
**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

Verizon Wireless (VAW) LLC,
CommNet Cellular License Holding, LLC,
Missouri Valley Cellular, Inc.,
Sanborn Cellular, Inc., and
Eastern South Dakota Cellular, Inc.,
d/b/a VERIZON WIRELESS,

Plaintiff,

vs.

Steve Kolbeck, Gary Hanson, and Dustin
Johnson, in their official capacities as
the Commissioners of the South Dakota
Public Utilities Commission,

Defendants,

South Dakota Telecommunications Ass'n
and Venture Communications Cooperative,

Intervenors.

Civil Number 04-3014

**VERIZON WIRELESS' MEMORANDUM
IN SUPPORT OF MOTION IN LIMINE**

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 ("Verizon Wireless") offer this Memorandum in Support of Motion in Limine ("Motion"). Verizon Wireless seeks an order precluding Intervenors' expert witness Larry Thompson from providing testimony that relies on or relates to interMTA traffic studies that he has failed and refused to provide to Verizon Wireless. Verizon Wireless further seeks an order excluding testimony regarding interMTA traffic studies that are based on the phone number of the originating caller, as the phone number does not necessarily identify the MTA in which a wireless call is made.

A. FACTS

On August 1, 2005, the Intervenor identified Mr. Larry Thompson as an expert witness. Mr. Thompson's Expert Report was provided to Verizon Wireless on September 1, 2005 as required by the Court's Scheduling Order. A copy of Mr. Thompson's Expert Report is attached as Exhibit A to the Affidavit of Philip Schenkenberg.

Following the Court's order denying Verizon Wireless' Motion for Summary Judgment, Intervenor served Mr. Thompson's Revised Expert Report. A copy of this Revised Expert Report, which was provided to Verizon Wireless on January 16, 2007, is Exhibit B to the Schenkenberg Affidavit. Mr. Thompson's Revised Expert Report contained opinions and referenced facts beyond those contained in his initial Expert Report.¹

Mr. Thompson's Revised Expert Report contained new information regarding the methodology and results of various "interMTA traffic studies" conducted by Mr. Thompson's consulting firm Vantage Point Solutions ("VPS"). Revised Expert Report, pp. 7-11 and Exhibit 5 thereto. While Mr. Thompson's initial Expert Report referred to the fact that VPS had performed interMTA traffic studies, he did not seek to rely on or testify to the results of those studies. *See* Initial Expert Report, pp. 3-4. The Revised Expert Report, however, contained an

¹ Rule 26(e) allows an expert to supplement his report to correct inaccuracies or to add information not previously available, but does not allow an expert to provide "wholly new opinions." *Sheesley v. Cessna Aircraft Co.*, No. 02-4185 et al., 2006 WL 3042793 at *3 (D.S.D. Oct. 24, 2006) (Schenkenberg Aff. Ex. H. The information at issue on this Motion is new and not merely a supplementation, and therefore was not timely disclosed. That said, however, Verizon Wireless does not seek to have testimony excluded simply because this Revised Expert Report was served out of time. To the contrary, Verizon Wireless indicated to Intervenor in December 2006 that it would not challenge the late-filed report so long as 1) all required disclosures were properly made, and 2) Verizon Wireless was allowed to conduct necessary and appropriate discovery. *See* Schenkenberg Aff. Ex. C and D. This Motion was made necessary because Intervenor subsequently failed to provide the information on which Mr. Thompson relies to support his new statements.

Exhibit 5 that detailed the methodology used in one such study, and reported that VPS has found interMTA traffic at levels up to and exceeding 30% of total traffic. Revised Expert Report, pp. 10-11, 14. These results will presumably be relied on to support opinions Mr. Thompson will express at trial.²

Following the receipt of the Revised Expert Report, and consistent with December 2006 correspondence, Verizon Wireless served additional discovery related to new material in the Revised Expert Report. Verizon Wireless requested the identity of carriers involved in these studies, copies of the studies themselves, and copies of documents exchanged between VPS and its clients regarding these studies. In its cover letter, Verizon Wireless noted that much of the information requested should have been automatically produced without need for a formal discovery request. Schenkenberg Aff., Ex. E. Intervenors responded to this discovery, but refused to identify the companies studied, refused to provide the studies, and refused to provide the actual data evaluated. Schenkenberg Aff., Ex. F. Intervenors' refusal to provide this information was based on the representation that Mr. Thompson is bound by confidentiality provisions not to disclose this information. *Id.* at pp. 2, 5-6. In other words, Intervenors want Mr. Thompson to affirmatively use information that he will not (or cannot) let Verizon Wireless see.

The interMTA traffic studies referenced in Mr. Thompson's Revised Expert Report fall into two categories. One set of studies determines whether a call is interMTA by looking at the

² Verizon Wireless says "presumably" because Mr. Thompson's Report does not clearly identify his opinions, and does not separate out his opinions from the facts on which he relies to support his opinions. If Intervenors seek to offer these results for their truth (instead of for the purpose of supporting an opinion of Mr. Thompson in his capacity as an expert), Verizon Wireless will assert other objections at that time.

area code and prefix of the wireless phone number – referred to as an NPA-NXX. Revised Expert Report, p. 9. This means that any call from a customer with a Des Moines phone number (for example) to a LEC in central South Dakota would be categorized as an interMTA call, regardless of the actual location of the caller when the call was made. The second category of interMTA study relies on the cell site serving the wireless caller when the call is made. Revised Expert Report, pp. 9-10. Mr. Thompson asserted that a cell site analysis can be done only by analyzing call detail records provided by the originating wireless company. Revised Expert Report, pp. 9-10.

Following discussions with opposing counsel, and in advance of trial, Verizon Wireless filed this Motion.

B. INTERVENORS WERE OBLIGATED TO PROVIDE THE STUDIES ON WHICH MR. THOMPSON RELIES

1. The Studies Should Have Been Produced With the Revised Expert Report

The purpose of expert testimony is to allow a non-party with specialized knowledge to provide opinions that can then be considered by the fact-finder. *See* Fed. R. Evid. 702. The federal rules, however, require the basis for such opinions to be fully disclosed. Fed. R. Civ. P. 26(a)(2)(B) requires that an expert report must “contain a complete statement of ... the data or other information considered by the witness in forming the opinions....” This full disclosure advances the purpose of candid and cost-efficient expert discovery, and prevents one party from ambushing the other at trial. *Ortiz-Lopez v. Sociedad Espanola de Auxilio Mutuo*, 248 F.3d 29, 35 (1st Cir. 2001); *see also, Peña-Crespo v. Puerto Rico*, 408 F.3d 10, 13 (1st Cir. 2005) (failure to provide an expert report that satisfies Rule 26(a)(2)(B) undermines opposing counsel’s ability to prepare for trial).

Here, Mr. Thompson's Revised Expert Report states that "more than half of the RLECs have interMTA factors that are estimated to be greater than 10%, several have interMTA factors that are estimated to be greater than 20%, and some have an interMTA factor of more than 30%." Revised Expert Report, p. 10. Mr. Thompson has not, however, provided copies of the studies relied on in support of this statement. This is exactly the kind of data or information that is automatically subject to disclosure under Fed. R. Civ. P. 26(a)(2)(B). *S&S Communications v. Local Exchange Carriers Assoc*, No. Civ 02-1028, 2005 WL 2897045, at * 5 (D.S.D. Nov. 3, 2005) (opposing party is entitled to know the exact documents being used by the expert in forming his or her opinion) (Schenkenberg Aff. Ex. G).

2. The InterMTA Traffic Studies Should Have Been Provided Pursuant to Discovery Requests

Even if these studies had not been subject to automatic disclosure pursuant to Fed. R. Civ. P. 26(a)(2)(B), they should have been provided in response to Verizon Wireless' request for this information in discovery. Verizon Wireless' First Set of Interrogatories, Requests for Production of Documents and Requests for Admissions included Document Request No. 6, which stated:

Document Request No. 6: Provide any documents which may be relied on by each and every expert that you have retained or consulted, including but not limited to, reports, opinions, charts, records, graphs, diagrams, photographs and technical publications.

Intervenors responded:

This information will be provided in the Expert's Report and supplemented as needed.

Schenkenberg Aff. Ex. I p. 8. Every Scheduling Order the Court has issued has required that discovery responses be supplemented on the 15th day of every other month. Notwithstanding

this requirement, Intervenor has not supplemented responses to provide the documents and data relied on by Mr. Thompson. Schenkenberg Aff. ¶ 9.

In addition, Verizon Wireless served discovery requests addressed to the Revised Expert Report as a way to avoid seeking to strike the new opinions and facts. Verizon Wireless specifically requested the identity of the carriers studied, the copies of the studies, and the supporting data. Schenkenberg Aff. Ex. E. As noted above, Intervenor provided some responsive information but refused to provide the identity of the carriers studied, the studies themselves, or any supporting data. The Court should find that this information should have been provided to Verizon Wireless in discovery.

C. THE COURT SHOULD EXCLUDE TESTIMONY THAT RELIES ON OR REFERS TO THE INTERMTA TRAFFIC STUDIES

The interMTA traffic studies and supporting data should have been produced to Verizon Wireless. This Court has applied a four-part test to determine whether the failure to provide information required by Rule 26(a) should result in the exclusion of expert testimony. *S&S Communications*, 2005 WL 2897045, at *3; *see also Transclean Corp. v. Bridgewood Services, Inc.*, 77 F.Supp.2d 1045, 1063 (D. Minn. 1999). Under that test, the Court considers (1) the importance of the excluded testimony; (2) the explanation of the party for its failure to comply with the required disclosure, (3) the potential prejudice that would arise from allowing the testimony, and (4) the availability of a continuance to cure such prejudice. *S&S Communications*, 2005 WL 2897045, at *3. This four-part test can and should be applied here to exclude testimony that refers to or relies on the interMTA studies.

1. The InterMTA Studies are Not Necessary to the Litigation of this Case

The first prong of the four-part test looks to whether the testimony to be offered is central to the case. In the *S&S Communications* case, the Court allowed expert testimony because

exclusion of the testimony would have compelled a dismissal of plaintiff's case. *Id.* at *3. The court noted the "distinct aversion" that courts have to the exclusion of important testimony. *Id.*

Unlike in the *S&S Communications* case, the results of the interMTA traffic studies completed by VPS are not central to this case. There is no dispute that wireless carriers may deliver both interMTA and intraMTA traffic in South Dakota. These studies, then, which represent an attempt to approximate interMTA traffic levels between one wireless carrier and some subset of South Dakota LECs, will not turn this case. The central issues in this case are whether the SS7 and reporting obligations imposed by the South Dakota Legislature are lawful, whether Verizon Wireless can comply with the requirements without undue burden, whether the penalty provision – which would allow all intraMTA traffic to be billed at access rates – is preempted, and whether the mandatory requirements in Chapter 284 are necessary to fill a gap in the negotiation and arbitration process provided for in federal law. Whether the amount of interMTA traffic in any specific case is 0%, 2%, 5%, or 20% of total traffic is simply not important to these ultimate issues.

It is significant that Mr. Thompson's Revised Expert Report itself does not establish a link between the results of these studies and any expert opinion he purports to hold. Without such a link, these "facts" become simply interesting pieces of information that are not integral to the expert opinions provided. For these reasons, the Court should find that it is not important for Mr. Thompson to testify about or in reliance on the interMTA traffic studies conducted.

2. Intervenor's Explanation of its Failure to Comply with the Required Disclosure

The second prong of the four-part test looks to the justification given by the party not providing the required disclosure. Here, the Intervenor has failed to provide this information because Mr. Thompson is contractually obligated not to disclose it. *See Schenkenberg Aff., Ex.*

E, pp. 2, 5-6. This may at first blush seem reasonable. However, some – perhaps all – of the subjects of these studies are members of the Intervenor South Dakota Telecommunications Association. The Association’s members could authorize Mr. Thompson to release much of this information if they chose to do so. And, if confidentiality concerns are legitimate, the Intervenor has sought to elicit expert testimony on issues for which they knew this could not meet applicable disclosure obligations. In light of the clear requirements and purposes of Fed. R. Civ. P. 26(a)(2)(B), this prong of the test weighs against the Intervenor.

3. Verizon Wireless Would be Potentially Prejudiced if the Testimony is Allowed

The third prong of the four-part test seeks to identify the prejudice that would result from allowing the testimony. Verizon Wireless would be prejudiced if Mr. Thompson were allowed to rely on or refer to the results of interMTA studies that Verizon Wireless has not had access to. Mr. Thompson describes an interMTA traffic study as a complicated process that requires the proper evaluation of thousands of individual pieces of data. Revised Expert Report, p. 7. For the result to be accurate, the study must do the following:

- * accurately determine the universe of calls to be studied;
- * capture all such calls, and
- * accurately correlate the calls to the originating and terminating MTAs.

Verizon Wireless has been provided with nothing that would allow it to evaluate whether any of these three tasks was done. If the studies performed by VPS failed to accurately determine the universe of calls to be studied, Verizon Wireless will have no way of knowing that. It is possible, for example, that the studies neglected to include all number blocks assigned to the respective carriers. Because Verizon Wireless has not been provided with the identity of either the wireless carrier or the landline carriers, and no underlying data, it has no way to

investigate this on its own, and no way of effectively cross-examining Mr. Thompson on this point.

Likewise, Verizon Wireless has no way of determining whether the studies were conducted in a way so as to capture the traffic to be studied. Said another way, Verizon Wireless does not have information that would allow it to determine whether the data collection process tracked the proposed methodology. Mr. Thompson should not be able to hold that information but still testify that the studies produced accurate results.

Finally, without the studies (including a description of the methodology used for each) and documents exchanged, Verizon Wireless cannot fully evaluate whether VPS accurately correlated the calls to their originating and terminating MTAs. While Verizon Wireless can cross-examine Mr. Thompson on methodological issues, it cannot explore the errors caused by such problems without having access to the studies themselves.³

For these reasons, the Court should find that Verizon Wireless would be prejudiced if Mr. Thompson were allowed to testify regarding the results of the interMTA studies while at the same time shielding them from disclosure.

4. The Availability of a Continuance to Cure Such Prejudice

Verizon Wireless understands that this information cannot be provided (and will not be provided) by Mr. Thompson. As a result, a continuance will not cure the prejudice that will be caused by the lack of disclosure.

For the above reasons, the Court should exclude testimony that refers to or relies on the interMTA traffic studies identified in the Revised Expert Report.

³ If the Court finds the results of particular studies not to be important to the ultimate issue (as argued above), the extent of this prejudice will be limited significantly.

D. THE COURT SHOULD EXCLUDE TESTIMONY ON STUDIES THAT USE THE TELEPHONE NUMBER TO IDENTIFY THE ORIGINATING MTA

The VPS interMTA traffic studies fall into two categories. The studies that utilize SS7 information look to the “NPA-NXX” of the originating wireless caller to determine the MTA in which the call is made. Because the phone number of the wireless caller does not reliably determine whether a call is interMTA or intraMTA, Mr. Thompson’s opinions should not be based on the results of such studies. The Court should thus exclude testimony regarding or relying on this unreliable methodology.

Fed. R. Evid. 702 provides that expert opinions must be the result of applying reliable methods to sufficient facts. At a more fundamental level, Fed. R. Evid. 401 allows for the admission only of evidence that is relevant. InterMTA studies that rely on the NPA-NXX of a wireless caller are not reliable, and the results of such studies are not relevant.

InterMTA studies that rely on NPA-NXX of the caller do not reliably identify interMTA traffic levels. A wireless carrier’s NPA-NXX is the first six digits of his or her telephone number. While telephone numbers are generally assigned based on the customer’s billing address, wireless customers are by nature mobile. When a customer takes his or her phone to a different MTA and calls a local number, the call will be physically intraMTA. Thus, a methodology that designates such a call as interMTA by comparing the phone numbers is simply wrong.

The FCC established that a wireless call is subject to reciprocal compensation (not access) if the call originates and terminates in the same MTA. *In the Matter of Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15499, FCC 96-325 First Report and Order, ¶ 1036 (rel. Aug. 8, 1996) (“*First Report & Order*”). Chapter 284 also utilizes the location of the caller when the call is made as the basis for

determining whether a call is intraMTA or interMTA. "Local telecommunications traffic" includes "any wireless to wireline telecommunications traffic that originates and terminates in the same major trading area" 49-31-109, S.D.C.L. Neither the FCC nor the South Dakota Legislature has designated a telephone number as a factor in determining whether a call is interMTA.

The results of interMTA studies that do not actually identify the originating MTA of the call are not reliable, are not based on sufficient information, and cannot form the basis of a legitimate expert opinion. In addition, the result of such studies will not tend to prove or disprove any contested fact in this case. As a result, the Court should exclude any testimony regarding the results of these studies.

E. CONCLUSION

For the above reasons, the Court should grant Verizon Wireless' motion.

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

DATED this 13th day of June, 2007

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