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, Plaintiffs, vs. BOB SAHR, GARY HANSON, and DUSTY JOHNSON, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendants, SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION and VENTURE COMMUNICATIONS COOPERATIVE, Intervenors.	Civil No. 04-3014 **PLAINTIFFS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

In its opening memorandum ("Memo.") Verizon Wireless made four separate arguments in support of its motion for summary judgment preempting various provisions of SDCL §§ 49-31-109 through 49-31-115 ("Chapter 284"). Verizon Wireless' first argument (made at pages 8-11) is that Chapter 284 conflicts with Federal Communications Commission ("FCC") directives by authorizing local exchange carriers ("LECs") to bill commercial mobile radio service

("CMRS") providers for intraMTA traffic pursuant to tariffs and in the absence of an interconnection agreement. Verizon Wireless' second argument (made at pages 12-16) is that Chapter 284 directly conflicts with FCC rules and orders by authorizing LECs to bill CMRS providers access charges for intraMTA traffic. Verizon Wireless' third argument (made at pages 16-21) is that Chapter 284 directly conflicts with an FCC order establishing that wireless carriers are not required to have the technical ability to identify traffic for jurisdictional purposes, and should negotiate or arbitrate these compensation obligations. Verizon Wireless' fourth argument (made at pages 21-24) is that Chapter 284 is preempted to the extent it imposes regulatory requirements on traffic that is physically interstate and therefore subject to the exclusive jurisdiction of the FCC.

In their joint response, the defendants and intervenors (collectively "Respondents") fail to identify fact issues that preclude the entry of summary judgment and make legal arguments that do not withstand scrutiny. As discussed below, the Court should reject Respondents' arguments and grant Verizon Wireless the relief requested in its Motion.

I. STANDARD OF REVIEW

As the moving party, Verizon Wireless had the initial burden to identify undisputed facts that support entry of summary judgment as a matter of law. If Respondents claim that there are material fact disputes that preclude the entry of summary judgment, they had the burden to set forth specific facts showing there are genuine issues for trial. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002). As non-moving parties, they cannot rest upon mere denials or allegations to avoid the entry of summary judgment. *Id.*

As argued below, Respondents have identified certain fact disputes, but fail to explain why those fact disputes are "material" and must be litigated before resolving Verizon Wireless' preemption claims. In addition, Respondents have claimed to dispute several fact statements

when in reality they dispute the application of the law to the facts.[1] These are not true fact disputes to be resolved at trial. *See American Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 915 (construction of state statute for purpose of constitutional challenge is a question of law) (D.S.D. 1999). Finally, many of Mr. Thompson's statements are inadmissible legal conclusions or go beyond the scope of Mr. Thompson's expert report. The Court should find that no material disputes of fact prevent the entry of summary judgment.

II. VERIZON WIRELESS' CURRENT COMPLIANCE WITH CHAPTER 284 IS NOT IN DISPUTE

Verizon Wireless established through sworn testimony that it delivers intraMTA and interMTA traffic in South Dakota today without delivering signaling information that identifies whether a call is interMTA or intraMTA. Statement of Facts, ¶¶ 39, 41, 44, 50. Respondents do not dispute these underlying facts, but instead dispute suggestions and inferences that might be drawn from these facts. Resp. to Statement of Facts, ¶¶ 39, 41, 44, 50. As a result, there is no fact dispute on this issue.

Verizon Wireless also established that it today does not have the software and internal databases necessary to collect and report interMTA traffic data in South Dakota. Statement of Facts, ¶¶ 47, 48, 50. Again, Respondents do not dispute these underlying facts, but only

[1] For example, at paragraphs 35 and 36 of their Response to Statement of Facts, Respondents claim to dispute Verizon Wireless' testimony that Verizon Wireless cannot today determine the physical location of the caller at the time the call is made. Yet, an examination of their filing shows they do not dispute that factual statement (and offer no contrary evidence), but instead they claim that under their interpretation of Chapter 284 that fact is not dispositive. The same problem is found in paragraphs 39, 41, 44 and 45 of Respondents' Response to Statement of Facts.

suggestions and inferences. Resp. to Statement of Facts, ¶¶ 47, 50.[2] As a result, this is not a fact dispute.

The only fact question raised by Respondents is how burdensome it would be for Verizon Wireless to bring itself into compliance with the Act. *See* Thompson Aff., ¶ 16 ("I believe Verizon Wireless providers (sic), with the proper software tools and post-processing techniques, have the ability to comply with the state statutes . . . ."). Whether such compliance would be less burdensome (as Mr. Thompson opines) or more burdensome (as Verizon Wireless testified) does not bear on the preemption question.[3] Verizon Wireless is not configured today to meet requirements imposed by state law, and is not meeting those requirements. Verizon Wireless believes those legal requirements are unlawful and should not have to prove the costs of bringing itself into compliance with a state law in order to have the issue adjudicated. *See Minnegasco Gas Co. v. Pub. Serv. Comm'n.*, 523 F.2d 581, 582 (8th Cir. 1975) (court would hear constitutional challenge to state statute giving state rate authority over utility because "presumptive authority to alter rates interferes with [Plaintiff's] longterm financial planning and performance under the contract. *See Public Util. Comm'n. v. United States*, 355 U.S. 534, 78

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[2] Respondents object broadly to paragraph 48 of the Statement of Facts, but nothing in the Thompson affidavit addresses whether Verizon Wireless currently has the capability to collect, categorize and report interMTA traffic. In addition, Mr. Thompson purports to have no personal knowledge at all regarding Verizon Wireless' current capabilities, but takes what he claims to know about wireless networks generally and concludes that Verizon Wireless has raw data (*i.e.*, the location of the originating cell site) that could be used to generate interMTA reports. *See* Thompson Aff. ¶ 16. This is far different than having the software and databases to take the raw data, organize it by terminating LEC, categorize it by jurisdiction, and issue reports to terminating LECs. The Court should find that it is undisputed that Verizon Wireless does not currently have these systems in place.

[3] Moreover, this question depends in part on the Court's resolution of two threshold legal questions – whether Chapter 284 authorizes a carrier to use the cell site as a proxy for the originating point of a call, and whether Chapter 284 allows the use of traffic samples instead of "accurate" and "verifiable" percentage measurements.

S. Ct. 446, 2 L.Ed. 2d 470 (1958)."), *cert. denied*, 424 U.S. 915 (1976). In addition, the passage of time during which Verizon Wireless does not comply with Chapter 284 gives rise to claims that could be asserted by LECs in South Dakota. As reflected in Exhibit A to the Second Affidavit of Philip Schenkenberg, counsel for the intervenors is representing a number of SDTA Companies in commission proceedings that include counterclaims against another wireless carrier for having failed to comply with SDCL § 49-31-110. Those carriers are seeking an order imposing access charges on traffic previously delivered as a result of the alleged noncompliance.

The Court should find that it is undisputed that Verizon Wireless currently does not comply with the requirements in Chapter 284, which is all that is necessary to allow the court to proceed on summary judgment.

III. THE COURT SHOULD DISREGARD MUCH OF MR. THOMPSON'S AFFIDAVIT

Nothing in Mr. Thompson's testimony raises material issues of fact for trial. However in considering this motion the Court should disregard Mr. Thompson's legal opinions regarding the meaning and interpretation of Chapter 284, as well as portions of his affidavit not contained in his expert report.

Paragraphs 7, 11, and 12 of the Thompson Affidavit contain his opinions regarding the meaning and interpretation of portions of Chapter 284. For example, in paragraph 7 Mr. Thompson opines that "The statute does not require the wireless provider to determine the physical location of the caller when identifying the MTA in which the call originates." This testimony relates to a legal question raised in Respondents' Reply – whether the statute requires identification of traffic based on the location of the caller, or instead based on the location of the cell site.

Mr. Thompson is not qualified to provide expert testimony as to the meaning and interpretation of Chapter 284. Federal Rule of Evidence 702 allows the court to consider testimony from a witness with scientific, technical or other specialized knowledge so long as that person has been "qualified as an expert by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Mr. Thompson's background, which is contained in paragraphs 2-4 of his affidavit show him to be an engineer who provides engineering, financial, and regulatory services for wireless and wireline clients. There is nothing in his background that makes Mr. Thompson qualified to provide expert testimony regarding the meaning and interpretation of a state statute. As a result, these portions of the Thompson affidavit are not competent expert opinions under Fed. R. Evid. 702 and should be disregarded.

The Court should also reject any suggestion that Mr. Thompson's opinions have evidentiary value because he provided testimony in before the Legislature in support of Chapter 284 (Thompson Aff. ¶ 6). As this court has held, South Dakota law prohibits consideration of extrinsic evidence of Legislative intent. *American Meat Institute v. Barnett*, 64 F. Supp. 2d 906, 915-16 (D.S.D. 1999). In *American Meat Institute*, the state "proffered testimony concerning the legislature's intent as to how the statute should be read and applied." *Id.* The Court held that evidence to be in admissible under settled South Dakota law. *Id.* Similar treatment is appropriate here.

The Court should also disregard portions of Mr. Thompson's testimony that are beyond his expert report. Exhibit B to the Second Affidavit of Philip Schenkenberg is Mr. Thompson's expert report, and Exhibit C shows the portions of the Thompson affidavit not included in that expert report. Rule 26(A)(2) of the Federal Rules of Civil Procedure requires that an expert report contain "a complete statement of all opinions to be expressed and the basis and reasons

therefor; the data or other information considered by the witness in forming the opinions ...." Respondents have not complied with this rule, and instead offered testimony on a number of topics not previously disclosed, including Mr. Thompson's belief as to Verizon Wireless' capabilities to identify traffic and prepare reports (paragraphs 8-9, 16), how certain "optional" SS7 fields might in the future be used to address traffic separations issues (paragraph 10), capabilities of Lucent and Nortel switches (paragraph 11), the results of recent interMTA traffic studies conducted by his company (paragraph 14, 17), and the regulatory positions taken by Verizon Communications (paragraphs 16, 18).[4] While these statements are not sufficient to raise issues of material fact for trial, they should also be disregarded because they are beyond Mr. Thompson's expert report.[5]

IV. VERIZON WIRELESS' FIRST ARGUMENT: CHAPTER 284 IS PREEMPTED BECAUSE IT CONFLICTS WITH THE FCC'S REGULATION OF CMRS-LEC COMPENSATION UNDER FCC RULE 20.11

Verizon Wireless requests an order that Chapter 284 is preempted to the extent it would allow LECs to bill under their tariffs, and in the absence of an interconnection agreement, for traffic that originates and terminates in the same MTA. Memo., p. 11. The FCC's *T-Mobile Order*[6] and 47 C.F.R. § 20.11(d) prohibit a LEC from billing under tariff for traffic that

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[4] As noted at paragraph 18 of Mr. Thompson's Affidavit, the statements of Verizon Communications and not statements of Verizon Wireless.

[5] Notwithstanding its position that Mr. Thompson fails to raise fact issues that bear on the preemption question, Verizon Wireless has notified counsel for the Respondents that if the court orders a trial on new facts or opinions raised by Mr. Thompson it will request the opportunity to conduct additional necessary discovery regarding these new proffered opinions. In the unlikely event that this occurs and is not resolved by the parties, Verizon Wireless reserves the right to bring a motion to strike or a motion *in limine* excluding Mr. Thompson from testifying on those issues at trial.

[6] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket 01-92, 20 FCC Rcd. 4855, Declaratory Ruling and Report and Order (2005).

originates and terminates in the same MTA. 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, n.57. The Respondents argue that if Chapter 284's traffic identification requirement is lawful (which is taken up in Verizon Wireless' third argument, *infra*) the state can enforce the traffic identification requirement by imposing an otherwise preempted result. This argument should be rejected – the Supremacy Clause does not allow the state to do indirectly that which it cannot do directly. The Court should grant Verizon Wireless' motion.

A. There Are No Disputed Facts That Prevent Entry of Summary Judgment

Respondents do not claim that alleged fact disputes prevent the entry of summary judgment on Verizon Wireless' first argument. Resp. Reply, pp. 6-9. Nor do they identify how the resolution of any specific fact question would turn this basic preemption question. To the contrary, the Respondents do not dispute that Chapter 284 authorizes LECs, in some circumstances, to bill Verizon Wireless (and others) under their tariffs and in the absence of an agreement, for traffic that originates and terminates in the same MTA. Resp. Br., p. 7. They do not dispute that Verizon Wireless has been delivering and continues to deliver both interMTA and intraMTA traffic to SDTA companies (and others) without identifying that traffic as required by Chapter 284. Resp. to Statement of Facts, ¶ 50. As a result, the Court should find that there are no material issues of fact that prevent Verizon Wireless' first argument from being considered on summary judgment.

B. A State Cannot Authorize IntraMTA Traffic Being Billed Under Tariff

Verizon Wireless' first argument is directed at what one might call "the remedy" in Chapter 284 – the LEC's authorization to classify and bill all traffic at intrastate access rates if

the requirements of Chapter 284 are not met. The Respondents rely primarily on an argument that Chapter 284's identification requirements are an "appropriate exercise of state power." Resp. Reply, p. 7. However, even if the underlying requirements were lawful, that still would not give the state the right to authorize a preempted remedy. What the Respondents call "unidentified traffic" unquestionably contains intraMTA traffic, and a state law that authorizes intraMTA traffic to be billed under tariff and in the absence of an interconnection agreement directly contradicts the FCC's *T-Mobile Order* and FCC Rule 20.11(d).[7] This direct conflict with federal is preempted.

The Respondents' only legal citation is to an order issued by the FCC's Wireline Competition Bureau. *In the Matter of Petition of Cavalier Tel.*, 18 FCC Rcd. 25887, DA 03-3947 (2003), *recon. pending*. This Order does not address CMRS traffic, did not involve state action, and predates the *T-Mobile Order*. *Id.* Moreover, the parties in the *Cavalier* case were arbitrating the obligation imposed on a *transit carrier*, not an originating carrier, and agreed that the transiting carrier would have to pay for certain traffic it did not identify. *Id.* ¶ 3.[8] In short, there is nothing about the *Cavalier* case that in any way bears on Verizon Wireless' first argument.

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[7] Respondents appear to suggest that "unidentified traffic" is a separate category of traffic that is distinguished from intraMTA or interMTA traffic. Resp. Reply, p. 7. This is, of course, incorrect. Under the FCC's Rules, there are two kinds of CMRS traffic – that which originates and terminates in the same MTA, and that which does not. *First Report & Order*, ¶ 1036. The MTA distinction does not depend on what information is in the signaling field or whether interMTA percentage measurements are provided to terminating carriers. 47 C.F.R. § 51.701(a)(2). As a result, the question is not whether the state can impose tariff-based compensation obligations on "unidentified traffic" (which is a meaningless term under federal law), but whether the state can impose tariff-based compensation obligations on intraMTA traffic.

[8] Verizon Wireless has not challenged SDCL § 49-31-112, which imposes obligations on transit carriers.

The Respondents have not attempted to distinguish *Rose v. Arkansas State Police*, in which the Supreme Court preempted a state from using its state authority to create a remedy that contradicted federal requirements. 479 U.S. 1, 3-4 (1986). *Rose* clearly says that the Supremacy Clause preempts state action that authorizes the "precise conduct" that has been prohibited by the federal government. *Id.* at 4. That principle applies here. The question is not whether it might be "reasonable" for the South Dakota legislature to impose this remedy, but whether the state can lawfully allow LECs to bill for intraMTA traffic out of tariff and in the absence of an agreement. Because the FCC prohibits LECs from doing so, Chapter 284 creates a direct conflict with federal law and is preempted.

C. Relief Requested

It is undisputed that Verizon Wireless is sending intraMTA traffic to LECs in South Dakota without meeting the requirements of Chapter 284. Under federal law, this traffic cannot be billed under tariff, and cannot be billed in the absence of an interconnection agreement. Under Chapter 284, this intraMTA traffic can be billed under tariff, and can be billed whether or not the parties have an interconnection agreement. As a result of this direct conflict, 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); 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.

V. VERIZON WIRELESS' SECOND ARGUMENT: THE FCC'S MTA RULE PREEMPTS STATES FROM AUTHORIZING LECS TO BILL INTRAMTA TRAFFIC AT ACCESS RATES

Verizon Wireless seeks an order that the FCC's MTA rule preempts a state from authorizing LECs to bill intraMTA traffic at access rates. Memo, p. 12. Verizon Wireless relied on several cases holding that the FCC's decision in the *First Report & Order*[9] that intraMTA calls cannot be subjected to access rates preempts the application of state law to achieve a contrary result. Memo, pp. 12-15.[10] The Respondents argue that Chapter 284 does not undermine the MTA rule because it only applies to "unidentified traffic," and it was a reasonable policy decision for the state to address the problem of "unidentified traffic" by imposing access charges for noncompliance. Resp. Reply, pp. 13-15. These arguments utterly miss the point. By allowing LECs to charge access rates for traffic that cannot be subject to access rates, the state law has created a conflict with federal law that cannot stand.

A. There Are No Disputed Facts That Prevent Entry of Summary Judgment

As with Verizon Wireless' first argument, the Respondents fail to identify any material issue of fact that would prevent the entry of summary judgment on Verizon Wireless' second

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[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd. 15499, FCC 96-325, First Report and Order (1996) ("*First Report & Order*").

[10] Verizon Wireless would like to bring to the Court's attention another court case enforcing the federal prohibition on the application of access tariffs to intraMTA wireless traffic. *Alma Tel. Co. v. Pub. Serv. Comm'n*, ___ S.W.3d ___, No. SC 86529, 2006 WL 44350 (Jan 10, 2006) (Schenkenberg Aff. Ex. E). In *Alma* the Missouri court held that while it might have been lawful (prior to the *T-Mobile Order*) to charge for intraMTA wireless traffic by tariff, the use of access tariffs and access rates was fatal. *Id.* at *2. The court noted that the FCC had settled this issue when it made a critical distinction between interMTA wireless traffic (subject to access rates) and intraMTA wireless traffic (subject to reciprocal compensation). *Id.* The court went on to criticize the Missouri ILECs for being "simply unwilling to acknowledge the clear distinction made between intraMTA calls and all other calls." *Id.* at *3.

argument. It is undisputed that Chapter 284 would, in some cases, allow all traffic (including primarily intraMTA traffic) to be classified and billed at intrastate access rates. The legal question, then, is whether the MTA rule acts to preempt such a result. Respondents do not identify any facts that need to be litigated in order to decide the basic preemption question. The Court should find that this issue is appropriately resolved on summary judgment.

B. A State Cannot Authorize LECs to Bill IntraMTA Traffic At Access Rates

Like Verizon Wireless' first argument, Verizon Wireless' second argument is a challenge to the remedy in Chapter 284. The Respondents do not disagree with Verizon Wireless' basic premise – that the FCC's MTA Rule preempts states from allowing LECs to bill accessrates for intraMTA traffic. Resp. Reply, pp. 10-11. Instead, they claim that this rule does not extend to what they call "unidentified traffic." *Id.* at 12. However, as noted above (*supra* fn. 6) there is no separate category under federal law for "unidentified traffic," nor has the FCC ever established a carve-out in the MTA Rule for traffic that does not meet state law standards such as those in Chapter 284. A state cannot avoid federal preemption by simply re-categorizing intraMTA traffic as "unidentified traffic."

C. Respondents' Argument That There Is a Regulatory "Void" Related to "Unidentified Traffic" Is a Red Herring

Respondents try to support their argument by claiming that the Legislature has simply filled a regulatory void regarding the identification of wireless traffic. Resp. Reply, p. 15. However, a state cannot fill a regulatory void in a way that directly conflicts with federal law. *Cipollone v. Liggett Grap, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617 (1992) (state laws that conflict with federal law are "without effect"); *see also* 47 U.S.C. § 261(b) & (c) (state regulations must be consistent with federal law). In addition, there is no regulatory void related to CMRS traffic. The FCC clearly directed that CMRS providers are not required to identify

interMTA traffic and should negotiate overall compensation obligations under Sections 251-252. *First Report & Order,* ¶ 1044. Unresolved issues would then be subject to compulsory arbitration. 47 C.F.R. § 20.11(e). Instead of a void, there is a federal scheme that the SDTA companies would prefer to replace with a state scheme that gives them the right to charge their wireless competitors exorbitant access rates for local calls. This is not something the Legislature can lawfully provide to them.

Respondents' "regulatory void" argument relies in part on a misuse of the term "unidentified traffic." Resp. Reply, p. 6. Verizon Wireless' traffic is not "unidentified" under any common understanding – Verizon Wireless populates SS7 signaling messages in accordance with industry standards so that the terminating carrier can identify Verizon Wireless as the originating carrier. Harmon Aff. ¶ 17. And where Verizon Wireless delivers interMTA and intraMTA traffic together (as the FCC deems appropriate), Verizon Wireless negotiates regarding overall compensation under the Act, subject to compulsory arbitration. Clampitt Aff. ¶ 17. Verizon Wireless has thus done just what it is required to do under FCC rules and industry practice, and the SDTA companies, through the existing regulatory regime, have the right to obtain all the compensation they are due through negotiation or arbitration. Again, this is not a regulatory void, it is a regulatory regime that the SDTA companies asked the Legislature to change.

The Court should also disregard Respondents' claim that the SDTA Companies have a "constitutional right" to a return on investment that gives the Legislature the authority to establish an intercarrier compensation scheme that undermines federal law. Resp. Reply, p. 11. First, rate of return arguments cannot drive policy in this area. As the Fifth Circuit Court of Appeals said when it rejected similar challenges to action taken by the FCC to implement 47

U.S.C. § 254, "predictable market outcomes" are "the very antithesis of the Act." *Alenco Comm'ns, Inc. v. FCC*, 201 F.3d 608, 622 (5th Cir. 2000).[11] Second, the state cannot simply depart from the important policy decision that local traffic must be subject to cost-based rates instead of access rates. *See* 47 U.S.C. § 252(d)(2) (reciprocal compensation is set at the additional costs of termination); 47 C.F.R. § 51.705(a) (reciprocal compensation for local traffic is set based at forward-looking rates). The Eighth Circuit Court of Appeals recently confirmed how important it is to properly set reciprocal compensation rates:

> To make sure that competitors make efficient investment and operating decisions, it is vital that competing telephone companies, when leasing equipment, face the same costs that the ILEC faces: For instance, if Qwest (an ILEC) incurs some small cost for every minute that a switch is used, then its competitors should as well. Otherwise, competitors may over-or-under-consume network resources, which would undermine effective competition in the local exchange market. For that reason, state commissions must set lease rates that reflect an ILEC's actual cost structure.

Ace Tel. Ass'n v. Koppendrayer, ___ F.3d ___, Nos. 05-1170, 05-1171, 2005 WL 3543671, at *2 (8th Cir. Dec. 29, 2005) (Second Schenkenberg Aff., Ex. D). The *Ace* case affirmed a Minnesota decision setting reciprocal compensation rates at $0.00 because no "additional costs" were incurred by the ILEC in terminating traffic:

> An ILEC like Qwest can collect reciprocal compensation charges from others only if it negotiates a non-zero rate with them or if the state commission finds that it incurs additional costs in terminating other carriers' traffic, *see* 47 U.S.C. § 252(d)(2)(A)(ii). Put another way, telephone companies have to establish ways to pay one another their additional costs. But if no additional costs are incurred, there is nothing to pay.

[11] The court also rejected a takings argument (which is what is implied by Petitioners) as premature given that the impact of the FCC's regulatory action had not been demonstrated. *Id.* at 624.

Id. at *4. The Court should reject Respondents' suggestion that the South Dakota Legislature has the authority to disregard these federal policy decisions and establish a new regime for setting local traffic rates in order to ensure that their state-regulated carriers earn specific rates of return.

D. Relief Requested

Chapter 284 purports to authorize LECs in South Dakota to bill access rates for some CMRS traffic that originates and terminates in the same MTA. The FCC's MTA Rule prohibits this result. Therefore, 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' THIRD ARGUMENT: CHAPTER 284 IS PREEMPTED BECAUSE IT CONFLICTS WITH PROCEDURES IN 47 U.S.C. §§ 251-252 AND THE FCC'S IMPLEMENTING RULES AND ORDERS

Verizon Wireless seeks an order that Chapter 284 conflicts with the FCC's *First Report & Order* and the procedures in the 1996 Act for resolving compensation disputes when intraMTA and interMTA traffic are delivered together. Memo., pp. 20-21. The FCC allowed these calls to be delivered together, rejected claims that a CMRS provider needed to be able to identify all such traffic, and directed parties to resolve these issues through negotiation and arbitration. *First Report & Order*, ¶ 1044. As a result, a state statute that applies specific identification requirements and does not rely on the negotiation process in the Act conflicts with these substantive and procedural requirements.

The Respondents take the untenable position that Chapter 284 should survive because it is equivalent to paragraph 1044 of the *First Report & Order*, and even concede that Chapter 284

could not be enforced as written.[12] Their argument cannot, however, cure the clear, substantive and procedural conflicts between Chapter 284 and federal law.

A. There Are No Disputed Facts That Prevent Entry of Summary Judgment

Once again, the Petitioners have failed to identify any material fact disputes that prevent the entry of summary judgment on Verizon Wireless' third argument. Resp. Reply, pp. 17-20. The Court should find it appropriate to resolve this legal challenge to Chapter 284 on summary judgment.

B. Chapter 284 Mandates Substantive Identification Requirements Different From Those Allowed by the FCC

Verizon Wireless objects to Chapter 284 because it changes the substantive identification requirements allowed by the FCC in paragraph 1044 of the *First Report & Order*. First, SDCL §§ 49-31-110 and 111 require a CMRS provider to provide accurate jurisdictional information in the signaling field, which the parties today agree cannot be done. Respondents appear to concede that such a requirement would be unlawful, and instead suggest that SDCL §§ 49-31-110 and 111 do not require anything more than "industry standard" signaling information, even if that does not accurately identify calls as local or nonlocal. Resp. Reply, p. 19. Verizon Wireless believes Chapter 284 clearly requires CMRS providers to identify the jurisdiction of the call and include jurisdictural information in the signaling field, contrary to what the FCC deemed acceptable in paragraph 1044 of the *First Report & Order*.

Second, Chapter 284 requires interMTA traffic to be measured based on the physical location of the caller and does not allow for the use of a "cell site" proxy. A call is "local" or "nonlocal" under SDCL § 49-31-109 depending on the physical location of the caller. The

[12] It is difficult to square Respondents claim that Chapter 284 fills a "void" with their argument here that Chapter 284 and paragraph 1044 are substantively identical.

Respondents argue that Chapter 284 implicitly incorporates cell site proxy authorized by the FCC in paragraph 1044 of the *First Report & Order.* Resp. Reply, p. 18. While Verizon Wireless agrees that the FCC authorizes the use of a cell site proxy, the South Dakota Legislature did not. It is illogical for the Petitioners to argue on the one hand that the Legislature has authority to create its own standards in this area, and on the other hand that Chapter 284 should be read to implicitly incorporate FCC standards. In addition, "it is not the function of a federal court to rewrite a state statute to cure all its constitutional infirmities." *American Meat Inst. v. Barnett*, 64 F. Supp. 2d 906, 917 (D.S.D. 1999). Because Chapter 284 directs Verizon Wireless to report the jurisdiction of its traffic based on the physical location of the caller, it has altered the FCC's substantive identification requirements and is therefore preempted.

Third, paragraph 1044 of the *First Report & Order* allows parties to negotiate compensation levels through the use of estimates and traffic studies, while Chapter 284 requires the continuous collection and reporting of accurate and verifiable information. Respondents claim that Chapter 284 is consistent with paragraph 1044 of the *First Report & Order* because the exact same traffic studies and samples would satisfy both standards. Resp. Reply, p. 19. Again, this is an illogical reading of Chapter 284. An obligation to continuously provide information that is "accurate" and "verifiable," subject to imposition of an access charge, is far different than a standard that allows parties to negotiate the best way to determine how much interMTA traffic exists. As discussed in Verizon Wireless' Statement of Facts (¶ 22) and essentially not disputed (Resp. to Statement of Facts, ¶ 9), agreements on interMTA traffic percentages will be estimates. The South Dakota legislature's imposition of a requirement that percentage measurements be "accurate" and "verifiable" would hold Verizon Wireless to a substantive standard rejected by the FCC.

C. Chapter 284 Undermines the FCC's Statement that Carriers Should Determine Overall Compensation Levels Through Negotiations And the Use of Traffic Samples or Studies

Chapter 284 also changes the procedural mechanism for carriers to determine compensation levels – negotiation is replaced with a legislatively imposed result. Procedurally, the FCC directed that CMRS providers and LECs *negotiate* this issue in order to reach voluntary agreement as to overall compensation levels. Voluntary agreements can be based on any business considerations the parties deem appropriate, and must be approved unless the terms are discriminatory or contrary to the public interest. 47 U.S.C. § 252(e)(2)(A). If no voluntary agreement is reached, compulsory arbitration is available. 47 U.S.C. § 252(b)(1). The Federal Courts have recognized the importance of this process. For example, in *Wisconsin Bell v. Bie*, the Seventh Circuit Court of Appeals held that a state could not set an alternative method for establishing compensation between parties without undermining the Act. 340 F.3d 441, 444 (7th Cir. 2003). A state process outside of the Act "places a thumb on the negotiating scales" and alter the balance established by Congress and the FCC. *Id.* at 444. Compensation decisions, including any appeals, would proceed through state court, even though Congress placed jurisdiction over compensation arbitrations with the federal court. *Id.*; *see also* 47 U.S.C. § 252(e)(6). Perhaps most importantly, a state process "short-circuits negotiations" under Section 252 that are so important in achieving the de-regulatory goals of the Act. *Id.* at 445. Chapter 284 similarly alters this procedural process as CMRS providers address compensation issues with South Dakota LECs.

D. Requested Relief

The South Dakota Legislature has required CMRS providers to identify, measure, and report interMTA calls and has established a compensation regime for combined intraMTA and

interMTA traffic outside of the process set forth in the 1996 Act. This violates the Act and FCC mandates. As a result, 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

Verizon Wireless seeks an order that Chapter 284 is preempted to the extent it reaches interstate traffic that is beyond the state's regulatory authority. Memo., p. 24. Respondents claim that Chapter 284 does not reach interstate traffic because intraMTA wireless traffic is "local" and thus under the state's regulatory authority. Resp. Reply. p. 21. This erroneous argument should be rejected and Verizon Wireless' Motion should be granted.

A. There Are No Disputed Facts That Prevent Entry of Summary Judgment

Once again, the Petitioners have failed to identify any material fact disputes that prevent the entry of summary judgment on Verizon Wireless' fourth argument. The Court should find it appropriate to resolve this legal challenge to Chapter 284 on summary judgment.

B. Respondents' Arguments Should Be Rejected

The Respondents claim that SDCL 49-31-110 "does not implicate interstate traffic" because it is limited to intraMTA traffic that is "local." Resp. Reply, p. 21. This statement is completely wrong. As a factual matter, it is undisputed that intraMTA traffic terminated in South Dakota may originate in Minnesota, North Dakota, Wisconsin, Missouri, Iowa, Illinois,

Nebraska, Colorado, Wyoming or Kansas. Statement of Facts, ¶ 17. Such traffic is not "intrastate." The Respondents' suggestion that intraMTA traffic is "deemed" intrastate because it has been designated as "local" by the FCC is also without merit. Resp. Reply, p. 21. When the FCC established the MTA as the "local" area for CMRS traffic it specifically recognized that the FCC – not states – has *exclusive* jurisdiction over that issue:

> [I]n light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local 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.

First Report & Order, ¶ 1036 (emphasis added).[13] The Court should reject Respondents' claim that states have the authority to regulate interstate intraMTA traffic.

The Respondents also argue that Chapter 284's regulation of interstate services is only a byproduct of its regulation of intrastate services. Resp. Reply, p. 21. This argument is also belied by the language of SDCL § 49-31-111, which clearly imposes signaling and measurement obligations on interstate traffic, and allows interstate traffic to be billed at intrastate access rates.

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[13] In a different section of the Communications Act Congress has preempted states from regulating CMRS rates but allowed states to petition for authority to take over such rate regulation. 47 U.S.C. § 332(c)(3)(A). The FCC's implementing rules make clear that any such petition could authorize only state regulation of "intrastate" rates. 47 C.F.R. § 20.13(a). This is a further indication that the interstate/intrastate distinction remains meaningful as applied to wireless traffic. *See also* 47 U.S.C. § 261(c) (allowing some state regulation of "intrastate" services).

The Legislature intended to regulate interstate interMTA calls, and did so. Respondents' arguments to the contrary should be rejected.

Finally, Respondents cite no legal authority for the proposition that a state can overturn decades of regulatory limitations and decide to regulate how interstate calls are delivered, measured, and billed. Instead, they make a weak attempt to distinguish the *Vonage*[14] decision by arguing that the FCC has not classified all CMRS offerings as interstate. Resp. Reply, p. 22. This misses the point – such a classification is only necessary to bring intrastate calls into the interstate domain. When a call is physically interstate to begin with – like the physically interstate calls at issue here – jurisdiction lies with the federal government. The problem in *Vonage* was that while a state could have regulated the intrastate portion it was unquestionably prohibited from regulating the service when it was physically interstate in nature. *Vonage Order*, ¶¶ 26-28. Here, Verizon Wireless seeks an order that the regulatory obligations imposed in Chapter 284 are preempted to the extent they reach interstate traffic. *Vonage* clearly supports Verizon Wireless' request.[15]

C. Relief Requested

Chapter 284 regulates interstate services that are subject to the exclusive jurisdiction of the FCC. As a result, Verizon Wireless requests an order as follows:

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[14] *In the Matter of Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Util. Comm'n*, WC Docket No. 03-211, 2004 WL 2601194, FCC 04-267 (rel. Nov. 12, 2004) ("*Vonage Order*").

[15] The Respondents cite *Qwest Corporation v. Scott*, 380 F.3d 367 (8th Cir. 2004) and argue that the separations process by which states are allowed to regulate mixed-use facilities "has never been perfect." Resp. Reply, pp. 21, 23. The FCC has created no separations process to allow states to regulate interstate traffic for these purposes. The state of South Dakota has neither sought nor received permission from the FCC to regulate the interstate traffic. And, the legislature made not attempt to limit Chapter 284 to interstate traffic.

(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.

VIII. SEVERANCE

The Respondents request that if the Court grants Verizon Wireless' motion it sever the unconstitutional provisions from the balance of Chapter 284. *See, e.g.,* Resp. Reply, p. 9. The Respondents identify the correct legal standard to be applied in determining whether unconstitutional provisions should be severed. *Id.*

Verizon Wireless has not in this case challenged all of Chapter 284, but has asked only that the Court preempt the enforcement of identification, reporting, and remedy provisions as applied to CMRS traffic. As a result, Verizon Wireless does not object to an order that renders Chapter 284 unenforceable as to CMRS traffic but leaves intact obligations that apply to landline traffic.

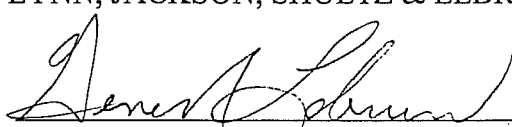
The above statement is subject to one caveat. Verizon Wireless has challenged both the substantive requirements imposed on CMRS providers and the remedy provided to LECs. If the Court were to preempt either the substantive requirements or the remedy, but not both, the severance analysis would be slightly different. While it is reasonable to assume that the Legislature would have enacted Chapter 284 to address landline traffic even if it could not address wireless traffic, it is also reasonable to believe that within the CMRS category, the requirement and the remedy are inseparably connected. As a result, if either is preempted, the other should be preempted as well. This Court conducted a similar analysis in *American Meat Institute v. Barnett*, 64 F. Supp. 2d 906 (D.S.D. 1999). In that case, the Court identified unconstitutional provisions and then also struck provisions that are explicitly tied to or dependent on the unconstitutional provisions. *Id.* at 922. Where a provision is dependent on a struck

section, or establishes a remedy for a violation that has been struck, the Court properly determined that the Legislature would not have passed one without the other. *Id.* Similar treatment is appropriate here.

IX. CONCLUSION

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

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

DATED this 17th day of January, 2006 By: 

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by first class mail, postage prepaid, true and correct copies of the foregoing **Plaintiffs' Reply Memorandum Of Law In Support Of Motion For Summary Judgment** and **Second Affidavit of Philip Schenkenberg** relative to the above-entitled matter.

Gene N. Lebrun