EXHIBIT 1

3 RIVERS TELEPHONE COOPERATIVE, INC.; RANGE TELEPHONE COOPERATIVE, INC.; BLACKFOOT TELEPHONE COOPERATIVE, INC.; NORTHERN TELEPHONE COOPERATIVE, INC.; INTERBEL TELEPHONE COOPERATIVE, INC.; CLARK FORK TELECOMMUNICATIONS, INC.; LINCOLN TELEPHONE COMPANY; RONAN TELEPHONE COMPANY; and HOT SPRINGS TELEPHONE COMPANY, Plaintiffs, vs. U.S. WEST COMMUNICATIONS, INC., Defendant.

CV 99-80-GF-CSO

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA, GREAT FALLS DIVISION

2003 U.S. Dist. LEXIS 24871

August 22, 2003, Decided
August 22, 2003, Filed

PRIOR HISTORY: 3 Rivers Tel. Coop. Inc. v. U.S. West Communs., Inc., 45 Fed. Appx. 698, 2002 U.S. App. LEXIS 18196 (2002)

DISPOSITION: Motions ruled upon.

LexisNexis(R) Headnotes

COUNSEL: [*1] For 3 RIVERS TELEPHONE COOPERATIVE, INC., RANGE TELEPHONE COOPERATIVE, INC., BLACKFOOT TELEPHONE COOPERATIVE, INC., NORTHERN TELEPHONE COOPERATIVE, INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., plaintiffs: William A. Squires, ATTORNEY AT LAW, Missoula, MT.

For LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, plaintiffs: Ivan C. Evilsizer, ATTORNEY AT LAW, Helena, MT.

For U.S. WEST COMMUNICATIONS, INC., defendant: John L. Alke, HUGHES KELLNER SULLIVAN & ALKE, Helena, MT.

For U.S. WEST COMMUNICATIONS, INC., counter-claimant: John L. Alke, HUGHES KELLNER SULLIVAN & ALKE, Helena, MT.

For 3 RIVERS TELEPHONE COOPERATIVE, INC., RANGE TELEPHONE COOPERATIVE, INC., BLACKFOOT TELEPHONE COOPERATIVE, INC., NORTHERN TELEPHONE COOPERATIVE, INC., INTERBEL TELEPHONE COOPERATIVE, INC., CLARK FORK TELECOMMUNICATIONS, INC., counter-defendants: William A. Squires, ATTORNEY AT LAW, Missoula, MT.

For LINCOLN TELEPHONE COMPANY, RONAN TELEPHONE COMPANY, HOT SPRINGS TELEPHONE COMPANY, counter-defendant: Ivan C. Evilsizer, ATTORNEY AT LAW, Helena, MT.

JUDGES: Carolyn S. Ostby, United State Magistrate Judge.

OPINIONBY: Carolyn S. Ostby

OPINION:

ORDER

Plaintiffs, nine Montana independent local telephone companies, instituted this action to recover damages for breach of tariff and other related state law causes of action against Defendant U.S. West Communications, now known as Qwest (Qwest). n1 Plaintiffs generally allege that Qwest breached filed tariffs by refusing to pay terminating carrier access charges for all interexchange calls Qwest transported to Plaintiffs for delivery to Plaintiffs' telephone service subscribers. n2

n1 The Court refers to Defendant as Qwest throughout this Order.

n2 The nine Plaintiffs are divided into two groups. The first group, represented by William A. Squires, includes 3 Rivers Telephone Cooperative (3 Rivers), Range Telephone Cooperative (Range), Blackfoot Telephone Cooperative (Blackfoot), Northern Telephone Cooperative (Northern), Interbel Telephone Cooperative (Interbel) and Clark Fork Telecommunications (Clark Fork). The second group of Plaintiffs, represented by Ivan C. Evilsizer, includes Ronan Telephone Company (Ronan), Hot Springs Telephone Company (Hot Springs) and Lincoln Telephone Company (Lincoln). John Alke represents Qwest.

[*3]

Before the Court are the following motions:

1. The motion of Ronan, Hot Springs and Lincoln for summary judgment on Counts One, Two and Three of the Complaint; n3

2. Qwest's Motion for Summary Judgment; n4

3. The motion of 3 Rivers, Range, Blackfoot, Northern, Interbel and Clark Fork for summary judgment on Counts One, Two and Three of the Complaint; n5

4. Qwest's motion to strike the affidavit of Jan Reimers; n6 and

5. Qwest's motion to strike the supplemental affidavit of Jan Reimers and the reply affidavit of Joan Mandeville. n7

n3 Court's Doc. No. 66.

n4 Court's Doc. No. 73.

n5 Court's Doc. No. 79.

n6 Court's Doc. No. 87.

n7 Court's Doc. No. 110.

Having reviewed the record, together with the parties' arguments in support of their respective positions, the Court is prepared to rule.

I. PROCEDURAL BACKGROUND

On February 5, 1999, Plaintiffs filed a complaint with the Montana Public Service Commission (PSC). The PSC dismissed the [*4] complaint for lack of subject matter, jurisdiction. n8 On April 6, 2000, Montana's First Judicial District Court affirmed the PSC's final agency decision dismissing the complaint for lack of subject matter jurisdiction. n9

n8 In the Matter of US WEST Communications, Inc., Complaint by Clark Fork Telecommunications, Inc., et al., Pertaining to Terminating Access Charges, Montana PSC Docket No. D99.2.26, Order No. 6185 (July 2, 1999) (attached as App. 2 to *Qwest's Reply Brief* (Court's Doc. No. 109)).

n9 Central Montana Communications, Inc., et al. v. U.S. West Communications, Inc., and the Montana PSC, Cause No. BDV 99-551 (April 6, 2000) (attached as App. 3 to *Qwest's Reply Brief* (Court's Doc. No. 109)).

On July 8, 1999, Plaintiffs filed the instant action in Montana's Ninth Judicial District Court alleging four claims: breach of tariff and switched access agreements (Count One); unjust enrichment (Count Two); estoppel (Count Three); and breach of the implied covenant of good faith and [*5] fair dealing (Count Four). n10 On August 16, 1999, Qwest removed the matter to this Court. n11

n10 This claim is incorrectly designated as "Count Five" in the Complaint and Jury Demand.

n11 Court's Doc. No. 1.

On December 11, 2000, then-Magistrate Judge Richard F. Cebull n12 granted Qwest's motion for summary judgment. n13 On December 13, 2000, the Clerk of Court entered Judgment. n14 On January 9, 2001, Plaintiffs appealed. n15 On August 27, 2002, the Ninth Circuit Court of Appeals filed an unpublished Memorandum reversing Judge Cebull's decision, and remanding the matter "for further proceedings on the interpretation and application of the [Plaintiffs'] tariffs." n16

n12 Judge Cebull is now a U.S. District Court Judge.

n13 Court's Doc. No. 47.

n14 Court's Doc. No. 48.

n15 Court's Doc. No. 49.

n16 Court's Doc. No. 57 (3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 Fed. Appx. 698 (9th Cir. 2002) (unpublished)).

[*6]

On November 12, 2002, Chief U.S. District Judge Donald W. Molloy ordered that the case be reassigned to the undersigned. n17 On January 30, 2003, upon the parties' consent, U.S. District Judge Sam E. Haddon assigned the case to the undersigned for all purposes. n18

n17 Court's Doc. No. 59.

n18 Court's Doc. No. 64.

On February 20, 2003, the Court held a status hearing at which counsel for the parties advised the Court that a stay of this matter to allow declaratory proceedings before the Montana PSC, as suggested by the Ninth Circuit in its remand order, would not be appropriate in this case. n19 Thus, on February 24, 2003, with the parties' agreement, the Court issued an Order setting a briefing schedule for summary judgment motions.

n19 It appears, in any event, that a stay pending declaratory proceedings before the Montana PSC would be foreclosed by the PSC's prior determination that it lacks subject matter jurisdiction over this case, as well as by the Montana state court's affirmance of that decision. See *supra* notes 8 and 9.

[*7]

II. FACTUAL BACKGROUND

A. Plaintiffs

Plaintiffs are rural telephone companies registered with the Montana PSC as telecommunications carriers. n20 Plaintiffs, not being part of the original Bell system, are at times referred to as "Independents." n21 Plaintiffs are local exchange carriers (LECs) that provide local telephone service to their subscribers or "end users," *i.e.*, customers at the "ends" of telephone lines.

n20 On January 1, 2003, Clark Fork, a wholly-owned subsidiary of Blackfoot, merged into its parent and ceased operating as Clark Fork Telecommunications. As the successor in interest to Clark Fork, Blackfoot remains a concurring carrier, and "Telephone Company" under the MILEC tariff (discussed *infra),* as of January 1, 2003, for the prior Clark Fork service areas. *Plaintiffs' Statement of Uncontroverted Facts* (Court's Doc. No. 68) [hereafter *Pltf.s' Stmt. of U.F.]* PP27 and 28; *Qwest's Statement of Genuine Issues* (Court's Doc. No. 89) [hereafter *Qwest's Stmt. of G.I.]* P1.

n21 *Pltf.s' Stmt. of U.F.* P1; *Qwest's Stmt. of G.I.* P1.

[*8]

B. Qwest

Qwest is one of the Regional Bell Operating Companies (RBOCs) established, in the 1982 antitrust breakup of the Bell system, n22 an event generally known as "Divestiture." Following Divestiture, Qwest and the other RBOCs were primarily limited to providing local exchange service, n23 and intra-local access and transport area (intra-LATA) n24 long distance service, n25 which is sometimes referred to as "local long distance." n26

n22 *Pltf.s' Stmt. of U.F.* P2; *Qwest's Stmt. of G.I.* P1.

n23 Thus Qwest, in addition to the other services it provides, is also an LEC. *Qwest's Statement of Uncontroverted Facts* (Court's Doc. No. 76) [hereafter *Qwest's Stmt. of U.F.]* P3.

n24 LATAs are "geographically based service islands created by the divestiture decree, marking the boundaries beyond which a Bell company may not carry telephone calls." Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* 1374 (2d ed., Aspen L. & Bus. 1999) [hereafter *Huber].*

n25 *Qwest's Stmt. of U.F.* P3.

n26 That portion of Montana within which Qwest operates was split into two LATAs. On December 20, 2002, the Federal Communications Commission (FCC) authorized Qwest to enter the inter-LATA long distance market in Montana. *Qwest's Stmt. of U.F.* P5.

[*9]

C. Relationship Between Plaintiffs and Qwest

Telephone calls between LECs are long distance calls that travel over long distance trunk groups. Long distance carriers provide long distance service for such calls.

Plaintiffs and Qwest historically have been interconnected in Montana in that Qwest has carried calls from originating LECs to terminating LECs in the same LATA - calls known as intra-LATA (local long distance) calls. Generally, when a carrier such as Qwest carries an intra-LATA call from one LEC to another, it pays the LEC that owns the local exchange in which the call originated an "originating carrier access charge." Further, it pays the LEC that owns the local exchange in which the call terminated a "terminating carrier access charge." These "access charges" n27 are for the use of the LECs' local telephone networks, and for services rendered in completing the calls on the LECs' facilities. n28

n27 Plaintiffs note, and Qwest does not dispute, that, "in the telecommunications industry, "carrier access charges (CAC)," "access service," "exchange access," and "switched access service/charges" are used interchangeably." *Brief in Support of Motion for Summary Judgment* of Ronan, Hot Springs and Lincoln [hereafter *Ronan et al.'s Opening Brief]* at 10, n.9. In this Order, the Court also uses the terms interchangeably.

[*10]

n28 *Pltf.s' Stmt. of U.F.* P3; *Qwest's Stmt. of G.I.* P2; *Qwest's Stmt. of U.F.* P7.

Under applicable tariffs, n29 Qwest purchased from Plaintiffs Feature Group C (FGC) access services, a network configuration allowing the commingling of traffic that may be originated by various carriers, but which is delivered entirely by Qwest to Plaintiffs for termination on their local networks. The FGC connection between Plaintiffs and Qwest does not provide for the identification of the originating carrier on a call transmitted to Plaintiffs by Qwest. n30

n29 The tariffs at issue herein are as follows: (1) the Telephone Carriers of Montana (TECOM) tariff, which was approved by the Montana PSC on December 21, 1995, and which has remained unchanged since that time; (2) the Montana Independent Local Exchange Carriers (MILEC) tariff, which was approved by the Montana PSC effective March 10, 1994, and which had remained unchanged since that time; and (3) the Ronan Telephone Company tariff (Ronan tariff), and (4) the Hot Springs Telephone Company tariff (Hot Springs tariff), both of which the Montana PSC approved effective January 1, 1988, and both of which have remained unchanged in their basic service and rate provisions since PSC approval. *Pltf.s' Stmt. of U.F.* PP6-8; *Qwest's Stmt. of G.I.* P1. Also, Qwest has never challenged the tariffs, nor sought any amendment or change to the tariffs. *Id.*

[*11]

n30 *Pltf.s' Stmt. of U.F.* P23; *Qwest's Stmt. of G.I.* P1.

D. Dispute in the Instant Action

For a time prior to the events giving rise to this action, n31 Qwest, as the designated intra-LATA carrier for Plaintiffs' subscribers, paid Plaintiffs terminating carrier access charges. n32 During that time, when Plaintiffs' subscribers made intra-LATA long distance calls, Qwest was automatically the intra-LATA long distance carrier. Plaintiffs billed Qwest's intra-LATA long distance charges to their subscribers, collected the money for Qwest, and then charged Qwest a billing and collection fee. n33 Plaintiffs charged Qwest originating carrier access charges on the intra-LATA long distance calls placed by their subscribers (as measured by Plaintiffs' call records), and charged Qwest terminating carrier access charges for the intra-LATA long distance calls to their subscribers based upon a ratio of terminating to originating minutes (known as a "T/O ratio"). n34

n31 Qwest characterizes this time as "prior to the enactment of the Federal Telecommunications Act of 1996, Public Law 104-104, the implementation of intra-LATA equal access dialing parity, and Qwest's withdrawal as the designated intra-LATA carrier for [Plaintiffs], ..." Qwest's *Brief in Support of Motion for Summary Judgment* [hereafter *Qwest's Opening Brief]* at 3.

[*12]

n32 *Id.* (citing *Qwest's Stmt. of U.F.* PP13-18).

n33 *Id.* (citing *Qwest's Stmt. of U.F.* P15).

n34 *Id.* (citing *Qwest's Stmt. of U.F.* PP10-11, 17-18).

Sometime later, Qwest ceased to act as designated intra-LATA carrier for all of Plaintiffs' subscribers. Qwest then reasoned that if it was not originating traffic in the Plaintiffs' exchanges, its liability for terminating carrier access charges became zero under a T/O ratio. n35 Thus, in late 1998 and early 1999, Qwest notified Plaintiffs that it would begin paying them terminating carrier access charges only for its own customers' long distance calls into Plaintiffs' exchange. n36 In other words, Qwest advised Plaintiffs that it would no longer pay terminating carrier access charges for telecommunications traffic it delivered to Plaintiffs for termination that did not originate from Qwest subscribers. A short time later, Qwest stopped paying Plaintiffs the terminating carrier access charges. Plaintiffs' initiation of this action followed. n37

n35 *Id.* at 3 (citing *Qwest's Stmt. of U.F.* P19). Plaintiffs disagree with Qwest's reasoning. They argue that Qwest continues to originate toll traffic from the Lincoln exchange, even though Qwest is no longer the "designated intra-LATA carrier," and that Lincoln continues to use a T/O ratio to calculate terminating access minutes for purposes of billing Qwest. *Pltf.s' Stmt. of G.I.* PP1 and 6. Plaintiffs also argue that Ronan and Hot Springs used a T/O ratio to calculate terminating access minutes for billing Qwest until October of 1999, after which they billed Qwest based upon actual measured minutes of terminating traffic. *Pltf.s' Stmt. of G.I.* P2. Further, Plaintiffs argue that Qwest is still capable of originating toll traffic from an exchange even though it is no longer the designated intra-LATA carrier in that exchange, *Pltf.s' Stmt. of G.I.* P6, and still is, therefore, liable under the applicable tariffs for terminating carrier access charges on all traffic it carriers to Plaintiffs for termination.

[*13]

n36 *Id.* (citing *Qwest's Stmt. of U.F.* P34).

n37 A development in the telecommunications industry occurred during the years immediately preceding initiation of this action. From January of 1996 until December of 1999, Type 2 wireless traffic in Montana increased from 2.12 million minutes to 11.79 million minutes. *Qwest's Stmt. of U.F.* P23. During the same period, the increase in wireless traffic being terminated in Plaintiffs' exchanges increased from approximately 287,000 minutes of Type 2 usage to approximately 2,900,000 minutes of Type 2 usage. *Qwest's Stmt. of U.F.* P24. Because of this increase in wireless communications, a significant amount of the intra-LATA traffic carried through Qwest's facilities is wireless traffic. *Qwest's Opening Brief* at 4 (citing *Qwest's Stmt. of U.F.* PP23-25; 37).

Generally, Plaintiffs maintain that Qwest is liable for the terminating carrier access charges under filed tariffs that govern the relationships between the parties. n38 Plaintiffs argue that Qwest is liable for these types of charges under the applicable tariffs regardless [*14] of whether the traffic originates as wireline or wireless. n39

n38 *Ronan et al.'s Opening Brief* at 10-15; *Plaintiffs' Brief in Support of Motion for Summary Judgment* [hereafter *3 Rivers et al.'s Opening Brief]* at 7-14.

n39 *Id.*

Qwest generally maintains, *inter alia,* that it is not liable under the filed tariffs for the terminating carrier access charges, as they are measured by Plaintiffs, because Plaintiffs' access tariffs do not apply to Qwest as a transit carrier. n40 Qwest argues that the tariffs follow the industry standard for such charges, *i.e.,* that the carrier selected by the calling party pays both originating and terminating access charges. Thus Qwest, as a mere transit carrier for calls, is not responsible for terminating carrier access charges for calls that its subscribers do not originate. n41

n40 *Qwest's Opening Brief* at § § I and II.

n41 *Id.*

[*15]

E. Judge Cebull's Decision and the Ninth Circuit's Remand

In granting Qwest's prior summary judgment motion, Judge Cebull determined, *inter alia,* that federal law, as interpreted by the FCC, relieved Qwest of any obligation to pay terminating carrier access charges for telecommunications traffic that its subscribers did not initiate. n42 Judge Cebull further determined that the filed tariff doctrine (also known as the filed rate doctrine) had no application because the case does not involve a dispute about rates. n43 On appeal, the Ninth Circuit reversed and remanded holding, *inter alia,* that Judge Cebull "erred in failing to interpret the tariffs at issue in this case." n44

n42 Court's Doc. No. 47.

n43 *Id.*

n44 Court's Doc. No. 57.

III. DISCUSSION

A. The Parties' Arguments

1. *Plaintiffs*

Plaintiffs cite the Ninth Circuit's remand order in urging the Court to apply the filed tariff doctrine, interpret the language [*16] of the applicable tariffs and apply that language to the facts of this case. n45 Plaintiffs predict that when the Court interprets the tariffs, it will become clear that they have met their obligation of providing Qwest with terminating access service, which involves accepting and terminating *(i.e.,* transmitting to local telephones) interexchange (typically between two cities or towns) telephone calls sent to them by other telephone companies such as Qwest. n46

Plaintiffs further argue that the tariffs also impose upon Qwest an obligation which Qwest has failed to meet. Specifically, Plaintiffs argue that the tariffs require Qwest to pay them terminating access charges for the access service that Plaintiffs provide. Plaintiffs maintain that the tariffs require payment of access charges regardless of whether Qwest is the originating carrier for a call made by one of its own subscribers, or whether the subscriber of some other LEC originated the call, and Qwest then transported the traffic to Plaintiffs for termination. Plaintiffs also argue that the tariffs require Qwest to pay terminating carrier access charges regardless of whether the originating carrier that transmits the traffic [*17] to Qwest is a wireline or wireless carrier. n47 In sum, Plaintiffs maintain that Qwest unilaterally decided not to pay the terminating carrier access charges required by the tariffs, and has failed, since January of 1999, to pay Plaintiffs a large portion of the required charges for provision of the terminating access service. n48

n45 *Ronan et al.'s Opening Brief* at 4-5; *3 Rivers et al.'s Opening Brief* at 3-4.

n46 *3 Rivers et al.'s Opening Brief* at 3-4.

n47 *Ronan et al.'s Opening Brief* at 4-5.

n48 *Ronan et al.'s Opening Brief* at 4-5; *3 Rivers et al.'s Opening Brief* at 3-4.

Plaintiffs advance equitable claims in the alternative to their breach of tariff claim. n49 First, Plaintiffs argue that Qwest has been unjustly enriched at their expense, and that Qwest is, therefore, liable to them for compensation for services rendered. n50 Second, Plaintiffs argue that they are entitled to relief under the promissory estoppel doctrine. They argue that Qwest promised to [*18] abide by the rates, terms and conditions of the applicable tariffs, Plaintiffs relied on Qwest's promises, their reliance was reasonable and foreseeable and Plaintiffs suffered injury as a result of their reliance. n51

49 *Ronan et al.'s Opening Brief* at 16-17; *3 Rivers et al.'s Opening Brief* at 14-18.

n50 *Id.*

n51 *3 Rivers et al.'s Opening Brief* at 16-18.

2. Qwest

Qwest advances a markedly different interpretation of the tariffs from that of Plaintiffs. According to Qwest, the tariffs under which Plaintiffs claim entitlement to terminating carrier access charges "clearly and unequivocally apply" a practice standard in the telecommunications industry known as "calling party's network

pays" (CPNP). n52 CPNP, Qwest argues, requires the originating carrier, whomever it may be, to pay the terminating carrier access charges. n53 Qwest argues that the CPNP standard "is part of a national paradigm that has existed since Divestiture," n54 and is reflected in [*19] the tariffs' structures. n55

n52 *Qwest's Opening Brief* at 9.

n53 *Id.* at 5-7

n54 *Id.* at 4.

n55 *Id.* at 7-9

For example, Qwest argues, each tariff contains a general applicability provision for carrier access service that specifies that the originating carrier is responsible for paying the access charge. Further, Qwest maintains, certain definitions in the tariffs indicate applicability of the CPNP standard, and the tariffs' administrative provisions use language that contemplates that the originating carrier is responsible for both originating and terminating access charges. n56 Also, Qwest notes, the Montana PSC twice has held that under the CPNP standard, carriers that transport third-party traffic from an originating carrier to a terminating carrier have no obligation to compensate the terminating carrier because the call did not originate on the transporting carrier's facilities. n57

n56 *Id.*

[*20]

n57 *Id.* at 5-7.

Next, Qwest argues that the filed rate doctrine, applied to this case, completely bars all of Plaintiffs' claims. n58 Specifically, Qwest argues that because the tariffs make the originating carrier responsible for payment of both originating and terminating carrier access fees, Plaintiffs "are precluded from extending the tariff specified liability to [Qwest] by asserting equitable theories of relief." n59 In other words, application of the filed rate doctrine precludes application of equitable forms of relief to vary the filed tariffs' terms.

n58 *Id.* at 10-11.

n59 *Id.*

Finally, Qwest argues that even if the Court were to interpret the tariffs in such a way as to make Qwest liable for terminating access charges on traffic originated by other carriers, federal law preempts any application of Plaintiffs' carrier access tariffs to intra-Major Trading Area (MTA) n60 wireless traffic. [*21] n61 Qwest argues that the FCC, within its comprehensive federal jurisdiction over Commercial Mobile Radio Service (CMRS or "wireless service"), has adopted "reciprocal compensation," which requires CMRS providers and LECs to compensate each other for terminating their respective traffic. n62 The FCC, Qwest argues, has prohibited LECs from charging terminating carrier access charges for terminating intra-MTA wireless traffic, and has limited the LECs to receiving only reciprocal compensation. Thus, Qwest argues, Plaintiffs cannot levy terminating carrier access charges against intra-MTA wireless traffic transported by Qwest without being in direct violation of the FCC prohibition. n63

n60 A Major Trading Area (MTA) is the local calling area for wireless telecommunications providers. See 47 C.F.R. § 51.701(b)(2), with MTAs determined pursuant to 47 C.F.R. § 24.202.

n61 *Qwest's Opening Brief* at 11.

n62 *Id.* at 11-12.

n63 *Id.* at 12-13 (citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499, First Report and Order PP1035-1036).

[*22]

In further support of this position, Qwest argues that the Supremacy Clause of the U.S. Constitution supports the notion of preemption here because allowing Plaintiffs to assess terminating carrier access charges on intra-MTA wireless traffic transported on Qwest's facilities "would directly thwart the FCC prohibition against assessing access charges on intra-MTA wireless traffic." n64

n64 *Qwest's Opening Brief* at 13.

B. Interpretation of* the *Tariffs

In reversing Judge Cebull, the Ninth Circuit made clear that, on remand, the Court must apply the filed tariff doctrine and interpret the tariffs at issue. Because the Ninth Circuit's discussion of the applicable law in this case forms the framework for this Court's analysis, the Court repeats it here:

> Under the filed tariff doctrine, a tariff filed with and approved by a regulating agency forms the "exclusive source" of the terms and conditions governing the provision of service of a common carrier to its customers. Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1170 (9th Cir. 2002) [*23] (citation and internal quotation marks omitted); see also Am. Tel. & Telegraph Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222, 227, 141 L. Ed. 2d 222, 118 S. Ct. 1956 (1998); Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000). A filed tariff obtains the force of law binding the utility and its customers to its terms and may be interpreted and enforced by a court in a breach of tariff action such as this one. Brown, 277 F.3d 1171-72. Because the [Plaintiffs'] tariffs form the exclusive source of the obligations between the [Plaintiffs] and their customers, the district court erred in analyzing the parties' obligations under FCC interpretations of the Telecommunications Act of 1996, 47 U.S.C. § 251-52, without interpreting the tariffs themselves. To interpret the tariffs in this case may also require further development of the record on technology and practices in the telecommunications industry, particularly as it relates to the transmission of calls in Montana. On this record, we therefore reverse the decision of the district court and remand for further proceedings on the interpretation and application of the [Plaintiffs'] tariffs. [*24] n65

n65 Court's Doc. No. 57 (3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 F.ed Appx. 698 (9th Cir. 2002) (unpublished) (footnotes omitted)).

Under the Ninth Circuit's mandate, the Court must apply the filed tariff doctrine. Thus, the Court's first task is to interpret the tariffs.

As noted *supra,* n66 the tariffs at issue are the TECOM, MILEC, Ronan and Hot Springs tariffs. The MILEC tariff was filed in 1994 in conjunction with the purchase by Plaintiffs 3 Rivers, Range and Clark Fork of various rural local exchange properties from Qwest. n67 As part of the purchase, Qwest demanded that the parties enter into Intra-LATA Switched Access Agreements, and that the terms of those agreements be incorporated in the MILEC tariff. n68

n66 See note 29.

n67 *Pltf.s' Stmt. of U.F.* P10; *Qwest's Stmt. of G.I.* P1.

n68 *Pltf.s' Stmt. of U.F.* P11; *Qwest's Stmt. of G.I.* P1.

[*25]

The "issuing" carriers for the TECOM and MILEC tariffs are those Plaintiffs that by statute are subject to full regulation by the Montana PSC. The "concurring" carriers under the TECOM and MILEC tariffs are those Plaintiffs that by Montana statute are not subject to full regulation by the Montana PSC, but that agree to offer intrastate access services under the terms of the tariffs. Both the "issuing" and the "concurring" carriers are referred to as the "Telephone Company" in the TECOM and MILEC tariffs. n69 Concurring carriers in the TECOM tariff include 3 Rivers, Range, Blackfoot, Northern and Interbel. Lincoln is included as an issuing carrier in the TECOM tariff. Concurring carriers in the MILEC tariff include 3 Rivers and Range. Clark Fork is included as an issuing carrier in the MILEC tariff.

N69 *Pltf.s' Stmt. of U.F.* P12; *Qwest's Stmt. of G.I.* P1.

As an initial matter, the parties acknowledge, and the record reflects, that the TECOM and MILEC tariffs are nearly identical with respect to the [*26] provisions relevant to determination of this dispute. n70 Further, the parties acknowledge, and the record reflects, that the Ronan and Hot Springs tariffs employ structures similar to those used in the TECOM and MILEC tariffs. The Ronan and Hot Springs tariffs, however, do contain certain differences in style and wording. n71 Accordingly, the Court will address the tariffs together except as nec-

essary to emphasize relevant distinctions among the tariffs.

n70 *Qwest's Opening Brief* at 8-9; *3 Rivers et al.'s Opening Brief* at 10-14.

n71 *Qwest's Opening Brief* at 9; *Ronan et al.'s Opening Brief* at 11-15.

"The construction of a tariff, including the threshold question of ambiguity, ordinarily presents a question of law for the court to resolve." n72 Tariffs are considered to be contracts; thus, general principles of contract law apply. n73 "Claimed ambiguities or doubts as to the meaning of a rate tariff must have a substantial basis in light of the ordinary meaning of the words used ... [*27] ." n74 Interpretation of the tariffs at issue in this action necessarily begins with a review of their language. n75

n72 Milne Truck Lines, Inc. v. Makita U.S.A., 970 F.2d 564, 567 (9th Cir. 1992) (citations omitted); see also BellSouth Telecommunications, Inc. v. Kerrigan, 55 F. Supp. 2d 1314, 1323-24 (N.D. Florida 1999) (noting that "the common meaning of a tariff is a question of law.").

n73 Milne, 970 F.2d at 567.

n74 Id. at 568 (citations omitted).

n75 The tariffs at issue herein are contained in Attachments to Plaintiffs' Additional Disclosure of Contracts filed October 18, 1999 (Court's Doc. No. 15). The Court hereafter will refer to provisions of the tariffs only by reference to the specific tariff and its section numbers.

The TECOM and MILEC tariffs state their applicability as follows:

1. Application of Tariff

> 1.1 This tariff contains regulations, rates and charges applicable to the provision [*28] of Carrier Common Line, Switched Access and Dedicated Access Services, and other miscellaneous services, hereinafter referred to as the Telephone Company, to Customer(s).

The TECOM and MILEC tariffs define "Customer(s)" as follows:

2.6 Definitions

* * *

Customer(s)

> Any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which orders to the services offered under this tariff, including Local Exchange Carrier(s), Interexchange Carrier(s) (IC's), and End User(s).

These provisions, read together, demonstrate that the TECOM and MILEC tariffs apply to services, including switched access services, that Plaintiffs provide to Qwest as a "customer." Nowhere in the record does Qwest dispute that it received such services.

The TECOM and MILEC tariffs provide, in pertinent part, the following description of switched access service:

6. Switched Access Service

6.1 General

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a communication path between a customer's premises and an end user's premises. It provides [*29] for the use of common terminating, switching and trunking facilities, and both common subscriber plant and unshared subscriber plant (i.e., WATS access lines) of the Telephone Company. Switched Access Service provides for the ability to originate calls from an end user's premises to a customer's premises. and to terminate calls from a customer's premises to and (sic) end user's premises in the LATA where it is provided. Specific references to material describing the elements of Switched Access Service are provided in 6.2.
>
> Rates and charges for Switched Access Service depend generally on its use by the customer, i.e., for MTS or WATS services. Rates and charges for Switched Ac-

> cess Service are set forth in 6.9 following. The application of rates for Switched Access Service is described in 6.8 following.

(Emphasis added).

In describing the Switched Access Service, the tariffs do not distinguish between those calls that originate with an end user from an LEC other than Qwest, and those calls that originate with one of Qwest's own end users, for ultimate access to Plaintiffs' exchanges for termination. The tariffs speak of terminating calls from a customer's (Qwest's) [*30] premises, not "a customer's end user."

In other words, the section describes the "hand off" of a call from an originating end user, be it a Qwest subscriber or another LEC's subscriber whose call Qwest is transporting, to Plaintiffs' exchanges for termination. Thus, the tariffs contemplate the same access charges for all calls Qwest transports from its premises to Plaintiffs for termination, regardless of whether the calls originate with one of Qwest's own end users or with the end user of a different LEC, with Qwest only transporting the call to Plaintiffs for termination.

Based on the unambiguous language of this provision, the Court finds unpersuasive Qwest's argument that the provision "specifies that the access customer, the party responsible for paying the access charge, is the originating carrier." n76 This tariff provision's language states only that when Qwest uses Plaintiffs' access service to terminate access traffic from its premises, Qwest is liable for paying access charges resulting from provision of the terminating access service. In short, the tariff simply does not say what Qwest says it says.

n76 *Qwest's Opening Brief* at 7.

[*31]

Further, section 6.1 provides: "The application of rates for Switched Access Service is described in 6.8 following." Section 6.8.1(C) provides: "Rates as set forth in Section 6.9 apply to all Feature Group A, B, C, D and FGA-FX Switched Access Minutes, and will be accumulated for billing on a monthly basis, or another period."

Qwest has FGC access with Plaintiffs. As a matter of practice, Qwest sends FGC access traffic to Plaintiffs' network exchanges via FGC trunks. According to the tariffs, Plaintiffs must bill Qwest for this traffic on a monthly basis under the tariffs' rates. These sections, in this Court's opinion, further support the interpretation of the tariff that Qwest is the customer responsible for payment of terminating access charges.

Also, section 5.2(c) of the TECOM tariff, for example, provides:

> For Feature Group C . . . Switched Access Service, the customer shall specify;
>
> - The number of BHMC [Busy Hour Minutes of Capacity] from the customer designated premises to the end office . . .
>
> - The number of trunks desired between customer designated premises and an entry switch or Operator Transfer Service location."

(Emphasis [*32] added).

The TECOM and MILEC tariffs also address measurement of switched access service, in pertinent part, as follows:

> 6.8.4 Customer traffic to end offices will be measured (i.e., recorded and assumed) by the Telephone Company at end office switches or access tandem switches. Originating and terminating calls will be measured (i.e., recorded or assumed) by the Telephone Company to determine the basis for computing chargeable access minutes. In the event the customer message detail is not available because the Telephone Company lost or damaged tapes or incurred recording system outages, the Telephone Company will use an estimate.
>
> * * *
>
> (E) Feature Group C Usage Measurement
>
> * * *
>
> Terminating calls over FGC to services other than 800, 900 or Directory Assistance may be measured by the Telephone Company. For terminating calls

> over FGC to services other than 800, 900 or Directory Assistance, if terminating FGC usage is not directly measured at the terminating entry switch, it will be imputed from originating usage, excluding usage from calls to 800, 900, WATS or Directory Assistance. A 1.0 terminating ratio will be assumed.

The Ronan and Hot Springs [*33] tariffs contain similar provisions in section 6.8.4. Pursuant to the foregoing language, Plaintiffs will measure, when possible, the terminating access traffic sent by Qwest (as the Customer) to Plaintiffs, and that the measurement will form the basis for the access charges. Plaintiffs maintain, and Qwest does not dispute, that they can and do measure this traffic, and continue to bill Qwest for terminating access traffic based on all actual measured minutes of traffic sent by Qwest to Plaintiffs on FGC trunks. Again, in this Court's opinion, the tariffs' language further supports an interpretation of the tariffs that makes Qwest responsible for paying Plaintiffs terminating access charges.

With respect to the Ronan and Hot Springs tariffs, the Ronan tariff states its applicability as follows:

1. Application of Tariff

> 1.1 This tariff contains regulations, rates and charges applicable to the provision of Carrier Common Line, Switched Access, and other miscellaneous services, hereinafter referred to collectively as services(s), provided by [Ronan] to Interexchange Carrier(s) (hereinafter, IC(s)), commercial mobile radio service providers (hereinafter CMRS providers), [*34] U.S. West Communications, other telecommunications carriers, and to End User(s), when service(s) is ordered or provided to an IC's location, a CMRS provider's location, other telecommunications carrier location, and/or to U.S. West Communications.

The Hot Springs tariff contains similar language. n77 A fair reading of this language makes clear that the tariffs apply to services, including switched access services, that Ronan and Hot Springs provide to Qwest.

n77 The Hot Springs tariff, rather than referring to U.S. West, refers to Mountain States Telephone and Telegraph Company (MST), which was a wholly-owned subsidiary of U.S. West. The parties do not appear to dispute that MST is now Qwest for purposes of this action.

Further, the Ronan and Hot Springs tariffs also expressly include Qwest in their definition of "Customer(s)," a term used throughout the tariffs to describe those individuals or entities that order or use telecommunications services provided by Ronan and Hot Springs. The Ronan tariff defines [*35] "Customer(s)" as follows:

2.6 Definitions

> * * *
>
> Customer(s)
>
> Any individual person, partnership, association, cooperative, joint-stock company, trust, corporation, residence, business, government or private entity, or other entity, including interexchange carrier, CMRS provider, U.S. West Communications, or other telecommunications carrier, that subscribes, orders or uses the telecommunications services provided by [Ronan] offered under this tariff. For purposes of this tariff, unless the context otherwise requires, the terms "Customer" and "Subscriber" shall be interchangeable.

From this plain language, it is readily apparent that Qwest, as a user of services provided by Ronan and Hot Springs, and as an expressly named customer in the definition, falls within the tariffs' definition of customer.

The Ronan and Hot Springs tariffs also include various provisions with respect to the type of switched access services at issue, as well as with respect to the measurement and billing of such services. First, the tariffs provide that access rates apply whenever access to

the local exchange is provided for any type of toll or switched telecommunications [*36] services.

> 3.3 Undertaking of [Ronan and Hot Springs]
>
> * * *
>
> (C) When access to the local exchange is required to provide any switched MTS or MTS type or WATS or WATS type service, or enhanced services, or any other switched telecommunications service utilizing [Ronan or Hot Springs] service(s), TS [Traffic Sensitive] Access Service Rates and Regulations, as set forth in Section 6 following will apply... n78

n78 Plaintiffs note, and Qwest does not dispute, that "'MTS' means 'Message Telephone Service' which is the industry name for standard switched telephone service (long distance or toll calls). WATS means 'Wide Area Telephone Service' which is a variant of MTS." *Ronan et al.'s Opening Brief* at 12, n.11 (citing Newton's Telecom Dictionary, pp. 485 and 819 (18th ed. 2002)).

The "switched MTS ... service" and "any other switched telecommunications services utilizing [Ronan's or Hot Springs'] service(s)" language in this provision must be read to include Qwest's use of [*37] Ronan's and Hot Springs' terminating carrier access service at issue herein. At a minimum, the plain meaning of "any other" indicates an all-encompassing expression of the types of services subject to the rates and regulations for Traffic Sensitive (TS) Access Service found in section 6 of the tariff.

Next, the Ronan and Hot Springs tariffs provide, in pertinent part, the following explanation of TS Access Service provided by Ronan and Hot Springs:

> 6. Traffic Sensitive Access Service
>
> 6.1 General
>
> Traffic Sensitive, hereinafter referred to as TS Access Service(s) which is available to customers for their use in furnishing their services to end users, provides a communication path between a customer's premises and an end user's premises. It provides for the use of common terminating, switching and trunking facilities, and common subscriber plants of [Ronan and Hot Springs]. TS Access Service(s) provides for the ability to originate calls from an end user's premises to a customer's premises or to the point of interface designated by [Ronan or Hot Springs] with [Qwest] or other customer or carrier to an end user's premises. n79

n79 The Ronan tariff goes on to provide:

> All transport and termination of intra-LCA (intra-local calling area) traffic that originates on [Ronan's] network and terminates on a CMRS provider's network, and all intra-LCA traffic that originates on a CMRS provider's network and terminates on [Ronan's] network, shall also be governed by the rates and charges contained in this tariff.

[*38]

This section of the tariffs, which is similar to that in the TECOM and MILEC tariffs discussed *supra,* also expressly describes the provision of "a communication path between a customer's premises and an end user's premises." The section also describes the TS Access Service's provision of "the ability to originate calls from an end user's premises to a customer's premises or to the point of interface designated by [Ronan or Hot Springs] with [Qwest] ... to an end user's premises ...."

In describing the TS Access Service, these tariffs, like the TECOM and MILEC tariffs, do not distinguish between those calls that originate with an end user from an LEC other than Qwest, and those calls that originate with one of Qwest's own end users, for ultimate access to Ronan or Hot Springs for termination. These tariffs also reference "an end user," not a "Qwest end user." Thus, the tariffs contemplate the same access charges for all calls Qwest transports to Ronan or Hot Springs for ter-

mination, regardless of whether the calls originate with one of Qwest's own end users or with the end user of a different LEC with Qwest merely transporting the call to Ronan or Hot Springs for termination. [*39]

Also, the Ronan and Hot Springs tariffs further describe the switching access service in sections 6.2 and 6.3. Those sections, read in conjunction with the tariff as a whole, indicate that Ronan and Hot Springs provide switched access service to their customers (including Qwest) without making any distinction, for purposes of applicable rates, between calls from other LEC's subscribers that Qwest then transports to Ronan or Hot Springs, and calls that originate with Qwest's subscribers. For example, section 6.3.1(E) provides:

> TS Access Service(s) switching when used in the terminating direction may be used to access valid telephone numbers in the local exchange area of the terminating end office switch.

The Ronan and Hot Springs tariffs define "terminating direction" in section 2.6 as "the use of Access Service for the completion of calls from an IC [Interexchange Carrier] or EC [Exchange Carrier] premises to an End User Premise[s]." Again, the tariff's language makes no distinction between the subscribers for whose calls Ronan and Hot Springs provide switching service for termination.

As noted above, Qwest urges a different interpretation of the tariffs. In [*40] arguing that the tariffs actually reflect the CPNP standard, Qwest directs the Court to the definitions of "customer message" and "end user" in the tariffs. Each tariff contains the following definitions:

> Customer Message
>
> A completed intrastate call originated by a customer's end user. A customer message begins when answer supervision from the premise of the ordering customer is received by [Plaintiff telephone company] recording equipment indicating that the called party has answered. A message ends when disconnect supervision is received by [Plaintiff telephone company] recording equipment from either the premise of the ordering customer or the customer's end user premise from which the call originated.
>
> End User
>
> Any customer of an intrastate telecommunications service that is not a carrier, except that a carrier shall be deemed to be an "end user" to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly.

Qwest argues, with very little explanation, that these definitions, together with the provisions already discussed above, "clearly [*41] contemplate[] that the same carrier (the originating carrier) is responsible for both originating and terminating access charges." n80 The Court does not agree.

n80 *Qwest's Opening Brief* at 8.

First, the Court has concluded that the tariffs' language, taken as a whole, unambiguously provides that Qwest is liable for terminating access charges for all traffic, regardless of its origin, that Qwest transports to Plaintiffs for delivery to Plaintiffs' telephone service subscribers.

Second, the definitions that are set out above do not help Qwest's position. The customer message definition, when the tariffs are read in their entirety, appears in the tariffs to determine chargeable access minutes. Similarly, the definition of end user contains no language that leads to the conclusion that it somehow reflects the presence of a CPNP regime in the tariffs. Qwest does not state where these terms are used in the tariffs to reflect a CPNP regime.

Based on the foregoing, the Court finds that the tariffs at issue [*42] in this action are unambiguous in that they impose upon Qwest liability for terminating access charges for all traffic Qwest transports to Plaintiffs for delivery to Plaintiffs' telephone service subscribers.

C. Historical Practices of the Parties

The parties' historical practices also support the conclusion that Qwest is liable for the terminating access charges. As set forth in Section II., *supra,* Qwest acknowledges that "under applicable tariffs, Qwest purchased from Plaintiffs Feature Group C (FGC) access services, a network configuration allowing the commingling of traffic that may be originated by various carriers, but which is delivered entirely by Qwest to Plaintiffs for termination on their local networks. The FGC connection between Plaintiffs and Qwest does not provide for the

identification of the originating carrier on a call transmitted to Plaintiffs by Qwest." n81

n81 *Pltf.s' Stmt. of U.F.* P23; *Qwest's Stmt. of G.I.* P1.

Under this relationship, Qwest had been paying [*43] Plaintiffs terminating access charges under a terminating to originating (T/O) ratio. n82 It stopped paying, however, for those calls that its subscribers did not originate, reasoning that if it was no longer originating traffic in one of the Plaintiff's exchanges, its liability for terminating access charges became zero under a T/O ratio. n83 Thus, Qwest had been paying the terminating access charges, but stopped when the T/O ratio billing method "collapsed." n84

n82 *Qwest's Opening Brief* at 3.

n83 *Id.*

n84 *Id.*

The problem with Qwest's position is that, while the parties at one time used the T/O ratio method for measuring terminating access services as permitted under the tariffs, n85 the tariffs also permit the parties to measure actual minutes. n86 Disuse of the T/O ratio method of measuring minutes did not relieve Qwest of its obligation, under the tariffs, for paying terminating access charges on calls it transported to Plaintiffs for termination. Accordingly, no justification [*44] exists for Qwest's decision to stop paying terminating access charges.

n85 See TECOM and MILEC tariffs at § 6.8.4(E).

n86 *Id.*

These facts, in this Court's opinion, further demonstrate that Qwest is liable for paying Plaintiffs terminating carrier access charges for the provision of access services regardless of the identity of the originating carrier. The historical practice of the parties also appears to be consistent with this Court's interpretation, and Plaintiffs' apparent understanding, of the terms of the applicable tariffs.

D. Federal Preemption

The Court's foregoing interpretation of the tariffs does not resolve fully the issue of the scope of Qwest's liability. Qwest argues that even if the Court determines, as it has, that Qwest is liable under the tariffs for terminating access charges on traffic originated by other carriers, Qwest cannot be held liable for such charges related to intra-MTA wireless traffic that it delivers to Plaintiffs for termination. n87

n87 *Qwest's Opening Brief* at 11.

[*45]

Qwest maintains that Commercial Mobile Radio Service (CMRS or "wireless service") falls under a different regulatory scheme than does wireline traffic. Qwest argues that Congress, in an effort to create a "unified and comprehensive regulatory scheme" for wireless traffic, vested the Federal Communications Commission (FCC) with broad rulemaking authority under the Communications Act of 1934, and has enacted laws to give the FCC specific authority over interconnection between CMRS providers and other carriers of telecommunications service. n88

n88 *Id.*

Under this authority, Qwest contends, the FCC has adopted administrative rules that require CMRS providers and LECs to compensate one another for terminating their respective traffic under "reciprocal compensation." n89 Further, Qwest argues, "the FCC has expressly held that [LECs] are prohibited from charging their switched access charges for terminating intra-MTA wireless traffic, and are limited to reciprocal compensation." n90

n89 *Id.* at 12 (citing 47 C.F.R. § 20.11(b)).

[*46]

n90 *Id.* at 12-13 (citing Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499, First Report and Order PP1035-1036) [hereafter *1996 Local Competition Order*].

Relying on the foregoing, Qwest ultimately argues that federal law impliedly preempts Plaintiffs' state law claims because "allowing [Plaintiffs] to assess their terminating access charges on intra-MTA wireless traffic transiting Qwest's facilities would directly thwart the FCC prohibition against assessing access charges on intraMTA wireless traffic." n91

n91 *Id.* at 13

Further, Qwest maintains that Plaintiffs "cannot argue that the wireless carriers can avoid having terminating access charges levied on their intra-MTA wireless traffic by connecting directly to them, as the federal Telecommunications [*47] Act of 1996 expressly contemplates indirect interconnections; 'Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.'" n92

n92 *Id.* (citing 47 U.S.C. § 251(a)(1)).

Plaintiffs advance three arguments in urging the Court to reject Qwest's preemption argument. First, Plaintiffs argue that the filed tariff doctrine, which makes a filed tariff the "exclusive source" of terms and conditions governing the provision of service of a common carrier to its customers, and which has the force of law, precludes a judicial challenge to the validity of a filed tariff. n93 Plaintiffs maintain that only the regulator with which a tariff is filed has the authority to invalidate it, and Qwest has failed thus far to present its preemption argument to the proper administrative forum. n94

n93 *Brief of Plaintiffs Ronan Telephone Company, Hot Springs Telephone Company and Lincoln Telephone Company in Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment* [hereafter *Ronan et al.'s Resp. Brief]* at 9-10; *Plaintiffs' Brief in Opposition to Defendant's Motion for Summary Judgment* [hereafter *3 Rivers et al.'s Resp. Brief]* at 18-19.

[*48]

n94 *Ronan et al.'s Resp. Brief* at 9-10.

Second, Plaintiffs argue that Qwest's preemption argument is barred by the "law of the case" doctrine. n95 Plaintiffs contend that Qwest, in challenging Plaintiffs' appeal to the Ninth Circuit, expressly presented its preemption argument to the appellate court. In reversing Judge Cebull, remanding the case and directing the district court to apply the filed tariff doctrine and interpret the tariffs, Plaintiffs argue, the Ninth Circuit implicitly rejected Qwest's preemption argument. Plaintiffs argue that, had the appellate court agreed that the FCC intra-MTA rule preempted the tariffs, it would have simply affirmed Judge Cebull's decision, and not remanded the matter for the district court's interpretation of the tariffs. n96

n95 *Ronan et al's Resp. Brief* at 9-10; *3 Rivers et al.'s Resp. Brief* at 18-19.

n96 *Id.*

Third, Plaintiffs maintain that, even if [*49] the Court rejects their first two arguments, the FCC order upon which Qwest relies in advancing its preemption argument *(i.e.,* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection Between Local Carriers and Commercial Mobile Radio Service Providers, 11 F.C.C.R. 15499, First Report and Order PP1035-1036 [hereafter *1996 Local Competition Order]),* does not preempt state authority over LEC interconnection rates for intra-MTA wireless-originated calls. n97 Rather, Plaintiffs contend, *inter alia,* that the *1996 Local Competition Order* draws distinctions between access charges applicable to long distance traffic and reciprocal compensation applicable to local traffic that make the FCC's order inapplicable to the type of traffic at issue in this case. n98

n97 *Ronan et al.'s Resp. Brief* at 12-17; *3 Rivers et al.'s Resp. Brief* at 18.

n98 *Id.*

1. Filed Tariff Doctrine

The Court finds Plaintiffs' first [*50] argument unpersuasive. The filed tariff doctrine, in and of itself, does not wholly preclude Qwest's preemption argument. The preemption doctrine, which derives from the Supremacy Clause of the United States Constitution, n99 allows federal law to preempt and displace state law under certain circumstances. n100 As the Ninth Circuit Court of Appeals has noted, tariffs have the force and effect of law. n101 Thus, in the instant case, the filed tariffs at issue in this case, which have the force and effect of state law,

are subject to potential preemption by federal law if the criteria for preemption are present. The filed tariff doctrine alone does not stave off potential federal law preemption.

n99 U.S. CONST., ART. VI, cl. 2 ("This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

n100 See Ting v. AT&T, 319 F.3d 1126, 1135-36 (9th Cir. 2003) and discussion *infra.*

[*51]

n101 Court's Doc. No. 57 (3 Rivers Telephone Cooperative, Inc., et al. v. U.S. West Communications, Inc., 45 Fed. Appx. 698 (9th Cir. 2002) (unpublished)).

The same reasoning applies with equal force to Plaintiffs' argument that only the regulator with which a tariff is filed has the authority to invalidate it. For this argument, Plaintiffs rely on the Ninth Circuit's decision in Brown v. MCI Worldcom Network Services, Inc. n102

n102 277 F.3d 1166 (9th Cir. 2002).

In Brown, as Plaintiffs correctly note, the court reiterated that "under the filed rate doctrine, no one may bring a judicial challenge to the validity of a filed tariff." n103 In advancing its preemption argument here, however, Qwest is not challenging the validity of the tariffs. Rather, Qwest maintains that the tariffs, with or without a pending challenge to their validity, are subject to federal preemption under appropriate [*52] circumstances.

n103 Id. at 1170.

Further, as noted *supra,* the tariffs in this case have the force and effect of state law. As such, they are as susceptible to federal preemption as any other state law. Accordingly, Plaintiffs' first argument fails. n104

2. The Law of the Case Doctrine

The Court also finds inapplicable the "law of the case" doctrine as a basis for Plaintiffs' challenge to Qwest's preemption argument. The Ninth Circuit has described application of the law of the case doctrine as follows:

> The law of the case doctrine provides that "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." U.S. v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (internal quotation and citation omitted); U.S. v. Miller, 822 F.2d 828, 832 (9th Cir. 1987) ("The rule is that the mandate of an appeals court precludes the district court on remand from [*53] reconsidering matters which were either expressly or implicitly disposed of upon appeal."). But a court may have discretion to depart from the law of the case if:
>
> 1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result. Alexander, 106 F.3d at 876 (emphasis added). A court's "failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion." Id. (citation omitted). n105

n104 The Court notes that the record contains further support for its conclusion with respect to this issue. In the Reply Affidavit of Cheryl Gillespie (Court's Doc. No. 43) filed on May 5, 2000, reference is made to a PSC matter that involved a petition by Ronan (represented by Mr. Evilsizer), under 47 U.S.C. § 251(b)(5), for exemption from the requirement that it enter into a reciprocal compensation arrangement with Montana Wireless (MW) (represented by Mr. Squires), the wireless subsidiary of Blackfoot. In the Matter of the Petition of Ronan Telephone Company for Suspension or Modification of provisions of the 1996 Telecommunications Act, Pursuant to 47 U.S.C. § 251(f) (2) and 253(b), Mont. PSC, Docket No. D99.4.111. Exhibit 6 to Ms. Gillespie's Reply Affidavit is MW's objection to Ronan's prehearing memorandum. In it,

Mr. Squires states, *inter alia,* that "the rating of [CMRS] calls as 'local' is a matter of Federal law, not a matter of [Ronan's] tariffs. It is irrelevant what the access tariffs provide with regard to CMRS traffic...." *Objection to Prehearing Memorandum of Ronan Telephone Company* at 2. From this statement, it appears that at one time, Blackfoot, through its subsidiary MW, took a position on the preemption issue which was consistent with that of Qwest in the instant case.

[*54]

n105 U.S. v. Cuddy, 147 F.3d 1111, 1114 (9th Cir. 1998).

However, application of the law of the case doctrine necessarily hinges on the threshold question of whether the appellate court actually decided the operative issue. n106 If the appellate court does not decide an issue, there is no law of the case. n107 Further, an issue does not become the law of the case merely because the appellate court could have decided it. n108

n106 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *Federal Practice and Procedure* vol. 18B, § 4478, 649 (2d ed., West Group 2002) ("Actual decision of an issue is required to establish the law of the case. Law of the case does not reach a matter that was not decided.") (citations omitted).

n107 U.S. v. Standard, 207 F.3d 1136, 1139 (9th Cir. 2000).

n108 See, e.g., Field v. Mans, 157 F.3d 35, 40-42 (1st Cir. 1998).

[*55]

In remanding, the Ninth Circuit did not decide, either explicitly or implicitly, Qwest's preemption argument. n109 It may be true, as Plaintiffs argue, that Qwest raised the preemption issue during proceedings on appeal. The Ninth Circuit, however, declined to address the issue, opting instead to remand the matter to the district court for interpretation of the tariffs and possible "further development of the record." n110

n109 See generally Court's Doc. No. 64.

n110 *Id.*

The Ninth Circuit did not mention federal preemption and, in fact, signaled to this Court that the issue remained open when it suggested in a footnote that a stay may be appropriate to allow pursuit of a declaratory ruling from the Montana PSC. In discussing the PSC's possible authority and expertise in the matter, the Ninth Circuit noted that the PSC might "issue a declaratory ruling with regard to . . . whether a tariff, interpreted to require payment for such calls, is just and reasonable in light of the FCC's interpretation [*56] of federal law." n111 In sum, because the Ninth Circuit did not decide the preemption issue, and instead suggested that the Montana PSC might want to address it, no law of the case exists that would preclude Qwest from making its preemption argument here." n112

n111 *Id.,* n.2.

n112 The Court is mindful that Plaintiffs' opposition to Qwest's preemption argument could be construed as a collateral attack upon an FCC order which, under the Hobbs Act, 28 U.S.C. § 2342, must be brought in a federal court of appeals. It is this Court's opinion, however, that the parties here are not asking the Court to determine the validity of the FCC's order. Rather, they are asking it to interpret the FCC's order. Thus, the Hobbs Act does not apply. See Pacific Bell v. Pac-West Telecomm, Inc., 325 F.3d 1114, 1125 (9th Cir. 2003).

3. Preemption

With respect to the preemption doctrine, the Ninth Circuit Court of Appeals recently reiterated that under the Supremacy Clause, [*57] federal law can preempt state law in three ways. n113 First, Congress may expressly preempt state law by enacting a statute with an explicit statutory command that state law be displaced (*i.e.,* "express" preemption)." n114 Second, Congress may impliedly preempt state law by establishing "a scheme of federal regulation [that] is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation'" (*i.e.,* "field" or "complete" preemption). n115 Third, federal law may impliedly preempt state law where a conflict exists between federal and state law (i.e., "conflict" preemption). n116

n113 Ting, 319 F.3d at 1135-36.

n114 Id. (citations omitted).

n115 Id. (citations omitted).

n116 Id. (citations omitted).

The FCC order n117 up on which Qwest relies does not contain preemptive text, so express preemption is not present here. Similarly, field preemption does not appear to be an issue here. Qwest [*58] neither argues that federal law occupies the field, nor directs the Court to any relevant authority that so suggests. Further, it is beyond dispute that state law and regulatory agencies retain significant roles in telecommunications regulation." n118 Thus, Qwest's preemption argument appears to focus exclusively on implied conflict preemption." n119

n117 The phrase "laws of the United States" in the Supremacy Clause includes regulations lawfully promulgated by federal agencies pursuant to their congressionally-delegated authority. See City of New York v. FCC, 486 U.S. 57, 64, 100 L. Ed. 2d 48, 108 S. Ct. 1637 (1988); International Ass'n of Independent Tanker Owners v. Locke, 159 F.3d 1220, 1226 (9th Cir. 1998). There is no dispute in this action that the Federal Communications Commission (FCC) is a federal agency with congressionally-delegated authority to lawfully promulgate regulations with respect to the telecommunications industry.

n118 Ting, 319 F.3d at 1136-37 (discussing state law's governance of formation of consumer long-distance contracts and detariffing's effect of creating a larger role for state law in the telecommunications industry as reasons "to preclude a finding that Congress intended to completely occupy the field").

[*59]

n119 *Qwest's Opening Brief* at 13 ("In this case, allowing [Plaintiffs] to assess their terminating access charges on intraMTA wireless traffic transiting Qwest's facilities would directly thwart the FCC prohibition against assessing access charges on intraMTA wireless traffic.").

Implied conflict preemption exists where "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." n120 Determining whether conflict preemption exists requires courts "to imply Congress' intent from the statute's structure and purpose." n121 If a statute or agency regulation does not specifically address the issue, courts are to "look to 'the goals and policies of the [statute or agency regulation]'" to determine its potentially preemptive effect. n122

n120 Ting, 319 F.3d at 1136 (citations omitted).

n121 Id. at 1135-36 (citations omitted).

[*60]

n122 Id. (citations omitted).

Congress passed the Telecommunications Act of 1996 (the Act, which is codified at 47 U.S.C. § § 151-615) in February of 1996. The Act was intended to stimulate competition in the local and long distance telephone markets. n123 As part of the statutory scheme relevant to this case, the Act required all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." n124

n123 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999); Pacific Bell, 325 F.3d at 1117-18.

n124 47 U.S.C. § 251(b)(5). Rules applicable to telecommunications further emphasized the reciprocal compensation arrangement between LECs and CMRS carriers as follows:

> (b) Local exchange carriers and commercial mobile radio service providers shall comply with principles of mutual compensation.
>
> (1) A local exchange carrier shall pay reasonable compensation to a commercial mobile radio service provider in connection with terminating traffic that originates on facilities of the local exchange carrier.

> (2) A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.

47 C.F.R. § 20.11(b).

[*61]

The Act's complexity prompted the FCC to create an order directing implementation of the Act. n125 In the *1996 Local Competition Order,* the FCC addressed the billing of those calls that a CMRS provider delivers to an LEC for termination in those instances in which the call both originates and terminates in the same MTA. n126 The parties disagree about the interpretation of the FCC's order. The Court addresses the operative paragraphs of the order in turn.

n125 *1996 Local Competition Order, supra.*

n126 *Id.* at PP 1035-1045.

First, in paragraph 1033, the FCC discussed the distinction between "transport and termination" and "access." The FCC noted that transport and termination of traffic, regardless of the location of its origination, implicates the same network functions. The FCC concluded, however, that a legal distinction remains between transport and termination of local traffic, and access services for long distance traffic. The FCC further emphasized that local traffic [*62] falls under the reciprocal compensation scheme, while termination of interstate and intrastate long-distance traffic is subject to access charges. These conclusions raised the question of what type of traffic is considered "local" and what is not. In the order's next three paragraphs, the FCC sought to answer that question.

In paragraph 1034, the FCC reaffirmed its stance in paragraph 1033, and concluded that the reciprocal compensation scheme applies only to traffic that originates and terminates in a "local area." The FCC in paragraph 1034 also discussed the historical application of access charges, which involved three carriers collaborating to complete a "long distance" call. The FCC contrasted those types of calls with those calls subject to the reciprocal compensation scheme in which two carriers work together to complete a "local call."

Next, paragraph 1035 provides, in pertinent part:

> 1035. With the exception of traffic to or from a CMRS network, state commissions have the authority to determine what geographic areas should be considered "local areas" for the purpose of applying reciprocal compensation obligations under section 251(b)(5), consistent with the state [*63] commissions' historical practice of defining local service areas for wireline LECs. Traffic originating or terminating outside of the applicable local area would be subject to interstate and intrastate access charges. . . . n127

n127 *Id.* at P 1035 (emphasis added).

In paragraph 1035, the FCC announced that state commissions are vested with the authority to determine what geographic areas are to be considered "local areas" for purposes of applying section 251(b)(5)'s reciprocal compensation obligations. However, paragraph 1035 specifically excepts from the state commission's authority "traffic to or from a CMRS [wireless] network." For that type of traffic, the FCC reserved for itself in paragraph 1036 the exclusive authority to define local services areas for traffic to or from CMRS networks.

In paragraph 1036, the FCC stated:

> 1036. On the other hand, in light of this Commission's exclusive authority to define the authorized license areas of wireless carriers, we will define the local [*64] service area for calls to or from a CMRS network for the purposes of applying reciprocal compensation obligations under section 251(b)(5). Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. Accordingly, traffic to or from a CMRS network that originates

> and terminates within the same MTA is subject to transport and termination rates under section 251(b) (5), rather than interstate and intrastate access charges. n128

n128 *Id.* at P 1036 (emphasis added) (footnotes omitted).

It is Qwest's position that the foregoing provisions [*65] from the *1996 Local Competition Order* specifically provide that traffic between an LEC and a CMRS provider that originates and terminates within the same MTA is local traffic and is, therefore, not subject to terminating access charges, but rather to reciprocal compensation. The Court agrees.

Paragraph 1036 expressly states that the FCC, for purposes of applying section 251(b)(5)'s reciprocal compensation obligations, defines the local service area for calls to or from a CMRS network as the Major Trading Area (MTA). In other words, traffic that both originates and terminates in the same MTA is considered "local," and thus "subject to transport and termination rates under section 251(b)(5) [reciprocal compensation], rather than interstate or intrastate access charges." The FCC's order makes no distinction, with respect to CMRS traffic that originates and terminates in the same MTA, between traffic that flows between two carriers or among three or more carriers before termination. This traffic is all "local" traffic subject to the reciprocal compensation scheme. n129

n129 In Iowa Network Services, Inc. v. Qwest Corp., 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324 (S.D. Iowa Oct. 9, 2002), the court rejected Iowa LECs' claim that Qwest owed access charges for intra-MTA wireless calls. The court held that such claims were precluded by the Iowa Utilities Board's prior decision that "the FCC had previously deemed intraMTA traffic as being local, and, therefore, access charges could not apply." 2002 U.S. Dist. LEXIS 19830, 2002 WL 31296324, *8.

[*66]

This conclusion is further bolstered by language in paragraph 1043 of the *1996 Local Competition Order,* which provides, in relevant part:

> 1043. As noted above, CMRS providers' license areas are established under federal, rules, and in many cases are larger than the local exchange service areas that state commissions have established for incumbent LECs' local service areas. We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges. Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC; with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming" traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the [*67] new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges. n130

n130 *Id.* at P 1043 (emphasis added) (footnotes omitted).

In this Court's opinion, the underlined text further supports the conclusion that traffic between an LEC and CMRS network that originates and terminates in the same MTA is local and, therefore, subject to reciprocal compensation rather than access charges. The FCC order makes no distinction between such traffic and traffic that flows between a CMRS carrier and LEC in the same MTA that also happens to transit another carrier's facilities prior to termination.

Further, the Court is not persuaded by Plaintiffs' argument that the last sentence of paragraph 1043 "carved out an exception" "that preserves the access charge system for wireless [*68] calls that were subject to access charges prior to the 1996 Act (such as the calls at issue). n131 The referenced language in the last sentence of paragraph 1043 pertains to "interstate access charges" and does not specifically reference "local" calls, i.e.

CMRS traffic that originates and terminates in the same MTA, as defined in paragraphs 1035 and 1036. In other words, the Court does not find these provisions inconsistent.

n131 *Ronan et al.'s Resp. Brief* at 15.

Based on the foregoing discussion, the Court concludes that 47 U.S.C. § 251(b), as implemented by the FCC's *1996 Local Competition Order,* preempts the tariffs in this case to the extent that the reciprocal compensation scheme applies to CMRS traffic that originates and terminates in the same MTA, regardless of whether it flows over the facilities of other carriers along the way to termination. Accordingly, Qwest is not liable to Plaintiffs for terminating access charges on CMRS (wireless) traffic that both originates [*69] and terminates in the same MTA. n132

n132 The Court is mindful that, because FGC traffic is commingled, Plaintiffs cannot identify what portion of Qwest incoming traffic is CMRS originated. Nonetheless, in deciding the issues raised by the pending motions, the Court is constrained to interpret and apply governing laws and regulations as they currently exist.

IV. MOTIONS TO STRIKE AFFIDAVITS

Qwest's Motion to Strike Affidavit of Jan Reimers will be denied. As the Plaintiffs note, the Ninth Circuit contemplated that the District Court may need to consider technology and practice in the telecommunications industry. n133 The Reimers affidavit does contain such information. Mr. Reimer's legal conclusions are given no weight by this Court.

n133 See *Plaintiff's Brief Opposing Defendant's Motion to Strike the Affidavit of Jan Reimers* at 4.

[*70]

Qwest's Motion to Strike the Affidavit of Joan Mandeville (Qwest's motion asks the Court to strike Ms. Mandeville's Reply Affidavit) also will be denied. Although the better practice is clear compliance with Local Rule 56.1(d), the parties recognize that the Court may grant leave to file "further affidavits" [see Fed. R. Civ. P. 56(e)] and it hereby does so.

Qwest's motion to strike to the Supplemental Affidavit of Jan Reimers will be granted. Fed. R. Civ. P. 56(e) requires that supporting and opposing affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated. therein." Reimer's supplemental affidavit fails to meet these standards. He repeatedly purports to instruct the Court on what evidence is relevant. n134 He opines on the legal obligations of the parties. n135 He speculates on what another affiant "knows." n136 And, he offers his opinion on the veracity of another affiant. n137 His supplemental affidavit is not helpful to the Court in understanding [*71] the facts. n138

n134 *Reimer's Supp. Aff.* at PP 7, 9, 10, 11 and 14.

n135 *Id.* at PP 8, 10 and 12.

n136 *Id.* at P 13.

n137 *Id.* at PP 7 and 14.

n138 See Fed. R. Evid. 702; see also Kostelecky v. NL Acme Tools, 837 F.2d 828, 830 (8th Cir 1988) (cited with approval in Fireman's Fund Ins. Co. v. Alaskan Pride Partnership, 106 F.3d 1465, 1468 (9th Cir. 1997)); CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *Federal Practice and Procedure* vol. 10B, § 2738, 345-57 (3d ed., West Group 1998).

V. CONCLUSION

Based on the foregoing,

IT IS ORDERED that:

1. The motion n139 of Ronan, Hot Springs and Lincoln for summary judgment on Count One is GRANTED in part, and DENIED in part, as set forth herein. The motion for summary judgment, as it relates to Counts Two and Three of the Complaint, is DENIED as MOOT in light of the Court's ruling on Count One;

2. Qwest's [*72] Motion n140 for Summary Judgment is GRANTED in part, and DENIED in part, as set forth herein; n141

3. The motion n142 of 3 Rivers, Range, Blackfoot, Northern, Interbel and Clark Fork for summary judgment on Count One is GRANTED in part, and DENIED in part, as set forth herein. The motion for summary judgment, as it relates to Counts Two and Three of the Complaint, is DENIED as MOOT in light of the Court's ruling on Count One;

4. Qwest's Motion n143 to Strike Affidavit of Jan Reimers is DENIED;

5. Qwest's Motion' n144 to Strike Affidavits of Jan Reimers and Joan Mandeville is GRANTED to the extent it relates to Mr. Reimer's supplemental affidavit, and DENIED to the extent it relates to Ms. Mandeville's reply affidavit.

n139 Court's Doc. No. 66.

n140 Court's Doc. No. 73.

n141 Qwest's motion seeks summary judgment on all of Plaintiffs' claims. Qwest did not argue the basis for its motion with respect to Count Four of the Complaint. Accordingly, Qwest's motion for summary judgment is DENIED to the extent it relates to Count Four.

n142 Court's Doc. No. 79.

n143 Court's Doc. No. 87.

[*73]

n144 Court's Doc. No. 110.

IT IS FURTHER ORDERED that lead trial counsel for each party shall appear in the chambers of the undersigned, Room 210, Federal Building, 215 1st Avenue North, Great Falls, Montana, at 2:00 p.m., September 30, 2003, for the purpose of participating in a scheduling conference. The conference is intended to develop a case-specific plan for remaining discovery, and to prepare a schedule for disposition of the issue remaining in the case.

Lead counsel for all parties shall confer to consider matters listed in Fed. R. Civ. P. 26(f) on or before September 15, 2003. The parties shall jointly file with the Court a written report outlining the discovery plan formulated at the conference on or before September 23, 2003.

The parties will design the discovery plan to require disclosure of all experts. Expert disclosures must comply with Fed. R. Civ. P. 26(a)(2)(B) on or before the deadline for disclosure. Discovery shall close thirty (30) to sixty (60) days after the deadline [*74] for disclosure of Defendant's experts. The parties should propose a date certain for the close of discovery.

The Clerk of Court is directed to notify the parties forthwith of the making of this Order.

DATED this 22nd day of this August, 2003.

Carolyn S. Ostby

United States Magistrate Judge