qwest notes, the Montana PSC twice has held that under the CPNP standard, carriers that transport third-party traffic from an originating carrier to a terminating carrier have no obligation to compensate the terminating carrier because the call did not originate on the transporting carrier's facilities. n57

n56 *Id.* [*20]

n57 *Id.* at 5-7.

Next, Qwest argues that the filed rate doctrine, applied to this case, completely bars all of Plaintiffs' claims. n58 Specifically, Qwest argues that because the tariffs make the originating carrier responsible for payment of both originating and terminating carrier access fees, Plaintiffs "are precluded from extending the tariff specified liability to [Qwest] by asserting equitable theories of relief." n59 In other words, application of the filed rate doctrine precludes application of equitable forms of relief to vary the filed tariffs' terms.

n58 *Id.* at 10-11.

n59 *Id.*

Finally, Qwest argues that even if the Court were to interpret the tariffs in such a way as to make Qwest liable for terminating access charges on traffic originated by other carriers, federal law preempts any application of Plaintiffs' carrier access tariffs to intra-Major Trading Area (MTA) n60 wireless traffic. [*21] n61 Qwest argues that the FCC, within its comprehensive federal jurisdiction over Commercial Mobile Radio Service (CMRS or "wireless service"), has adopted "reciprocal compensation," which requires CMRS providers and LECs to compensate each other for terminating their respective traffic. n62 The FCC, Qwest argues, has prohibited LECs from charging terminating carrier access charges for terminating intra-MTA wireless traffic, and has limited the LECs to receiving only reciprocal compensation. Thus, Qwest argues, Plaintiffs cannot levy terminating carrier access charges against intra-MTA wireless traffic transported by Qwest without being in direct violation of the FCC prohibition. n63

n60 A Major Trading Area (MTA) is the local calling area for wireless telecommunications providers. See *47 C.F.R. § 51.701(b)(2)*, with MTAs determined pursuant to *47 C.F.R. § 24.202.*

n61 *Qwest's Opening Brief* at 11.

n62 *Id.* at 11-12.

n63 *Id.* at 12-13 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499,* First Report and Order PP1035-1036).

[*22]

In further support of this position, Qwest argues that the *Supremacy Clause of the U.S. Constitution* supports the notion of preemption here because allowing Plaintiffs to assess terminating carrier access charges on intra-MTA wireless traffic transported on Qwest's facilities "would directly thwart the FCC prohibition against assessing access charges on intra-MTA wireless traffic." n64

n64 *Qwest's Opening Brief* at 13.

B. Interpretation of the *Tariffs*

In reversing Judge Cebull, the Ninth Circuit made clear that, on remand, the Court must apply the filed tariff doctrine and interpret the tariffs at issue. Because the Ninth Circuit's discussion of the applicable law in this case forms the framework for this Court's analysis, the Court repeats it here:

> [HN1] Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the "exclusive source" of the terms and conditions governing the provision of service of a common carrier to its customers. *Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002)* [*23] (citation and internal quotation marks omitted); see also *Am. Tel. & Telegraph Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222, 227, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998)*; *Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000)*. A filed tariff obtains the force of law binding the utility and its customers to its terms and may be interpreted and enforced by a court in a breach of tariff action such as this one. *Brown, 277 F.3d 1171-72.* Because the [Plaintiffs'] tariffs form the exclusive source of the obligations between the [Plaintiffs] and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, *47 U.S.C. § 251-52*, without interpreting the tariffs themselves. To interpret the tariffs in this case may also require further development of the record on technology and practices in the telecommunications industry, particularly as it relates to the transmission of calls in Montana. On this record, we therefore reverse the decision of the district court and remand for further proceedings on the interpretation and application of the [Plaintiffs'] tariffs. [*24] n65

n65 Court's Doc. No. 57 *(3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 F.ed Appx. 698 (9th Cir. 2002)* (unpublished) (footnotes omitted)).

Under the Ninth Circuit's mandate, the Court must apply the filed tariff doctrine. Thus, the Court's first task is to interpret the tariffs.

As noted *supra,* n66 the tariffs at issue are the TECOM, MILEC, Ronan and Hot Springs tariffs. The MILEC tariff was filed in 1994 in conjunction with the purchase by Plaintiffs 3 Rivers, Range and Clark Fork of various rural local exchange properties from Qwest. n67 As part of the purchase, Qwest demanded that the parties enter into Intra-LATA Switched Access Agreements, and that the terms of those agreements be incorporated in the MILEC tariff. n68

n66 See note 29.

n67 *Pltf.s' Stmt. of U.F.* P10; *Qwest's Stmt. of G.I.* P1.

n68 *Pltf.s' Stmt. of U.F.* P11; *Qwest's Stmt. of G.I.* P1.

[*25]

The "issuing" carriers for the TECOM and MILEC tariffs are those Plaintiffs that by statute are subject to full regulation by the Montana PSC. The "concurring" carriers under the TECOM and MILEC tariffs are those Plaintiffs that by Montana statute are not subject to full regulation by the Montana PSC, but that agree to offer intrastate access services under the terms of the tariffs. Both the "issuing" and the "concurring" carriers are referred to as the "Telephone Company" in the TECOM and MILEC tariffs. n69 Concurring carriers in the TECOM tariff include 3 Rivers, Range, Blackfoot, Northern and Interbel. Lincoln is included as an issuing carrier in the TECOM tariff. Concurring carriers in the MILEC tariff include 3 Rivers and Range. Clark Fork is included as an issuing carrier in the MILEC tariff.

N69 *Pltf.s' Stmt. of U.F.* P12; *Qwest's Stmt. of G.I.* P1.

As an initial matter, the parties acknowledge, and the record reflects, that the TECOM and MILEC tariffs are nearly identical with respect to the [*26] provisions relevant to determination of this dispute. n70 Further, the parties acknowledge, and the record reflects, that the Ronan and Hot Springs tariffs employ structures similar to those used in the TECOM and MILEC tariffs. The Ronan and Hot Springs tariffs, however, do contain certain differences in style and wording. n71 Accordingly, the Court will address the tariffs together except as necessary to emphasize relevant distinctions among the tariffs.

n70 *Qwest's Opening Brief* at 8-9; *3 Rivers et al.'s Opening Brief* at 10-14.

n71 *Qwest's Opening Brief* at 9; *Ronan et al.'s Opening Brief* at 11-15.

[HN2] "The construction of a tariff, including the threshold question of ambiguity, ordinarily presents a question of law for the court to resolve." n72 [HN3] Tariffs are considered to be contracts; thus, general principles of contract law apply. n73 "Claimed ambiguities or doubts as to the meaning of a rate tariff must have a substantial basis in light of the ordinary meaning of the words used ... [*27] ." n74 Interpretation of the tariffs at issue in this action necessarily begins with a review of their language. n75

n72 *Milne Truck Lines, Inc. v. Makita U.S.A., 970 F.2d 564, 567 (9th Cir. 1992)* (citations omitted); see also *BellSouth Telecommunications, Inc. v. Kerrigan, 55 F. Supp. 2d 1314, 1323-24 (N.D. Florida 1999)* (noting that "the common meaning of a tariff is a question of law."). n73 *Milne, 970 F.2d at 567*. n74 *Id. at 568* (citations omitted).

n75 The tariffs at issue herein are contained in Attachments to Plaintiffs' Additional Disclosure of Contracts filed October 18, 1999 (Court's Doc. No. 15). The Court hereafter will refer to provisions of the tariffs only by reference to the specific tariff and its section numbers.

The TECOM and MILEC tariffs state their applicability as follows:

1. Application of Tariff

> 1.1 This tariff contains regulations, rates and charges applicable to the provision [*28] of Carrier Common Line, Switched Access and Dedicated Access Services, and other miscellaneous services, hereinafter referred to as the Telephone Company, to Customer(s).

The TECOM and MILEC tariffs define "Customer(s)" as follows:

2.6 Definitions

* * *

Customer(s)

> Any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which orders to the services offered under this tariff, including Local Exchange Carrier(s), Interexchange Carrier(s) (IC's), and End User(s).

These provisions, read together, demonstrate that the TECOM and MILEC tariffs apply to services, including switched access services, that Plaintiffs provide to Qwest as a "customer." Nowhere in the record does Qwest dispute that it received such services.

The TECOM and MILEC tariffs provide, in pertinent part, the following description of switched access service:

6. Switched Access Service

6.1 General

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a communication path between a customer's premises and an end user's premises. It provides [*29] for the use of common terminating, switching and trunking facilities, and both common subscriber plant and unshared subscriber plant (i.e., WATS access lines) of the Telephone Company. Switched Access Service provides for the ability to originate calls from an end user's premises to a customer's premises. and to terminate calls from a customer's premises to and (sic) end user's premises in the LATA where it is provided. Specific references to material describing the elements of Switched Access Service are provided in 6.2.

> Rates and charges for Switched Access Service depend generally on its use by the customer, i.e., for MTS or WATS services. Rates and charges for Switched Access Service are set forth in 6.9 following. The application of rates for Switched Access Service is described in 6.8 following.

(Emphasis added).

In describing the Switched Access Service, the tariffs do not distinguish between those calls that originate with an end user from an LEC other than Qwest, and those calls that originate with one of Qwest's own end users, for ultimate access to Plaintiffs' exchanges for termination. The tariffs speak of terminating calls from a customer's (Qwest's) [*30] premises, not "a customer's end user."

In other words, the section describes the "hand off" of a call from an originating end user, be it a Qwest subscriber or another LEC's subscriber whose call Qwest is transporting, to Plaintiffs' exchanges for termination. Thus, the tariffs contemplate the same access charges for all calls Qwest transports from its premises to Plaintiffs for termination, regardless of whether the calls originate with one of Qwest's own end users or with the end user of a different LEC, with Qwest only transporting the call to Plaintiffs for termination.

Based on the unambiguous language of this provision, the Court finds unpersuasive Qwest's argument that the provision "specifies that the access customer, the party responsible for paying the access charge, is the originating carrier." n76 This tariff provision's language states only that when Qwest uses Plaintiffs' access service to terminate access traffic from its premises, Qwest is liable for paying access charges resulting from provision of the terminating access service. In short, the tariff simply does not say what Qwest says it says.

n76 *Qwest's Opening Brief* at 7.

[*31]

Further, section 6.1 provides: "The application of rates for Switched Access Service is described in 6.8 following." Section 6.8.1(C) provides: "Rates as set forth in Section 6.9 apply to all Feature Group A, B, C, D and FGA-FX Switched Access Minutes, and will be accumulated for billing on a monthly basis, or another period."

Qwest has FGC access with Plaintiffs. As a matter of practice, Qwest sends FGC access traffic to Plaintiffs' network exchanges via FGC trunks. According to the tariffs, Plaintiffs must bill Qwest for this traffic on a monthly basis under the tariffs' rates. These sections, in this Court's opinion, further support the interpretation of the tariff that Qwest is the customer responsible for payment of terminating access charges.

Also, section 5.2(c) of the TECOM tariff, for example, provides:

> For Feature Group C . . . Switched Access Service, the customer shall specify;
>
> > - The number of BHMC [Busy Hour Minutes of Capacity] from the customer designated premises to the end office . . .
> >
> > - The number of trunks desired between customer designated premises and an entry switch or Operator Transfer Service location."

(Emphasis [*32] added).

The TECOM and MILEC tariffs also address measurement of switched access service, in pertinent part, as follows:

> 6.8.4 Customer traffic to end offices will be measured (i.e., recorded and assumed) by the Telephone Company at end office switches or access tandem switches. Originating and terminating calls will be measured (i.e., recorded or assumed) by the Telephone Company to determine the basis for computing chargeable access minutes. In the event the customer message detail is not available because the Telephone Company lost or damaged tapes or incurred recording system outages, the Telephone Company will use an estimate.
>
> * * *
>
> (E) Feature Group C Usage Measurement
>
> * * *

> Terminating calls over FGC to services other than 800, 900 or Directory Assistance may be measured by the Telephone Company. For terminating calls over FGC to services other than 800, 900 or Directory Assistance, if terminating FGC usage is not directly measured at the terminating entry switch, it will be imputed from originating usage, excluding usage from calls to 800, 900, WATS or Directory Assistance. A 1.0 terminating ratio will be assumed.

The Ronan and Hot Springs [*33] tariffs contain similar provisions in section 6.8.4. Pursuant to the foregoing language, Plaintiffs will measure, when possible, the terminating access traffic sent by Qwest (as the Customer) to Plaintiffs, and that the measurement will form the basis for the access charges. Plaintiffs maintain, and Qwest does not dispute, that they can and do measure this traffic, and continue to bill Qwest for terminating access traffic based on all actual measured minutes of traffic sent by Qwest to Plaintiffs on FGC trunks. Again, in this Court's opinion, the tariffs' language further supports an interpretation of the tariffs that makes Qwest responsible for paying Plaintiffs terminating access charges.

With respect to the Ronan and Hot Springs tariffs, the Ronan tariff states its applicability as follows:

1. Application of Tariff

> 1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, Switched Access, and other miscellaneous services, hereinafter referred to collectively as services(s), provided by [Ronan] to Interexchange Carrier(s) (hereinafter, IC(s)), commercial mobile radio service providers (hereinafter CMRS providers), [*34] U.S. West Communications, other telecommunications carriers, and to End User(s), when service(s) is ordered or provided to an IC's location, a CMRS provider's location, other telecommunications carrier location, and/or to U.S. West Communications.

The Hot Springs tariff contains similar language. n77 A fair reading of this language makes clear that the tariffs apply to services, including switched access services, that Ronan and Hot Springs provide to Qwest.

> n77 The Hot Springs tariff, rather than referring to U.S. West, refers to Mountain States Telephone and Telegraph Company (MST), which was a wholly-owned subsidiary of U.S. West. The parties do not appear to dispute that MST is now Qwest for purposes of this action.

Further, the Ronan and Hot Springs tariffs also expressly include Qwest in their definition of "Customer(s)," a term used throughout the tariffs to describe those individuals or entities that order or use telecommunications services provided by Ronan and Hot Springs. The Ronan tariff defines [*35] "Customer(s)" as follows:

> 2.6 Definitions
>
> * * *
>
> Customer(s)
>
> Any individual person, partnership, association, cooperative, joint-stock company, trust, corporation, residence, business, government or private entity, or other entity, including interexchange carrier, CMRS provider, U.S. West Communications, or other telecommunications carrier, that subscribes, orders or uses the telecommunications services provided by [Ronan] offered under this tariff. For purposes of this tariff, unless the context otherwise requires, the terms "Customer" and "Subscriber" shall be interchangeable.

From this plain language, it is readily apparent that Qwest, as a user of services provided by Ronan and Hot Springs, and as an expressly named customer in the definition, falls within the tariffs' definition of customer.

The Ronan and Hot Springs tariffs also include various provisions with respect to the type of switched access services at issue, as well as with respect to the measurement and billing of such services. First, the tariffs provide that access rates apply whenever access to the local exchange is provided for any type of toll or switched telecommunications [*36] services.

> 3.3 Undertaking of [Ronan and Hot Springs]
>
> * * *
>
> (C) When access to the local exchange is required to provide any switched MTS or MTS type or WATS or WATS type service, or enhanced services, or any other switched telecommunications service utilizing [Ronan or Hot Springs] service(s), TS [Traffic Sensitive] Access Service Rates and Regulations, as set forth in Section 6 following will apply... n78

n78 Plaintiffs note, and Qwest does not dispute, that "'MTS' means 'Message Telephone Service' which is the industry name for standard switched telephone service (long distance or toll calls). WATS means 'Wide Area Telephone Service' which is a variant of MTS." *Ronan et al.'s Opening Brief* at 12, n.11 (citing Newton's Telecom Dictionary, pp. 485 and 819 (18th ed. 2002)).

The "switched MTS ... service" and "any other switched telecommunications services utilizing [Ronan's or Hot Springs'] service(s)" language in this provision must be read to include Qwest's use of [*37] Ronan's and Hot Springs' terminating carrier access service at issue herein. At a minimum, the plain meaning of "any other" indicates an all-encompassing expression of the types of services subject to the rates and regulations for Traffic Sensitive (TS) Access Service found in section 6 of the tariff.

Next, the Ronan and Hot Springs tariffs provide, in pertinent part, the following explanation of TS Access Service provided by Ronan and Hot Springs:

> 6. Traffic Sensitive Access Service
>
> 6.1 General
>
> Traffic Sensitive, hereinafter referred to as TS Access Service(s) which is available to customers for their use in furnishing their services to end users, provides a communication path between a customer's premises and an end user's premises. It provides for the use of common terminating, switching and trunking facilities, and common subscriber plants of [Ronan and Hot Springs]. TS Access Service(s) provides for the ability to originate calls from an end user's premises to a customer's premises or to the point of interface designated by [Ronan or Hot Springs] with [Qwest] or other customer or carrier to an end user's premises. n79

n79 The Ronan tariff goes on to provide:

> All transport and termination of intra-LCA (intra-local calling area) traffic that originates on [Ronan's] network and terminates on a CMRS provider's network, and all intra-LCA traffic that originates on a CMRS provider's network and terminates on [Ronan's] network, shall also be governed by the rates and charges contained in this tariff.

[*38]

This section of the tariffs, which is similar to that in the TECOM and MILEC tariffs discussed *supra,* also expressly describes the provision of "a communication path between a customer's premises and an end user's premises." The section also describes the TS Access Service's provision of "the ability to originate calls from an end user's premises to a customer's premises or to the point of interface designated by [Ronan or Hot Springs] with [Qwest] ... to an end user's premises ...."

In describing the TS Access Service, these tariffs, like the TECOM and MILEC tariffs, do not distinguish between those calls that originate with an end user from an LEC other than Qwest, and those calls that originate with one of Qwest's own end users, for ultimate access to Ronan or Hot Springs for termination. These tariffs also

reference "an end user," not a "Qwest end user." Thus, the tariffs contemplate the same access charges for all calls Qwest transports to Ronan or Hot Springs for termination, regardless of whether the calls originate with one of Qwest's own end users or with the end user of a different LEC with Qwest merely transporting the call to Ronan or Hot Springs for termination. [*39]

Also, the Ronan and Hot Springs tariffs further describe the switching access service in sections 6.2 and 6.3. Those sections, read in conjunction with the tariff as a whole, indicate that Ronan and Hot Springs provide switched access service to their customers (including Qwest) without making any distinction, for purposes of applicable rates, between calls from other LEC's subscribers that Qwest then transports to Ronan or Hot Springs, and calls that originate with Qwest's subscribers. For example, section 6.3.1(E) provides:

> TS Access Service(s) switching when used in the terminating direction may be used to access valid telephone numbers in the local exchange area of the terminating end office switch.

The Ronan and Hot Springs tariffs define "terminating direction" in section 2.6 as "the use of Access Service for the completion of calls from an IC [Interexchange Carrier] or EC [Exchange Carrier] premises to an End User Premise[s]." Again, the tariff's language makes no distinction between the subscribers for whose calls Ronan and Hot Springs provide switching service for termination.

As noted above, Qwest urges a different interpretation of the tariffs. In [*40] arguing that the tariffs actually reflect the CPNP standard, Qwest directs the Court to the definitions of "customer message" and "end user" in the tariffs. Each tariff contains the following definitions:

> Customer Message
>
> A completed intrastate call originated by a customer's end user. A customer message begins when answer supervision from the premise of the ordering customer is received by [Plaintiff telephone company] recording equipment indicating that the called party has answered. A message ends when disconnect supervision is received by [Plaintiff telephone company] recording equipment from either the premise of the ordering customer or the customer's end user premise from which the call originated.
>
> End User
>
> Any customer of an intrastate telecommunications service that is not a carrier, except that a carrier shall be deemed to be an "end user" to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly.

Qwest argues, with very little explanation, that these definitions, together with the provisions already discussed above, "clearly [*41] contemplate[] that the same carrier (the originating carrier) is responsible for both originating and terminating access charges." n80 The Court does not agree.

n80 *Qwest's Opening Brief* at 8.

First, the Court has concluded that the tariffs' language, taken as a whole, unambiguously provides that Qwest is liable for terminating access charges for all traffic, regardless of its origin, that Qwest transports to Plaintiffs for delivery to Plaintiffs' telephone service subscribers.

Second, the definitions that are set out above do not help Qwest's position. The customer message definition, when the tariffs are read in their entirety, appears in the tariffs to determine chargeable access minutes. Similarly, the definition of end user contains no language that leads to the conclusion that it somehow reflects the presence of a CPNP regime in the tariffs. Qwest does not state where these terms are used in the tariffs to reflect a CPNP regime.

Based on the foregoing, the Court finds that the tariffs at issue [*42] in this action are unambiguous in that they impose upon Qwest liability for terminating access charges for all traffic Qwest transports to Plaintiffs for delivery to Plaintiffs' telephone service subscribers.

C. Historical Practices of the Parties

The parties' historical practices also support the conclusion that Qwest is liable for the terminating access charges. As set forth in Section II., *supra,* Qwest acknowledges that "under applicable tariffs, Qwest purchased from Plaintiffs Feature Group C (FGC) access services, a network configuration allowing the commingling of traffic that may be originated by various carriers, but which is delivered entirely by Qwest to

Plaintiffs for termination on their local networks. The FGC connection between Plaintiffs and Qwest does not provide for the identification of the originating carrier on a call transmitted to Plaintiffs by Qwest." n81

n81 *Pltf.s' Stmt. of U.F.* P23; *Qwest's Stmt. of G.I.* P1.

Under this relationship, Qwest had been paying [*43] Plaintiffs terminating access charges under a terminating to originating (T/O) ratio. n82 It stopped paying, however, for those calls that its subscribers did not originate, reasoning that if it was no longer originating traffic in one of the Plaintiff's exchanges, its liability for terminating access charges became zero under a T/O ratio. n83 Thus, Qwest had been paying the terminating access charges, but stopped when the T/O ratio billing method "collapsed." n84

n82 *Qwest's Opening Brief* at 3.

n83 *Id.*

n84 *Id.*

The problem with Qwest's position is that, while the parties at one time used the T/O ratio method for measuring terminating access services as permitted under the tariffs, n85 the tariffs also permit the parties to measure actual minutes. n86 Disuse of the T/O ratio method of measuring minutes did not relieve Qwest of its obligation, under the tariffs, for paying terminating access charges on calls it transported to Plaintiffs for termination. Accordingly, no justification [*44] exists for Qwest's decision to stop paying terminating access charges.

n85 See TECOM and MILEC tariffs at § 6.8.4(E).

n86 *Id.*

These facts, in this Court's opinion, further demonstrate that Qwest is liable for paying Plaintiffs terminating carrier access charges for the provision of access services regardless of the identity of the originating carrier. The historical practice of the parties also appears to be consistent with this Court's interpretation, and Plaintiffs' apparent understanding, of the terms of the applicable tariffs.

D. Federal Preemption

The Court's foregoing interpretation of the tariffs does not resolve fully the issue of the scope of Qwest's liability. Qwest argues that even if the Court determines, as it has, that Qwest is liable under the tariffs for terminating access charges on traffic originated by other carriers, Qwest cannot be held liable for such charges related to intra-MTA wireless traffic that it delivers to Plaintiffs for termination. n87

n87 *Qwest's Opening Brief* at 11.

[*45]

Qwest maintains that Commercial Mobile Radio Service (CMRS or "wireless service") falls under a different regulatory scheme than does wireline traffic. Qwest argues that Congress, in an effort to create a "unified and comprehensive regulatory scheme" for wireless traffic, vested the Federal Communications Commission (FCC) with broad rulemaking authority under the *Communications Act of 1934*, and has enacted laws to give the FCC specific authority over interconnection between CMRS providers and other carriers of telecommunications service. n88

n88 *Id.*

Under this authority, Qwest contends, the FCC has adopted administrative rules that require CMRS providers and LECs to compensate one another for terminating their respective traffic under "reciprocal compensation." n89 Further, Qwest argues, "the FCC has expressly held that [LECs] are prohibited from charging their switched access charges for terminating intra-MTA wireless traffic, and are limited to reciprocal compensation." n90

n89 *Id.* at 12 (citing *47 C.F.R. § 20.11(b)*). [*46]

n90 *Id.* at 12-13 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499*, First Report and Order PP1035-1036) [hereafter *1996 Local Competition Order]*.

Relying on the foregoing, Qwest ultimately argues that federal law impliedly preempts Plaintiffs' state law claims because "allowing [Plaintiffs] to assess their terminating access charges on intra-MTA wireless traffic transiting Qwest's facilities would directly thwart the FCC prohibition against assessing access charges on intraMTA wireless traffic." n91

n91 *Id.* at 13

Further, Qwest maintains that Plaintiffs "cannot argue that the wireless carriers can avoid having terminating access charges levied on their intra-MTA wireless traffic by connecting directly to them, as the federal Telecommunications [*47] Act of 1996 expressly contemplates indirect interconnections; 'Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.'" n92

n92 *Id.* (citing *47 U.S.C. § 251(a)(1)*).

Plaintiffs advance three arguments in urging the Court to reject Qwest's preemption argument. First, Plaintiffs argue that the filed tariff doctrine, which makes a filed tariff the "exclusive source" of terms and conditions governing the provision of service of a common carrier to its customers, and which has the force of law, precludes a judicial challenge to the validity of a filed tariff. n93 Plaintiffs maintain that only the regulator with which a tariff is filed has the authority to invalidate it, and Qwest has failed thus far to present its preemption argument to the proper administrative forum. n94

n93 *Brief of Plaintiffs Ronan Telephone Company, Hot Springs Telephone Company and Lincoln Telephone Company in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* [hereafter *Ronan et al.'s Resp. Brief*] at 9-10; *Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment* [hereafter *3 Rivers et al.'s Resp. Brief*] at 18-19. [*48]

n94 *Ronan et al.'s Resp. Brief* at 9-10.

Second, Plaintiffs argue that Qwest's preemption argument is barred by the "law of the case" doctrine. n95 Plaintiffs contend that Qwest, in challenging Plaintiffs' appeal to the Ninth Circuit, expressly presented its preemption argument to the appellate court. In reversing Judge Cebull, remanding the case and directing the district court to apply the filed tariff doctrine and interpret the tariffs, Plaintiffs argue, the Ninth Circuit implicitly rejected Qwest's preemption argument. Plaintiffs argue that, had the appellate court agreed that the FCC intra-MTA rule preempted the tariffs, it would have simply affirmed Judge Cebull's decision, and not remanded the matter for the district court's interpretation of the tariffs. n96

n95 *Ronan et al's Resp. Brief* at 9-10; *3 Rivers et al.'s Resp. Brief* at 18-19.

n96 *Id.*

Third, Plaintiffs maintain that, even if [*49] the Court rejects their first two arguments, the FCC order upon which Qwest relies in advancing its preemption argument *(i.e., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499*, First Report and Order PP1035-1036 [hereafter *1996 Local Competition Order]),* does not preempt state authority over LEC interconnection rates for intra-MTA wireless-originated calls. n97 Rather, Plaintiffs contend, *inter alia,* that the *1996 Local Competition Order* draws distinctions between access charges applicable to long distance traffic and reciprocal compensation applicable to local traffic that make the FCC's order inapplicable to the type of traffic at issue in this case. n98

n97 *Ronan et al.'s Resp. Brief* at 12-17; *3 Rivers et al.'s Resp. Brief* at 18.

n98 *Id.*

1. Filed Tariff Doctrine

The Court finds Plaintiffs' first [*50] argument unpersuasive. The filed tariff doctrine, in and of itself, does not wholly preclude Qwest's preemption argument. [HN4] The preemption doctrine, which derives from the *Supremacy Clause of the United States Constitution*, n99 allows federal law to preempt and displace state law under certain circumstances. n100 As the Ninth Circuit Court of Appeals has noted, tariffs have the force and effect of law. n101 Thus, in the instant case, the filed

tariffs at issue in this case, which have the force and effect of state law, are subject to potential preemption by federal law if the criteria for preemption are present. The filed tariff doctrine alone does not stave off potential federal law preemption.

n99 *U.S. CONST., ART. VI, cl. 2* ("This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

n100 See *Ting v. AT&T, 319 F.3d 1126, 1135-36 (9th Cir. 2003)* and discussion *infra*. [*51]

n101 Court's Doc. No. 57 *(3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 Fed. Appx. 698 (9th Cir. 2002)* (unpublished)).

The same reasoning applies with equal force to Plaintiffs' argument that only the regulator with which a tariff is filed has the authority to invalidate it. For this argument, Plaintiffs rely on the Ninth Circuit's decision in Brown v. MCI Worldcom Network Services, Inc. n102

n102 *277 F.3d 1166 (9th Cir. 2002).*

In Brown, as Plaintiffs correctly note, the court reiterated that "under the filed rate doctrine, no one may bring a judicial challenge to the validity of a filed tariff." n103 In advancing its preemption argument here, however, Qwest is not challenging the validity of the tariffs. Rather, Qwest maintains that the tariffs, with or without a pending challenge to their validity, are subject to federal preemption under appropriate [*52] circumstances.

n103 *Id. at 1170.*

Further, as noted *supra*, the tariffs in this case have the force and effect of state law. As such, [HN5] they are as susceptible to federal preemption as any other state law. Accordingly, Plaintiffs' first argument fails. n104

2. The Law of the Case Doctrine

The Court also finds inapplicable the "law of the case" doctrine as a basis for Plaintiffs' challenge to Qwest's preemption argument. The Ninth Circuit has described application of the law of the case doctrine as follows:

> The law of the case doctrine provides that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997)* (internal quotation and citation omitted); *U.S. v. Miller, 822 F.2d 828, 832 (9th Cir. 1987)* ("The rule is that the mandate of an appeals court precludes the district court on remand from [*53] reconsidering matters which were either expressly or implicitly disposed of upon appeal."). But a court may have discretion to depart from the law of the case if:
>
> 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. *Alexander, 106 F.3d at 876* (emphasis added). A court's "failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." *Id.* (citation omitted). n105

n104 The Court notes that the record contains further support for its conclusion with respect to this issue. In the Reply Affidavit of Cheryl Gillespie (Court's Doc. No. 43) filed on May 5, 2000, reference is made to a PSC matter that involved a petition by Ronan (represented by Mr. Evilsizer), under *47 U.S.C. § 251(b)(5)*, for exemption from the requirement that it enter into a reciprocal compensation arrangement with Montana Wireless (MW) (represented by Mr. Squires), the wireless subsidiary of Blackfoot. In the Matter of the Petition of Ronan Telephone Company for Suspension or Modification of provisions of the 1996 Telecommunications Act, Pursuant to *47 U.S.C. § 251*(f) (2) and 253(b), Mont. PSC, Docket No. D99.4.111. Exhibit 6 to Ms. Gillespie's Reply Affidavit is MW's

objection to Ronan's prehearing memorandum. In it, Mr. Squires states, *inter alia,* that "the rating of [CMRS] calls as 'local' is a matter of Federal law, not a matter of [Ronan's] tariffs. It is irrelevant what the access tariffs provide with regard to CMRS traffic...." *Objection to Prehearing Memorandum of Ronan Telephone Company* at 2. From this statement, it appears that at one time, Blackfoot, through its subsidiary MW, took a position on the preemption issue which was consistent with that of Qwest in the instant case. [*54]

n105 *U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998).*

However, [HN6] application of the law of the case doctrine necessarily hinges on the threshold question of whether the appellate court actually decided the operative issue. n106 If the appellate court does not decide an issue, there is no law of the case. n107 Further, an issue does not become the law of the case merely because the appellate court could have decided it. n108

n106 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *Federal Practice and Procedure* vol. 18B, § 4478, 649 (2d ed., West Group 2002) ("Actual decision of an issue is required to establish the law of the case. Law of the case does not reach a matter that was not decided.") (citations omitted).

n107 *U.S. v. Standard, 207 F.3d 1136, 1139 (9th Cir. 2000).*

n108 See, e.g., *Field v. Mans, 157 F.3d 35, 40-42 (1st Cir. 1998).*

[*55]

In remanding, the Ninth Circuit did not decide, either explicitly or implicitly, Qwest's preemption argument. n109 It may be true, as Plaintiffs argue, that Qwest raised the preemption issue during proceedings on appeal. The Ninth Circuit, however, declined to address the issue, opting instead to remand the matter to the district court for interpretation of the tariffs and possible "further development of the record." n110

n109 See generally Court's Doc. No. 64.

n110 *Id.*

The Ninth Circuit did not mention federal preemption and, in fact, signaled to this Court that the issue remained open when it suggested in a footnote that a stay may be appropriate to allow pursuit of a declaratory ruling from the Montana PSC. In discussing the PSC's possible authority and expertise in the matter, the Ninth Circuit noted that the PSC might "issue a declaratory ruling with regard to . . . whether a tariff, interpreted to require payment for such calls, is just and reasonable in light of the FCC's interpretation [*56] of federal law." n111 In sum, because the Ninth Circuit did not decide the preemption issue, and instead suggested that the Montana PSC might want to address it, no law of the case exists that would preclude Qwest from making its preemption argument here." n112

n111 *Id.*, n.2.

n112 The Court is mindful that Plaintiffs' opposition to Qwest's preemption argument could be construed as a collateral attack upon an FCC order which, under the Hobbs Act, *28 U.S.C. § 2342*, must be brought in a federal court of appeals. It is this Court's opinion, however, that the parties here are not asking the Court to determine the validity of the FCC's order. Rather, they are asking it to interpret the FCC's order. Thus, the Hobbs Act does not apply. See *Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1125 (9th Cir. 2003).*

3. Preemption

With respect to the preemption doctrine, the Ninth Circuit Court of Appeals recently reiterated that [HN7] under the *Supremacy Clause,* [*57] federal law can preempt state law in three ways. n113 First, Congress may expressly preempt state law by enacting a statute with an explicit statutory command that state law be displaced (*i.e.,* "express" preemption)." n114 Second, Congress may impliedly preempt state law by establishing "a scheme of federal regulation [that] is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation'" (*i.e.,* "field" or "complete" preemption). n115 Third, federal law may impliedly preempt state law where a conflict exists between federal and state law (i.e., "conflict" preemption). n116

n113 *Ting, 319 F.3d at 1135-36.*

n114 *Id.* (citations omitted).

n115 *Id.* (citations omitted).

n116 *Id.* (citations omitted).

The FCC order n117 up on which Qwest relies does not contain preemptive text, so express preemption is not present here. Similarly, field preemption does not appear to be an issue here. Qwest [*58] neither argues that federal law occupies the field, nor directs the Court to any relevant authority that so suggests. Further, it is beyond dispute that state law and regulatory agencies retain significant roles in telecommunications regulation." n118 Thus, Qwest's preemption argument appears to focus exclusively on implied conflict preemption." n119

n117 The phrase "laws of the United States" in the *Supremacy Clause* includes regulations lawfully promulgated by federal agencies pursuant to their congressionally-delegated authority. See *City of New York v. FCC, 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988)*; *International Ass'n of Independent Tanker Owners v. Locke, 159 F.3d 1220, 1226 (9th Cir. 1998)*. There is no dispute in this action that the Federal Communications Commission (FCC) is a federal agency with congressionally-delegated authority to lawfully promulgate regulations with respect to the telecommunications industry.

n118 *Ting, 319 F.3d at 1136-37* (discussing state law's governance of formation of consumer long-distance contracts and detariffing's effect of creating a larger role for state law in the telecommunications industry as reasons "to preclude a finding that Congress intended to completely occupy the field"). [*59]

n119 *Qwest's Opening Brief* at 13 ("In this case, allowing [Plaintiffs] to assess their terminating access charges on intraMTA wireless traffic transiting Qwest's facilities would directly thwart the FCC prohibition against assessing access charges on intraMTA wireless traffic.").

[HN8] Implied conflict preemption exists where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." n120 Determining whether conflict preemption exists requires courts "to imply Congress' intent from the statute's structure and purpose." n121 If a statute or agency regulation does not specifically address the issue, courts are to "look to 'the goals and policies of the [statute or agency regulation]'" to determine its potentially preemptive effect. n122

n120 *Ting, 319 F.3d at 1136* (citations omitted).

n121 *Id. at 1135-36* (citations omitted). [*60]

n122 *Id.* (citations omitted).

Congress passed the Telecommunications Act of 1996 (the Act, which is codified at *47 U.S.C. § § 151-615*) in February of 1996. The Act was intended to stimulate competition in the local and long distance telephone markets. n123 As part of the statutory scheme relevant to this case, the Act required all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." n124

n123 *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*; *Pacific Bell, 325 F.3d at 1117-18.*

n124 *47 U.S.C. § 251(b)(5).* Rules applicable to telecommunications further emphasized the reciprocal compensation arrangement between LECs and CMRS carriers as follows:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.
>
> (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the

> commercial mobile radio service provider.

> *47 C.F.R. § 20.11(b).*

[*61]

The Act's complexity prompted the FCC to create an order directing implementation of the Act. n125 In the *1996 Local Competition Order,* the FCC addressed the billing of those calls that a CMRS provider delivers to an LEC for termination in those instances in which the call both originates and terminates in the same MTA. n126 The parties disagree about the interpretation of the FCC's order. The Court addresses the operative paragraphs of the order in turn.

n125 *1996 Local Competition Order, supra.*

n126 *Id.* at PP 1035-1045.

First, in paragraph 1033, the FCC discussed the distinction between "transport and termination" and "access." The FCC noted that transport and termination of traffic, regardless of the location of its origination, implicates the same network functions. The FCC concluded, however, that a legal distinction remains between transport and termination of local traffic, and access services for long distance traffic. The FCC further emphasized that local traffic [*62] falls under the reciprocal compensation scheme, while termination of interstate and intrastate long-distance traffic is subject to access charges. These conclusions raised the question of what type of traffic is considered "local" and what is not. In the order's next three paragraphs, the FCC sought to answer that question.

In paragraph 1034, the FCC reaffirmed its stance in paragraph 1033, and concluded that the reciprocal compensation scheme applies only to traffic that originates and terminates in a "local area." The FCC in paragraph 1034 also discussed the historical application of access charges, which involved three carriers collaborating to complete a "long distance" call. The FCC contrasted those types of calls with those calls subject to the reciprocal compensation scheme in which two carriers work together to complete a "local call."

Next, paragraph 1035 provides, in pertinent part:

> 1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under *section 251(b)(5),* consistent with the state [*63] commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. . . . n127

n127 *Id.* at P 1035 (emphasis added).

In paragraph 1035, the FCC announced that state commissions are vested with the authority to determine what geographic areas are to be considered "local areas" for purposes of applying *section 251(b)(5)*'s reciprocal compensation obligations. However, paragraph 1035 specifically excepts from the state commission's authority "traffic to or from a CMRS [wireless] network." For that type of traffic, the FCC reserved for itself in paragraph 1036 the exclusive authority to define local services areas for traffic to or from CMRS networks.

In paragraph 1036, the FCC stated:

> 1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local [*64] service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under *section 251(b)(5).* Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under *section 251(b)(5)* as it avoids creating artificial distinctions between CMRS providers. Accordingly, 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),* rather than interstate and intrastate access charges. n128

n128 *Id.* at P 1036 (emphasis added) (footnotes omitted).

It is Qwest's position that the foregoing provisions [*65] from the *1996 Local Competition Order* specifically provide that traffic between an LEC and a CMRS provider that originates and terminates within the same MTA is local traffic and is, therefore, not subject to terminating access charges, but rather to reciprocal compensation. The Court agrees.

Paragraph 1036 expressly states that the FCC, for purposes of applying *section 251(b)(5)*'s reciprocal compensation obligations, defines the local service area for calls to or from a CMRS network as the Major Trading Area (MTA). In other words, traffic that both originates and terminates in the same MTA is considered "local," and thus "subject to transport and termination rates under *section 251(b)(5)* [reciprocal compensation], rather than interstate or intrastate access charges." The FCC's order makes no distinction, with respect to CMRS traffic that originates and terminates in the same MTA, between traffic that flows between two carriers or among three or more carriers before termination. This traffic is all "local" traffic subject to the reciprocal compensation scheme. n129

n129 In *Iowa Network Services, Inc. v. Qwest Corp., 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324 (S.D. Iowa Oct. 9, 2002)*, the court rejected Iowa LECs' claim that Qwest owed access charges for intra-MTA wireless calls. The court held that such claims were precluded by the Iowa Utilities Board's prior decision that "the FCC had previously deemed intraMTA traffic as being local, and, therefore, access charges could not apply." *2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, *8.*

[*66]

This conclusion is further bolstered by language in paragraph 1043 of the *1996 Local Competition Order*, which provides, in relevant part:

> 1043. As noted above, CMRS providers' license areas are established under federal, rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under *section 251(b)(5)*, rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC; with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under *section 251(g)* to preserve the current interstate access charge regime, we conclude that the [*67] new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges. n130

n130 *Id.* at P 1043 (emphasis added) (footnotes omitted).

In this Court's opinion, the underlined text further supports the conclusion that traffic between an LEC and CMRS network that originates and terminates in the same MTA is local and, therefore, subject to reciprocal compensation rather than access charges. The FCC order makes no distinction between such traffic and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination.

Further, the Court is not persuaded by Plaintiffs' argument that the last sentence of paragraph 1043 "carved out an exception" "that preserves the access charge system for wireless [*68] calls that were subject to access charges prior to the 1996 Act (such as the calls at issue). n131 The referenced language in the last sentence of paragraph 1043 pertains to "interstate access charges" and does not specifically reference "local" calls, i.e. CMRS traffic that originates and terminates in the same MTA, as defined in paragraphs 1035 and 1036. In other words, the Court does not find these provisions inconsistent.

n131 *Ronan et al.'s Resp. Brief* at 15.

Based on the foregoing discussion, the Court concludes that *47 U.S.C. § 251(b)*, as implemented by the FCC's *1996 Local Competition Order*, preempts the tariffs in this case to the extent that the reciprocal compensation scheme applies to CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination. Accordingly, Qwest is not liable to Plaintiffs for terminating access charges on CMRS (wireless) traffic that both originates [*69] and terminates in the same MTA. n132

n132 The Court is mindful that, because FGC traffic is commingled, Plaintiffs cannot identify what portion of Qwest incoming traffic is CMRS originated. Nonetheless, in deciding the issues raised by the pending motions, the Court is constrained to interpret and apply governing laws and regulations as they currently exist.

IV. MOTIONS TO STRIKE AFFIDAVITS

Qwest's Motion to Strike Affidavit of Jan Reimers will be denied. As the Plaintiffs note, the Ninth Circuit contemplated that the District Court may need to consider technology and practice in the telecommunications industry. n133 The Reimers affidavit does contain such information. Mr. Reimer's legal conclusions are given no weight by this Court.

n133 See *Plaintiff's Brief Opposing Defendant's Motion to Strike the Affidavit of Jan Reimers* at 4.

[*70]

Qwest's Motion to Strike the Affidavit of Joan Mandeville (Qwest's motion asks the Court to strike Ms. Mandeville's Reply Affidavit) also will be denied. Although the better practice is clear compliance with Local Rule 56.1(d), the parties recognize that [HN9] the Court may grant leave to file "further affidavits" [see *Fed. R. Civ. P. 56(e)*] and it hereby does so.

Qwest's motion to strike to the Supplemental Affidavit of Jan Reimers will be granted. *Fed. R. Civ. P. 56(e)* [HN10] requires that supporting and opposing affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. therein." Reimer's supplemental affidavit fails to meet these standards. He repeatedly purports to instruct the Court on what evidence is relevant. n134 He opines on the legal obligations of the parties. n135 He speculates on what another affiant "knows." n136 And, he offers his opinion on the veracity of another affiant. n137 His supplemental affidavit is not helpful to the Court in understanding [*71] the facts. n138

n134 *Reimer's Supp. Aff.* at PP 7, 9, 10, 11 and 14.

n135 *Id.* at PP 8, 10 and 12.

n136 *Id.* at P 13.

n137 *Id.* at PP 7 and 14.

n138 See *Fed. R. Evid. 702*; see also *Kostelecky v. NL Acme Tools, 837 F.2d 828, 830 (8th Cir 1988)* (cited with approval in *Fireman's Fund Ins. Co. v. Alaskan Pride Partnership, 106 F.3d 1465, 1468 (9th Cir. 1997))*; CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *Federal Practice and Procedure* vol. 10B, § 2738, 345-57 (3d ed., West Group 1998).

V. CONCLUSION

Based on the foregoing,

IT IS ORDERED that:

1. The motion n139 of Ronan, Hot Springs and Lincoln for summary judgment on Count One is GRANTED in part, and DENIED in part, as set forth herein. The motion for summary judgment, as it relates to Counts Two and Three of the Complaint, is DENIED as MOOT in light of the Court's ruling on Count One;

2. Qwest's [*72] Motion n140 for Summary Judgment is GRANTED in part, and DENIED in part, as set forth herein; n141

3. The motion n142 of 3 Rivers, Range, Blackfoot, Northern, Interbel and Clark Fork for summary judgment on Count One is GRANTED in part, and DENIED in part, as set forth herein. The motion for summary judgment, as it relates to Counts Two and Three of the Complaint, is DENIED as MOOT in light of the Court's ruling on Count One;

4. Qwest's Motion n143 to Strike Affidavit of Jan Reimers is DENIED;

5. Qwest's Motion' n144 to Strike Affidavits of Jan Reimers and Joan Mandeville is GRANTED to the

extent it relates to Mr. Reimer's supplemental affidavit, and DENIED to the extent it relates to Ms. Mandeville's reply affidavit.

n139 Court's Doc. No. 66.

n140 Court's Doc. No. 73.

n141 Qwest's motion seeks summary judgment on all of Plaintiffs' claims. Qwest did not argue the basis for its motion with respect to Count Four of the Complaint. Accordingly, Qwest's motion for summary judgment is DENIED to the extent it relates to Count Four.

n142 Court's Doc. No. 79.

n143 Court's Doc. No. 87. [*73]

n144 Court's Doc. No. 110.

IT IS FURTHER ORDERED that lead trial counsel for each party shall appear in the chambers of the undersigned, Room 210, Federal Building, 215 1st Avenue North, Great Falls, Montana, at 2:00 p.m., September 30, 2003, for the purpose of participating in a scheduling conference. The conference is intended to develop a case-specific plan for remaining discovery, and to prepare a schedule for disposition of the issue remaining in the case.

Lead counsel for all parties shall confer to consider matters listed in *Fed. R. Civ. P. 26(f)* on or before September 15, 2003. The parties shall jointly file with the Court a written report outlining the discovery plan formulated at the conference on or before September 23, 2003.

The parties will design the discovery plan to require disclosure of all experts. Expert disclosures must comply with *Fed. R. Civ. P. 26(a)(2)(B)* on or before the deadline for disclosure. Discovery shall close thirty (30) to sixty (60) days after the deadline [*74] for disclosure of Defendant's experts. The parties should propose a date certain for the close of discovery.

The Clerk of Court is directed to notify the parties forthwith of the making of this Order.

DATED this 22nd day of this August, 2003.

Carolyn S. Ostby

United States Magistrate Judge

Briefs and Other Related Documents
Ronan Telephone Company v. Alltel Communications, Inc.D.Mont.,2007.Only the Westlaw citation is currently available.

United States District Court,D. Montana.
RONAN TELEPHONE COMPANY, a Montana corporation, and Hots Springs Telephone Company, Plaintiff,
v.
ALLTEL COMMUNICATIONS, INC., Gold Creek Cellular of Montana Limited Partnership, d/b/a Verizon Wireless, Verizon Wireless (VAW), LLC, Western Wireless, LLC, and WWC Paging Corporation, Defendants.
No. CV 06-99-MDWM.

Feb. 2, 2007.

Ivan C. Evilsizer, Evilsizer Law Office, Helena, MT, for Plaintiff.
Andrew M. Carlson, Briggs & Morgan, P.A., Minneapolis, MN, Philip R. Schenkenberg, Briggs & Morgan, St. Paul, MN, Stanley T. Kaleczyc, Browning Kaleczyc Berry & Hoven, Helena, MT, for Defendants.

ORDER

MOLLOY, Chief J.

I. Introduction

*1 United States Magistrate Judge Jeremiah C. Lynch entered his Findings and Recommendation in this matter on December 4, 2006. Plaintiffs filed objections and are therefore entitled to de novo review of the record. 28 U.S.C. § 636(b)(1). The Parties are familiar with the factual and procedural background so they will be recited only as necessary. After de novo review I agree, one exception noted herein, with Judge Lynch's conclusion that Defendants' partial motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted in part and denied in part.

II. Analysis

A. The Standard of Review for a Motion to Dismiss.

*1 Under Rule 12(b)(6) a complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Tanner v. Heise*, 879 F.2d 572, 576 (9th Cir.1989); *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). The court must accept all allegations of material fact as true, *Hospital Bldg. Co. v. Rex Hospital Trustees*, 425 U.S. 738, 740, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976), and construe the pleading in the light most favorable to the nonmoving party. *Tanner*, 879 F.2d at 576. "A complaint should not be dismissed if it states a claim under any legal theory, even if the plaintiff relies on a different legal theory." *Haddock v. Board of Dental Examiners of California*, 777 F.2d 462, 464 (9th Cir.1985).

*1 Nonetheless, dismissal can still be granted if there is a lack of a cognizable legal theory or if there is an absence of facts alleged under a cognizable legal theory. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533-34 (9th Cir.1984). Additionally, the Court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir.1994) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209, (1986)).

B. Plaintiffs' State Access Tariff Claims Fail.

*1 Judge Lynch correctly recognized that Counts 1 through 8, Plaintiffs' breach of contract claims predicated upon state access tariff disputes, should be dismissed to the extent they are based upon state access tariffs because federal law preempts them.

*1 The case here presents the question of how to resolve the application of federal and state authority concerning fees between telephone networks of varying size and capabilities. Plaintiffs, local exchange carriers, are seeking to assess state access tariffs on the Defendants who are wireless telecommunication operations, otherwise known as commercial mobile radio services ("CMRS"), for use of the Plaintiffs' facilities to connect with wireline customers within Montana.[FN1] The disputed traffic is wireless traffic that occurs within the single major trading area ("MTA") that encompasses all of

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EXHIBIT B

Montana and portions of the surrounding states. (By definition, all wireless calls that occur within a major trading area are local calls).

FN1. Qwest, a non-party, is the intermediary that routes Defendants' wireless traffic into Plaintiffs' facilities.

*2 The basic tenets of preemption are not contested. Through Article VI of the Constitution the Supremacy Clause provides that federal law can preempt state law by express preemption, field preemption, or conflict preemption. *Ting v. AT & T,* 319 F.3d 1126, 1135 (9th Cir.2003) (citation omitted). Conflict preemption applies here. The Ninth Circuit addressed conflict preemption in *Ting:* "[c]onflict preemption is found where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.* at 1136 (citation and internal quotation marks omitted). Contrary to Plaintiffs' objections, state access tariffs cannot be applied here where they would contradict federal law and rulings by the Federal Communications Commission ("FCC").

*2 The combination of 47 U.S.C. § 251(b) and FCC rulings such as the 1996 *First Report and Order* (*In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCCR 15499, FCC 96-325 (1996)) dictate that the state access tariffs are preempted by federal law. Section 251(b)(5), Reciprocal compensation, mandates "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Paragraph 1036 of the *First Report and Order* concludes, "[a]ccordingly, 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), rather than interstate and intrastate access charges." As Judge Lynch found, Plaintiffs wrongly contend that the provisions of section 251(b)(5) and paragraph 1036 do not bar them from applying state access tariffs.

*2 The courts have embraced federal preemption through the FCC in situations such as this. In *AT & T Corp. v. Iowa Utilities Board,* the United States Supreme Court recognized the FCC's authority, as set forth by Congress though the Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56, which empowered the FCC to regulate intrastate traffic through section 251(b). 525 U.S. 366, 378-80, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (addressing arguments by local exchange carriers and state commissions against preemption).

*2 Other courts across the country have followed suit and specifically applied this preemptive power to the authorities at hand. *See 3 Rivers Telephone Cooperative, Inc. v. U.S. West Communications, Inc.,* 2003 WL 24249671, *16-17 (D.Mont.2003) (Judge Ostby found federal preemption concerning a wireless provider operating within a major trading area); *Alma Telephone Co. v. Pub. Serv. Commission of Missouri,* 183 S.W.3d 575, 577-78 (Mo.2006) (acknowledging that the 1996 *First Report and Order,* working in conjunction with section 251(b)(1), imposes tariffs for wireless calls within a major trading area (local calls)); *Iowa Network Services, Inc. v. Qwest Corp.,* 466 F.3d 1091, 1096-97 (8th Cir.2006) (noting that intrastate or intraMTA wireless calls are subject to the *First Report and Order* and reciprocal compensation obligations, not state access charges).

*3 Plaintiffs' objections to the imposition of FCC authority on intrastate services are not well taken. A review of the Supreme Court's analysis in *AT & T* shows that Plaintiffs' arguments are readily addressed. The Court debated many of these very topics in the course of its deliberation. It noted that although it had previously curbed FCC jurisdiction in *Louisiana PSC v. FCC,* 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986), that case was factually inapposite and despite Plaintiffs' insistence, 47 U.S.C. § § 152 and 201 actually support FCC jurisdiction over intrastate traffic. *AT & T,* 525 U.S. at 378-80 ("[o]ur view is unaffected by 47 U.S.C. § 152(b)" and § 201 "explicitly" grants jurisdiction). Thus, the Supreme Court has spelled out why FCC jurisdiction applies here.

*3 Likewise, Plaintiffs' efforts to make an end run around section 251(b)(5), which imposes reciprocal compensation, through the rural telephone exemption are off the mark. P. Obj. 6-7. The rural telephone company exemption, section 251(f)(1), excuses such companies from the duty for local exchange carriers under section 251(c)(1) to negotiate in good faith to fulfill the duties of section 251(b). While there may not be a duty to negotiate, the language of section 251(c) does not trigger relief from the duties under section 251(b)(5). As Defendants noted, "the rural exemption relates to the method of establishing reciprocal compensation arrangements, not the underlying obligation to do so." D. Resp. Br. 10-11.

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*3 Nor does the Court find that the order in *In the Matter of the Petition of Blackfoot Telephone Coop.*, Mont. PSC Order No. 6218a/6219a, Docket No. 99.4.112 (2000) relieves Plaintiffs' burden as they suggest. P. Obj. 7. Notably, Plaintiffs failed to cite to the final page where, under "Conclusions of Law", it states, "Ronan has the duty to establish reciprocal compensation arrangements with other carriers" under section 251(b)(5). The Order set forth this conclusion after stating that Ronan was an exempt rural carrier and had no duty to negotiate under section 251(c)(1).

*3 Finally, Plaintiffs' assertion that the *"T-Mobile Order," In the Matter of Developing a Unified Intercarrier Compensation Regime,* 20 FCCR 4855 (2005), supports the imposition of Plaintiffs' state access tariffs is misplaced. The *T-Mobile Order* does acknowledge that "interconnection rates imposed via tariff may be permissible so long as the tariff does not supersede or negate the federal provision under sections 251 and 252." ¶ 13, *4863. However, the tariffs in question here are state access tariffs and as Judge Lynch and the *Alma Court* observed, the *T-Mobile Order* might allow for tariffs on local wireless traffic in the absence of an arrangement, or reciprocal compensation agreement, but not interstate or intrastate access charges.[FN2]

FN2. In their objections Plaintiffs dispute the characterization of their tariffs; they argue the tariffs are applicable to wireless traffic and therefore within the scope of the *T-Mobile Order* that would exempt them. P. Obj. 15-16. Judge Lynch found they were state access tariffs because that the only manner in which Plaintiffs' described them in their filings. Defendants further point out that that is how Plaintiffs' actually title their tariff. D. Resp. Br. 13. The filed tariff doctrine points the Court to review the actual tariff. *See Brown v. MCI WorldCom Network Servs., Inc.,* 277 F.3d 1166, 1170 (9th Cir.2002).
The tariff here does contemplate some interaction with commercial mobile radio service providers but not in the manner anticipated in the *T-Mobile Order* or by the federal implementing provisions, which the *T-Mobile Order* specifically states must be followed. ¶ 13, *4863. The vast majority of the tariff addresses broader access charges, which is implicitly acknowledged in Plaintiffs' objectives where they point the Court to an "additional" provision that addresses wireless use that Plaintiffs apparently added in 1999. P. Obj. 15. Even with the additional provision, which consists of one sentence, the tariff does not delineate how it sorts traffic with respect to the major trading area, the basis for determining local use, and the tariff apparently does not contemplate reciprocal compensation, contrary to the provisions of section 251(b)(5). Thus, while the tariff is not entirely bereft of some application to wireless networks, the small aspects of the tariff that are applicable are minimal, inadequate, do not fit within the exception provided by the *T-Mobile Order*, and are largely inconsequential to the balance of the tariff.
While the *T-Mobile Order* does provide an avenue for local exchange carriers to better engage commercial mobile radio services, the Court does not believe that a minimal effort such as this qualifies to obviate the previously discussed rulings and the regulatory scheme. Plaintiffs note that they have previously attempted to file a wireless tariff with the Montana PCS, but that the PCS did not accept it as a wireless reciprocal compensation tariff and instead termed it an interconnection agreement-review of the tariff at hand would invite similar classification. P. Obj. 18.

*3 Consequently, the Court finds that Plaintiffs' breach of contract claims, to the extent they are based upon state access claims, are dismissed because they are preempted by federal law and Plaintiffs are not entitled to relief.[FN3]

FN3. The Court agrees with Judge Lynch that a collateral estoppel analysis is not necessary where the claims fail in light of preemption.

C. The Court Declines to Dismiss the Federal Access Tariff Claims.

*4 Judge Lynch recommended dismissing the breach of contract claims (Counts 1-4) under the federal access tariffs where the federal access tariffs were never actually in front of the Court and Judge Lynch relied solely on the limited description set forth in the filings. The federal tariffs may be similar to those

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filed as state tariffs and thus not in compliance with federal provisions, the Court, however, in deference to the standards of Rule 12(b)(6) and the filed tariff doctrine will leave this issue for a later date in the proceedings. *See* *3 Rivers Telephone Coop., Inc. v. U.S. West Communications, Inc.*, 45 Fed. Appx. 698, 699 (9th Cir.2002).

D. The Unjust Enrichment Claim is Dismissed.

*4 The Court agrees with Judge Lynch's finding that Plaintiffs' unjust enrichment claim should be dismissed. Judge Lynch characterized this claim as a possible effort to get around the federal regulatory scheme, including the provisions of the *T-Mobile Order*. Although Plaintiffs may have made some efforts they have fallen short for the reasons stated above. In any event, an unjust enrichment claim is not an appropriate means to advance their case when there are other means under the federal regulatory scheme. *See* *Union Telephone Co. v. Qwest Corp.*, 2004 WL *4960780, *11 (D.Wyo.2004); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir.2002). Moreover, there is no evidence of misconduct or fault by Defendants that would invoke an unjust enrichment claim as anticipated under Montana law. *Brown v. Thornton*, 150 Mont. 150, 156, 432 P.2d 386, 390 (1967); *Randolph V. Peterson, Inc. v. J.R. Simplot Co.*, 239 Mont. 1, 8, 778 P.2d 879, 883 (1989). The Defendants' motion to dismiss the unjust enrichment claim warrants approval.

*4 Additionally, the Court, in the absence of substantial objection, further adopts Judge Lynch's recommendations to deny the motion to dismiss regarding statute of limitations in the federal portions of Counts 1 through 4 and 10 where the Court is unable to determine a point of accrual. Plaintiffs' attorney fees claim is also dismissed because as Judge Lynch reasoned, they cannot receive fees based upon state access claims that are preempted.

III. Conclusion

*4 Accordingly, based upon the foregoing I adopt Judge Lynch's Findings and Recommendation (dkt # 49) as set forth above: Defendants' partial motion to dismiss the second amended complaint (dkt # 39, which incorporates the earlier motion to dismiss dkt # 14) is GRANTED in part and DENIED in part.

*4 Defendants' partial motion to dismiss fails in respect to the federal access tariffs in Count 1 through 4 and where it is based upon statute of limitations arguments concerning the federal portions of Count 1 through 4 and Count 10.

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Slip Copy, 2007 WL 433278 (D.Mont.)

Briefs and Other Related Documents (Back to top)

- 9:06cv00099 (Docket) (Jun. 16, 2006)

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Union Telephone Co. v. Qwest Corp.
C.A.10 (Wyo.),2007.
Only the Westlaw citation is currently available.
United States Court of Appeals,Tenth Circuit.
UNION TELEPHONE COMPANY, a Wyoming corporation, Plaintiff-Appellant,
v.
QWEST CORPORATION, a Colorado corporation f/k/a U.S. West Communications, Inc., Defendant-Appellee.
No. 06-8012.

July 27, 2007.

Appeal from the United States District Court for the District of Wyoming, (D.C. No. 02-CV-209-WFD).

Bruce S. Asay, Associated Legal Group, LLC, Cheyenne, WY, for Plaintiff-Appellant.
Steven J. Perfrement, Holme, Roberts, & Owen LLP, Denver, CO, (Roy E. Hoffinger, Musgrave, & Theis, LLP, Denver, CO, and Paul Hickey, Hickey & Evans, LLP, Cheyenne, WY, with him on the briefs), for Defendant-Appellee.

Before LUCERO, ANDERSON, and McCONNELL, Circuit Judges.
LUCERO, Circuit Judge.
*1 Union Telephone Company (" Union") brought suit against Qwest Corporation (" Qwest") seeking compensation for telecommunication services provided by Union to Qwest. The district court granted summary judgment in favor of Qwest, and Union now appeals. Because Union has failed to present a valid agreement or tariff that could serve as the basis for its claims for compensation, we **AFFIRM.**

I

Union is a **telecommunications** company operating primarily in Wyoming, with some customers in Colorado and Utah. Its activities are subject to the **Telecommunications** Act of 1996 (" 1996 Act"), 47 U.S.C. §§ 153, et seq., as a **telecommunications** carrier, and, more specifically, an incumbent local exchange carrier (" ILEC").[FN1] As an ILEC, it provides wireline local and long distance services [FN2] to approximately 7000 customers, 6300 of whom are located in Wyoming. Union is also a wireless provider, servicing approximately 40,000 wireless subscribers, 30,000 of whom are located in Wyoming.

> FN1. A **telecommunications** carrier is defined as any provider of **telecommunications** services. 47 U.S.C. § 153(44). A local exchange carrier (" LEC") is a company that provides local telephone service in a particular geographic area. An ILEC is a LEC that was operating in a particular area on the date the 1996 Act took effect. § 251(h).

> FN2. Long distance service can refer either to interstate or " interLATA" service. InterLATA service is short-haul long distance service. Local Access and Transport Areas (" LATAs") were established to define the territory within which the new Regional Bell Operating Companies (" RBOCs") could offer long distance service following the 1982 settlement agreement divesting AT & T of its local service companies. Colorado is divided into two LATAs, while Wyoming and Utah each comprise a single LATA.

Qwest is a wireline **telecommunications** carrier and an ILEC, providing local and intraLATA service [FN3] in 14 western states, including Wyoming, Colorado, and Utah. Importantly for this appeal, it also provides " transit" services to other carriers in this region, meaning that other **telecommunications** companies may send calls over Qwest's network pursuant to agreements that must be approved by the appropriate state public utilities commission (" PUC"). When a Qwest customer places a call to a telephone user who subscribes to another LEC, such as Union, Qwest routes the call to that LEC's network for " termination," or completion. Some of the calls Qwest sends to Union are " originated," or placed, by Qwest customers, and some are originated by customers of other carriers and transited over the Qwest network.

> FN3. As an RBOC, Qwest was previously prohibited from providing interLATA

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EXHIBIT C

service. *See* 47 U.S.C. § 271(a). However, in 2002 the Federal Communications Commission (" FCC") authorized it to provide interLATA service in Colorado, Utah, and Wyoming through a separate affiliate. *See Qwest Commc'n Int'l, Inc.,* 17 F.C.C.R. 26,303, 26,305 (2002).

Because this case concerns both wireless and wireline telephone calls, a brief summary of the regulatory framework is necessary. Wireless service has been largely deregulated at the state level but remains subject to FCC regulation. *See* 47 U.S.C. § 332(c). State PUCs regulate local and intrastate wireline traffic, and the FCC sets the rules for interstate wireline traffic. Both wireless and wireline calls may be either local or long distance.[FN4] Compensation for local calls that originate and terminate with different carriers is determined by reciprocal compensation agreements. Long distance calls, that is, calls crossing from one calling area into another, incur a toll, and the originating carrier must compensate the terminating carrier for terminating the call.[FN5] For wireline services, this toll is called a terminating access charge, and rates are based on filed tariffs. Significantly, these tariffs apply only to long distance service. For toll calls traveling between local calling areas within the same state, or intrastate traffic, state PUCS must approve a LEC's proposed tariff. By contrast, interstate long distance service is subject to FCC regulation.

FN4. For wireless traffic, local calling areas are defined by the Major Trading Areas (" MTAs"). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 F .C.C.R. 15,499, 16,014 (1996) (First Report and Order) [hereinafter " *Local Competition Order* "]. Thus all intraMTA calls are local calls. Most of Colorado and Wyoming are in the same MTA.

FN5. This principle is known as " calling party pays." Interexchange carriers such as AT & T or Sprint may also carry traffic from one LATA to another. In that case, the interexchange carrier is responsible for paying both the originating LEC and the terminating LEC for the use of their networks.

*2 Union and Qwest share a contentious history, having litigated various aspects of their relationship for over a decade. This litigation involves a complaint filed by Union in 2000 with the Wyoming Public Services Commission against U.S. West Communications, Inc. (" U.S.West"), Qwest's predecessor. Union claimed that the interconnection technology U.S. West used to send traffic to Union's network did not allow Union to identify and properly bill the originating carrier. Union also claimed that U.S. West refused to compensate it for toll traffic sent to its network, despite the existence of allegedly applicable Union tariffs, and on these claims requested an order from the Commission, directing U.S. West to pay terminating access charges for all toll traffic routed to Union by U .S. West, regardless of which carrier originated the call.

U.S. West merged with Qwest, and thereafter both Union and Qwest submitted pre-filed testimony and presented witnesses at an evidentiary hearing before the Commission. Most of the testimony related to the interconnection technologies Qwest used to deliver toll traffic. However, the commissioners also inquired into Union's claim that Qwest was responsible for paying terminating access fees for all Qwest to Union traffic, regardless of where the call originated. On January 24, 2001, the Commission issued an order dismissing the vast majority of Union's claims. It found that " Union [had] cited no authority that the ' filed rate doctrine' applies to this case" with respect to Qwest's alleged duty to pay termination fees at Union's tariff rates.

Rather than seek reconsideration or judicial review of the Commission's decision, Union filed a complaint in federal court, asserting four claims against Qwest: (1) breach of tariff, (2) breach of contract, (3) discrimination by a common carrier, and (4) quantum meruit or unjust enrichment. These claims relate to two main categories of calls: (1) wireless traffic originated by Qwest and transported or terminated by Union in Wyoming, Colorado, and Utah, and (2) wireline, intrastate, long distance traffic transiting Qwest's network, originated by a third party and sent through Qwest's network for termination by Union in Wyoming, Colorado, and Utah. Wireless calls make up the bulk of the traffic at issue. The district court granted Qwest's motion for summary judgment, dismissing all of Union's claims except for the breach of tariff and contract claims with respect to wireline traffic terminating in Colorado and Utah.[FN6]

FN6. Union later moved to dismiss those

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remaining claims without prejudice, and the district court granted its motion.

Union now appeals the district court's grant of summary judgment.

II

We review a district court's grant of summary judgment de novo, " applying the same legal standard used by the district court." *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 557 (10th Cir.2001). Summary judgment is only appropriate if the evidence shows that " there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

III

*3 Union's breach of tariff and contract claims arise with respect to a number of distinct types of traffic. We consider first its wireless traffic claims, which consist of: intraMTA calls; interMTA, intrastate calls; and interMTA, interstate calls. We then consider wireline calls, which on appeal are comprised solely of calls terminated in Wyoming.

A

Pursuant to the 1996 Act, all LECs have a duty to " establish reciprocal compensation arrangements for the transport and termination of **telecommunications**." 47 U.S.C. § 251(b)(5). Compensation for terminating intraMTA, or local, wireless calls is determined by rates in these interconnection agreements and not by access charges contained in filed tariffs. *Local Competition Order*, 11 F.C.C.R. at 16014. As the *Local Competition Order* makes clear, these federal regulations bar Union from applying tariff-based access charges to intraMTA wireless traffic. Despite this fact, Union argues that it may apply its state tariffs to intraMTA wireless traffic based on a 2005 FCC decision, *Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4855 (2005). In that decision, the FCC addressed traffic sent from a commercial mobile radio services (" CMRS") provider to an ILEC. *See id.* at 4862. In the present case, acting as an ILEC, Qwest routes calls to Union for wireless termination. In other words, this case considers ILEC to CMRS traffic, the opposite of the situation in *Developing*. This distinction is important, because until *Developing* an ILEC could not compel a CMRS provider to negotiate a reciprocal compensation agreement. *See id.* at 4863 n. 54. Thus, tariffs were the only compensation mechanism for an ILEC terminating calls from an uncooperative CMRS provider. Given that Union is now empowered to compel Qwest to negotiate an interconnection agreement under 47 U.S.C. § 252, it can neither avail itself of *Developing's* stop-gap tariff allowance, because its state tariffs are inapplicable to this type of traffic, nor demand, absent a negotiated agreement, compensation for intraMTA traffic under a theory of breach of contract.

Most traffic at issue in the case before us is intraMTA, but we also consider a small amount of interMTA traffic. Union has duly filed tariffs in Wyoming, Colorado, and Utah, listing its wireline terminating access charges, which it contends should apply to wireless traffic as well. Qwest argues that Union has failed to show either that the filed tariffs apply to wireless traffic or that Union has properly filed rates for wireless services.

Under the filed rate doctrine, " the rate of the carrier duly filed is the only lawful charge, and deviation from it is not permitted." *Qwest Corp. v. AT & T Corp.*, 479 F.3d 1206, 1210 (10th Cir.2007) (quotation and alteration omitted). Duly filed rates bind both carriers and customers with the force of law. *Atchison, Topeka & Santa Fe Ry. Co. v. Bouziden*, 307 F.2d 230, 234 (10th Cir.1962). Rights and liabilities defined by the tariff " cannot be varied or enlarged by either contract or tort of the carrier." *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998).

*4 As previously noted, these parties share a long and litigious history, consequently, it is not entirely surprising that this issue has already been litigated. In *U.S. West Communications, Inc. v. Wyoming Public Services Commission*, the Wyoming Supreme Court held that " Union's cellular operations are distinct and separate from its landline operations." 907 P.2d 343, 348 (Wyo.1995). Under Wyoming state law, " Union is required to file rates for its cellular operations." *Id.* Because Union failed to file such rates, the court held that " Union is ... precluded from receiving terminating access charges for cellular calls until such tariffs are properly filed." *Id.* Union admits that it did not file separate tariffs for wireless services in Wyoming, thus it lacks an applicable tariff for terminating wireless traffic under Wyoming state law.

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The district court stayed judgment with respect to wireless calls terminated in Colorado and Utah in order to give Union an opportunity to present evidence that these states regulate wireless traffic.FN7 When Union failed to produce such evidence, the district court dismissed claims relating to those calls. Because Union does not present this court with either state law or regulation supporting its tariff claims in Colorado or Utah, we apply federal law to its remaining interMTA claims.

FN7. In 1995, Wyoming passed a statute deregulating most aspects of wireless telecommunication in the state, Wyo. Stat. § 37-15-104(a)(vi), and the district court surmised that Colorado and Utah may have taken similar action.

Pursuant to the Communications Act of 1934 (" Communications Act"), carriers may form interconnection agreements to provide **telecommunications** services and set reasonable rates for such services. 47 U.S.C. § 201. Absent agreement, wireless providers may petition the FCC for an order requiring interconnection with another carrier; the carrier must then establish just and reasonable charges. § 332(c)(1)(B) (incorporating by reference § 201). Union does not allege that it has an agreement with Qwest governing interMTA traffic, nor has it petitioned the FCC for an order requiring compliance with § 201. Because Union relies solely on state tariffs to support its claims, it has no basis for its breach of tariff or contract claims under federal law. Thus, we conclude that the district court properly granted summary judgment to Qwest on Union's breach of tariff and contract claims.

B

In 2001, the Wyoming Public Services Commission dismissed a number of Union's claims against Qwest, including a claim for compensation for all wireline toll traffic transited or originated by Qwest. Based on that decision, the district court held that Union's breach of contract and breach of tariff claims with respect to intrastate wireline traffic in Wyoming were barred by collateral estoppel. Under Wyoming law, the doctrine of collateral estoppel applies to " final adjudicative determinations which have been rendered by administrative tribunals." *Kahrs v. Bd. of Trs. for Platte County Sch. Dist. No. 1,* 901 P.2d 404, 406 (Wyo.1995). Courts must consider four factors in determining whether collateral estoppel bars relitigation of an issue:

*5 (1) whether the issue decided in the prior adjudication was *identical* with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding.

Id. Union argues that the first two factors have not been satisfied.

First, Union contends that the issues in the present case and in the case before the Commission are distinct. According to Union, its complaint before the Commission dealt with Union's attempts to properly identify the Qwest traffic terminated on its network, and did not address Qwest's obligation to pay for that traffic. Although much of the Commission complaint is devoted to identifying traffic, Union also argued that in the absence of proper identification, Qwest was responsible for paying access charges for all traffic coming from its network.FN8 This claim for compensation was based on Qwest's obligations under Union's tariff filed with the Commission. James Woody, a member of Union's board of directors and its management team, reiterated this argument when he was questioned directly about it by the Commission. Woody later testified before the district court that the breach of tariff and contract claims in the aforementioned complaint and the present claims are the same. In its order, the Commission found that Union failed to establish that the filed rate doctrine applied to its claim for compensation. Based on our careful review of the record and the Commission's order, we conclude that the tariff issues in the present case are identical to those raised and decided in the prior adjudication.

FN8. As stated in its claim for relief, Union requested that the Commission order Qwest to " be responsible for the payment of terminating access charges for all toll traffic routed by [Qwest] to [Union] on [Qwest] toll trunks, regardless of the originating carrier."

Second, Union claims that the Commission's order was not a judgment on the merits. Union contends

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that the Commission dismissed its claims without prejudice. It also argues that the Commission's decision could not have resulted in a judgment on the merits of the compensation claim because the Commission lacked authority to enter a monetary judgment for Union. Final decisions by administrative agencies like the Wyoming Public Services Commission can be judgments on the merits for the purposes of collateral estoppel. *Id.* at 406. A judgment that a party has failed to carry their burden of proof may preclude that party, under the doctrine of collateral estoppel, from attempting to prove the same issue in a later adjudication. *Yates v. United States,* 354 U.S. 298, 335-36 (1957) (reversed on other grounds). Collateral estoppel bars relitigation of *issues* previously decided; for preclusion of *claims,* the appropriate doctrine is res judicata. *Pokorny v. Salas,* 81 P.3d 171, 175 (Wyo.2003). The Commission issued an order ruling directly on three service-related issues and dismissing the remaining claims. As to Union's claim for compensation, the Commission held that Union failed to meet its burden of proof that the filed rate doctrine applied. It reached this conclusion after a review of all the evidence and a hearing, and nothing in the Commission's order indicates that it dismissed the claims without prejudice. Whether the Commission could have awarded monetary damages is immaterial to our determination of what issues it decided. Consequently, we conclude that the prior adjudication resulted in a judgment on the merits.

*6 Because Union does not contest the remaining two factors, we hold that collateral estoppel bars Union's breach of contract and tariff claims.

IV

In addition, Union advances a discrimination claim. Under the Communications Act and corresponding state statutes, **telecommunications** carriers may not unreasonably discriminate in their practices, classifications, or " services for or in connection with like communication services." 47 U.S.C. § 202(a); *see also* Wyo. Stat. § 37-15-404(a). Courts apply a three-step analysis to claims for discrimination under § 202(a). *Panatronic USA v. AT & T Corp.,* 287 F.3d 840, 844 (9th Cir.2002) (summarizing holdings of the Second and D.C. Circuits). First, the plaintiff must prove that the services are " like." *Id.* Second, the plaintiff must show that the services are provided under different terms and conditions. *Id.* If the plaintiff satisfies the first two requirements, the burden shifts to the defendant to justify the difference as reasonable. *Id.*

Union claims that Qwest unlawfully discriminates against it by using different methods to calculate its payment obligations to Union than it does with other LECs. This claim is unusual, in that Union, a provider of terminating services, is complaining that Qwest, a customer, discriminates against it. However, the duties of a common carrier like Qwest under the Communications Act do not necessarily benefit only customers, they may privilege suppliers as well. *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.,* 127 S.Ct. 1513, 1524-25 (2007) (discussing § 201 of the Communications Act). For the purposes of this appeal, we assume, without deciding, that a plaintiff may bring a discrimination claim against a customer.

The " like" services in question are Qwest's payments for terminating calls originated or transported by Qwest to a LEC. Relying on the testimony of Qwest experts, Union asserts that Qwest participates in " residual billing" and a " clearinghouse method" of billing with carriers in certain other states. When utilizing residual billing, the terminating carrier bills originating carriers for all identified traffic transported from Qwest's network, and bills Qwest for any remaining unidentified traffic. According to Qwest's expert, only some carriers in Minnesota, Iowa, and North Dakota have attempted to use residual billing, and since 2000, Qwest has refused to participate in this method. Only in North Dakota does a LEC use residual billing, pursuant to a settlement agreement between it and Qwest. Under the clearinghouse method, all the carriers in the state send a list of the interLATA toll calls they have originated or terminated to a central database. By searching this database, the central service can determine which carrier routed a call to a terminating LEC and assign proper terminating access charges. This method requires all carriers in a state to participate, and according to Qwest, it is only used in New Mexico, Oregon, and Washington.

*7 Based on this testimony, the district court held that Union had met its burden with respect to the first two steps of the discrimination analysis, but had failed to show that the discrimination was unreasonable. Although the district court incorrectly placed the burden on Union to show unreasonableness, based on our independent review

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of the record, we conclude that any differences in billing practices are reasonable. *See United States v. Sandoval,* 29 F.3d 537, 542 n. 6 (10th Cir.1994) (" We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court."). The evidence shows that several carriers have attempted to residually bill Qwest, and for several years, Qwest has rebuffed these efforts. Only one carrier continues to residually bill Qwest, and there only because the method is mandated by a settlement agreement. For the clearinghouse method, all local carriers in a state must agree to participate in such a program, and Qwest cannot implement this method without their cooperation. Nothing in the record indicates that carriers in Wyoming, Colorado, or Utah, including Union, have shown interest in instituting a clearinghouse billing system. Thus Qwest's failure to use this method with Union can be explained by its unavailability in those states. Because Qwest has sustained its burden and no genuine issue of material fact remains with respect to the discrimination claim, summary judgment was properly granted to Qwest.

V

Finally, Union argues that in the absence of an applicable contract or tariff, it is entitled to termination fees under the equitable theory of unjust enrichment. Qwest's position is that federal law preempts this equitable claim. Section 251 of the 1996 Act requires LECs to establish reciprocal compensation agreements through private negotiation. 47 U.S.C. § 251(b)(5). Should parties fail to reach an agreement, § 252 allows a party to seek state intervention or compel arbitration. 47 U.S.C. § 252. Qwest argues that by creating these procedures in the 1996 Act, Congress clearly intended parties to negotiate rather than seek equitable remedies in court. Because Union refused to seek a reciprocal compensation agreement, Qwest contends, it cannot now seek compensation in equity.

Under Wyoming law, unjust enrichment, or quantum meruit, is an equitable doctrine that " implies a contract so that one party may recover damages from another." *Bowles v. Sunrise Home Ctr.,* 847 P.2d 1002, 1004 (Wyo.1993). In order to establish this claim, Union must prove that: (1) valuable services were rendered to Qwest; (2) these services were accepted, used, and enjoyed by Qwest; (3) under circumstances which reasonably notified Qwest that Union expected to be paid; and (4) without such payment, Qwest would be unjustly enriched. *Eisele v. Rice,* 948 P.2d 1360, 1364 (Wyo.1997). However, " an action for unjust enrichment will not lie where it would frustrate law or public policy, either directly or indirectly." *Bowles,* 847 P.2d at 1004. Colorado and Utah apply similar standards to claims of unjust enrichment. *See, e.g., Salzman v. Bachrach,* 996 P.2d 1263, 1265-66 (Colo.2000); *Desert Miriah, Inc. v. B & L Auto, Inc.,* 12 P.3d 580, 582 (Utah 2000).

*8 The district court held that Union had " very ably stated a claim for unjust enrichment." Although it did not specifically address the issue of preemption, the district court went on to conclude that an equitable remedy was unavailable given that Union had failed to comply with applicable statutory and regulatory requirements.

We not only agree that Union has shown facts that might support each element of the unjust enrichment claim, but also agree that equitable relief is not appropriate under the circumstances. Because federal law requires parties such as Qwest and Union to set rates through interconnection agreements, 47 U.S.C. § 252, allowing Union to recover damages under a theory of unjust enrichment or quantum meruit would frustrate the federal regulatory mechanism. Union cites *WorldCom, Inc. v. Graphnet, Inc.,* 343 F.3d 651, 657 (3d Cir.2003), for the proposition that a party may seek compensation under a theory of unjust enrichment or quantum meruit, even if it did not comply with statutory requirements. On considering that case, it does not appear to us that *WorldCom* is apt, given that those parties had actually negotiated and executed a contract as required by the Communications Act, and had merely neglected to file it with the FCC. *Id.* at 654-55. Addressing the issues and facts in the case before us, we hold that it is inappropriate to imply a contract in equity considering that under federal law Union had an obligation to contract directly with Qwest but chose not to do so.

VI

The judgment of the district court is **AFFIRMED.** All pending motions are **DENIED.**

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