UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, et al., Plaintiff, vs. Bob Sahr, et al., Defendants and Intervenors.	Civil Number 04-3014 **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

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"). Chapter 284 imposes certain requirements on telecommunications carriers and ties those requirements to compensation paid for local and nonlocal traffic. This state-imposed mechanism contradicts federal law, which establishes the basis for compensation obligations, the type of compensation to be charged, technical requirements imposed on carriers, and the proper role of the state in addressing intercarrier compensation.

First, Chapter 284 conflicts with Federal Communications Commission ("FCC") directives regarding the basis for compensation obligations. The FCC has prohibited landline local exchange carriers ("LECs") from billing commercial mobile radio service ("CMRS") providers for local traffic pursuant to tariffs and has required that LECs request to negotiate an agreement before such charges apply. Chapter 284 authorizes LECs to bill for such traffic under tariff, and absent a request for an agreement. Second, Chapter 284 directly conflicts with FCC rules and orders regarding the type of compensation that applies to local traffic. The FCC has

required such traffic be subject to cost-based reciprocal compensation rates and has prohibited the application of higher "access" charges. Chapter 284 authorizes LECs to bill CMRS providers access charges for local traffic. Third, Chapter 284 directly conflicts with an FCC order establishing that wireless carriers are not required to have the technical ability to measure traffic for jurisdictional purposes. Fourth, Chapter 284 ignores the longstanding jurisdictional separation between interstate and intrastate traffic, and imposes regulatory requirements on interstate calls that are subject to the exclusive jurisdiction of the FCC.

For these reasons, Verizon Wireless respectfully requests that the court issue an order declaring that Chapter 284 is preempted as applied to traffic between CMRS providers and LECs in South Dakota. Verizon Wireless also seeks to enjoin the Commissioners of the PUC from taking action to enforce the preempted provisions of Chapter 284 in accordance with SDCL § 49-31-114 and from promulgating rules to implement the preempted provision of Chapter 284 in accordance with SDCL § 49-31-115.

I. STANDARD OF REVIEW

Summary judgment is "an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citation omitted); *Great West Cas. Co. v. Travelers Indem. Co.*, 925 F. Supp. 1455, 1462 (D.S.D. 1996). Summary judgment must be entered when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Strategic Directions Group, Inc. v. Bristol-Myers Squibb Co.*, 293 F.3d 1062, 1064 (8th Cir. 2002); *Ambur v. United States*, 206 F. Supp. 2d 1021, 1023 (D.S.D. 2002) (citing *Celotex*); *Jacobsen v. Howard*, 904 F. Supp. 1065, 1066 (D.S.D. 1995) ("The Court must grant a party's motion for summary judgment if there are no genuine issues of material fact for trial and that party is entitled to judgment as a matter of law.").

II. 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. First, "[p]reemption 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). This is referred to as express preemption. Even in the absence of express preemption, state action may still be barred by the doctrine of implied preemption. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). A state law is impliedly preempted where: (1) Congress has legislated comprehensively, thus "occupying the field" and leaving no room for states to supplement federal law; or (2) the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *La. Pub. Serv. Comm'n*, 476 U.S. at 368-69. Preemption may result from action taken by Congress and also from action taken by 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).

In addition, states cannot disregard FCC orders because 28 U.S.C. § 2342, the Hobbs Act, grants the United States Courts of Appeal exclusive jurisdiction "to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" any final order of the FCC. 28 U.S.C. § 2342. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (final rulings of the FCC cannot be altered other than in the Federal Courts of Appeal); *Sable Communications of Cal. v. FCC*, 827 F.2d 640, 643 (9th Cir. 1987) (allowing party to undermine an FCC order violates the Hobbs Act).

III. BACKGROUND OF REGULATORY AUTHORITY OF COMMERCIAL MOBILE RADIO SERVICE

A. CMRS Is a Federally Regulated Service

In the late 1970s, the FCC launched an exhaustive rulemaking proceeding concerning wireless telecommunications services and created a comprehensive regulatory structure for the new telecommunications medium. Because "state and local regulation might conflict with and thereby frustrate" federal policies, the FCC exercised "federal primacy" over several key aspects of cellular service. *In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 F.C.C.2d 469, at ¶¶ 79, 82 (1981). The basis for this preemptive authority was found in the longstanding federal authority over the radio spectrum and the FCC's regulation of entry qualifications for wireless service providers:

> Title III of the Communications Act of 1934 . . . provides us with adequate authority to assert federal primacy to the extent set forth above. In addition, the federal plan for provision of cellular service set forth in our Order, principally the goal of introducing nationwide compatible cellular service without undue delay, and the fact that cellular systems are to be interconnected with the public landline telephone network and capable of providing interstate as well as intrastate communications, provides a further basis for this Commission asserting federal primacy over licensing of cellular facilities. *Our assertion of federal primacy focuses on entry qualifications* . . . .

In re An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, 89 F.C.C.2d 58, ¶ 84 (1982) (footnote omitted) (emphasis added) ("*Cellular Communications Sys.*"). The FCC further held that "[i]t is imperative that no additional requirements be imposed by the states which could conflict with our standards and frustrate the federal scheme for the provision of nationwide cellular service." *Id.* ¶ 81.

B. Federal Authority Over Interconnection and Intercarrier Compensation

In 1993, Congress amended Section 332 of the Communications Act (47 U.S.C. § 332) to extend the FCC's authority over CMRS by preempting state regulation of entry and rates for CMRS providers. 47 U.S.C. § 332(c)(3)(A).[1] In addition, the 1993 Act specifically established that carriers have a right to interconnect with LECs in order to exchange traffic, and established that CMRS interconnection matters are subject to regulation by the FCC. *Id.* at § 332(c)(1)(B). The FCC implemented the 1993 Act by requiring LECs and CMRS providers to pay each other mutual compensation for the exchange of traffic. *See* 47 C.F.R. § 20.11.

In the 1996 Telecommunications Act,[2] Congress supplemented federal authority over interconnection and compensation between LECs and CMRS providers. Congress imposed certain new obligations on all LECs with respect to interconnection and compensation. 47 U.S.C. §§ 251(a), (b)(5). Congress also established a framework for implementing these requirements. The 1996 Act provides that carriers may voluntarily negotiate the terms for interconnection and compensation. *See* 47 U.S.C. § 252(a), (b). Carriers that reach voluntarily-negotiated agreements may depart from the FCC's rules, and the 1996 Act precludes state commissions from dictating the terms of these agreements except to ensure that they are nondiscriminatory and consistent with the public interest. *See* 47 U.S.C. § 252(e)(2)(A).

If parties do not reach agreement, they may submit unresolved issues relating to interconnection and compensation to the state commission for arbitration. 47 U.S.C. § 252(b). The state must resolve all issues "consistently with the requirements of section 251 of [the 1996

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[1] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993) ("1993 Act").

[2] The Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151 *et seq.*) ("1996 Act").

Act], including the regulations prescribed by the [FCC]." *Id.* § 252(e)(2)(B). Any appeal of a state Commission decision must be filed in federal district court. 47 U.S.C. § 252(e). States are permitted to enforce their own "access and interconnection" regulations, but Congress explicitly provided that any such regulations must establish obligations of LECs, be consistent with Section 251, and not prevent the implementation of the 1996 Act. 47 U.S.C. § 251(d)(3).

In August of 1996, the FCC adopted its *First Report & Order* implementing the inter-carrier compensation provisions of Section 251 of the 1996 Act.[3] In doing so, the FCC exercised its broad oversight over CMRS to establish specific compensation rules that apply under Section 251 of the Act when CMRS carriers and LECs exchange traffic. The FCC established the scope of the "reciprocal compensation" obligation set forth in 47 U.S.C. § 251(b)(5), holding that because CMRS service areas are "federally authorized" and vary in size from typical wireline exchange areas, the definition of "local" traffic for CMRS carriers should be based on a CMRS service area. The FCC selected the largest CMRS license area, the major trading area ("MTA"), to be the geographic scope of a "local" area for calls to or from a CMRS network. *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."); *First Report & Order*, ¶ 1036. As a result, "traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5) [i.e, reciprocal compensation], rather than interstate and intrastate access charges." *First Report & Order*, ¶ 1036; *see also id.* ¶ 1043 (same). This is commonly referred to as the "MTA rule."

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[3] *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"*).

In paragraph 1044 of the *First Report & Order*, the FCC recognized that it might be difficult for CMRS providers to determine which calls originated by their customers were intraMTA because it is not always possible to tell from the traffic records exchanged by the carriers which cell site a mobile customer is connected to, let alone the customer's specific geographic location. The FCC determined, 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." *Id.* The FCC recognized that the technology that might permit such location identification could not be readily implemented and could be burdensome, and thus, explicitly allowed CMRS providers to calculate their compensation obligations on a negotiated basis, or by extrapolating from traffic studies and samples. *Id.*

C. New FCC Rule 47 C.F.R. § 20.11(d)-(e)

In February of 2005, the FCC issued an order amending its rules governing CMRS-LEC compensation obligations. *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*"). Certain wireless carriers had petitioned the FCC for a declaratory ruling that it was unlawful for LECs to charge wireless carriers under state tariffs for calls subject to reciprocal compensation under Section 251(b)(5). *T-Mobile Order*, ¶ 1. While the FCC did not make such a declaration for prior time periods, it did establish new rules going forward. First, the FCC prohibited LECs from charging wireless carriers under state tariffs for any traffic that originates and terminates in the same major trading area. Its new Rule 20.11(d) provides:

> Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

47 C.F.R. § 20.11(d). The FCC then provided ILECs with the right to initiate formal negotiations with wireless carriers under Section 252 of the Act, and to ask the state commission to arbitrate any issues not resolved through negotiation:

> An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission.

47 C.F.R. § 20.11(e). The FCC made clear in the *T-Mobile Order* that as a result of these new rules, "in the absence of a request for an interconnection agreement, no compensation is owed for termination." *T-Mobile Order*, ¶ 14, fn. 57.

IV. VERIZON WIRELESS IS ENTITLED TO A DECLARATION THAT CHAPTER 284 IS PREEMPTED BECAUSE IT CONFLICTS WITH THE FCC'S REGULATION OF CMRS-LEC COMPENSATION UNDER FCC RULE 20.11

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

As noted above, FCC Rule 20.11 specifically addresses compensation obligations between CMRS providers and LECs. This rule provides that LECs and CMRS providers must pay each other "reasonable compensation" for traffic they send to the other. 47 C.F.R. § 20.11(b). Pursuant to its recent amendment of Rule 20.11, LECs cannot charge CMRS providers under tariff for calls that originate and terminate in the same MTA. 47 C.F.R. § 20.11(d). In addition, the *T-Mobile Order* 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 traffic that originates and terminates in the same MTA. *T-Mobile Order*, ¶ 14, fn.57.

It is clear that the FCC has the authority under 47 U.S.C. § 332 to establish rules that govern compensation paid for traffic between LECs and CMRS providers. As stated by the

Eighth Circuit, Section 332 provides the FCC with jurisdiction and authority to issue rules of "special concern" applicable to CMRS providers. *Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 800 n. 21 (8th Cir. 1997), *rev'd on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).[4] The *T-Mobile Order* and the FCC's amendment of Rule 20.11 represent rules of special concern that address interconnection and compensation between CMRS providers and LECs. The FCC established these rules to further its stated policy goal of ensuring that compensation obligations be established pursuant to the 1996 Act, rather than by unilateral measures imposed on parties outside of this process:

> [W]e now take action in this proceeding to amend our rules going forward to make clear our preference for contractual arrangements for non-access CMRS traffic. As discussed above, precedent suggests that the [FCC] intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act.

T-Mobile Order, ¶ 14. Under this process, issues not resolved through negotiations would be resolved by the state commission applying the standards set forth in Section 252 of the 1996 Act. *Id.* ¶ 16. Because the FCC has supreme regulatory authority in these matters, state action that conflicts with these regulatory standards, 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); 28 U.S.C. § 2342.

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[4] As a result, when the Eighth Circuit Court of Appeals struck down many of the FCC's interconnection rules as beyond the FCC's regulatory authority (which decision was later overturned by the U.S. Supreme Court), the Eighth Circuit nonetheless upheld the FCC's rules as applied to CMRS providers because of the FCC's statutory authority under Section 332 to regulate CMRS interconnection. *Id.*

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

Chapter 284 conflicts with FCC Rule 20.11(d) and the *T-Mobile Order* in two impermissible ways. First, Chapter 284 establishes conditions under which LECs would be authorized to classify intraMTA traffic as "nonlocal" traffic. SDCL § 49-31-110. Once classified as "nonlocal," intraMTA traffic would 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 Chapter 284, the terminating LEC would be authorized to bill all traffic – including intraMTA traffic – under its state or federal access tariff. *Id.* This conflicts with the FCC's prohibition on billing intraMTA traffic under tariff.

Second, Chapter 284 authorizes LECs to bill for call termination even if the parties have no interconnection agreement and neither party has requested such an agreement. SDCL § 49-31-110. 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 Chapter 284 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.

In *Rose v. Arkansas State Police*, the Arkansas Legislature had authorized an adjustment to death benefits paid under a worker's compensation regime. 479 U.S. 1, 3-4 (1986). This

adjustment was at odds with the federally prescribed calculation method. *Id.* The Supreme Court first recognized that "[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." *Id.* at 3. The Court went on:

> Congress plainly intended to give supplemental benefits to the survivors, not to assist the States by subsidizing their benefit programs. The Arkansas statute, however, passed three years after the Benefits Act was enacted, provides that the state award shall be reduced by the full amount of the federal payment. The state statute authorizes the precise conduct that Congress sought to prohibit and consequently is repugnant to the Supremacy Clause.

Id. at 4 (emphasis added). As in *Rose*, the South Dakota Legislature has authorized "the precise conduct" that is prohibited by federal law, and as a result, the enforcement of the state law is preempted. *See also Wisconsin Bell v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003) ("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, *see, e.g., Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103-04 and n. 2, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992) . . .").

C. Relief Requested

Verizon Wireless requests that the Court enter an order as follows:

(1) Declaring that SDCL § 49-31-110 is preempted by 47 C.F.R. § 20.11 and the *T-Mobile Order* to the extent it would allow a South Dakota LEC to bill a CMRS provider under its tariffs for calls that originate and terminate in the same MTA rather than through an interconnection agreement or request for agreement under 47 C.F.R. § 20.11(e);

(2) Enjoining the Commissioners of the PUC from taking any action to enforce or implement the preempted provisions under SDCL §§ 49-31-114 and 115.

V. VERIZON WIRELESS IS ENTITLED TO A DECLARATION THAT THE FCC'S MTA RULE PREEMPTS STATES FROM AUTHORIZING LECS TO BILL INTRAMTA TRAFFIC AT ACCESS RATES

A. States Cannot Authorize IntraMTA CMRS Calls to be Billed at Access Rates

In its *First Report and Order* the FCC established that calls originating and terminating within the same MTA are subject to reciprocal compensation under Section 251(b)(5) instead of access rates. *First Report & Order*, ¶ 1036; 47 C.F.R. § 51.701. Since then, the courts and state commissions have thwarted the efforts of LECs to collect access rates for calls subject to the MTA rule, holding that the FCC's MTA rule preempts state laws that would authorize LECs to charge access rates for intraMTA wireless traffic.

1. *3 Rivers Tel. Coop., Inc., et al. v. U.S. West Comm., Inc.*

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 rural ILECs 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., et al. v. U.S. West Comm., Inc.*, 2003 U.S. Dist. LEXIS 24871 (D.Mont. Aug. 22, 2003). 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 issue raised was whether state law could lawfully authorize the application of access rates to intraMTA wireless traffic.

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 ILECs the right to charge access rates for these calls. *Id.* at *65. Under the *3 Rivers* case, a state compensation mechanism that subjects intraMTA wireless calls to access rates is preempted by federal law.

2. *Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd.*

A federal court in Iowa recently rejected similar attempts by rural ILECs to charge Qwest access rates for transited wireless calls. *Rural Iowa Indep. Tel. Ass'n v. Iowa Utils. Bd.*, 385 F.Supp.2d 797 (S.D. Iowa 2005). As in Montana, Qwest had refused to pay access charges for such traffic in light of the FCC's rules and orders related to wireless traffic. *Id.* at 800-01. The Iowa Utilities Board had held that Qwest could not be held liable for access charges under the FCC's reciprocal compensation rules because intraMTA wireless traffic is "local" and not subject to access rates. *Id.* The ILECs challenged the Iowa Board's decision by appealing to the federal district court.

The court upheld the Iowa Board's ruling, finding that there is no real dispute that intraMTA wireless traffic is "local," and not subject to access charges, and that the Iowa Board's "determinations related to reciprocal compensation and the obligations of the parties were also in accordance with federal law." *Id.* at 820. *See also Iowa Network Services, Inc. v. Qwest Corporation*, 385 F.Supp.2d 850, 878 (S.D. Iowa 2005) (agreeing with Iowa Board decision that transit carrier between Qwest and terminating ILEC could not charge Qwest access rates for intraMTA wireless traffic because access charges cannot be assessed for local traffic).

3. *Other Decisions*

In addition to these two clear federal decisions, other courts and commissions have enforced the prohibition on collecting access rates for intraMTA wireless traffic. In Pennsylvania, Verizon Wireless sought to establish interconnection agreements with small ILECs. *Petition of Cellco Partnership d/b/a Verizon Wireless*, Pennsylvania Public Util. Comm'n Docket No. P-00021995 et al., Opinion and Order (Jan. 13, 2005). The ILECs argued that wireless calls delivered through Verizon Communications (the landline transit carrier) were subject to access rates because of legacy arrangements under state law governing traffic between landline networks. *Id.* at 30-38. The Pennsylvania Commission disagreed, stating:

> Based on the foregoing, notwithstanding the stated retention of the ITORP facilities arrangement by which indirect traffic is currently exchanged, the intercarrier compensation methodology that existed prior to TA96 must be regarded as superseded by operation of law. We find this conclusion to be in accord with *Verizon North Inc., et al., v. Strand et al.*, 367 F.3d 577 (6th Cir. 2004) wherein the court invalidated certain state imposed tariffs which had the effect of frustrating the objective of TA96 to encourage competitors and incumbent LECs to engage in arbitration.

Id. at 42. The Pennsylvania Commission thus agreed that state access charge mechanisms were superseded by the FCC's MTA rule.

In another case, ILECs in Oklahoma asked the state commission to set reciprocal compensation rates for intraMTA wireless traffic at a rate equal to tariffed access rates:

> The RTCs proposed a reciprocal compensation rate of $0.053804. That rate is not based on a reliable, forward-looking cost study . . . . The reciprocal compensation rate proposed by the RTCs in this proceeding is in fact their intrastate terminating access rate.

In the Matter of Southwestern Bell Wireless L.L.C., Okla. Corp. Comm'n Cause No. PUD 200200149 et al., Interlocutory Order, Attachment A., p. 3 (Aug. 1, 2002), *aff'd*, *Atlas Tel. Co. v. Corporation Comm'n of Okla.*, 309 F.Supp.2d 1299, 1310-11 (W.D. Okla. 2004). The

Commission rejected the ILECs' methodology for establishing reciprocal compensation rates in this manner. *Id.* at 10.[5]

B. Chapter 284 Unlawfully Authorizes LECs to Bill IntraMTA Traffic at Access Rates

Chapter 284 conflicts with the FCC's MTA rule because it establishes circumstances under which ILECs can charge access rates for intraMTA wireless 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 all traffic (including "local" intraMTA traffic) at access rates.

The court should find that the FCC has prohibited charging access rates for intraMTA wireless traffic, and that state law is preempted from creating exceptions to that prohibition. This is exactly what federal courts decided in the Montana and Iowa decisions discussed above. Those courts rejected attempts to enforce state law to allow the application of access charges to intraMTA wireless traffic. Instead, federal law preempted states from authorizing a result prohibited by the FCC. *3 Rivers*, 2003 U.S. Dist. LEXIS 24871, at *22 (Section 251(b) and the *First Report & Order* conflict with and preempt the tariffs); *Rural Iowa Indep. Tel. Ass'n*, 385 F.Supp.2d at 820.

A recent Ninth Circuit decision involving pay phone traffic also supports the federal preemption of state laws that would change an FCC-mandated compensation mechanism. In *Metrophones Telecomms. Inc. v. Global Crossing Telecomms. Inc.*, a pay phone service provider sued a long distance carrier to recover compensation for calls made by the long distance carrier's

[5] This case was affirmed by the 10th Circuit on other grounds. *Atlas Tel. Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256 (10th Cir. 2005). While not addressing the rate issue, the court did affirm that intraMTA wireless calls that are routed through a third party carrier cannot be subject to access charges. *Id.* at 1264-65.

customers. 423 F.3d 1056, 1062 (9th Cir. 2005). The plaintiff asserted a number of causes of action, including a negligence claim based on alleged violations of FCC Rules and Orders. *Id.* at 1078. The court determined that the negligence claim, if allowed, would make the defendant liable for charges it was not liable for under FCC rules and orders. *Id.* The FCC had created "a system for compensation" and state law could not be enforced to alter the FCC's "careful assignment of liability." *Id.*

For the same reasons, Chapter 284 cannot be enforced to allow LECs to bill intraMTA traffic at access rates because that conflicts with the system for compensation created by the FCC's adoption of the MTA rule.

C. Relief Requested

Verizon Wireless requests that the Court enter an order as follows:

(1) 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

(2) Enjoining the Commissioners of the PUC from taking any action to enforce or implement the preempted provisions under SDCL §§ 49-31-114 and 115.

VI. VERIZON WIRELESS IS ENTITLED TO A DECLARATION THAT CHAPTER 284 IS PREEMPTED BECAUSE IT CONFLICTS WITH PROCEDURES IN 47 U.S.C. §§ 251-252 AND THE FCC'S IMPLEMENTING RULES AND ORDERS

A. The FCC Has Determined That Carriers Do Not Need to Measure InterMTA Traffic, and that InterMTA Traffic Issues Should be Addressed in Negotiations

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 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 decided how that issue should be addressed:

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

First Report & Order, ¶ 1044 (footnotes omitted). By releasing wireless carriers from the obligation to implement measurement technology, and directing that this issue be subject to negotiations between carriers, the FCC established a specific regulatory construct to address commingled interMTA/intraMTA traffic.

B. Chapter 284 is in Direct Conflict with Paragraph 1044 of the *First Report & Order*

Chapter 284 directly conflicts 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 demands all information be calculated based on accurate and

verifiable information. SDCL §§ 49-31-110, -111. 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 disagreed with and nullified the FCC's decisions on this very significant intercarrier compensation issue.

The members of the SDTA were apparently unsatisfied with the FCC's determination regarding commingled interMTA/intraMTA traffic. Rather than seeking relief from the FCC they drafted, lobbied, and obtained the passage of a state law that attempts to overturn Paragraph 1044 of the *First Report & Order* in the State of South Dakota. Motion to Intervene as Defendants, pp. 2-3, (filed Oct. 1, 2004). It is this kind of fact pattern that calls out for an application of the Supremacy Clause. The state has a created a direct conflict with an FCC directive and imposed an obligation the FCC rejected. This conflicts with federal law, stands as an obstacle to the implementation of federal policies, and renders an FCC order meaningless. The court should find Chapter 284's treatment of commingled interMTA and intraMTA wireless traffic to be subject to conflict preemption and unenforceable under the Hobbs Act.

C. The State's Only Role on this Issue is to Arbitrate Agreements Under 47 U.S.C. § 252

In addition to the conflict on substantive standards, the state has taken the wrong procedural route to resolving issues related to intercarrier compensation. Procedurally, Congress and the FCC left this issue to be decided through carrier negotiations, followed by binding arbitration under 47 U.S.C. § 252. If the state is to establish obligations between carriers for this traffic, it must do so by resolving open issues in an arbitration proceeding rather than by adopting a statute of general application.

The 1996 Act creates a specific role for state commission participation in implementing the 1996 Act. States review and approve negotiated agreements under 47 U.S.C. § 252(e)(2)(A), and resolve open issues in expedited arbitration proceedings subject to 47 U.S.C. § 252(e)(2)(B). It is this process that will lead to carrier arrangements, as all LECs have an obligation to establish reciprocal compensation arrangements under 47 U.S.C. § 251(b)(5). *First Report & Order*, ¶ 1045.

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

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

MCI Telecomm. Corp. v. Bell Atl.-Pa., 271 F.3d 491, 516 (3d Cir. 2001). The Seventh Circuit has described states as "'deputized' federal regulators" as they implement the 1996 Act. *MCI Telecomm. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000). And the D.C. Circuit has noted that the 1996 Act carefully delineates specific roles for states in implementing Sections 251 and 252, and that where Congress did not provide a state role, none can be inferred. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004). This is fully consistent with the Supreme Court's confirmation that the 1996 Act limited state authority, which is consistent with federal law:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 378 n.6 (1999). 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, Inc. v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (noting the importance of the federal court appeal process in determining whether the state commission order conflicts with the 1996 Act).

By passing a statute that sets 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 Chapter 284 are specifically designed to implement the 1996 Act. SDCL § 49-31-110 ("If necessary for the assessment of transport and termination charges pursuant to 47 U.S.C. § 251(b)(5)"). Yet there are no carrier negotiations, and no state action to resolve open issues pursuant to the standards in 47 U.S.C. § 252, 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 Chapter 284 must be resolved through the negotiation and arbitration process, and consistent with FCC rules and orders as required by 47 U.S.C. § 252.

D. Requested Relief

Verizon Wireless requests the Court enter an order:

(1) Declaring that SDCL §§ 49-31-110 and 111 are preempted because they require a CMRS provider to identify, measure, or report calls that are interMTA;

(2) Declaring that SDCL §§ 49-31-110 and 111 are preempted because they establish intercarrier compensation obligations for CMRS providers outside of the

negotiation and arbitration process Congress enacted in 47 U.S.C. § 252 and the FCC's rules; and

(3) Enjoining the Commissioners of the PUC from taking any action to enforce or implement the preempted provisions under SDCL §§ 49-31-114 and 115.

VII. VERIZON WIRELESS IS ENTITLED TO A DECLARATION THAT CHAPTER 284 IS PREEMPTED BECAUSE IT REGULATES INTERSTATE TELECOMMUNICATIONS

A. 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. Today, 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:

> [Q]uestions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to interstate communications service are to be governed solely by federal law . . . and states are precluded from acting in this area.

Ivy Broad. Co. v. Am. Tel. & Tel. Co., 391 F.2d 486, 491 (2d Cir. 1968). *See also 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. . . . Exclusive FCC jurisdiction over interstate matters is well-established, absent a clear, express deferral.") (emphasis added). Indeed, Section 152(b) of the Act "was clearly intended to give states significant power to regulate wire communications that are wholly intrastate in nature."

McDonnell Douglas Corp. v. Gen. Tel. Co. of Cal., 594 F.2d 720, 724 (9th Cir. 1979) (emphasis added). State authority is even further circumscribed with respect to CMRS. Congress amended Section 152(b) to exclude CMRS, thereby permitting federal law to apply to intrastate CMRS.

B. 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* Clampitt Aff. Ex. JC-1. "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.[6] SDCL § 49-31-110 and -111 apply on their terms to all "local" and "nonlocal" calls, and specifically reference the fact that these calls may be "interstate." SDCL §§ 49-31-110, 111.

Because the South Dakota Legislature has no authority to regulate interstate communications, Chapter 284 cannot be enforced as to interstate traffic. The FCC has recognized that state regulation cannot be allowed to extend to interstate communications. *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, 2004 WL 2601194, FCC 04-267 (rel. Nov. 12, 2004) ("*Vonage Order*"). In the *Vonage Order*, the FCC addressed Minnesota's attempt to regulate Internet voice service offerings (referred to as "DigitalVoice Service"), which by their nature include both interstate and intrastate services. *Vonage Order*,

[6] Verizon Wireless engineers its network today so that it will have limited interMTA traffic from Iowa and North Dakota delivered subject to Chapter 284. *See* Clampitt Aff. ¶ 15.

¶ 18. The FCC began by recognizing that Congress has given the FCC "exclusive" jurisdiction over interstate communications, *i.e.*, communications that originate and terminate in different states. *Vonage Order*, ¶¶ 16-17. Because DigitalVoice Service "enables interstate communications," it is a "jurisdictionally mixed" service, and the FCC "has exclusive jurisdiction under the Act to determine the policies and rules, that govern the interstate aspect of DigitalVoice service." *Vonage Order*, ¶ 18.

The FCC then recognized that a state commission must separate out and regulate only the intrastate services, and that any regulation that fails to respect that boundary "produces a direct conflict with our federal law and policies, and impermissibly encroaches on our exclusive jurisdiction over interstate services." *Vonage Order*, ¶ 22. The FCC provided some examples of how Minnesota's proposed regulation of DigitalVoice Service would unlawfully extend to interstate services:

> 26. . . . For example, assume Minnesota were to use DigitalVoice subscribers' NPA/NXXs as a proxy for those subscribers' geographic locations when making or receiving calls. If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.
>
> 27. Similarly, if a Minnesota NPA/NXX subscriber residing in Minnesota used its service outside the state to call someone in Minnesota, that call would appear to be an intrastate call when it is actually interstate. . . .
>
> 28. We further consider whether Minnesota could assert jurisdiction over DigitalVoice communications based on whether the subscriber's billing address or address of residence are in Minnesota. This too fails. When a subscriber with a Minnesota billing address or address of residence uses DigitalVoice from any location outside the state to call a party located in Minnesota, Minnesota would treat that communication as "intrastate" based on the address proxy for that subscriber's location, yet in actuality it would be an interstate call.

Vonage Order, ¶ 26-28 (footnotes omitted) (emphases added).[7]

Here, the state has imposed regulation without respecting the interstate/intrastate distinction, and as a result, regulates calls that are "actually interstate." Because the state of South Dakota has no authority to regulate interstate services, Chapter 284 cannot be enforced as to interstate traffic.

C. Relief Requested

Verizon Wireless requests an order as follows:

(1) Declaring that SDCL §§ 49-31-110 and 111 are preempted because they reach interstate traffic that is subject to exclusive jurisdiction of Congress and the FCC;

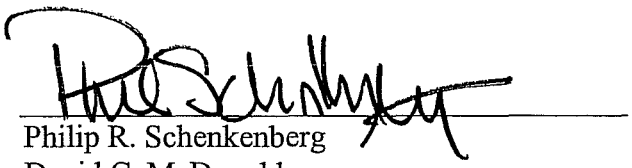
(2) Enjoining the Commissioners of the PUC from taking any action to enforce or implement the preempted provisions under SDCL §§ 49-31-114 and 115.

CONCLUSION

For the above reasons, Verizon Wireless respectfully requests that the Court grant its motion for summary judgment.

Dated: November 11, 2005

BRIGGS AND MORGAN, P.A.



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[7] An "NPA/NXX" is industry shorthand for a phone number.

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) ss.
COUNTY OF HENNEPIN)

Court File No. 04-3014

Sheryl M. O'Neill, being first duly sworn, deposes and states that on the 15th day of November, 2005, she served the attached PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT upon:

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(which is the last known address of said attorney) by depositing a true and correct copy thereof in the United States mail, postage prepaid.

Sheryl M O'Neill

Subscribed and sworn to before me
this 15th day of November, 2005.

Sandra J. Cambronne
Notary Public

SANDRA J. CAMBRONNE
Notary Public
Minnesota
My Commission Expires January 31, 2010