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 **SECOND AFFIDAVIT OF PHILIP R. SCHENKENBERG**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

1. My name is Philip R. Schenkenberg. I am a shareholder at the law firm of Briggs and Morgan, P.A.. I am an attorney for Verizon Wireless in the above matter. I make this affidavit in support of Verizon Wireless' Motion for Summary Judgment.

2. Attached as Exhibit A are two pleadings filed by SDTA Companies with the South Dakota Public Utilities Commission asserting claims under Chapter 284.

3. Attached as Exhibit B is the expert report of Larry Thompson, served on September 1, 2005.

4. Attached as Exhibit C is the Affidavit of Larry Thompson that indicates which portions are either legal opinion or beyond the scope of Mr. Thompson's expert report.

5. Attached as Exhibit D is a copy of *Ace Tel. Ass'n v. Koppendrayer*, ___ F.3d ___, Nos. 05-1170, 05-1171, 2005 WL 3543671 (8th Cir. Dec. 29, 2005).

6. Attached as Exhibit E is a copy of *Alma Tel. Co. v. Pub. Serv. Comm'n of Missouri*, ___ S.W.3d ___, 2006 WL 44350 (Jan. 10, 2006).

FURTHER AFFIANT SAYETH NOT.

Philip R. Schenkenberg

Subscribed and sworn to before me
this 13th day of January, 2006.

Notary Public

SHERYL M. O'NEILL
Notary Public
Minnesota
My Commission Expires January 31, 2010

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Court File No. 04-3014

_____, being first duly sworn, deposes and states that on the ____ day of January, 2006, (s)he served the attached SECOND AFFIDAVIT OF PHILIP R. SCHENKENBERG upon:

Darla Pollman Rogers
Ritter, Rogers, Wattier & Brown, LLP
319 South Coteau Street
P.O. Box 280
Pierre, South Dakota 57501-0280

Rolayne Ailts Wiest
South Dakota Public Utilities Commission
500 East Capitol
Pierre, South Dakota 57504-5070

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

_____

Subscribed and sworn to before me
this _____ day of January, 2006.

_____
Notary Public

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF WWC LICENSE LLC AGAINST GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC.; VIVIAN TELEPHONE COMPANY; SIOUX VALLEY TELEPHONE COMPANY; UNION TELEPHONE COMPANY; ARMOUR INDEPENDENT TELEPHONE COMPANY; BRIDGEWATER-CANISTOTA INDEPENDENT TELEPHONE COMPANY; AND KADOKA TELEPHONE COMPANY	DOCKET NO. CT05-001 AMENDED ANSWER AND AMENDED COUNTERCLAIM OF GOLDEN WEST COMPANIES

COME NOW Golden West Telecommunications Cooperative, Inc.; Vivian Telephone Company; Sioux Valley Telephone Company; Union Telephone Company; Armour Independent Telephone Company; Bridgewater-Canistota Independent Telephone Company; and Kadoka Telephone Company (hereinafter collectively referred to as "Golden West Companies"), by and through Riter, Rogers, Wattier & Brown, LLP, of 319 South Coteau Street, Pierre, South Dakota 57501, and hereby submit this Answer to the Amended Complaint filed by WWC License LLC (hereinafter "WWC") before the South Dakota Public Utilities Commission ("Commission"), and assert this Amended Counterclaim against WWC, pursuant to ARSD 20:10:01:11.01 and SDCL §15-6-13(a). All reference herein to the Complaint refer to WWC's Amended Complaint.

EXHIBIT A

JURISDICTION

1. The entire jurisdictional paragraph of the Reciprocal Interconnection, Transport and Termination Agreement ("Interconnection Agreement" or "Interconnection Agreements") provides as follows:

> 14.16 Governing Law – For all claims under this Agreement, that are based upon issues within the jurisdiction of the FCC or governed by federal law, the Parties agree that the remedies for such claims shall be governed by the FCC and the Act. For all claims under this agreement that are based upon issues within the jurisdiction of the Commission or governed by state law, the Parties agree that the jurisdiction for all such claims shall be with such Commission, and the remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of South Dakota without reference to conflict of law provisions.

2. This Action will require an interpretation and adjudication of the contractual rights and obligations between parties.

3. As a general rule, administrative agencies and commissions cannot consider or adjudicate contractual rights and obligations between parties, except where they have been granted power by organic or valid statutory enactment to do so. See In re Northwestern (Hub City), 560 NW 2d 925 (SD 1997), quoting from Williams Elec. Co-op v. Montana-Dakota Util. Co., 79 NW 2d 508 (ND 1956).

4. Consideration and adjudication of contractual rights and obligations between parties are issues within the jurisdiction of the Circuit Courts of the State of South Dakota.

5. Accordingly, this Commission may choose to defer jurisdiction of this case to the South Dakota Circuit Courts.

ANSWER

6. Golden West Companies reallege Paragraphs 1-5 of this Answer.

7. The Complaint of WWC fails to state a claim upon which relief can be granted, and should therefore be dismissed.

8. Golden West Companies deny each and every matter and allegation in WWC's Complaint, unless herein specifically admitted or qualified.

9. Golden West Companies admit Paragraphs 1 and 2 of WWC's Complaint, except for the date of approval for Sioux Valley Telephone Company's Interconnection Agreement (October 20, 1004), which Golden West Companies deny.

10. Golden West Companies admit that a portion of Section 14.16 of the Interconnection Agreement is accurately set forth in Paragraph 3 of the Complaint, but deny that Paragraph 3 sets forth all of the jurisdictional provisions of the Interconnection Agreement.

11. Golden West Companies admit that the Interconnection Agreement states that the effective date of the Agreement is January 1, 2003 (Paragraph 13.1 of the Interconnection Agreement), but deny all other matters stated in Paragraph 4 of the Complaint.

12. Golden West Companies admit that the previous Interconnection Agreements terminated on December 31, 2002, but deny all other allegations in Paragraph 5 of the Complaint.

13. Golden West Companies admit Paragraph 6 of the Complaint.

14. Golden West Companies deny Paragraphs 7 and 8 of the Complaint.

15. Golden West Companies admit that in addition to the interconnection agreement, Golden West Companies have the right to charge intrastate access rates for intrastate traffic. Golden West Companies deny that portion of Paragraph 9 of the Com-

plaint alleging the statutes referred therein are unconstitutional, and further assert that the Commission does not have authority to determine the constitutionality of the statutes.

16. Golden West Companies deny all allegations contained in Paragraph 10 of the Complaint, including but not limited to the amount of WWC's calculations, that any interest is due under the Interconnection Agreement, and the figures contained in Exhibit B of the Complaint.

17. Golden West Companies admit that prior to the current Interconnection Agreement, in addition to the previous Interconnection Agreement, WWC and Golden West had a transiting agreement. Golden West Companies deny the balance of Paragraph 11 of the Complaint.

18. Golden West Companies admit to calculating credits due to WWC, as stated in Exhibit C of the Complaint, but deny all other allegations in Paragraph 12 of the Complaint.

19. Golden West Companies deny Paragraphs 13, 14, 15 and 16 of the Complaint.

20. Golden West Companies admit receipt of a letter from Ron Williams dated January 14, 2004, but deny all other allegations in Paragraph 14, and specifically deny the applicability of SDCL §49-13-14.1 or that WWC is entitled to double its damages.

AFFIRMATIVE DEFENSES

21. Golden West Companies reallege Paragraphs 1 through 20 of this Answer.

22. As an affirmative defense, Golden West Companies allege that WWC's Complaint is barred by the Statute of Limitations.

A. On or about March 1, 2003, WWC and attorneys for all South Dakota Rural Telecommunications Companies (RTCs), including Golden West Companies, entered into a Settlement Agreement that set forth the basic terms of the agreed-upon settlement for interconnection between WWC and the RTCs. (See Confidential Exhibit A).

B. Said Settlement Agreement established the effective date of interconnection as January 1, 2003.

C. Said Settlement Agreement established a two-year Statute of Limitations for past due reciprocal compensation charges.

D. WWC alleges that Golden West Companies owe WWC for past due reciprocal compensation charges, but WWC failed to initiate the action within two years of the effective date of the Interconnection Agreement, and thus WWC's claim is barred by the Statute of Limitations agreed to by the parties in the Settlement Agreement.

23. As an affirmative defense, Golden West Companies allege that WWC did not comply with the terms and conditions of the Interconnection Agreement, as hereinafter set forth, and WWC is thus estopped from filing an action against Golden West Companies.

24. The Interconnection Agreement sets forth the effective date of the Agreement, but is silent as to the method of truing up reciprocal charges back to January 1 of 2003.

25. Golden West Companies did not charge the negotiated rates until approved by the Commission and recalculated by the Companies, because of uncertainty as to whether the Commission would approve the rates set forth in the Interconnection Agreements for retroactive application.

A. Ratemaking authority delegated to State Public Utilities Commissions has generally been characterized as a legislative function; and accordingly, it has often been held that rates established in the utility ratemaking process cannot be applied retroactively. See Peoples Natural Gas Company vs. Minnesota Public Utilities Commission, 369 N.W.2d 530 (MN 1985); and Northwestern Public Service Company vs. Cities of Chamberlain, Huron, Mitchell, Redfield, Webster, and Yankton, 265 N.W.2d 867 (SD 1978).

B. Although the rates set forth in the Interconnection Agreements submitted by the Golden West Companies and WWC were proposed by terms of each of the Agreements to have an effective date of January 1, 2003, it was believed by the Golden West Companies at the time that this Commission might not adopt the rates retroactively. The general prohibition against retroactive ratemaking referenced above and the lack of any specific statutory authority granted to this Commission to approve rates retroactively is reason to question the validity of the contracted rates back to the January 1, 2003, date in this proceeding.

26. Following Commission approval of the rate retroactive to January 1, 2003, Golden West Companies began the process of calculating the reciprocal charges back to January 1, 2003, for each Company.

27. Upon completion of those calculations and commencing with December 2004 invoices, Golden West Companies have been crediting true-up charges on WWC's monthly invoices, and will continue to do so until the total amount, as calculated by Golden West Companies, is fully credited, all in accordance with the letter of Dennis Law to WWC dated December 1, 2004, (Exhibit C of WWC's Complaint).

28. The amounts of WWC's claimed "Refund Due" in Paragraph 10 of its Amended Complaint do not include credits issued by Golden West Companies to WWC from December of 2004 through the present date.

29. Since the Interconnection Agreement is silent as to the method of truing up reciprocal charges back to January 1 of 2003, Golden West Companies have not breached any terms and conditions of the Interconnection Agreement by crediting such reciprocal charges to accomplish the true-up.

30. Golden West Companies are entitled to compensation for any transiting services provided to WWC by Golden West Companies.

31. Plaintiff has failed to provide sufficient allegations or any legal basis that would entitle Western Wireless to recover double damages or attorneys fees pursuant to SDCL §49-13-14.1. By Order dated August 26, 2005, this Commission dismissed Plaintiff's claims for double damages and attorneys' fees.

32. SDCL 49-31-109 through 49-31-115 are constitutional, and the Commission does not have jurisdiction to decide otherwise.

33. The Interconnection Agreement authorizes Golden West Companies to charge intrastate access charges, and Golden West Companies have properly charged intrastate access charges for intrastate traffic.

AMENDED COUNTERCLAIM

34. Golden West Companies reallege paragraphs 1 through 33 of the Answer.

35. For its Counterclaim against WWC, Golden West Companies allege the following.

FACTUAL BASIS

36. This Counterclaim is against WWC License LLC, a wireless carrier of 3650 131st Ave. SE, Suite 400, Bellevue, Washington, 98006 ("WWC").

37. The parties executed and the Commission approved Interconnection Agreements between the parties on the following dates:

Company	Executed Dated	Approved Date
WWC and Golden West	January 28, 2004	May 13, 2004
WWC and Vivian Telephone Co.	February 18, 2004	June 30, 2004
WWC and Sioux Valley Telephone Co.	April 15, 2004	October 20, 2004
WWC and Union Telephone Co.	June 4, 2004	August 26, 2004
WWC and Armour Independent Telephone Co.	June 4, 2004	August 26, 2004
WWC and Bridgewater-Canistota Telephone Co.	June 4, 2004	August 26, 2004

38. Contained in the Interconnection Agreements were provisions concerning InterMTA Traffic, as follows:

> 1.0 Definitions
>
> "InterMTA traffic" means all wireless to wireline calls, which originate in one MTA and terminate in another MTA based on the location of the connecting cell site serving the wireless end user and the location of the end office serving the wireline end user.
>
> 7.2.3 For billing purposes, if either Party is unable to

> classify on an automated basis the traffic delivered by CMRS as local traffic or interMTA traffic, a Percent InterMTA Use (PIU) factor will be used, which represents the estimated portion of interMTA traffic delivered by CMRS provider.
>
> The initial PIU factor to be applied to total minutes of use delivered by the CMRS Provider shall be 3.0%. This factor shall be adjusted three months after the executed date of this Agreement and every six months thereafter during the term of this Agreement, based on a mutually agreed to traffic study analysis. Each of the Parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic.

39. Larry Thompson, a professional engineer from Vantage Point Solutions ("VPS"), attempted to negotiate a traffic study analysis with WWC on behalf of Golden West Companies and other Companies, but despite numerous requests starting as early as July 17, 2003, and continuing to date, WWC has refused to negotiate in good faith with Mr. Thompson.

40. Mr. Thompson, on behalf of Golden West Companies, is unable to finally calculate the InterMTA Factor for all of the Companies because of WWC's failure to supply necessary data, but according to preliminary estimates, Mr. Thompson anticipates that the InterMTA Factor for Golden West Companies will be higher than 3%. VPS has calculated the Golden West Companies InterMTA Factor as follows:

Golden West Telecommunications Cooperative	15.10%
Vivian Telephone Company	32.60%
Sioux Valley Telephone Company	6.20%
Union Telephone Company	5.10%
Bridgewater-Canistota Telephone Company	12.20%
Kadoka Telephone Company	28.00%
Armour Independent Telephone Company	20.10%

41. According to the calculations for Golden West Companies, this would result in a WWC payment shortfall, on a monthly basis, for all monthly billings for all

companies prior to July 1, 2004, with anticipated increases in that monthly amount for billings after July 1, 2004. The approximate monthly shortfalls of the Golden West Companies between July of 2004, and June of 2005 are as follows:

Golden West Telecommunications Cooperative	$20,371.00
Vivian Telephone Company	36,259.45
Sioux Valley Telephone Company	955.87
Union Telephone Company	201.25
Bridgewater-Canistota Telephone Company	527.23
Kadoka Telephone Company	677.07
Armour Independent Telephone Company	736.66

42. WWC's failure to negotiate in good faith, as specifically required by the Interconnection Agreement, constitutes a breach of said Agreement by Western Wireless.

43. Golden West Companies are entitled to a refund from WWC for the amounts due to Golden West Companies as a result of continued use of the default InterMTA factor of 3% caused by WWC's continuing refusal to negotiate a new and accurate InterMTA factor.

44. Alternatively and at a minimum, Golden West Companies are entitled to offset amounts being credited to WWC with amounts due to Golden West Companies following adjustment of the InterMTA Factor.

45. In addition to the duties imposed by the Interconnection Agreements, WWC also has the duty as the originating carrier delivering both local and non-local telecommunications traffic to separately provide the terminating carrier with accurate and verifiable information identifying traffic sent for termination, specifically including percentage measurements that enable the terminating carrier to appropriately classify the traffic as being either local or non-local, and to assess the appropriate applicable transport

and termination or access charges. If this accurate and verifiable information is not provided by the originating carrier, the terminating carrier is authorized to classify all unidentified traffic terminated as non-local traffic for service billing purposes. See SDCL §49-31-110.

46. WWC, by its failure to abide by the terms of the existing Interconnection Agreements, is also acting in violation of SDCL §49-31-110, and by refusing to cooperate in appropriately identifying its terminated traffic is liable for compensation as set forth in the statute (treatment of all traffic as non-local and subject to access charges).

WHEREFORE, GOLDEN WEST COMPANIES pray:

1. That this case be transferred to Circuit Court;

2. That WWC's Complaint and all claims asserted therein be dismissed with prejudice, and that WWC recover nothing thereby or thereunder;

3. That judgment be entered in favor of Golden West Companies and against WWC, in an amount to be determined at hearing, which represents the amount of underpayment to Golden West Companies as a result of the improper and unadjusted InterMTA Factor.

4. Alternatively, that the amount of credits to WWC as calculated by Golden West Companies be offset by the amount due and owing to Golden West Companies as a result of application of the proper InterMTA Factor.

5. That Golden West Companies are entitled to interest on all amounts found to be due and owing from WWC to Golden West Companies.

6. That Golden West Companies be awarded costs, disbursements, and attorneys fees incurred herein; and

7. For such other and further relief as the Commission or Court deems just and proper.

DATED this fourteenth day of September, 2005.

Darla Pollman Rogers

Darla Pollman Rogers
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501
Telephone 605-224-7889
Attorney for Golden West Companies

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Amended Answer and Counterclaim of Golden West Companies was served via the method(s) indicated below, on the fourteenth day of September, 2005, addressed to:

Talbot J. Wieczorek	(X)	First Class Mail
Gunderson, Palmer, Goodsell & Nelson, LLP	( )	Hand Delivery
P. O. Box 8045	( )	Facsimile
Rapid City, South Dakota 57709	( )	Overnight Delivery
	( )	E-Mail
Rolayne Ailts Wiest	(X)	First Class Mail
South Dakota Public Utilities Commission	( )	Hand Delivery
500 East Capitol	( )	Facsimile
Pierre SD 57501	( )	Overnight Delivery
	( )	E-Mail

Dated this fourteenth day of September, 2005.

Darla Pollman Rogers

Darla Pollman Rogers
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, South Dakota 57501
Telephone (605) 224-7889
Fax (605) 224-7102

CONFIDENTIAL

1

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF WWC LICENSE LLC AGAINST VENTURE COMMUNICATIONS CO-OPERATIVE	DOCKET NO. CT05-_____ ANSWER AND COUNTERCLAIM OF VENTURE COMMUNICATIONS TO COMPLAINT OF WWC

COMES NOW VENTURE COMMUNICATIONS COOPERATIVE (hereinafter "Venture"), by and through Riter, Rogers, Wattier & Brown, LLP, of 319 South Coteau Street, Pierre, South Dakota 57501, and hereby submits this Answer to the Complaint filed by WWC License LLC (hereinafter "WWC") before the South Dakota Public Utilities Commission ("Commission"), and asserts this Counterclaim against WWC, pursuant to ARSD 20:10:01:11.01 and SDCL §15-6-13(a).

JURISDICTION

1. The entire jurisdictional paragraph of the Reciprocal Interconnection, Transport and Termination Agreement ("Interconnection Agreement" or "Interconnection Agreements") provides as follows:

> 14.16 Governing Law – For all claims under this Agreement, that are based upon issues within the jurisdiction of the FCC or governed by federal law, the Parties agree that the remedies for such claims shall be governed by the FCC and the Act. For all claims under this agreement that are based upon issues within the jurisdiction of the Commission or governed by state law, the Parties agree that the jurisdiction for all such claims shall be with such Commission, and the remedy for such claims shall be as provided for by such Commission. In all other respects, this Agreement shall be governed by the domestic laws of the State of South Dakota without reference to conflict of law provisions.

2. This Action will require an interpretation and adjudication of the contractual rights and obligations between parties.

3. As a general rule, administrative agencies and commissions cannot consider or adjudicate contractual rights and obligations between parties, except where they have been granted power by organic or valid statutory enactment to do so. See In re Northwestern (Hub City), 560 NW 2d 925 (SD 1997), quoting from Williams Elec. Co-op v. Montana-Dakota Util. Co., 79 NW 2d 508 (ND 1956).

4. Consideration and adjudication of contractual rights and obligations between parties are issues within the jurisdiction of the Circuit Courts of the State of South Dakota.

5. Accordingly, this Commission may choose to defer jurisdiction of this case to the South Dakota Circuit Courts.

ANSWER

6. Venture realleges Paragraphs 1-5 of this Answer.

7. The Complaint of WWC fails to state a claim upon which relief can be granted, and should therefore be dismissed.

8. Venture denies each and every matter and allegation in WWC's Complaint, unless herein specifically admitted or qualified.

9. Venture admits Paragraphs 1 and 2 of WWC's Complaint.

10. Venture admits that a portion of Section 14.16 of the Interconnection Agreement is accurately set forth in Paragraph 3 of the Complaint, but denies that Paragraph 3 sets forth all of the jurisdictional provisions of the Interconnection Agreement.

11. Venture admits that the Interconnection Agreement states that the effective date of the Agreement is January 1, 2003 (Paragraph 13.1 of the Interconnection Agreement), but deny all other matters stated in Paragraph 4 of the Complaint.

12. Venture admits that the previous Interconnection Agreements terminated on December 31, 2002, but deny all other allegations in Paragraph 5 of the Complaint.

13. Venture denies Paragraph 6 of the Complaint.

14. Venture denies all allegations contained in Paragraph 7 of the Complaint, including but not limited to the amount of WWC's calculations, that any interest is due under the Interconnection Agreement, and the figures contained in Exhibit B of the Complaint.

15. Venture denies Paragraphs 8, 9, 10, 11, and 12 of the Complaint.

16. Venture admits that portion of Paragraph 13 alleging WWC requested Venture to refund the money, and admits to receipt of a letter from Talbot J. Wieczorek dated February 14, 2005, which is attached to Plaintiff's Complaint as Exhibit C. Venture denies all other allegations in Paragraph 13, and specifically denies the applicability of SDCL §49-13-14.1 or that WWC is entitled to double its damages.

AFFIRMATIVE DEFENSES

17. Venture realleges Paragraphs 1 through 16 of this Answer.

18. As an affirmative defense, Venture alleges that WWC's Complaint is barred by the Statute of Limitations.

A. On or about March 1, 2003, WWC and attorneys for all South Dakota Rural Telecommunications Companies (RTCs), including Venture, entered into a Settlement Agreement that set forth the basic terms of the agreed-upon settlement for interconnection between WWC and the RTCs. (See Confidential Exhibit A).

B. Said Settlement Agreement established the effective date of interconnection as January 1, 2003.

C. Said Settlement Agreement established a two-year Statute of Limitations for past due reciprocal compensation charges.

D. WWC alleges that Venture owes WWC for past due reciprocal compensation charges, but WWC failed to initiate the action within two years of the effective date of the Interconnection Agreement, and thus WWC's claim is barred by the Statute of Limitations agreed to by the parties in the Settlement Agreement.

19. As an affirmative defense, Venture alleges that WWC did not comply with the terms and conditions of the Interconnection Agreement, as hereinafter set forth, and WWC is thus estopped from filing an action against Venture.

20. The Interconnection Agreement sets forth the effective date of the Agreement, but is silent as to the method of truing up reciprocal charges back to January 1 of 2003.

21. Venture did not charge the negotiated rates until approved by the Commission and recalculated by the Companies, because of uncertainty as to whether the Commission would approve the rates set forth in the Interconnection Agreements for retroactive application.

A. Ratemaking authority delegated to State Public Utilities Commissions has generally been characterized as a legislative function; and accordingly, it has often been held that rates established in the utility ratemaking process cannot be applied retroactively. See Peoples Natural Gas Company vs. Minnesota Public Utilities Commission, 369 N.W.2d 530 (MN 1985); and Northwestern Public Service Company vs. Cities of

Chamberlain, Huron, Mitchell, Redfield, Webster, and Yankton, 265 N.W.2d 867 (SD 1978).

B. Although the rates set forth in the Interconnection Agreements submitted by Venture and WWC were proposed by terms of each of the Agreements to have an effective date of January 1, 2003, it was believed by Venture at the time that this Commission might not adopt the rates retroactively. The general prohibition against retroactive ratemaking referenced above and the lack of any specific statutory authority granted to this Commission to approve rates retroactively is reason to question the validity of the contracted rates back to the January 1, 2003, date in this proceeding.

22. Following Commission approval of the rate retroactive to January 1, 2003, Venture began the process of calculating the reciprocal charges back to January 1, 2003, for its Company.

23. Upon completion of those calculations and commencing with April, 2004, invoices, Venture has been crediting true-up charges on WWC's monthly invoices, and will continue to do so until the total amount, as calculated by Venture, is fully credited.

24. Since the Interconnection Agreement is silent as to the method of truing up reciprocal charges back to January 1 of 2003, Venture has not breached any terms and conditions of the Interconnection Agreement by crediting such reciprocal charges to accomplish the true-up.

25. Plaintiff has failed to provide sufficient allegations or any legal basis that would entitle Western Wireless to recover double damages or attorneys fees pursuant to SDCL §49-13-14.1.

COUNTERCLAIM

26. Venture realleges paragraphs 1 through 25 of the Answer.

27. For its Counterclaim against WWC, Venture alleges the following.

FACTUAL BASIS

28. This Counterclaim is against WWC License LLC, a wireless carrier of 3650 131st Ave. SE, Suite 400, Bellevue, Washington, 98006 ("WWC").

29. The Commission approved Interconnection Agreements between the parties on April 5, 2004.

30. Contained in the Interconnection Agreements were provisions concerning InterMTA Traffic, as follows:

> 1.0 Definitions
>
> "InterMTA traffic" means all wireless to wireline calls, which originate in one MTA and terminate in another MTA based on the location of the connecting cell site serving the wireless end user and the location of the end office serving the wireline end user.
>
> 7.2.3 For billing purposes, if either Party is unable to classify on an automated basis the traffic delivered by CMRS as local traffic or interMTA traffic, a Percent InterMTA Use (PIU) factor will be used, which represents the estimated portion of interMTA traffic delivered by CMRS provider.
>
> The initial PIU factor to be applied to total minutes of use delivered by the CMRS Provider shall be 3.0%. This factor shall be adjusted three months after the executed date of this Agreement and every six months thereafter during the term of this Agreement, based on a mutually agreed to traffic study analysis. Each of the Parties to this Agreement is obligated to proceed in good faith toward the development of a method of traffic study that will provide a reasonable measurement of terminated InterMTA traffic.

31. Larry Thompson, a professional engineer from Vantage Point Solutions ("VPS"), attempted to negotiate a traffic study analysis with WWC on behalf of Venture and all other Companies, but despite numerous requests starting as early as

July 17, 2003, and continuing to date, WWC has refused to negotiate in good faith with Mr. Thompson.

32. Mr. Thompson, on behalf of Venture, has calculated an InterMTA Factor of 9.0%.

33. According to the calculations for Venture, this would result in a WWC payment shortfall, on a monthly basis, for monthly billings prior to July 1, 2004, with anticipated increases in that amount for billings after July 1, 2004.

34. WWC's failure to negotiate in good faith, as specifically required by the Interconnection Agreement, constitutes a breach of said Agreement by Western Wireless.

35. Venture is entitled to a refund from WWC for the amounts due to Venture as a result of continued use of the default InterMTA factor of 3% caused by WWC's continuing refusal to negotiate a new and accurate InterMTA factor.

36. Alternatively and at a minimum, Venture is entitled to offset amounts being credited to WWC with amounts due to Venture following adjustment of the InterMTA Factor.

37. In addition to the duties imposed by the Interconnection Agreements, WWC also has the duty as the originating carrier delivering both local and non-local telecommunications traffic to separately provide the terminating carrier with accurate and verifiable information identifying traffic sent for termination, specifically including percentage measurements that enable the terminating carrier to appropriately classify the traffic as being either local or non-local, and to assess the appropriate applicable transport and termination or access charges. If this accurate and verifiable information is not pro-

vided by the originating carrier, the terminating carrier is authorized to classify all unidentified traffic terminated as non-local traffic for service billing purposes. See SDCL §49-31-110.

38. WWC, by its failure to abide by the terms of the existing Interconnection Agreements, is also acting in violation of SDCL §49-31-110, and by refusing to cooperate in appropriately identifying its terminated traffic is liable for compensation as set forth in the statute (treatment of all traffic as non-local and subject to access charges).

WHEREFORE, VENTURE prays:

1. That this case be transferred to Circuit Court;

2. That WWC's Complaint and all claims asserted therein be dismissed with prejudice, and that WWC recover nothing thereby or thereunder;

3. That judgment be entered in favor of Venture and against WWC, in an amount to be determined at hearing, which represents the amount of underpayment to Venture as a result of the improper and unadjusted InterMTA Factor.

4. Alternatively, that the amount of credits to WWC as calculated by Venture be offset by the amount due and owing to Venture as a result of application of the proper InterMTA Factor.

5. That Venture be awarded costs, disbursements, and attorneys fees incurred herein; and

6. For such other and further relief as the Commission or Court deems just and proper.

DATED this eleventh day of April, 2005.

Darla Pollman Rogers

Darla Pollman Rogers
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, SD 57501
Telephone 605-224-7889
Attorney for Venture

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Answer and Counter-claim of Venture was served via the method(s) indicated below, on the eleventh day of April, 2005, addressed to:

Talbot J. Wieczorek	(X)	First Class Mail
Gunderson, Palmer, Goodsell & Nelson, LLP	( )	Hand Delivery
P. O. Box 8045	( )	Facsimile
Rapid City, South Dakota 57709	( )	Overnight Delivery
	(X)	E-Mail

Dated this eleventh day of April, 2005.

Darla Pollman Rogers

Darla Pollman Rogers
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, South Dakota 57501
Telephone (605) 224-7889
Fax (605) 224-7102
Attorney for Venture

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT FILED BY WWC LICENSE LLC AGAINST GOLDEN WEST TELECOMMUNICATIONS COOPERATIVE, INC., VIVIAN TELEPHONE COMPANY, SIOUX VALLEY TELEPHONE COMPANY, UNION TELEPHONE COMPANY, ARMOUR INDEPENDENT TELEPHONE COMPANY, BRIDGEWATER-CANISTOTA INDEPENDENT TELEPHONE COMPANY AND KADOKA TELEPHONE COMPANY REGARDING INTERCARRIER BILLINGS	)	ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING JURISDICTION CT05-001

On February 16, 2005, the Public Utilities Commission (Commission) received a complaint filed by WWC License LLC (Complainant) against Golden West Telecommunications Cooperative, Inc., Vivian Telephone Company, Sioux Valley Telephone Company, Union Telephone Company, Armour Independent Telephone Company, Bridgewater-Canistota Independent Telephone Company and Kadoka Telephone Company (Golden West Companies) regarding intercarrier billings.

On February 17, 2005, the Commission electronically transmitted notice of the filing and the intervention deadline of March 4, 2005, to interested individuals and entities. No petitions to intervene or comments were filed.

On March 8, 2005, the Commission received an Answer and Counterclaim of Golden West Companies. On March 29, 2005, the Commission received WWC's Answer to Golden West Companies' Counterclaim. On April 6, 2005, the Commission received a Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment from WWC. On May 20, 2005, the Commission received a Memorandum in Response to Complainant's Motion for Partial Summary Judgment from the Golden West Companies. On May 23, 2005, the Commission received an Affidavit of Dennis Law from the Golden West Companies.

The Commission finds that it has jurisdiction to enter this preliminary order pursuant to SDCL Chapters 1-26, 49-1, including 49-1-9 and 49-1-11, 49-13, including 49-13-1 through 49-13-14.1, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-11, 49-31-76 and 49-31-89, and ARSD Chapters 20:10:01 and 20:10:32.

At its duly noticed May 24, 2005, meeting, the Commission considered this matter. The Commission unanimously voted to grant the Motion for Partial Summary Judgment regarding jurisdiction, determining that the Commission does have jurisdiction over this matter pursuant to SDCL Chapters 49-13 and 49-31 and 47 U.S.C. § 252, but to take the

matter under advisement, and defer voting regarding WWC's request for immediate payment of undisputed overage charges and WWC's request that the Commission find interest is applicable to any overage charges. It is therefore

ORDERED, that the Motion for Partial Summary Judgment regarding jurisdiction is granted.

Dated at Pierre, South Dakota, this 26th day of May, 2005.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Delaine Kolbo

Date: 5/26/05

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

Gary Hanson

GARY HANSON, Chairman

Robert K. Sahr

ROBERT K. SAHR, Commissioner

DUSTIN M. JOHNSON, Commissioner

Expert Report

Prepared for

Civil No. 04-3014, U.S. District Court,
District of South Dakota, Central Division

Prepared by

Larry D. Thompson

Vantage Point

Customer Focused. Technology Driven.

September 1, 2005

Vantage Point Solutions
1801 North Main Street
Mitchell, SD 57301

Phone: (605) 995-1777 • Fax: (605) 995-1778
www.vantagepnt.com

EXHIBIT B

Expert Report of Larry Thompson

I am a Professional Engineer and Chief Executive Officer of Vantage Point Solutions (VPS). VPS is a telecommunications engineering and consulting company providing a full range of services including Professional Engineering, Outside Plant Engineering, strategic planning, technology evaluations, network architecture design, regulatory expertise, and feasibility studies. VPS is headquartered in Mitchell, South Dakota and employs approximately 65 fulltime staff.

I have been an active participant in the telecommunications industry since 1985. I received a Bachelors of Arts in Physics (1983) from William Jewell College, a Bachelors of Science in Electrical Engineering (1985) from the University of Kansas, and a Masters of Science in Electrical and Computer Engineering (1986) from the University of Kansas. Prior to Vantage Point Solutions, I was General Manager for the Telecom Consulting and Engineering (TCE) Business Unit of Martin Group and previous to this, was a consultant for CyberLink Corporation (Boulder, Colorado) and a satellite systems engineer for TRW (Redondo Beach, California).

I have not testified as an expert at trial or by deposition. I have testified before state regulatory commissions, but not within the last four years. I have been published in United States Telecom Association's "USTA Telecom Executive"[1] magazine and National Telecom Cooperative Association's "NTCA Rural Telecommunications

[1] "Look Who's Talking Now – Do Video and Voice Mix?", USTA Telecom Executive, September/October 2004, pg. 30-32.

Magazine."[2] I have also had my whitepapers included in various regulatory filings. I am being compensated for my work on an hourly basis at my regular billing rate of $115 per hour.

VPS provides engineering services to our clients for both their wireless and wireline networks. I have been involved in the design and implementation of many voice, data, video, and wireless networks. VPS provides engineering services for many of the rural local exchange carriers (RLECs) in South Dakota and I am familiar with their switching networks and capabilities.

I am familiar with South Dakota bill SB144 as well as South Dakota Codified Laws 49-31-109 through 49-31-115. On February 3, 2004, I provided testimony before the South Dakota State Senate committee regarding SB144. My handouts for this testimony have been attached as Exhibit 1. On February 17, 2004, I provided testimony before the South Dakota State House of Representative committee regarding SB144. My handouts have been attached as Exhibit 2.

I have assisted clients in identifying and quantifying telecommunications traffic into their company. I have done this by analyzing the System Signaling 7 (SS7) messages from the signaling network and the Automatic Message Accounting (AMA) records and Exchange Message Interface (EMI) records from various switching networks. I have assisted in identifying "phantom" traffic, so that our clients could properly bill the proper other carriers for use of their network.

I have performed numerous wireless InterMTA studies. These studies consist of processing thousands of records to determine the amount of InterMTA traffic that is

[2] "A Technology for the Next Generation", NTCA Rural Telecommunications Magazine, November/December 2003, pg. 23-26.

being delivered to my landline clients. These studies have used the NPA-NXX in the SS7 messages to provide an estimate of the InterMTA as well as using Call Detail Records (CDRs) from the wireless networks that include the caller tower location for a more accurate determination of the InterMTA factor. The goal of these studies has been to determine the amount of InterMTA. As described in the FCC First Report and Order,[3] wireless calls originating in one Major Trading Area (MTA) and terminating in the same MTA are subject to reciprocal compensation. Wireless calls that originate in one MTA and terminate in another MTA are subject to access charges. To properly bill for wireless traffic, it is necessary to also determine the amount of the InterMTA traffic that is Interstate and Intrastate in nature.

I have reviewed the claims of Verizon Wireless in its propsed Stipulation of Facts. Verizon Wireless delivers both local and access traffic over both direct and indirect trunks. The indirect trunks between RLEC and Verizon Wireless are often common trunks and the Verizon Wireless traffic is intermixed with other carrier traffic. The South Dakota statues require carriers to "transmit signaling information in accordance with commonly accepted industry standards."[4]

The Ordering and Billing Forum (OBF) has been working to expand the SS7 signaling format to better identify telecommunications traffic so the terminating carrier can more accurately bill for the traffic. Many involved with the OBF would like to see the Jurisdictional Information Parameter (JIP) field in the SS7 used to identify the wireless caller's connecting tower at the start of the call. Earlier this year, the JIP was

[3] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) (*"First Report & Order"*).
[4] South Dakota Codified Laws SDCL 49-31-110 and SDCL 49-31-111.

expanded to include information regarding the originating wireless switch.[5] This was certainly a step in the correct direction. I would expect that the use of the JIP will continue to be enhanced to provide more detailed information regarding the location of the originating wireless caller.

Because the commonly accepted industry standards for signaling continue to evolve and are not yet adequate to quantify nonlocal traffic, the South Dakota Codified Laws allow the originating carrier to "separately provide the terminating carrier with accurate information including verifiable percentage measurements that enables the terminating carrier to appropriately classify nonlocal telecommunications traffic as being either interstate or intrastate, and to assess the appropriate applicable access charges.[6] The form and substance of the accurate information required in this statue is not defined, except that it be adequate for the terminating carrier to appropriately classify the traffic and assess the applicable charges.

Because the commonly accepted industry standards for signaling may not today be adequate to determine the precise location of a wireless caller, wireless carriers often establish their delivered local and toll (interstate and intrastate) traffic ratios in an agreed upon contract. Normally the contract ratios are based on historical experience or using a special study. Since wireless carriers have the ability to determine the connecting tower of their wireless customer, a special study can accurately determine the local and toll (interstate and intrastate) mix for a given test period.

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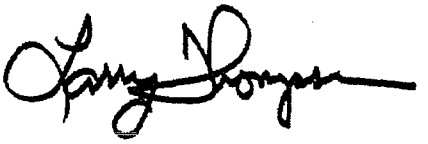
[5] Alliance for Telecommunications Industry Solutions, ATIS-0300011, Network Interconnection Interoperability (NIIF) Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks.

[6] South Dakota Codified Law SDCL 49-31-110.

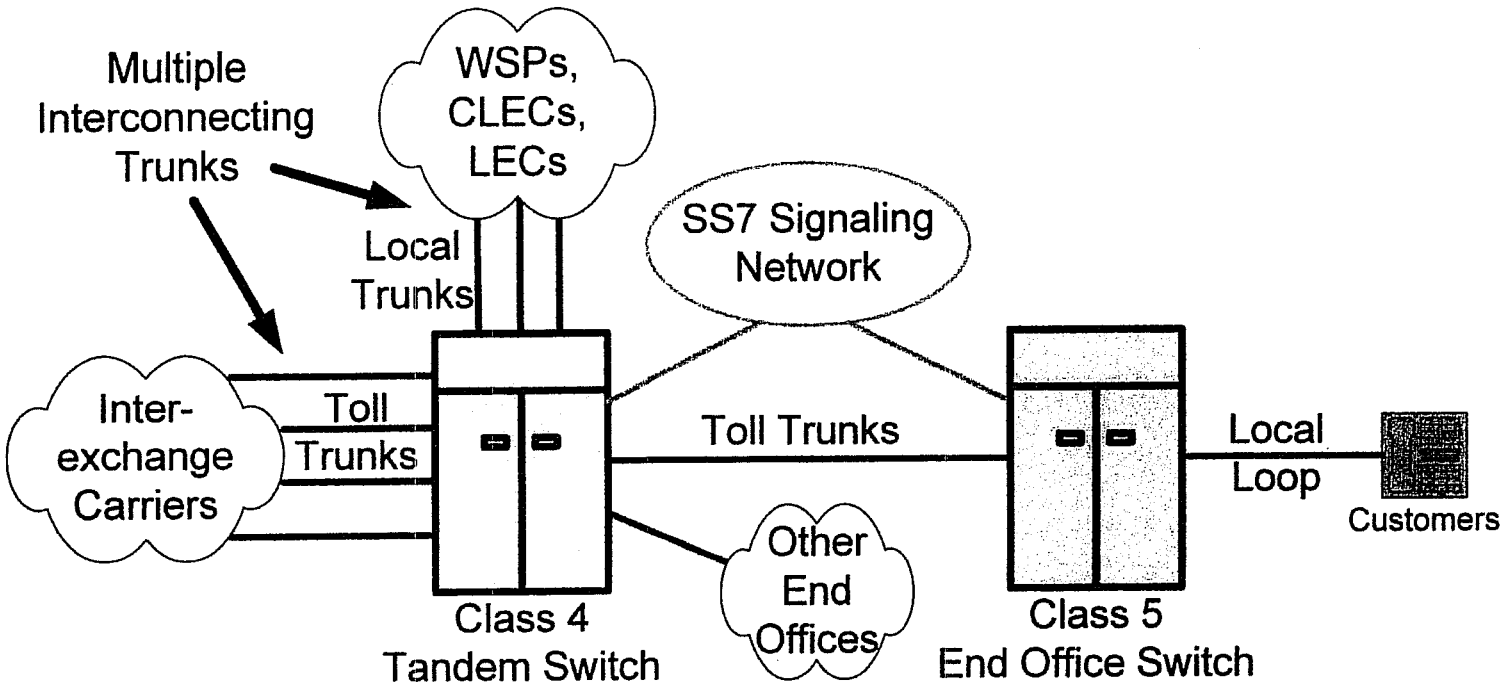
Proper classification of wireless traffic is especially important for carriers operating in South Dakota, since South Dakota has three different MTAs (Minneapolis, Denver, and Des Moines). This can be seen in Exhibit 3. In addition, much of the southern part of South Dakota borders the Omaha MTA. Because of this, South Dakota has a higher InterMTA factor than most other states. It is important for South Dakota carries to be able to accurately classify the terminating traffic to be properly compensated for the use of their network.



Larry Thompson, P.E.
Chief Executive Officer
Vantage Point Solutions, Inc.

September 1, 2005
Date

Switching Network



Switches Can Record Call Information Based on SS7, Trunk, and Switch Parameters

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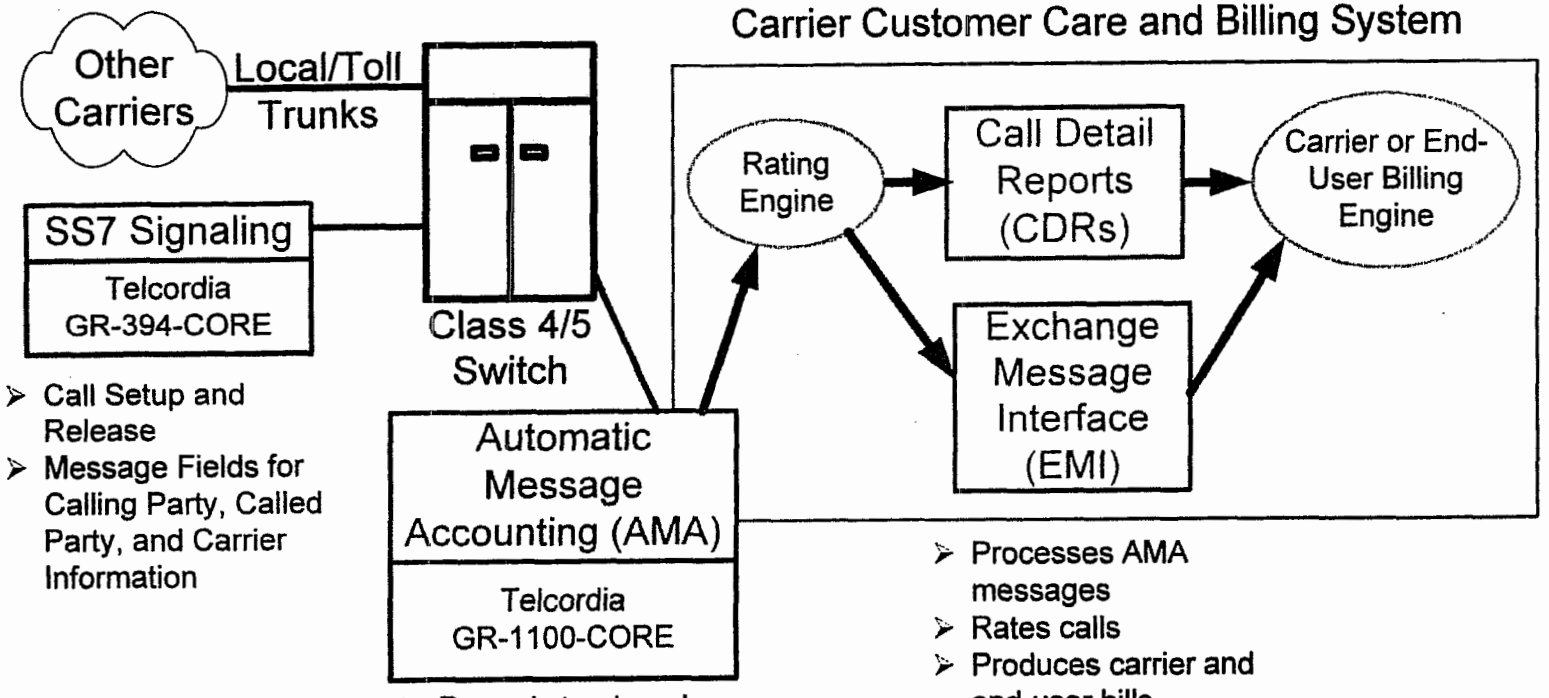
Carrier Call Information Processing



- Call Setup and Release
- Message Fields for Calling Party, Called Party, and Carrier Information

- Records trunk and call information
- SS7 Message information
- RAW format

- Processes AMA messages
- Rates calls
- Produces carrier and end-user bills

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SS7 Signaling Overview

- Signaling protocol used between switches in the PSTN
- Sets up and releases call paths
- Call setup messages has fields for
  - Calling party number
  - Called party number
  - Local Routing Number
  - Carrier Identification Number
  - Many other fields . . .

Vantage Point

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AMA Record Overview

- Records detailed information about each call
- SS7 Parameters
  - Calling and Called Number
  - Disconnect method
  - Jurisdiction Information, etc.
- Switch information
  - Trunk, etc.
- Call parameters
  - Duration
  - Time of day, etc.

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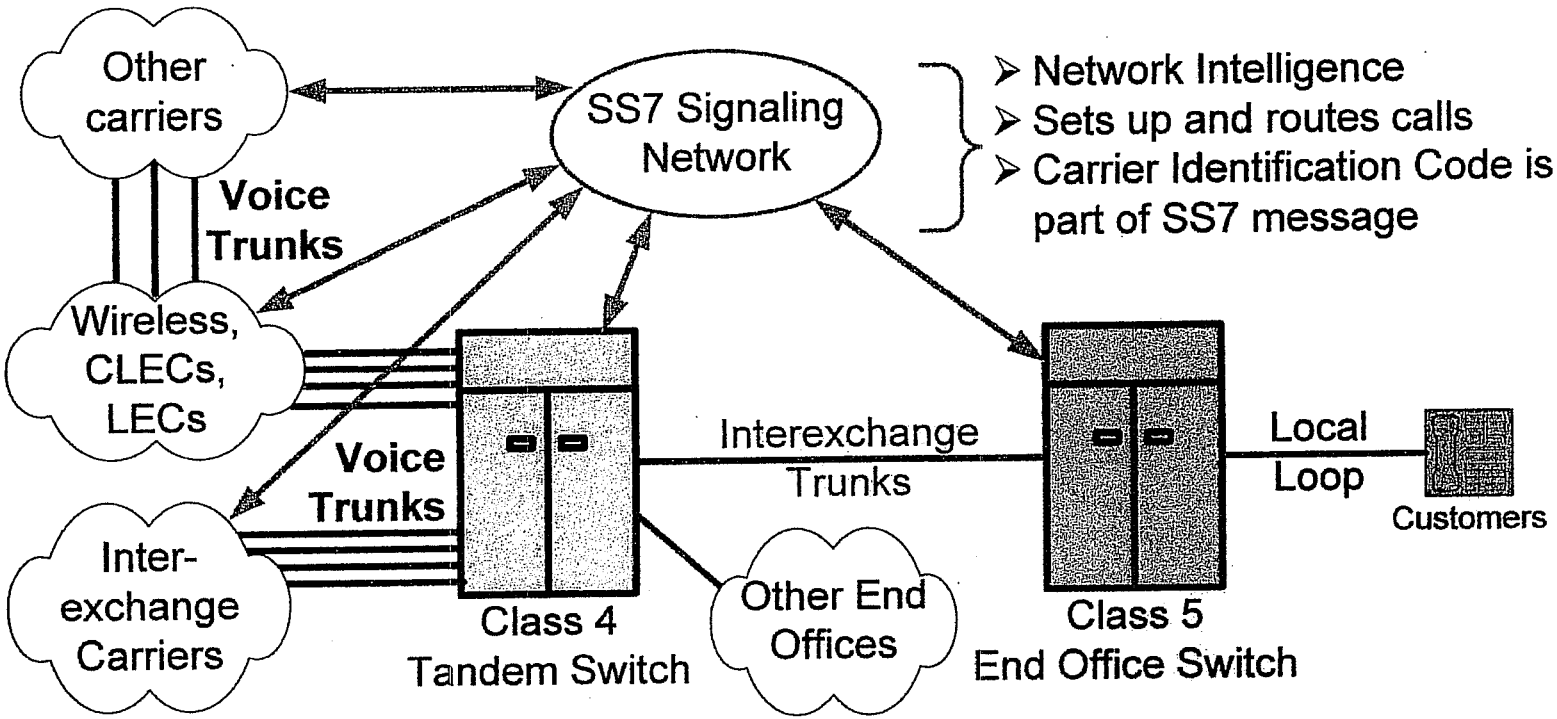
Switching Network



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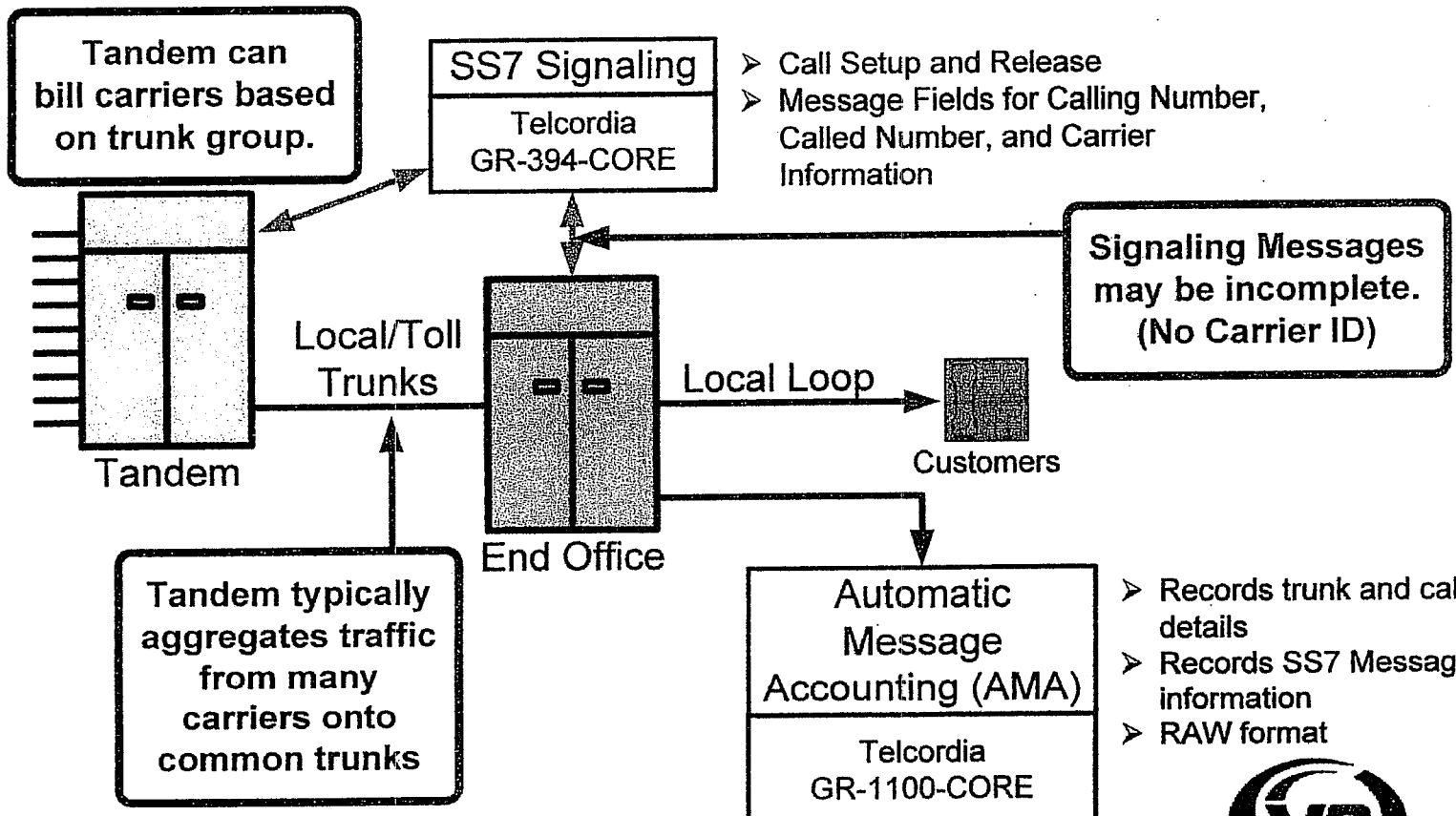
Call Recording



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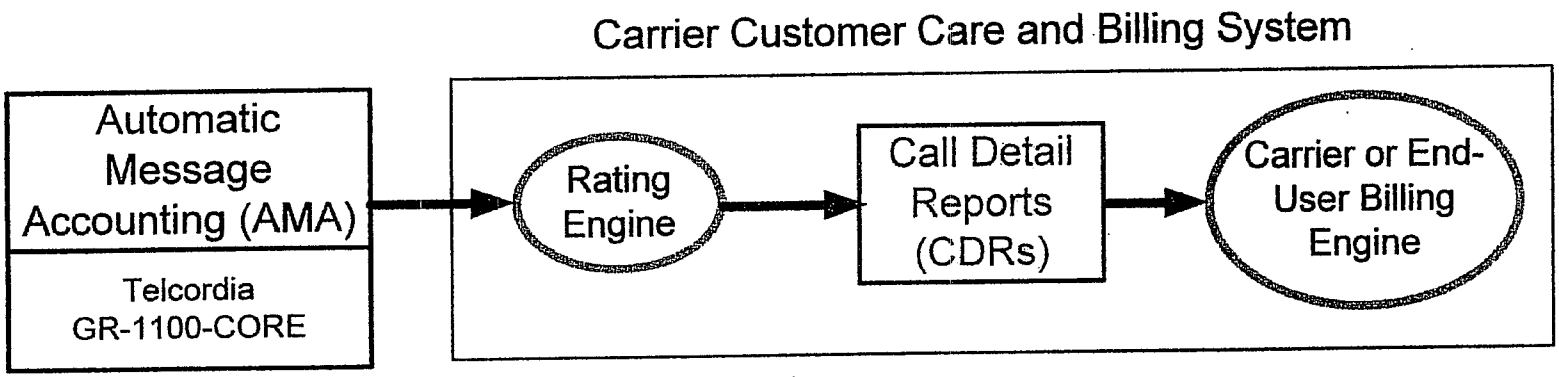
Call Processing and Billing



- Recorded on hard disk (or tape) in switch
- Records trunk group, call details, and SS7 message details

Determines WHO to bill based on:

- Carrier ID (preferred)
- Incoming trunk (not possible on common/shared trunks)
- Calling party number (difficult and not accurate)
- Records from transiting carrier (often incomplete)

Determines WHAT to bill based on:

- Type (Local or Toll)
- Jurisdiction (state or interstate)
- Specific carrier contracts
- Time of day
- Call duration

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Issue Summary

- Telephone company cannot properly bill for traffic on their networks
  - Common trunks: Cannot bill based on incoming trunk group
  - Carrier ID: Often missing in SS7 signaling message
- Tandem records may also be incomplete
- Solution: Carriers should be required to use industry standard methods of identifying their traffic so it can be measured and billed properly.

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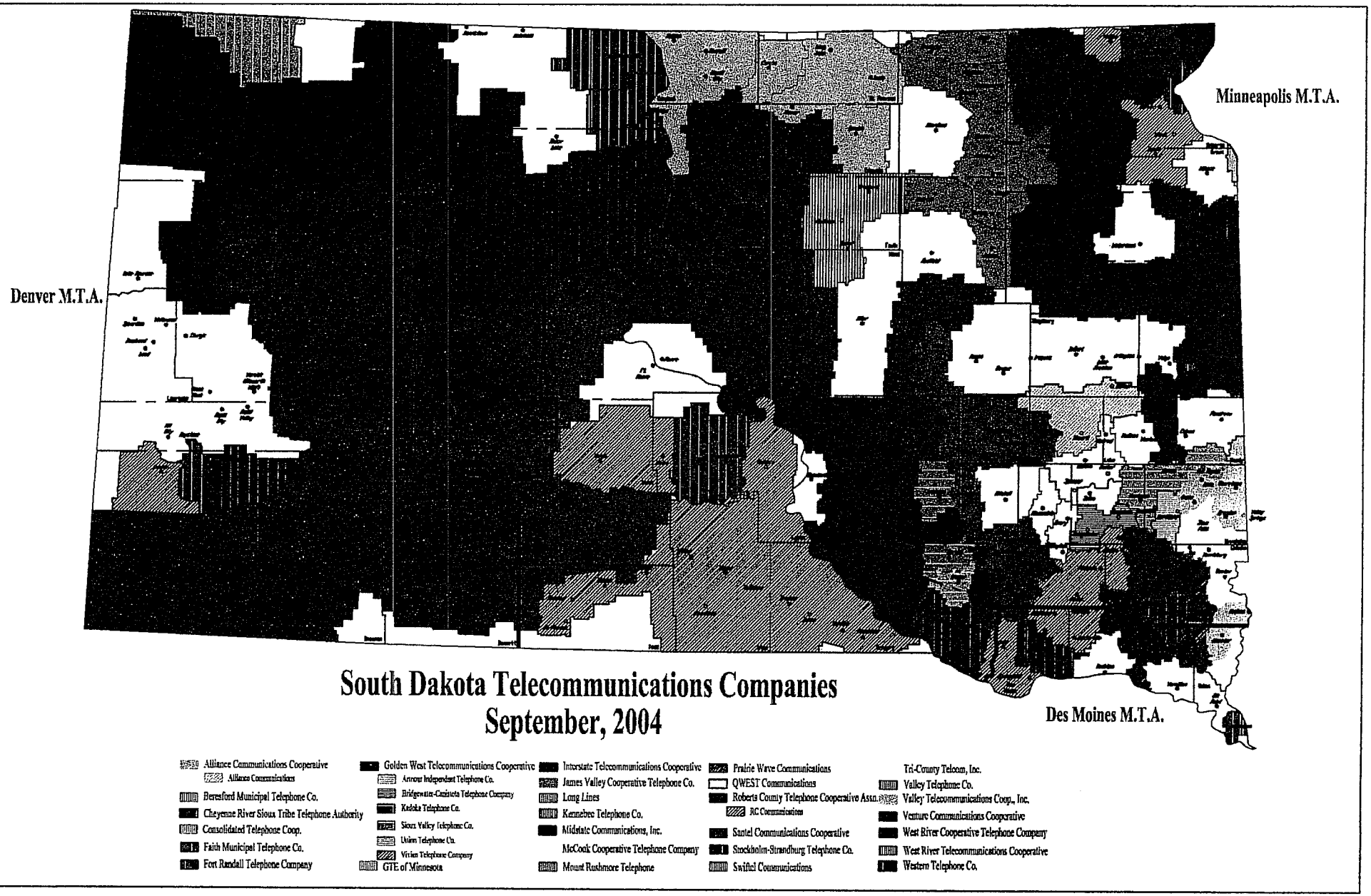

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding, LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc., d/b/a VERIZON WIRELESS, Plaintiff, Vs. Bob Sahr, Gary Hanson, and Dustin Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendant, South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Intervenors.	Civil Number 04-3014 CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the INTERVENORS' AND DEFENDANT'S EXPERT REPORT, prepared by Larry Thompson, Vantage Point, was served via the method(s) indicated below, on the first day of September, 2005, addressed to:

Rolayne Ailts Wiest, General Counsel South Dakota Public Utilities Commission 500 East Capitol Avenue Pierre, South Dakota 57501	(X) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail
Gene N. Lebrun Steven J. Oberg Lynn, Jackson, Shultz & Lebrun P. O. Box 8250 Rapid City, South Dakota 57709	(X) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail

Philip R. Schenkenberg Briggs and Morgan, P.A. 2200 IDS Center 80 South Eighth Street Minneapolis, MN 55402	(✗) ( ) ( ) ( ) ( )	First Class Mail Hand Delivery Facsimile Overnight Delivery E-Mail

Dated this first day of September, 2005.

Margo D. Northrup

Margo D. Northrup
Riter, Rogers, Wattier & Brown, LLP
P. O. Box 280
Pierre, South Dakota 57501
Telephone (605) 224-5825
Fax (605) 224-7102
Attorneys for Intervenors

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

Verizon Wireless (VAW) LLC, CommNet Cellular License Holding LLC, Missouri Valley Cellular, Inc., Sanborn Cellular, Inc., and Eastern South Dakota Cellular, Inc. d/b/a VERIZON WIRELESS, Plaintiff, vs. Bob Sahr, Gary Hanson, and Dusty Johnson, in their official capacities as the Commissioners of the South Dakota Public Utilities Commission, Defendants, and South Dakota Telecommunications Ass'n and Venture Communications Cooperative, Defendant Intervenors.	)	Civil No. 04-3014 **AFFIDAVIT OF** **LARRY THOMPSON**

STATE OF SOUTH DAKOTA

COUNTY OF DAVISON

1. My name is Larry D. Thompson. My business address is 1801 N. Main Street, Mitchell, South Dakota 57301. I am the Chief Executive Officer of Vantage Point Solutions, Inc. (VPS).

EXHIBIT C

2. I received a Bachelors of Arts in Physics (1983) from William Jewell College, a Bachelors of Science in Electrical Engineering (1985) from the University of Kansas, and a Masters of Science in Electrical and Computer Engineering (1986) from the University of Kansas. I am a Registered Professional Engineer in South Dakota and 14 other states. I have been involved in the design and implementation of many voice, data, video, and wireless networks. I focus on assisting rural Local Exchange Carriers (RLECs) with nearly all technical and financial aspects of their operations.

3. VPS is a telecommunications and consulting firm headquartered in Mitchell, South Dakota. The client base of VPS is made up of RLECs. VPS provides engineering, financial, and regulatory services to our clients for both their wireless and wireline networks. VPS provides services to many of the RLECs in South Dakota that are SDTA member companies and I am familiar with much of their networks and operations.

4. My staff and I have performed numerous studies to determine the amount of wireless traffic that originates and terminates in different MTAs (interMTA). These studies consist of processing thousands of records to determine the amount of interMTA traffic that is being delivered to our landline RLEC clients. These studies have estimated the location of the wireless caller using either the calling party NPA-NXX from the SS7 messages or more accurately using the connecting cell site or tower location available in the wireless Call Detail Records (CDRs). The goal of these studies was to determine the amount of interMTA traffic delivered by a wireless carrier to many of our RLEC clients.

5. As described in the FCC First Report and Order,[1] wireless calls originating in one Major Trading Area (MTA) and terminating in the same MTA are subject to reciprocal compensation. Wireless calls that originate in one MTA and terminate in another MTA are subject to access charges. To properly bill for wireless traffic, it is necessary to also determine the amount of the interMTA traffic that is interstate and intrastate in nature.

6. I make this Affidavit in response to many of the matters and statements that were set forth in Verizon Wireless' Motion for Summary Judgment and associated Affidavits.[2] I am familiar with South Dakota Senate Bill SB144 as well as South Dakota Codified Laws 49-31-109 through 49-31-115. I provided testimony in both House and Senate legislative committee hearings held to address the Senate Bill. My handouts provided to the committee members as a supplement to my testimony provided during the committee hearings are attached as Exhibit LDT-1A and LDT-1B.[3] Matters addressed in the provisions of SB144 related to unidentified telecommunications traffic are within my personal knowledge based on my job experience.

7. The Plaintiffs claim in their Motion for Summary Judgment at paragraph 21, that "the FCC recognized...that CMRS providers were not required to ascertain whether calls are interMTA or intraMTA,"[4] and cite the *First Report and Order* at paragraph 1044 to support their claim. However, the very language that they emphasize does not support this claim, but instead

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[1] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) (*"First Report & Order"*).

[2] Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, Paragraph 9, November 15, 2005.

[3] SDCL, 49-31-109 through 49-31-115.

[4] Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, Paragraph 21, November 15, 2005.

indicates only that "it is not necessary for incumbent LECs or CMRS providers to be able to ascertain geographic locations when determining the rating for any particular call at the moment the call is connected." 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. Verizon Wireless incorrectly believes that the South Dakota legislation requires the wireless carrier to determine the actual location of the caller when determining if the call is interMTA or intraMTA. This is not required by the FCC or common industry practice. The FCC stated, "For administrative convenience, the location of the initial cell site when a call begins shall be used as the determinant of the geographic location of the mobile customer."[5] Thus, for purposes of categorizing traffic as either intraMTA or interMTA, it is only necessary to know the originating or connecting cell site location, not the physical location of the caller. In his Affidavit, Jeff Harmon claims, "Because Verizon Wireless operates some cell towers that serve across MTA and/or state boundaries, Verizon Wireless could identify the MTA or state in which the call originates only by determining the physical location of the caller..."[6] However, Verizon Wireless already must know the connecting cell site or tower location at the start of the call for its own networking and administration purposes. This information is needed by the wireless carrier for wireless call handling and handoff operations, as well as for call routing, roaming, and other network purposes.

LEGAL OPINION NOT IN REPORT

8. Verizon Wireless would also need to know the calling party or tower location to determine appropriate taxes and Universal Service Fund contributions. All intrastate, interstate

[5] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order (released Aug. 8, 1996) ("*First Report & Order*"), para. 1044.

[6] Affidavit of Jeff Harmon, Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, para. 9, November 15, 2005.

and international providers of telecommunications within the United States are required to file the FCC Form 499-A (Telecommunications Reporting Worksheet). The worksheet and associated instructions are included as Exhibit LDT-2. This form requires that these providers separately identify the portion of gross revenues that arise from interstate and international service. According to the instructions for this form, the FCC provides a safe harbor percentage of interstate revenues associated with mobile services of monthly and activation charges, as well as message charges including roaming, but excluding toll charges. However, these safe harbor percentages may not be applied to fixed local services revenues or toll service charges. All filers must report the actual amount of interstate and international revenues for these services. (For example, toll charges for itemized calls appearing on mobile telephone customer bills should be reported as intrastate, interstate or international based on the origination and termination points of the calls.)

NOT IN REPORT

9. Therefore, with information Verizon Wireless no doubt has concerning only the originating or connecting cell site location, not the physical location of the caller, Verizon Wireless could prepare "accurate and verifiable information, including percentage measurements that enables the terminating carrier to appropriately classify telecommunications traffic as being either local or nonlocal, and interstate or intrastate" for which the South Dakota statute allows. [7]

10. Jeff Harmon discusses the fields that are populated in the Initial Address Message (IAM) of a Signaling System 7 (SS7) message and states: "The mandatory SS7 fields that are automatically populated are message type, nature of connections, forward call indicators, calling party's category, user service information, and called party number."[8] In his affidavit, Mr.

[7] SDCL 49-31-110.

[8] Affidavit of Jeff Harmon, Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, para.12, November 15, 2005.

Harmon continues to discuss the optional SS7 message fields that Verizon utilizes as part of its standard business practices. These optional fields include the calling party number[9] and the Jurisdictional Information Parameter ("JIP").[10] Mr. Harmon indicates that Verizon follows the Alliance for Telecommunications Industry Solutions ("ATIS") Network Interconnection Interoperability Forum ("NTIF") recommendations for the data fill of the JIP parameter.[11] Mr. Harmon does not address the other optional fields in the SS7 message that could be used to data fill information to assist both Verizon and other telecommunications service providers with the determination of traffic types (intraMTA, interMTA and intrastate, or interMTA and interstate) with standard AMA post-processing techniques. These optional fields include, but are not limited to, the Circuit Assignment Map parameter and the Generic Address parameter. The use of these optional fields has not been standardized by ATIS; however, they could potentially be used to address the traffic type separation issue with the proper software tools and post-processing techniques.

NOT IN REPOR

11. Jeff Harmon stated, "there is no industry-standard SS7 field that Verizon Wireless could use to identify whether a call is intraMTA, interMTA and intrastate, or interMTA and interstate."[12] This is a correct statement, but only based on today's SS7 signaling standards. The South Dakota legislation, however, is not limited by today's signaling standards. It is recognized in the legislation that signaling standards are constantly being changed and, furthermore, there are other provisions in the legislation that allow for originating carriers to provide separate

LEGAL OPINION NOT IN REPORT

[9] Id. at para. 15.

[10] Id. at para. 16.

[11] Id. at para. 18.

[12] Id. at para. 20.

information, regardless of actual signaling capabilities, that can assist in reasonably categorizing terminated telecommunications traffic. The Ordering and Billing Forum (OBF) has been working to expand the SS7 signaling format to better identify telecommunications traffic so the terminating carrier can more accurately bill for the traffic. Many involved with the OBF would like to see the Jurisdictional Information Parameter (JIP) field in the SS7 used to identify the wireless caller's connecting tower at the start of the call. Earlier this year, the JIP was expanded to include information regarding the originating wireless switch.[13] This was certainly a step in the correct direction. I would expect that the use of the JIP will continue to be enhanced to provide more detailed information regarding the location of the originating wireless caller (with respect to the location of the initial tower location at the start of the call). Furthermore, there is signaling information available to Verizon Wireless with respect to each wireless originated call that is not passed along in the SS7 message such as the trunk group number associated with the originating cell tower or the actual cell site number. For example, the Lucent Technologies 5ESS can identify the cell site number as part of the Automatic Message Accounting ("AMA") setup internal to the switching system per Lucent Table 2003 – Radio/Channel/Cell Information.[14] Similarly, the Nortel Network MTX identifies the originating trunk group from a specific cell location as a field in the AMA recording called the First Originating Trunk Common Language Location Identifier ("CLLI") field.[15]

NOT IN REPORT

[13] Alliance for Telecommunications Industry Solutions, ATIS-0300011, Network Interconnection Interoperability (NIIF) Reference Document, Part III, Installation and Maintenance Responsibilities for SS7 Links and Trunks.

[14] Lucent Technologies Document 401-610-133 Issue 28 - Flexnet®/Autoplex® Wireless Networks Executive Cellular Processor (ECP) Release 24 pp 4-125 to 4-127

[15] Nortel Networks Document 411-2131-204 – MTX 12 (February 2004) – DMS-MTX CDMA/TDMA Billing Management Manual Standard Issue 11.11 p 6-147

12. Because the commonly accepted industry standards for signaling continue to evolve and are not yet adequate to quantify nonlocal traffic, SDCL 49-31-111 allows the originating carrier to "separately provide the terminating carrier with accurate information including verifiable percentage measurements that enables the terminating carrier to appropriately classify nonlocal telecommunications traffic as being either interstate or intrastate, and to assess the appropriate applicable access charges."[16] The form and substance of the accurate information required in this statute is not defined, except that it be adequate for the terminating carrier to appropriately classify the traffic and assess the applicable charges.

LEGAL OPINION

13. Because the commonly accepted industry standards for signaling are not yet adequate to indicate the precise location of the wireless caller, wireless carriers often establish their delivered local and toll (interstate and intrastate) traffic ratios in an agreed upon contract. Normally the contract ratios are based on historical experience or using a special study. Since wireless carriers have the ability to determine the connecting tower of their wireless customer, a special study can accurately determine the local and toll (interstate and intrastate) mix for a given test period.

14. John L. Clampitt claims that the amount of interMTA traffic is "limited" on the Verizon Wireless network.[17] If the purpose of this statement is to imply that the issue of unidentified telecommunications traffic exchanged between wireless and wireline carriers is insignificant or inconsequential, I would disagree with the statement. Proper classification of wireless traffic is especially important for carriers operating in South Dakota, since South Dakota has three different MTAs (Minneapolis, Denver, and Des Moines). In addition, much of the

[16] SDCL 49-31-111.

[17] Affidavit of John L. Clampitt, Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, Paragraph 15, November 15, 2005.

southern part of South Dakota borders the Omaha MTA. These MTA boundaries along with the RLEC territories are shown in Exhibit LDT-3. Because of this, South Dakota has a higher interMTA factor than most other states. VPS has not performed any interMTA studies for Verizon Wireless traffic. However, some recent wireless studies have shown interMTA traffic between 10% and 35%, and some higher. Even Verizon Wireless, in more than one of its Reciprocal Transport and Termination Agreements with wireline LECs in South Dakota, has agreed to an interMTA traffic factor or ratio of 20% (of all Verizon traffic terminated by the LEC, 20% is agreed to be interMTA). It is important for South Dakota carriers to be able to accurately classify the terminating traffic to be properly compensated for the use of their networks.

NOT IN REPOR

15. Phantom traffic is commonly defined as traffic for which the terminating carrier is unable to determine either the carrier responsible for paying for the call or traffic where the terminating carrier is not able to determine the appropriate jurisdiction for properly rating the call. If the wireless traffic is not properly categorized by jurisdiction (intraMTA or interMTA and interstate, or interMTA and intrastate), then the wireless traffic would be considered phantom traffic. According to a National Exchange Carrier Association (NECA) news release dated April 7, 2004, it is estimated that 20% or more of telephone call minutes processed by some end office switches cannot be billed and phantom traffic could represent hundreds of millions of dollars of lost revenue to local telephone companies. Craig Bellinghausen of Verizon included a statement in his September 24, 2004, presentation regarding Phantom Traffic in which Verizon acknowledges that it is a growing concern.[18] According to his presentation, Verizon's

[18] Craig Bellinghausen, Phantom Traffic Pennsylvania Telephone Association New York State Telecommunications Association, September 24, 2004 (note that Mr. Bellinghausen made these statements as a representative of "Verizon" and not "Verizon Wireless.")

"Measured Phantom Transit Traffic is in the 3% to 6% range. Phantom Calls Terminating on Verizon's network is in the 12% to 15% range. Bottom Line: Significant Issue at Verizon." This presentation has been included as Exhibit LDT-4.

16. Mr. Clampitt claims that Verizon Wireless does not today have the capability to measure traffic for intercarrier compensation purposes and does not have the ability to generate reports that would identify traffic as intraMTA/interMTA and intrastate/interstate.[19] He also refers to "technical limitations and costs"[20] as the reason Verizon Wireless does not provide the signaling information or reports needed. As with other wireless carriers, I believe Verizon Wireless providers, with the proper software tools and post-processing techniques, have the ability to comply with the state statutes by generating Call Detail Records (CDRs) for wireless originated calls not handled by an Interexchange Carrier (IXC) that include the connecting tower at the start of the call, the called party number, the call date, and call duration. Using this information, Verizon Wireless or the terminating carrier could process the CDRs to determine the interMTA factor.

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17. Mr. Harrop admits that there are systems and services that can measure and bill interMTA traffic.[21] This seems contrary to the other affidavits that try to establish that the measurement of interMTA traffic is not possible with the Verizon Wireless network. VPS has recently worked with another wireless carrier in South Dakota to extract the required signaling information from the wireless network. VPS processed this data to determine the actual

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[19] Id. at para. 16.

[20] Id. at para. 20.

[21] Affidavit of Edward A. Harrop, Verizon Wireless (VAW) LLC, et al., Plaintiff vs. Bob Sahr, et al., Defendants and Intervenors, Civil Number 04-3014, Paragraph 3, November 11, 2005.

interMTA factor for the test period. In addition to determining the interMTA factor, the amount of interstate and intrastate traffic was also determined.

18. Verizon has also publicly offered suggestions as to how the industry should work together regarding phantom traffic. These suggestions included establishing industry standards, such as an interMTA record field, and seeking "legislation requiring that certain data legally must be passed on traffic."[22]

Dated this 22 day of December, 2005.

By Larry Thompson, CEO
Vantage Point Solutions, Inc.

Subscribed and Sworn to me this 22nd day of December, 2005.

Notary Public
My Commission Expires: 08/28/2008

[22]Craig Bellinghausen, Phantom Traffic Pennsylvania Telephone Association, New York State Telecommunications Association, September 24, 2004.

Briefs and Other Related Documents
Only the Westlaw citation is currently available.

United States Court of Appeals,Eighth Circuit.

ACE TELEPHONE ASSOCIATION; Hometown Solutions; Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; Northstar Access, LLC; Otter Tail Telecom, LLC; Paul Bunyan Rural Telephone Company; Tekstar Communications, Inc.; US Link, Inc., Appellees,

v.

Leroy KOPPENDRAYER, in his official capacity as Chairman of the Minnesota Public Utilities Commission; R. Marshall Johnson, in his official capacity as a member of the Minnesota Public Utilities Commission; Kenneth Nickolai, in his official capacity as a member of the Minnesota Public Utilities Commission; Phyllis Reha, in her official capacity as a member of the Minnesota Public Utilities Commission; Gregory Scott, in his official capacity as a member of the Minnesota Public Utilities Commission; The Minnesota Public Utilities Commission, Appellants,

Qwest Corporation, Intervenor Defendant/Appellant.

No. 05-1170, 05-1171.

Submitted: Sept. 12, 2005.
Filed: Dec. 29, 2005.

Background: Competitive local exchange carriers (CLECs) moved for judicial review and declaratory relief pursuant to Telecommunications Act after Minnesota Public Utilities Commission (MPUC) set at zero reciprocal compensation rate (RCR) for incumbent local exchange carrier (ILEC) and CLECS. The United States District Court for the District of Minnesota, 2004 WL 2810106, granted motion. MPUC and ILEC appealed.

Holdings: The Court of Appeals, Arnold, Circuit Judge, held that:

4(1) MPUC did not act arbitrarily and capriciously when, in setting RCR, it looked back to prior proceeding in which it determined rates for LECs' leasing of network elements to supplement the record;

5(2) setting RCR at zero did not violate Act; and

6(3) federal law precluded MPUC from imposing non-zero RCR once it determined that ILEC could charge CLECs only fixed, per-line rate for end-office switching.

Reversed.

[1] **Declaratory Judgment 118A 393**

118A Declaratory Judgment
118AIII Proceedings
118AIII(H) Appeal and Error
118Ak392 Appeal and Error
118Ak393 k. Scope and Extent of Review in General. Most Cited Cases

Telecommunications 372 910

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k899 Judicial Review or Intervention
372k910 k. Standard and Scope of Review. Most Cited Cases
De novo review applied to district court's order granting motion by competitive local exchange carriers (CLECs), pursuant to Telecommunications Act, for judicial review and declaratory relief from order issued by Minnesota Public Utilities Commission (MPUC). Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(e)(6).

De novo review applied to district court's order granting motion by competitive local exchange carriers (CLECs), pursuant to Telecommunications Act, for judicial review and declaratory relief from order issued by Minnesota Public Utilities Commission (MPUC). Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(e)(6).

[2] **Telecommunications 372 644**

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases
Under Telecommunications Act, federal court

EXHIBIT D

reviews state utilities commission's interpretation of federal law de novo, but reviews its factual determinations under the arbitrary and capricious standard. Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(e)(6).

[3] **Telecommunications 372 644**

372 Telecommunications
372I In General
372k633 Judicial Review or Intervention in General
372k644 k. Standard and Scope of Review. Most Cited Cases
In the context of federal court review of factual determinations made by state utilities commission pursuant to Telecommunications Act, the arbitrary and capricious standard of review is the same as the substantial evidence standard, and therefore court will uphold commission's factual findings and reasonable inferences drawn therefrom as long as those findings are supported by substantial evidence in the record as a whole. Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(e)(6).

[4] **Telecommunications 372 864(1)**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k864 Reciprocal Compensation
372k864(1) k. In General. Most Cited Cases
Minnesota Public Utilities Commission (MPUC) did not act arbitrarily and capriciously when, in setting at zero the reciprocal compensation rate (RCR) for incumbent and competitive local exchange carriers (LECs) under Telecommunications Act and state law, which required that RCR be based on reasonable approximation of additional costs incurred by LECs in terminating calls, MPUC looked back to prior proceeding in which it determined rates for LECs' leasing of network elements to supplement the record in RCR proceeding, given that earlier proceeding supported conclusion in RCR proceeding that costs of modern end-office switching did not vary significantly with usage, that competitive LECs challenging RCR were parties to earlier proceeding, and that federal regulations permitted MPUC to use same forward-looking, economic cost-based pricing standard for both proceedings. Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(d)(2)(A)(ii); M.S.A. § 237.12(4)(1).

[5] **Telecommunications 372 864(1)**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k864 Reciprocal Compensation
372k864(1) k. In General. Most Cited Cases
Although Telecommunications Act required local exchange carriers (LECs) to establish ways to reimburse one another for additional costs incurred in transporting and terminating telecommunications, it did not require that such reciprocal compensation be some non-zero amount, even when no additional costs were incurred, and therefore Minnesota Public Utilities Commission (MPUC) did not violate Act by setting reciprocal compensation rate (RCR) for state's incumbent and competitive LECs at zero. Communications Act of 1934, § 251, as amended, 47 U.S.C.A. § 251(b)(5), (d)(2)(A)(ii).

[6] **Telecommunications 372 864(1)**

372 Telecommunications
372III Telephones
372III(F) Telephone Service
372k854 Competition, Agreements and Connections Between Companies
372k864 Reciprocal Compensation
372k864(1) k. In General. Most Cited Cases
Federal law precluded Minnesota Public Utilities Commission (MPUC) from imposing any non-zero reciprocal compensation rate (RCR), reflecting additional charges incurred by local exchange carrier (LECs) in terminating calls, once MPUC determined, pursuant to Telecommunications Act, that incumbent LEC could charge competitive LECs only a fixed, per-line rate for end-office switching. Communications Act of 1934, § 252, as amended, 47 U.S.C.A. § 252(d)(2)(A)(ii).

[7] **Administrative Law and Procedure 15A 417**

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(C) Rules and Regulations
15Ak416 Effect

15Ak417 k. Force of Law. Most Cited Cases
Regulations promulgated by a federal agency pursuant to an act of Congress carry with them the force of law.

Appeals from the United States District Court for the District of Minnesota.

Counsel who presented argument on behalf of the appellant was Jeanne M. Cochran, Assistant Attorney General, of St. Paul, Minnesota. Also appearing on the brief were Mike Hatch and Brian H. Sande.
Counsel who presented argument on behalf of the intervenor/appellant was John M. Devaney of Washington, D.C. Also appearing on the brief were Roy W. Hoffinger and Jason D. Topp.
Counsel who presented argument on behalf of the appellee was Michael John Bradley of Minnesapolis, Minnesota. Also appearing on the brief were Dan Lipshultz and MIchael J. Bradley.

Before ARNOLD, HANSEN, and GRUENDER, Circuit Judges.

ARNOLD, Circuit Judge.
***1** The Minnesota Public Utilities Commission (MPUC) and Qwest Communications, Inc., appeal the district court's grant of a motion for judicial review and declaratory relief. We reverse.

I.

The phone companies that filed the motion, Ace Telephone Association, Hometown Solutions, Hutchinson Telecommunications, Inc., Mainstreet Communications, LLC, NorthStar Access, LLC, Otter Tail Telecom, LLC, Paul Bunyan Rural Telephone Company, Tekstar Communications, Inc., and U.S. Link, Inc., are so-called competitive local exchange carriers (CLECs), *i.e.,* they compete to provide local telephone service. We will refer to the phone companies that brought this court action as the CLEC Coalition.

The Coalition's members compete in the Minnesota local telecommunications market against Qwest, and thus Qwest customers and CLEC customers often call one another. When this occurs, federal law allows the telephone company of the person called to collect from the caller's telephone company the additional costs, if any, that it incurred in sending the call to its final destination, referred to as "terminating the call." *See* 47 U.S.C. § 251(b)(5). Evidently because both parties frequently agree to pay one another the costs of terminating calls, the charge in telecommunications parlance is known as "reciprocal compensation." This charge can be set either through negotiations by the carriers or by the state utilities commission. Here the MPUC set the reciprocal compensation rate (RCR) for Qwest and members of the CLEC Coalition at zero. The CLEC Coalition argues that the MPUC's action was arbitrary and capricious and not supported by substantial evidence. The MPUC and Qwest disagree and contend that the MPUC's decision was neither arbitrary nor capricious and was properly based on evidence generated in a related MPUC proceeding. In addition, Qwest maintains that an order entered in the related proceeding required the MPUC to set the RCR at zero.

[1] [2] The CLEC Coalition's motion for judicial review and declaratory relief is a creature of 47 U.S.C. § 252(e)(6), a provision of the Telecommunications Act of 1996 (the Act) that empowers federal district courts to review state commission determinations like the one challenged here to ensure that they meet the requirements of § 251 and § 252. We review the district court's order granting the CLEC Coalition's motion *de novo,* applying the same standards as the district court. *Cf. Luckes v. County of Hennepin,* 415 F.3d 936, 938 (8th Cir.2005). These standards require us to review a state commission's interpretation of federal law *de novo. See Qwest Corp. v. Minnesota Pub. Utilities Comm'n,* 427 F.3d 1061, 1064 (8th Cir.2005); *Michigan Bell Tel. Co. v. MFS Intelenet of Mich., Inc.,* 339 F.3d 428, 433 (6th Cir.2003). But we recognize the state commission's superior technical expertise, and we review its factual determinations under the arbitrary and capricious standard, *see Qwest,* 427 F.3d at 1064; *Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.,* 323 F.3d 348, 354 (6th Cir.2003).

II.

***2** One of the purposes of the Act is to foster competition in local telephone markets. It offers so-called incumbent local exchange carriers (ILECs), *i.e.,* in general, dominant providers of local telephone service in a particular region, *see* 47 U.S.C.A. § 251(h), the opportunity to compete in the long-distance market; to gain entry, however, an ILEC must facilitate competition for local service. It does so by entering into interconnection agreements with

competing carriers and leasing elements of its network to them at cost-based rates. *See* 47 U.S.C. § 271(c)(2)(B). The Act prefers that these rates be set through negotiation, *see* 47 U.S.C. § 252(a), but when the ILEC and the competitor cannot agree upon a rate they may turn to the state commission. The state commission is to set the lease rate based on the total long-run incremental costs of the network element at issue. 47 C.F.R. § § 51.501, 51.505. 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. *See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd 15499, 15874 para. 743 (1996) (Local Competition Order) (subsequent history omitted).

In a previous proceeding brought by AT & T and Worldcom (both CLECS though not plaintiffs here), the MPUC set out to determine the rates at which Qwest should lease certain network elements to CLECs. One such element was end-office switching. An end-office switch routes telephone calls to their final destination. Previously, Qwest had charged competitors $1.08 per month for each telephone line connected to a switch, as well as $0.00181 for each minute that they used the switch. While Qwest argued in favor of continuing this pricing structure, the CLEC Coalition and others contended that the per-minute part of the charge was outdated and that the MPUC should price end-office switching at a fixed, per-line rate only.

After hearing testimony in the network-element proceeding, the MPUC's administrative law judge concluded that the most reasonable method for leasing end-office switching was on a fixed, per-line basis. The ALJ concluded that Qwest's cost model was out-of-date and not adequately supported by the evidence in the record. The ALJ also noted that allowing Qwest to charge a usage-sensitive fee while competitors charged customers a fixed rate for their telephone service would stifle competition. The MPUC adopted the ALJ's report and required Qwest to submit a compliance filing listing the charge for the end-office switch at a fixed, monthly, per-line rate with no per-minute usage charges.

*3 In its compliance filing, Qwest priced end-office switching at a fixed rate of $3.12 per line per month, with no per-minute usage charge. In that same filing, Qwest also set its RCR at zero. (The previous RCR had been $0.00181 per minute, the same rate that Qwest had charged competitors when leasing them an end-office switch). The regulations promulgated pursuant to the Act require that, except in limited circumstances, the ILEC and all CLECs in the state pay one another the same rate for terminating each other's calls (RCR). 47 C . F.R. § 51.711(a). Like Qwest, therefore, CLEC Coalition members would collect nothing for terminating another carrier's call. A CLEC could deviate from this zero rate only by developing its own cost study and proving to the MPUC that its costs were higher than Qwest's. 47 C.F.R. § 51.711(b).

After complaints from the CLEC Coalition, the MPUC opened a separate proceeding to investigate the proper RCR. After the issue had been briefed and argued, the MPUC decided to approve Qwest's zero RCR. In doing so, the MPUC cited the Act, which states that the RCR should be merely "a reasonable approximation of *the additional costs* of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added). Since the provision of the Act that addresses the RCR does not "authorize ... any State commission to engage in any rate-regulation proceeding to establish with particularity the additional costs of transporting or terminating calls," 47 U.S.C. § 252(d)(2)(B)(ii), the MPUC felt it proper to use the earlier network-element proceeding to establish the RCR.

III.

[3] The Coalition argues, and the district court held, that the MPUC's decision to order a zero RCR was arbitrary and capricious. With respect to reviewing the MPUC's factual determinations, we believe that the arbitrary-and-capricious standard is the same as the substantial-evidence standard. *See GTE South, Inc. v. Morrison,* 199 F.3d 733, 745 & 745 n. 5 (4th Cir.1999); *cf. Association of Data Processing v. Fed. Reserve Sys.,* 745 F.2d 677, 683 (D.C.Cir.1984). As long as the MPUC's factual findings are supported by substantial evidence in the record as a whole, we will uphold those findings and the reasonable inferences that the MPUC drew from them. *See Michigan Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.,* 323 F.3d 348, 354 (6th Cir.2003).

[4] We conclude that the district court erred in holding that the MPUC's decision was arbitrary and capricious. Under federal law, the MPUC was to base the RCR on "a reasonable approximation of the additional costs" of termination. 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis added). Furthermore, Minnesota law required the MPUC to assume the use of "the most efficient telecommunications technology currently available." Minn.Stat. § 237.12(4)(1). The MPUC therefore could not continue to impose an RCR that it concluded was founded on "clearly outdated cost studies." Instead, it had to make a reasonable approximation of what additional costs, if any, telephone companies incurred in terminating a call. To do so, the MPUC looked back to its recent network-element proceeding.

*4 In the network-element proceeding, the ALJ recognized that usage-based costs were theoretically possible, but determined that no party had actually demonstrated that usage-based costs in fact existed or, if they did, how much they were. In that proceeding, the MPUC accepted the ALJ's reasoning, and it determined that all the costs of the end-office switch were arguably recovered through the fixed-rate price. The MPUC thus had reason to believe in the RCR proceeding that the costs of modern end-office switching did not vary significantly with usage. Multiple parties in the earlier proceeding had introduced evidence consistent with that supposition. On this record, the MPUC reasonably concluded that the additional costs for terminating a telephone call were approximately zero.

The MPUC was entitled to look to the previous network-element proceeding when deciding the appropriate RCR. We know of no rule that limits a regulatory agency to considering evidence within a particular record in making a decision; instead, it may use findings made in one context to help decide a related matter in another. The CLEC coalition was a party to the previous proceeding. All the parties to the RCR proceeding recognized that the end-office switch issue and the reciprocal compensation issue were economically related inquiries. FCC regulations permitted the MPUC to use the same "forward-looking, economic cost-based pricing standard" for both proceedings. *See Local Competition Order,* 11 Fcc Rcd at 16023 para. 1054. In fact, the MPUC established the earlier $0.00181 RCR using the same information that was used to establish the previous end-office switch lease rate. And the CLEC Coalition members, in their initial comments to the MPUC concerning reciprocal compensation, repeatedly referred to the previous record. Rather than reinvent the wheel, the MPUC looked back to the network-element proceeding to supplement the record in the instant matter. The parties had ample opportunity in the reciprocal-compensation proceeding to present contrary evidence. Because the findings from the network-element proceeding were relevant to the reciprocal-compensation proceeding, and because the FCC permitted state commissions to use a similar standard in addressing both issues, the MPUC did not err in considering the earlier record.

[5] We also conclude that the district court erred in holding that a zero RCR violated the plain language of the Act. The court relied on 47 U.S.C. § 251(b)(5), which states that each local exchange carrier has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." It is true that each carrier has to set up procedures by which to pay other carriers for the costs of terminating its traffic, and a carrier would violate the Act if it simply refused to establish any way to reimburse others for their additional costs. But this duty to deal does not necessarily imply that the RCR must be some non-zero amount. 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. The district court's reading of § 251(b)(5) would force carriers to pay one another regardless of whether they incurred additional costs or not. Such a reading would directly contradict the plain meaning of § 252(d)(2)(A)(ii). For the reasons indicated, the district court erred in reversing the MPUC's order.

IV.

*5 [6] We conclude, moreover, that the district court's order must be reversed for another, independently sufficient reason: Once the MPUC ordered Qwest to charge only a fixed per-line rate for end-office switching, federal law prevented the MPUC from imposing any non-zero RCR.

[7] The Act, as the Supreme Court has noted, is often difficult to interpret. *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). This is true of the term "additional costs" as

used in § 252(d)(2)(A)(ii); it is hardly free from ambiguity. But the Federal Communications Commission (FCC) has clarified the meaning of the phrase. In its first order implementing the local competition provisions of the Act, the FCC stated that "the 'additional cost' to the LEC of terminating a call ... primarily consists of the traffic-sensitive component of local switching." *Local Competition Order,* 11 FCC Rcd at 16024-25 para. 1057. After finding that the cost of other related network elements do not vary with traffic, the FCC turned to the end-office switch. It determined that "only that portion of the forward-looking, economic cost of end-office switching *that is recovered on a usage-sensitive basis* constitutes an 'additional cost' to be recovered through termination charges." *Id.* (emphasis added). Regulations promulgated by a federal agency pursuant to an act of Congress carry with them the force of law. *See Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 843-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The phrase "is recovered on a usage-sensitive basis" is, we think, best read as referring to the usage-based portion of the end-office switch lease rate. It would make little sense to say that this phrase refers to the recovery of termination charges themselves. We agree with Qwest that this phrase refers to the usage charge that is recovered when the end-office switch is leased as a network element. Therefore, if a state commission decides that the switch should be leased on a fixed, per-line basis, paragraph 1057 precludes it from establishing a non-zero termination charge for that same switch. This is the case regardless of the state commission's rationale for the fixed-rate pricing. Paragraph 1057 looks to the MPUC's action, not to its motivation. It is immaterial whether the MPUC ordered a fixed rate for cost-based or public-policy considerations.

Once the MPUC determined that there were no grounds for a per-minute usage-based charge on end-office switching and that there were public policy reasons to impose only a fixed-rate price, the die was cast. The CLEC Coalition asked for a fixed end-office switching lease rate, and the MPUC gave them one. The consequences of that decision may prove more costly than the Coalition expected, but we believe that that is what the law requires.

V.

For the reasons stated above, we reverse the district court's order granting the motion for judicial review and declaratory relief.

C.A.8 (Minn.),2005.
Ace Telephone Ass'n v. Koppendrayer
--- F.3d ----, 2005 WL 3543671 (C.A.8 (Minn.))

Briefs and Other Related Documents (Back to top)

- 05-1170 (Docket) (Jan. 14, 2005)
- 05-1171 (Docket) (Jan. 14, 2005)

END OF DOCUMENT

Briefs and Other Related Documents
Only the Westlaw citation is currently available.
NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Missouri,En Banc.

STATE ex rel. ALMA TELEPHONE COMPANY, et al., Respondents,

v.

PUBLIC SERVICE COMMISSION OF the STATE OF MISSOURI, Appellant,

State ex rel. BPS Telephone Company, et al., Respondents,

AT & T Wireless Services, Inc., et al., Appellants.

No. SC 86529.

Jan. 10, 2006.

Appeal from the Circuit Court of Cole County, Thomas J. Brown, Judge.

STEPHEN N. LIMBAUGH, JR., Judge.

***1** In these two consolidated cases, the Missouri Public Service Commission disallowed a proposal by certain rural telephone companies to amend "access tariffs" to be imposed on several wireless telephone service providers. [FN1] On petition for writ of review, the circuit court reversed the PSC's decision, and thereafter, the PSC and the wireless service providers appealed. After opinion by the Court of Appeals, Western District, this Court granted transfer. Mo. Const. art. V, sec. 10. The judgment of the trial court is reversed, and the PSC's decision is affirmed.

FN1. In the first case, the rural telephone companies are: Alma Telephone Company, MoKan Dial Inc., Mid-Missouri Telephone Company, Choctaw Telephone Company, Chariton Telephone Company, Peace Valley Telephone Company, Mid-Missouri Telephone Group, and Small Telephone Exchange Group.
In the second case, the rural telephone companies are: BPS Telephone Company, Citizens Telephone Company of Higginsville, Mo., Inc., Craw-Kan Telephone Cooperative, Inc., Elington Telephone Company, Farber Telephone Company, Goodman Telephone Company, Granby Telephone Company, Grand River Mutual Telephone Corporation, Green Hills Telephone Corporation, Holway Telephone Company, Iamo Telephone Company, Kingdom Telephone Company, KLM Telephone Company, Lathrop Telephone Company, Le-Ru Telephone Company, McDonald County Telephone Company, Mark Twain Rural Telephone Company, Miller Telephone Company, New London Telephone Company, Orchard Farm Telephone Company, Oregon Farmers Mutual Telephone Company, Ozark Telephone Company, Seneca Telephone Company, Steelville Telephone Exchange, Inc., and Stoutland Telephone Company.
In both cases, the wireless services providers are: AT & T Wireless Services, Inc., GTE Midwest Incorporated, Southwestern Bell Telephone Company, Southwestern Bell Wireless, Inc., and Sprint Spectrum L.P. d/b/a Sprint PCS.

I. Facts and Procedural History

This litigation involves a dispute concerning the method by which the rural telephone companies should be compensated for delivering calls that originated from wireless telephones and terminated in the rural companies' local exchanges during February 1998 through January 2001. The telephone traffic at issue involves wireless calls that occurred within one of Missouri's two "Major Trading Areas" (MTA) for telecommunications. Thus, the traffic was intrastate, as well as intraMTA.

Prior to 1998, Southwestern Bell Telephone Company (SBTC), operating as a large interexchange carrier, transported and terminated calls for wireless carriers, or commercial mobile radio service providers (CMRS providers). SBTC charged the CMRS providers a tariff for this service. However, this tariff did not compensate rural local exchange carriers (LECs)-the respondents herein-for completing wireless calls that terminated on their systems. During the early 1990s, the PSC found SBTC liable to the LECs under the LECs' own existing access tariffs. Then in 1998, SBTC was

EXHIBIT E

permitted to revise its wireless termination tariffs to eliminate its obligation to pay the LECs, and instead the CMRS providers were to compensate the LECs directly. In this regard, the PSC ordered the CMRS providers to seek reciprocal compensation arrangements with the LECs for the termination of the wireless traffic or, otherwise, to cease delivering wireless traffic to the LECs. Despite this order, few reciprocal arrangements were entered, and CMRS providers continued to transmit wireless originated traffic to the LECs, which were unable to block the wireless calls. In an effort to obtain compensation, the LECs then billed the CMRS providers under existing access tariffs, which established the rates that the LECs could charge for completing long distance or toll calls on their local exchanges. However, the CMRS providers refused to pay on the ground that the tariffs did not apply to wireless originated traffic, which the Federal Communications Commission (FCC) deemed to be intraMTA, or local traffic. During that time, though, the LECs did not seek enforcement of the PSC's order requiring the CMRS providers to enter reciprocal compensation arrangements or cease delivering traffic to the LECs. [FN2]

> FN2. However, during oral argument, counsel for the LECs advised the Court that "complaint proceedings" against the CMRS providers for failure to enter into the reciprocal compensation arrangements are now pending before the PSC.

In 1999, the LECs filed proposed amended access tariffs with the PSC to clarify the tariffs' applicability to wireless originated traffic. Under the proposal, each tariff would be amended as follows:
***2** The provisions of this tariff apply to all traffic regardless of type or origin, transmitted to or from the facilities of the Telephone Company, by another carrier, directly or indirectly, until and unless superseded by an agreement approved pursuant to 47 U.S.C. 252, as may be amended.

The CMRS providers and SBTC intervened and objected to the tariffs, and after a hearing, the PSC rejected the proposed amended tariffs. The LECs then filed a writ of review with the circuit court, which reversed the decision of the PSC. After an initial appeal to the court of appeals, which reversed and remanded for failure of the PSC to make adequate findings of fact, the PSC again ruled against the LECs, relying on federal regulatory rulings in determining that intraMTA calls are local calls and not subject to access tariffs. The LECs again sought a writ of review in the circuit court, the court again reversed the PSC, and the PSC and CMRS providers then appealed. Both sides agree that the facts are not in dispute and only a question of law remains to be resolved.

II. Analysis

This case is controlled by the Federal Telecommunications Act of 1996(FTA), 47 U.S.C. sec. 251 et seq. (2000). The FCC is charged with implementing and enforcing the provisions of the FTA, 47 U.S.C. sec. 201(b) (2000), and FCC regulations and decisions are binding on the industry and state commissions, *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 37-79 (1999).

The FTA requires interconnection, directly or indirectly, between telecommunications carriers. 47 U.S.C. at sec. 251(a). To allow for the recapture of costs for interconnection, the FTA provides for "reciprocal compensation arrangements for the transport and termination of telecommunications," *id.* at sec. 251(b)(5), and implementing regulations place a duty on LECs and wireless carriers to negotiate and enter in to those arrangements, 47 C.F.R. 51.301. In this case, as noted, no such arrangements were completed.

The FCC has recently confirmed that in the absence of a reciprocal compensation arrangement, "CMRS providers accept the terms of otherwise applicable state tariffs." *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs,* 2005 FCC LEXIS 1212, para. 12 (2005). The access tariffs that the LECs now seek, however, are not "otherwise applicable state tariffs." That question was settled in a FCC ruling known as the "Local Competition Order," issued when the FTA first became effective. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* First Report and Order, 11 F.C.C.R. 15299 (1996). In pertinent part, the Order first makes a critical distinction between transport and termination tariffs, which are applicable to local traffic, and access tariffs, which are applicable to long-distance traffic. Specifically, the Order states: "Transport and termination of local traffic are different services than access service for long-distance telecommunications," and "The Act preserves the legal distinctions between charges for

transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Id.* at para. 1033. To then distinguish between local calls and long-distance calls, the Order provides that the "local service area" for wireless calls is the same as the Major Trading Area. *Id.* at paras. 1035-1036. The import is that wireless calls made within the MTA are local, and wireless calls made outside of the MTA are long-distance. *Id.* at para. 1036. The Order then concludes that "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." *Id.* Because in this case all parties agree that the traffic in question originates and terminates within the same MTA, only tariffs pertaining to transport and termination rates may be imposed, and conversely, tariffs pertaining to interstate and intrastate access charges may not be imposed. Thus, the proposed tariffs, which the LECs concede are interstate and intrastate access charges, are unlawful, and the PSC was correct in disallowing them.

*3 The LECs contention that the FTA does not prohibit state access tariffs in the absence of a reciprocal compensation flies in the face of the FCC's Local Competition Order, and it appears that the LECs are simply unwilling to acknowledge the clear distinction made between intraMTA calls and all other calls. They also rely on *State ex rel. Sprint Spectrum, L. P., et al. v. Missouri Public Service Comm'n,* 112 S.W.3d 20 (Mo.App.2003), for the proposition that access tariffs are lawful even as applied to intraMTA traffic. However, the tariffs in question in Sprint were not access tariffs but were instead intraMTA transportation and termination tariffs-tariffs that are explicitly approved under the Local Competition Order. Finally, the LECs argue that the access tariffs are allowable under the FTA's "safe harbor" provision in sec. 251(g), which states that until reciprocal compensation agreements are entered in to, LECs are to be afforded the same state tariffs that applied to wireless traffic before the FTA was enacted. The access tariffs available to the LECs at that time, however, did not purport to cover intraMTA wireless traffic, and it was for that reason that the LECs sought to enlarge the scope of those access tariffs in the first place. The safe harbor, in other words, applies only to the existing access tariffs on long-distance calls, rather than calls placed within the MTA.

III. Conclusion

The PSC was correct in holding that the proposed access tariffs are unlawful. Accordingly, the judgment of the circuit court is reversed, and the decision of the PSC is affirmed.

WOLFF, C.J., STITH, TEITELMAN, RUSSELL and WHITE, JJ., and ROMINES, Sp.J., concur.
PRICE, J., not participating.
Mo.,2006.
State ex rel. Alma Tel. Co. v. Public Service Com'n of State of Missouri
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