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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

October 29, 2004

The Honorable Charles B. Kornmann
United States District Judge
United States Courthouse
102 Fourth Avenue SE, Suite 408
Aberdeen, SD 57402

**Re: Verizon Wireless (VAW) LLC, et al.
v. Bob Sahr, et al.
Civil No. 04-3014
Response to Court's Memorandum of October 20, 2004**

Dear Judge Kornmann:

As you are aware, we represent the Plaintiffs in the above-referenced matter and are responding to your Memorandum to counsel dated October 20, 2004.

As to the question you raised in the first paragraph of your Memorandum ("what position did the PUC take during the legislative session as to SB 144?"), we assume that this question will be addressed by counsel for the Defendants and/or counsel for Defendant Intervenors. Verizon Wireless is unaware what, if any, position was taken by the South Dakota Public Utilities Commission ("PUC") during the legislative session.

As to the questions raised in the second paragraph of your Memorandum, Verizon Wireless would like to inform you of certain steps it has taken since receiving your Memorandum and its view of the law regarding whether the Federal Communications Commission ("FCC") is an indispensable party pursuant to Fed. R. Civ. P. 19.

Since receiving your Memorandum, in-house regulatory counsel for Verizon Wireless has contacted the Office of General Counsel of the FCC to notify them of this action and invite the FCC to participate. Regulatory counsel has provided the FCC's Office of General Counsel with the pleadings that have so far been filed in this action. Verizon Wireless' invitation to the FCC to participate in this action is currently being considered by the Office of General Counsel.

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As to the issue of whether the FCC is an indispensable party pursuant to Fed. R. Civ. P. 19, Verizon Wireless does not believe this to be the case. When considering the issue of whether the federal government or a federal agency is an indispensable party pursuant to Fed. R. Civ. P. 19, the federal courts consistently hold that when an action does not challenge the validity of a federal statute or a federal agency's rules, regulations or orders, then the federal government and/or the agency is not an indispensable party. See *FHM Constructors, Inc. v. Village of Canton Housing Authority*, 779 F. Supp. 677, 685-86 (N.D.N.Y. 1992) (where the resolution of the dispute centers around a determination of whether or not a federal statute and the regulations promulgated thereunder preempt state law, the Department of Housing and Urban Development ("HUD") is not an indispensable party within the meaning of Fed. R. Civ. P. 19); *Milwaukee County Pavers Assoc. v. Fiedler*, 731 F. Supp. 1395, 1406-07 (W.D. Wis. 1990) (federal government is not an indispensable party under Fed. R. Civ. P. 19 where plaintiffs' challenge is directed toward a state's implementation of federal legislation, not toward the federal legislation itself); *Degregorio v. O'Bannon*, 86 F.R.D. 109, 120 (E.D. Pa. 1980) (Department of Health, Education and Welfare ("HEW") is not an indispensable party under Fed. R. Civ. P. 19, but HEW is invited by the court to submit an *amicus* brief); *Sturdevant v. Deer*, 70 F.R.D. 539, 542-43 (E.D. Wis. 1976) (where plaintiffs do not allege any violation or failure on the part of the United States government, the government is not subject to compulsory joinder under Rule 19); *National Welfare Rights Organization v. Wyman*, 304 F. Supp. 1346, 1349-50 (E.D.N.Y. 1969) (HEW is not subject to joinder under Rule 19 where plaintiffs are merely seeking to invalidate a state statute; interests of HEW could be adequately protected and made known to the court by the filing of an *amicus* brief); see also *Seaboard Air Line R.R. Co. v. Daniel*, 333 U.S. 118, 122-23, 68 S.Ct. 426, 429 (1948) (United States is an indispensable party to an action to suspend or enjoin an order of the Interstate Commerce Commission; but when the action requests only the removal of an obstruction to plaintiff's obedience of that order, the United States is not an indispensable party).

A decision by the United States District Court of New York in *FHM Constructors, Inc. v. Village of Canton Housing Authority*, 779 F. Supp. 677 (N.D. N.Y. 1992) is particularly helpful in considering whether the FCC is an indispensable party within the meaning of Fed. R. Civ. P. 19 in the present case. In *FHM Constructors*, the dispute centered around whether a higher state wage rate applied to a federal Department of Housing and Urban Development ("HUD") housing project. HUD, which was named as a defendant, made a motion to dismiss that plaintiffs opposed claiming that HUD was an indispensable party pursuant to Fed. R. Civ. P. 19. *Id.* At 685. The court, in ruling that HUD was not an indispensable party within the meaning of Fed. R. Civ. P. 19, noted that

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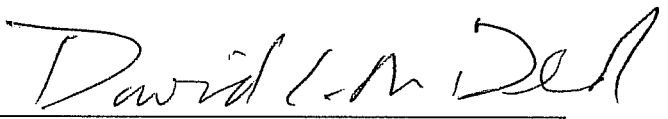
the plaintiffs sought no relief against HUD and had not alleged that HUD misinterpreted or violated its own regulations or guidelines. Rather, the plaintiffs sought to have the court find that federal statutes preempted state law. The court concluded as follows:

“The resolution of the dispute centers around a determination of whether or not a federal statute and the regulations promulgated thereunder preempt state law. This is a legal determination which this court can make without the continued presence of HUD in this lawsuit.”

Id. at 686.

The question before the Court is whether these federal statutes and FCC rules, regulations, or orders preempt the statutory requirements of South Dakota Senate Bill No. 144, not the validity of the federal statutes themselves or the FCC rules, regulations, or orders applicable in this case. For this reason, Verizon Wireless believes that the FCC is not an indispensable party within the meaning of Fed. R. Civ. P. 19. We will inform the Court of the FCC’s decision whether to participate in the case as soon as we hear from them.

Briggs and Morgan, P.A.

By 
David C. McDonald

ATTORNEYS FOR PLAINTIFFS

DCM/sra

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