Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Expedited Declaratory Ruling of South Dakota Network, LLC

To: The Commission

PETITION FOR EXPEDITED DECLARATORY RULING OF SOUTH DAKOTA NETWORK, LLC

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Filed: February 7, 2018
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Executive Summary

South Dakota Network, LLC ("SDN") respectfully requests the Commission to issue a declaratory ruling asserting its jurisdiction over a dispute between SDN and Northern Valley Communications, Inc. ("NVC") concerning interstate traffic and associated facilities at issue in a South Dakota case; and declaring that (a) a contract between SDN and an interexchange carrier ("IXC"), entered into for the purpose of terminating large volumes of traffic bound to a competitive local exchange carrier ("CLEC") engaged in access stimulation or "traffic pumping," is lawful under the Communications Act of 1934, as amended (the "Act") and (b) that CLECs enjoy no exclusive right to transport terminating traffic to their end offices (or elsewhere), including the related matter that the filing of a CLEC federal tariff does not confer a right to compel other carriers to use the tariffed services.

NVC’s circuit court complaint concerns a physically intrastate trunk facility carrying almost entirely interstate traffic. Furthermore, NVC’s complaint and other papers filed in the state proceeding are replete with references to SDN’s interstate tariff filings, the Act, the Commission’s rules, as well as arguments that SDN has violated NVC’s rights under the Act. It is well established that it is the nature of the traffic, and not the physical location of the facility, that determines whether the Commission has jurisdiction. In addition, the issues before the state court are inextricably intertwined with federal issues in the areas of competition policy, interconnection, and statutory responsibility over its licensees. Thus, the state court’s decision significantly intrudes into the FCC’s jurisdiction here.

A key element of NVC’s claims, and particularly its attempt at the judicial dissolution of SDN, is its contention that SDN’s agreement with AT&T was unlawful. However, the Transformation Order’s pronounced 2011 policy change favoring negotiated agreements for
access traffic supports a declaration that SDN may lawfully negotiate commercial agreements. There are no carve-outs or exceptions to the negotiated agreement doctrine which would apply to CEA providers or dominant carriers generally.

NVC’s claims are largely predicated upon the assumption that it enjoys an exclusive right to transport stimulated traffic between Sioux Falls and Groton, South Dakota. Such an assumption violates more than two decades of Commission policy governing the access market. There are two key Commission access policies implicated by the SDN/NVC dispute. The first is the Commission’s long-standing goal to promote competition for interstate transport services; the second is the Commission’s recognition that there are certain market failures in the terminating access market that require regulatory correction. In light of the Commission’s policies aimed directly at increasing competition in the access market and curbing CLEC monopoly power, it is clear that NVC’s assertion of a monopoly entitlement for interstate access transport is flatly inconsistent with the Act and Commission rules and policies.

Each count of NVC’s complaint invokes the federal questions SDN has described above: SDN’s ability to enter into a contract for competitive service, and NVC’s right to provide transport. Accordingly, these Counts are within the exclusive province of the Commission.
PETITION FOR EXPEDITED DECLARATORY RULING
OF SOUTH DAKOTA NETWORK, LLC

South Dakota Network, LLC, a South Dakota limited liability company (“SDN”), requests pursuant to Section 1.2 of the Commission’s Rules\(^1\) that this Commission issue an expedited Declaratory Ruling on federal issues in a matter set for trial in South Dakota state court beginning on March 19, 2018. Substantively, SDN’s Petition asks that the Commission confirm (a) that the Commission has jurisdiction over interstate traffic and associated facilities at issue in the South Dakota case; (b) that a contract between SDN and an interexchange carrier (“IXC”), entered into for the purpose of terminating large volumes of traffic bound to a competitive local exchange carrier (“CLEC”) engaged in access stimulation or “traffic pumping,” is lawful under the Communications Act of 1934, as amended (the “Act”),\(^2\) and (c) that CLECs enjoy no exclusive right to transport terminating traffic to their end offices (or elsewhere), including the related matter that the filing of a CLEC federal tariff does not confer a right to compel other carriers to use the tariffed services. Commission action is necessary to avoid regulatory uncertainty associated with the court action.

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\(^{1}\) 47 C.F.R §1.2

\(^{2}\) 47 U.S.C. §§151 et seq.
SDN requests that a Public Notice issue as soon as reasonably possible setting comment dates. SDN appreciates the requirements of the Commission’s processes and does not expect a ruling by the trial date, but submits that circumstances warrant a speedy comment cycle. The matters before the trial court are almost entirely subject to the Commission’s jurisdiction, including rates, terms, and conditions, and points of interconnection for interstate traffic. Indeed, among other claims, the plaintiffs seek the judicial dissolution of SDN. The trial court has sought an amicus curiae brief from the Commission’s Office of General Counsel (“OGC”) on only two of the many important issues that are within the Commission’s jurisdiction. Rather than filing an amicus brief, SDN is suggesting to the OGC that it request a stay of proceedings to the state court pending the Commission’s determination of this Petition. The Commission is respectfully requested to issue its Public Notice seeking comment on the Petition as soon as reasonably possible.

I. BACKGROUND

This matter arises from the latest dispute between an IXC and a CLEC long engaged in access stimulation. Despite all efforts by SDN to avoid an improper intrusion on the Commission’s plenary jurisdiction, a constantly changing attack on SDN in the litigation makes it inevitable that the state court will not be able to avoid such intrusion and entanglement. The most recent change in claims by the CLEC reveals its true aim, which is to establish an exclusive or monopoly right to access transport or otherwise enforce rights to collect amounts for transport services not ordered by the IXC. SDN provided and continues to provide transport services in what it believed to have been a proper utilization of available authority to resolve the dispute, but that competition is being attacked as unlawful and contrary to the Commission’s policies. SDN had attempted to obtain a pronouncement from the Commission on these issues in the context of
an order issuing on the Petition for Forbearance filed by AT&T in WC Docket No. 16-363, which would have been issued well before the trial date. In the litigation between SDN and the CLEC, an amicus curiae brief has been requested, but would not sufficiently address the important federal issues that are within the Commission’s jurisdiction. Thus under the present state of the litigation, with all claims against SDN crystalized and other avenues unavailable, SDN now comes before the Commission to address the issues in the proper forum and jurisdiction.

As the Commission is aware, SDN is a centralized equal access (“CEA”) network provider operating under this Commission’s Section 214 authority, issued in 1990. SDN’s network was originally authorized and constructed for the purpose of providing equal access and related services for rural incumbent telephone companies in the state of South Dakota. By virtue of the extremely remote, sparsely populated locations served by such companies, IXCs did not seek to serve these low volume traffic areas. SDN’s aggregation of low volume traffic in Sioux Falls, South Dakota solved that problem, and since 1992 a large number of IXCs have been providing competitive long-distance service to a growing number of rural communities (approximately 300 as of today) through SDN’s equal access tandem switch in Sioux Falls. Over time, efficiencies of this centralization and aggregation resulted in further service offerings to these rural communities.

5 Id at ¶24 (noting benefits of traffic demand through centralized equal access).
6 These services include SS7, CNAM, video transport from a centralized headend, Internet (now with DDoS mitigation), Home/Farm automation support, and Network Marketing support for regional network RFPs that support rural telehealth, regional banking, State Circuit Courts, schools and Governmental facilities from the smallest communities up through an including services for the Federal Government.
In addition to carrying the traffic of its rural *incumbent* local exchange carrier owners, rural *competitive* local exchange carriers affiliated with SDN's owners have designated the SDN switch in the LERG for interstate and intrastate transport services. One of SDN’s member-ILECs, James Valley Cooperative Telephone Company (“James Valley”), is affiliated with Northern Valley Communications, Inc. (“NVC”), a CLEC. NVC is a well-known access stimulator and has been involved in a number of court and Commission proceedings regarding its practices.\(^7\) NVC’s access stimulation scheme has had a material, negative impact upon SDN’s business. In April of 2013, AT&T stopped paying SDN’s tandem switching (CEA) charges for stimulated traffic associated with NVC. These withheld access charges include significant amounts for interstate traffic. Although SDN has acted diligently to ameliorate the corrosive effect of NVC’s traffic stimulation scheme upon SDN’s business, other major interexchange carriers in addition to AT&T have also failed to pay for the same reason.

Numerous efforts were made to resolve the non-payment disputes between SDN and AT&T and NVC and AT&T. These included efforts by SDN to explore alternative transport options for AT&T on a prospective basis, including economic alternatives similar to direct transport that would address the problems created by the high volume, stimulated traffic. After discussions with Commission staff, SDN filed revisions to its interstate tariff to address these high volume concerns. Ultimately, these tariff revisions were withdrawn in light of discussions with FCC staff. In lieu of tariff revisions, SDN developed a contract option for transport of AT&T traffic between SDN and NVC. SDN and AT&T entered into such a contract in

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\(^7\) See *Qwest Communications Corp. v. Northern Valley Communications*, 26 FCC Rcd 8332 (FCC 2011), reconsideration denied, 26 FCC Rcd 14520 (FCC 2011) and *Sprint Commun. Co. L.P. v. Northern Valley Communs.*, 26 FCC Rcd 10780 (FCC 2011), petitions for review consolidated and denied, *N. Valley Communs., LLC v. FCC*, 717 F.3d 1017, 1019 (D.C. Cir. 2013) (cataloging NVC tariff filings, which were rejected, seeking to evade FCC rule for “end users” to be charged a fee by CLECs in order to assess interstate access charges against IXCs).
September 2014, after which NVC and its corporate affiliates filed suit against SDN, its CEO and Managers in a circuit court in South Dakota.⁸

Although cloaked in South Dakota statutory and common law claims as discussed below, NVC’s complaint asks the state court to make findings contrary to the Act, the Commission’s precedent, and its pro-competitive policies. These matters were brought before the court in a motion to dismiss and/or refer issues to this Commission upon grounds of preemption and/or primary jurisdiction, which the court largely denied;⁹ Count V of NVC’s complaint, claiming that SDN had violated South Dakota statutory provisions concerning unfair treatment of a “regular established dealer,” was the only Count dismissed as preempted.¹⁰ Aside from the preempted Count V, the only area in which the judge showed any deference concerning NVC’s claims relates to the judicial dissolution of SDN in Count VIII (regarding the alleged unlawful access tariff cost study and the allegation that SDN had violated the Act by its Agreement with AT&T). Rather than refer the matter to the Commission, however, the Court only invited an amicus curiae brief if the Commission “is so inclined.”¹¹

II. THE COMMISSION HAS JURISDICTION OVER THIS DISPUTE

NVC’s circuit court complaint concerns a physically intrastate trunk facility carrying almost entirely interstate traffic. Furthermore, NVC’s complaint and other papers filed in the state proceeding are replete with references to SDN’s interstate tariff filings, the Act, the

⁹ See, Attachment A: Memorandum Decision on Defendant’s Motion to Dismiss and Alternative Motion to Stay and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell, James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al., No. 15-134 (S.D. 5th Cir. July 17, 2017) (“Memorandum Decision”).
¹⁰ Id. at pp. 12-13.
¹¹ Id. at p. 18.
Commission’s rules, as well as arguments that SDN has violated NVC’s rights under the Act.\textsuperscript{12} For instance, factual allegations in the complaint include reference to NVC’s “federal tariff,”\textsuperscript{13} the payment for which SDN allegedly interfered,\textsuperscript{14} Commission meetings and tariff filings which were the result of an SDN “scheme,”\textsuperscript{15} and that a Transport Agreement struck between SDN and AT&T was discriminatory because it replaced SDN’s withdrawn Commission tariff amendment.\textsuperscript{16} The Agreement is alleged to have caused a breach of an operating agreement between SDN and its members and their affiliates (i.e., James Valley and NVC),\textsuperscript{17} specifically an implied contract term evidently believed by NVC to award it an interstate transport monopoly,\textsuperscript{18} and resulted in an alleged intentional interference with a business relationship.\textsuperscript{19} Each claim has a core issue of conformity with the Commission’s regulations or rights arising therefrom.

Against this background, there can be no factual dispute that NVC’s complaint is primarily driven by interstate traffic and, therefore, is subject to the Commission’s jurisdiction. It is well established that it is the nature of the traffic, and not the physical location of the facility, that determines whether the Commission has jurisdiction. The dividing line between the regulatory jurisdiction of the FCC and states depends on “the nature of the communications which pass through the facilities [and not on] the physical location of the lines.”\textsuperscript{20} Interstate and

\begin{footnotesize}
\begin{enumerate}
\item See Attachment B: Second Amended Complaint, James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al., No. 15-134 (S.D. 5th Cir. May 2016)(“Complaint”).
\item Id. at ¶45.
\item Id. at ¶52, 53.
\item Id at ¶¶56 – 59.
\item See Complaint at ¶¶65-71.
\item Id. at ¶¶74-83.
\item Id. at ¶86.
\item Id. at ¶¶94-99.
\end{enumerate}
\end{footnotesize}
foreign communications are “totally entrusted to the FCC.”21 The Commission has “plenary and comprehensive regulatory jurisdiction over interstate and foreign communications.”22 “Congress vested in [the FCC] plenary jurisdiction to regulate the instrumentalities and facilities used in the transmission and reception of interstate communications.”23 Indeed, the Commission’s jurisdiction has been upheld over physically intrastate terminal equipment even against evidence that “[a]pproximately 97% of telephone calls” were intrastate.24 There can be no serious debate then that the interstate traffic here and associated facilities are squarely within the Commission’s jurisdiction. In addition, the issues before the state court are inextricably intertwined with federal issues in the areas of competition policy, interconnection, and statutory responsibility over its licensees. Thus, the state court’s decision significantly intrudes upon the FCC’s jurisdiction here.

To be sure, this Petition may not anticipate all of the outcomes by which NVC’s complaint could inhibit Commission policies. As discussed in greater detail below, NVC has only recently developed a new damage theory which posits that NVC has been denied access revenue from the failure of a wholesale IXC market. This failure is laid at the feet of the SDN/AT&T Agreement. Moreover, SDN has learned that it may now face damages at trial up to, and possibly exceeding, $25 million. These developments, and other theories at trial (e.g. breach of the operating agreement), if reduced to a judgment, may inhibit SDN’s ability to compete, if not function altogether. If such matters come to pass, the South Dakota proceeding could become ripe for preemption, and SDN may seek such an outcome.

21 Id. at 1501.
III. **THE COMMISSION SHOULD DECLARE THAT SDN CAN CONTRACT FOR TRANSPORT AND SWITCHING**

A key element of NVC’s claims, and particularly its attempt at the judicial dissolution of SDN, is its contention that SDN’s agreement with AT&T was unlawful. Indeed, NVC has recently lodged a letter with the Commission’s Office of General Counsel (“OGC”) \(^{25}\) seeking an amicus curiae filing to such effect with the court. Relatedly, the U.S. District Court for South Dakota’s Northern District has noted that the existence of a valid agreement between SDN and AT&T is significant to its decision in a judicial dispute covering the same pumped traffic and SDN transport facilities. \(^{26}\) In addition to the legal disputes covering past periods, a ruling upon SDN’s legal authority to contract under Commission precedent and rules is necessary as a matter of prospective business relationships (thereby removing this issue from determination by a state court jury in South Dakota). As the Commission knows, access stimulation/traffic pumping is not a benign practice. \(^{27}\) SDN’s network was designed to connect and aggregate low volumes of access traffic from rural communities for the purpose of presenting an economic case for IXCs to offer presubscribed service there. That SDN has had IXC non-payment issues with respect to stimulated traffic thus is no surprise. State court judges and a Brown County, South Dakota jury do not have the Commission’s expertise in this area. As is discussed in the next sections of this Petition, important Commission policies are at risk without a ruling as requested here. SDN’s

\(^{25}\) See Attachment C: Letter from G. David Carter to Jennifer Tatel, Esq., et al., Office of General Counsel, dated September 2, 2017 at p. 2.


\(^{27}\) See, e.g., Sprint Communications Company, L.P. v. Crow Creek Sioux Tribal Court, Native American Telecom, LLC and B.J. Jones, 121 F.Supp.3d 905, 923 (S.D. 2015) (“To the contrary, the Commission noted that one of the purposes of the CAF Order was to “curtail wasteful arbitrage practices.” Of those wasteful practices, access stimulation was singled out as “one of the most prevalent arbitrage activities today[.]”).
ability to enter into agreements with willing IXC buyers is a key business tool to maintain the viability of obtaining payment for service in the face of access stimulation.\(^\text{28}\)

Thus, SDN’s decision to enter into the AT&T agreement was driven by a compelling business imperative to resolve IXC customer disputes caused by NVC’s traffic pumping. As previously discussed, NVC’s complaint challenges SDN’s ability to enter into a contract with AT&T for stimulated traffic transport and switching service,\(^\text{29}\) and seeks judicial dissolution of SDN, notwithstanding SDN’s section 214 authorization. NVC also argues in its state court complaint that the AT&T agreement violates “requirements as a rate of return carrier.”\(^\text{30}\) However, the Transformation Order’s pronounced 2011 policy change favoring negotiated agreements for access traffic supports a declaration that SDN may lawfully negotiate commercial agreements, as in the case of transporting AT&T’s stimulated terminating access traffic to NVC’s Groton, South Dakota switch.

Two of the Transformation Order’s principal objectives were to implement comprehensive intercarrier compensation reform that leaves “… carriers free to enter into negotiated agreements that allow for different terms”\(^\text{31}\) and to “…curtail two of the most

\(^{28}\) As noted, the Commission has extended the 251(b)(5) regime to the transport and termination of all access traffic, not just stimulated access traffic. Given that all LECs are entitled to establish contracts with willing negotiating partners under the Transformation Order, it is certainly the case that whether SDN is considered to have been a dominant CEA provider or a non-dominant CLEC (or something in between) at the time of its AT&T agreement, it certainly had the right to have provided a competitive transport service.

\(^{29}\) Although NVC alleges that SDN’s contract with AT&T is for the provision of switching and transport services, SDN contends that it only provided terminating transport service pursuant to the contract. SDN contends that the factual question of whether SDN has provided transport and switching service should be decided by the Commission via the complaint process. However, for purposes of this Declaratory Ruling, SDN asks the Commission to decide the legal question assuming switching service was provided.

\(^{30}\) Complaint at ¶123.

\(^{31}\) Transformation Order at ¶¶648, 739.
prevalent arbitrage activities today, access stimulation and phantom traffic ...”32 A close review of this Order shows that this language is hardly gratuitous. After requiring a “default” tariff-based mechanism, the Commission stated many times that “carriers should be free to negotiate commercial agreements.”33 Commission rule section 51.905(a) states that, “[t]he rates set forth in this section are default rates. Notwithstanding any other provision of the Commission’s rules, telecommunications carriers may agree to rates different from the default rates.”34 The Commission has affirmed this policy in its recent 2016 Technology Transitions Order, where it described the Transformation Order, in pertinent part, as follows: “The rate caps these rules prescribe are “default rates” from which the rules permit carriers to deviate by private agreement [citing fn. 60].”35 In the next paragraph, the Commission noted: “… private agreements require a willing negotiating partner[.]”36

These Orders leave little doubt as to SDN’s ability to provide terminating access switching and transport service pursuant to contract or pursuant to SDN’s default tariffed rate. There are no carve-outs or exceptions to the negotiated agreement doctrine which would apply to CEA providers or dominant carriers generally. Against this background, the Commission is respectfully requested to reaffirm that SDN may arrange to provide terminating access transport and switching through consensual agreement.

32 Id. at ¶649.
33 Id at fn. 1290; see also, ¶812 (“At the same time, carriers remain free to enter into negotiate agreements that differ from the default rates established above.”); ¶828 (carriers permitted to negotiate alternative intercarrier compensation arrangements to the tariff based default rates); ¶1322-1323 (carriers allowed to negotiate agreements during transition to bill and keep).
34 47 CFR §51.905.
36 Id. at ¶26.
IV. THE COMMISSION SHOULD DECLARE THAT CLECS HAVE NO EXCLUSIVE RIGHT TO INTERSTATE TRANSPORT SERVICE

NVC’s claims are largely premised upon the assumption that it enjoys an exclusive right to transport stimulated traffic between Sioux Falls and Groton, South Dakota.\(^{37}\) SDN submits that such an assertion is flatly contrary to the Commission’s policies and regulations regarding transport competition, and respectfully requests that the Commission rule that no such CLEC-exclusive or monopoly right is permissible.

A review of the complaint itself shows NVC’s mistaken assumption in this respect. For instance, the complaint asserts that NVC and its two affiliates refused to relinquish NVC’s “right” to transport AT&T’s traffic;\(^{38}\) that SDN “attempted to force NVC to relinquish its existing rights to collect tariffed access charges;”\(^{39}\) and that SDN interfered with NVC’s “expectancy of future business with AT&T pursuant to NVC’s tariffs.”\(^{40}\) NVC has argued variously, that its “right” to transport arises because its tariff was “deemed lawful,” that SDN promised to accord NVC “the same terms and conditions” which apply to NVC’s ILEC owner and SDN’s other owners (and thus implicitly agreed that NVC has an exclusive transport arrangement),\(^{41}\) and that the Transformation Order cemented, in an unspecified way, such exclusive transport rights.\(^{42}\)

\(^{37}\) Groton is the headquarters of NVC’s parent ILEC, James Valley. NVC is headquartered in Aberdeen, SD. James Valley supposedly operates a tandem switch connecting and terminating traffic to the town of Redfield, SD, which is in NVC’s service area and in which the traffic stimulating entities are apparently located.

\(^{38}\) See Complaint at ¶6.

\(^{39}\) Id. at ¶92.

\(^{40}\) Id. at ¶95.

\(^{41}\) See Complaint at ¶¶37-39. See, also, Attachment E: Letter from James Cremer, counsel to NVC, to William Heaston, SDN of November 17, 2014 (“SDN is not entitled to provide transport services to AT&T because services are provided by NVC pursuant to its deemed lawful tariff.”)

\(^{42}\) Attachment F: Letter from James Cremer to William Heaston of March 31, 2014.
NVC’s argument that its federal tariff was “deemed lawful,” and that the *Transformation Order* gave it transport monopoly rights, are questions of law running to the central issue whether NVC has exclusive transport rights for interstate traffic. These assertions are patently wrong, as there are no provisions in the Commission’s orders or rules which stand for this proposition. Indeed, none are cited by NVC.

The claim that SDN is in a position to grant NVC an exclusive or monopoly transport right also is absurd on its face – SDN enjoys no such power or authority. NVC's claim is based on a letter in which NVC asked SDN to provide service on the “same terms and conditions” provided to its ILEC members. SDN, however, cannot confer any interstate rights upon carriers choosing to designate SDN’s tandem as a POI in the LERG. Through the 214 process, the Commission conferred special privileges on SDN and its members. However, because NVC is not a member of SDN, it is not included in SDN's 214 authority.

In fact, NVC’s complaint violates more than two decades of Commission policy governing the access market. There are two key Commission access policies implicated by the SDN/NVC dispute. The first is the Commission’s long-standing goal to promote competition for interstate transport services; the second is the Commission’s recognition that there are certain market failures in the terminating access market that require regulatory correction. This dispute involves both policies because NVC is effectively attempting to extend its market power over end-user customers to IXCs seeking competitive transport alternatives.

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43 This argument is based upon the misquotation of NVC’s letter which, in fact, recognizes that its CLEC status may require different treatment. *See* Complaint at Exhibit A: Letter from Doug Eidahl of NVC to Rich Scott of SDN, September 8, 1999. Moreover, there is no evidence that SDN agreed to any of these terms. In any event, SDN cannot confer a transport monopoly on NVC.
Beginning in 1992, the Commission adopted a series of Orders intended to promote competition for interstate access services, including transport services in particular. In one such Order, the Commission required the larger local telephone companies to allow competitors to construct transmission facilities into their offices so as to compete for dedicated services in local markets. In another, the Commission began to restructure its Part 69 Rules governing access in order “to promote competition for interstate switched transport.” As part of this proceeding, the Commission explicitly adopted a structure where dedicated circuits were priced as though they were shared circuits (i.e., they were priced based on usage, not on a flat-rate basis) for a variety of competitive and policy reasons, with the expectation that competition in this market would develop. In a companion proceeding, the Commission took a series of steps to increase competition in the long-distance access market through expanding interconnection including for switched access transport, particularly given the emergence of the competitive access provider (“CAP”) industry, and tandem switching. Later, the Telecommunications Act of 1996 was adopted (“the ’96 Act”) to address, among other things, the market power of incumbents by requiring them to make components of their networks available to entrants at cost-based rates.

Though access competition did develop as intended by the Commission’s Orders and the ’96 Act, it also emerged that competitive LECs retained market power over terminating traffic that required Commission intervention in order to discipline anticompetitive behavior.

45 See In Re: Transport Rate Structure and Pricing, 7 FCC Rcd 7006 at ¶¶1-6 (FCC 1992).
46 Id. at ¶¶27-30.
49 PL 104-104, 110 Stat. 56.
Specifically, in imposing access charge benchmarks upon the CLEC industry, the Commission noted the market power enjoyed by CLECs over their end users:

[T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXC's, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates. Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.\(^{50}\)

The Seventh R&O went on to find that “IXCs are subject to the monopoly power that CLECs wield over access to their end users,” and established benchmark pricing rules, described as a “…restriction on the CLEC’s exercise of their monopoly power…”\(^{51}\)

After plugging that hole in the regulatory paradigm, principally caused by the CLEC manipulation of internet service provider (“ISP”) bound traffic, the Commission was shortly faced with new access stimulation schemes like those of NVC. In the Transformation Order, the Commission indicated that “[t]he record confirms the need for prompt Commission action to address the adverse effects of access stimulation,” which adverse effects include “unjust and unreasonable” interstate switch access rates and harm to competition by giving companies that pump traffic a competitive advantage over companies that do not.\(^{52}\) Recalling that the terminating access markets essentially consist of a series of bottleneck monopolies over access to individual end users,\(^{53}\) the Commission recognized that access stimulation was yet another

\(^{50}\) *In Re: Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (FCC 2001) at ¶¶34 (“Seventh R&O”).

\(^{51}\) Id. at ¶¶38-40. See also, *In Re: ACS Anchorage, Inc.* 22 FCC Rcd 16304 (FCC 2007) at ¶59 (… “interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers’ carrier charges cannot be fully deregulated.”).

\(^{52}\) *Transformation Order* at ¶¶661-665.

\(^{53}\) *Transformation Order* at ¶674, citing *In Re: Access Charge Reform*, 16 FCC Rcd 9923, 9935 (*CLEC Access Reform Order*).
instance of CLECs exploiting a *de facto* monopoly in this market. According to the Commission, it stepped in with new benchmarking rules aimed at breaking up this market power wielded by CLECs.

In light of the Commission’s policies aimed directly at increasing competition in the access market and curbing CLEC monopoly power, it is clear that the assertion of a monopoly entitlement for interstate access transport is flatly inconsistent with the Act and Commission rules and policies.

V. **EACH CLAIM IMPLICATIONS THIS COMMISSION’S JURISDICTION**

As discussed below, each count of NVC’s complaint triggers Commission jurisdiction and policy issues, as previously discussed: SDN’s ability to enter into a contract for competitive service, and NVC’s alleged exclusive right to provide transport. Counts I (Breach of Operating Agreement), II (Breach of Contracts), III (Breach of Fiduciary Duty and Duty of Good Faith and Fair Dealing), IV (Intentional Interference with Business Relationship), and VII (Conversion) all implicate NVC’s claim to enjoy exclusive transport rights. Counts VI (Unjust Enrichment) and VIII (Dissolution) raise questions about SDN’s ability to contract for competitive transport service. Count IX (Declaratory Judgment) and the Prayer for Relief closely follow the claims in the other Counts, including fixing the POI, specifying terms, and dissolving SDN. Accordingly, these Counts are the exclusive province of the Commission.

A. **Counts Implicating Exclusive Transport Claims**

In Count I, NVC alleges that SDN has wrongfully changed its point of interconnection (“POI”) with the SDN network. However, the Commission retains jurisdiction over the

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54 *CLEC Access Reform Order* at 9936.
55 *Transformation Order* at ¶679-701.
interconnection of intrastate communications facilities used in interstate communications, as here, and has never granted CLECs the right to demand a point of interconnection outside its service area with other (particularly, non-ILEC) carriers. The court rejected arguments that the movement of the POI implicated this Commission’s jurisdiction on this score when it concluded that Count I “…does not challenge the rate, terms and conditions of telecommunications service.” This conclusion is simply unsustainable, as the base dispute in NVC’s complaint concerns transport mileage, and AT&T’s payments therefor. These in turn are directly determined by the POI at issue. It is clear that this claim thus does affect the rates, terms and conditions of interstate service provided to AT&T and AT&T’s prerogatives to arrange competitive alternatives to NVC’s transport, as previously demonstrated. The state law claim is at once at odds with SDN’s role as a competitor, and AT&T’s right to a competitive choice for interstate transport.

In Count II, NVC alleges that SDN has interfered with “NVC’s ability to collect tariffed transport charges from long-distance carriers for transporting said access traffic from Sioux Falls to Brown County.” The Commission has exclusive jurisdiction over interstate tariffs and their terms, including any right to collect tariff charges in a competitive market. SDN briefed this claim in detail, demonstrating for the court how NVC relies upon an alleged “right” to carry traffic between Sioux Falls and Brown County, South Dakota (NVC’s geographic location).

56 Complaint at ¶80.
57 National Ass’n of Regulatory Util. Com’rs at 1498-1501.
58 Memorandum Decision at pp. 8-9.
59 As the Commission is aware, the POI defines the starting point of a particular service, and typically becomes an important determinant of any mileage calculation regarding transport services. For instance, under NECA #5, the tariff generally indicates (6.4.6) that “The mileage to be used to determine the monthly rate for Local Transport is calculated on airline distances between the end office switch … and the customer's serving wire center …,” which itself is influenced by the location of the POI.
60 Complaint at ¶86.
without competitive ‘interference’ from SDN,\textsuperscript{61} and accordingly raises a substantial federal question regarding Commission policy and precedent on transport competition. Notably, SDN’s expert report by Mr. Joseph Gillan included citation to Commission precedent supporting the proposition that CLECs have no right to determine IXC traffic routing in the first instance.\textsuperscript{62} The court, as before, refused to acknowledge that enforcement of this “right” would have any economic effect: “under either theory, Plaintiffs do not challenge the rate, terms and conditions of a telecommunications service agreement.”\textsuperscript{63} The court’s ruling is notable for its failure to grasp the operations of the interstate access market (and understandably so). The presence of competitive service does not interfere with a carrier’s ability to collect tariff charges unless, of course, such carrier has not been selected by the customer.

In Count III, NVC alleges that SDN and its managers have violated a state-law statutory obligation imposed upon members of a limited liability company by, among other things, “attempting to force NVC to relinquish its existing rights to collect tariffed access charges.”\textsuperscript{64} This count raises matters falling within the Commission’s exclusive jurisdiction, such as the interpretation of a CLEC’s access tariff and the “rights” thereby conferred, including how such “rights,” if they exist at all, intersect with the Commission’s competition policy. As previously discussed, the Commission has exclusive jurisdiction over this issue. Quite simply, the filing of a tariff hardly confers upon NVC any right to traffic, which goes to the heart of the Commission’s competition policy for the last four decades, at least.

\textsuperscript{62} CLEC Access Reform Order at 9960, ¶92 (FCC 2001).
\textsuperscript{63} Memorandum Decision at p 10.
\textsuperscript{64} Complaint at ¶92.
In Count IV, NVC alleges intentional interference with NVC’s relationship with AT&T pursuant to NVC’s interstate tariffs, specifically with its ability to collect for its transport services. Again, the validity of NVC’s tariff and of NVC’s claim to competition-free transport service are issues squarely within the Commission’s jurisdiction. The court, though, rejected SDN’s argument that this claim implicated the Act, concluding that, “… the alleged wrongful acts are not predicated on duties or obligations imposed by the FCA.” SDN respectfully submits that the Commission will have a different view of transport competition, as discussed above.

In Count VII, NVC alleges SDN has converted circuit capacity leased “exclusively” to NVC. NVC claims it has been “harmed” by SDN’s “unlawful” use of NVC’s property, and NVC seeks recovery of lost tariff charges to other IXCs who may have used AT&T to deliver access traffic to NVC through the SDN agreement with AT&T. It is clear that this Count is predicated on NVC’s claim that it has a transport monopoly, and accordingly raises a question as to whether any such right exists. If NVC has no right to the underlying traffic on the facilities, then NVC’s claimed “harm” is conjectural at best. Even if SDN improperly used NVC’s leased

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65 Complaint at ¶99.
66 Critically, the most recent filing in state court by NVC now seeks to recover, under this tort claim, alleged lost profits due to AT&T utilizing the transport agreement with SDN to provide wholesale service to other carriers rather than pay NVC’s tariffed rates. That filing was made in response to SDN’s dispositive motion under state law, which the Court denied. See Attachment H: Except from January 26, 2018 Motions Hearing Transcript at p. 31:6-23; pp. 54-57, South Dakota Network, LLC’s Motion for Partial Summary Judgment, James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al., No. 15-134. This amply demonstrates that the state court proceeding will be rife with arguments and decisions about the lawfulness of the SDN agreement with AT&T, all of which center on applicable Commission regulations, the Act and regulation of rates for interstate access traffic.
67 Memorandum Decision at 12.
68 Complaint at ¶116.
69 Complaint at ¶120.
facility, this would not mean that NVC is entitled to its tariffed rate. NVC can only obtain its tariffed rate when it provides the tariffed service to the IXC, in this case AT&T. Here, it did not. SDN provided the transport service in question.

B. Counts Implicating the Lawfulness of the SDN-AT&T Agreement

In Count VI, NVC alleges unjust enrichment predicated upon its assertion that SDN’s provision of transport service to AT&T is unlawful because SDN may not contract for transport and switching.\(^{70}\) The lawfulness of SDN’s provision of interstate transport service to AT&T is squarely within the Commission’s exclusive jurisdiction. The court ruled against SDN’s argument that NVC’s unjust enrichment claim was improper, despite NVC’s allegations that SDN “is not lawfully permitted to provide …” the AT&T transport service\(^{71}\) and that SDN cannot lawfully provide the transport service to AT&T.\(^{72}\) As previously noted, this is the same agreement which the court now agrees should be subject to an OGC amicus brief – precisely because it is within the Commission’s jurisdiction. At bottom, this count turns upon SDN’s ability to contract for access services and, as such, intrudes upon the Commission’s jurisdiction.

Count VIII seeks the dissolution of SDN, predicated upon the alleged illegality of the AT&T/SDN agreement and alleged improper cost study filings in support of SDN’s federal tariff.\(^{73}\) In a nutshell, then, this claim represents an attempt to dissolve an entity of federal creation, subject to prior Commission approval for discontinuance of service, based upon alleged violations of the Act itself, the Commission’s rules regarding SDN’s ability to contract for transport service, and an alleged violation of the Commission's tariffing rules. The state court denied SDN’s request to refer this Count to the FCC, content only to hear from OGC in an

\(^{70}\) Complaint at ¶106.
\(^{71}\) Compare Complaint at ¶106 with Memorandum Decision at p 14.
\(^{72}\) Complaint at ¶¶1, 106, 123, and 124.
\(^{73}\) Complaint at ¶123.
amicus filing.\textsuperscript{74} This Count again implicates the Commission’s jurisdiction. The Commission should find that SDN may lawfully contract for transport and switching access services; that SDN’s federal access tariff was filed as deemed lawful and, therefore, there is no valid dispute regarding SDN's cost study. Further, even if SDN is not allowed to provide access service pursuant to contract, or if SDN's cost study and tariffed access rate did not comply with Commission rules, such conduct would not result in the revocation of SDN's authority to operate. Indeed, the unilateral dissolution of SDN is outside the court’s jurisdiction.\textsuperscript{75}

VI. CONCLUSION

Based on the forgoing, SDN respectfully requests the following action from the Commission:

1. A ruling that the Commission has plenary jurisdiction over the traffic and facilities at issue in NVC’s complaint, and a related ruling that if NVC has facts purporting to show a violation of the Act in this matter, that it exercise its remedies under the Act.

2. A ruling that NVC’s complaint treads upon the Commission’s policies and precedent favoring competition in the access service market, including for switching and high-volume transport.

3. A ruling that SDN is authorized to contract for access services, as it has with AT&T, or a related ruling that if not, SDN may not be dissolved by the South Dakota court based upon any lack of SDN’s ability to have contracted for access service, and/or claims concerning its 2014 Annual Access Filing cost support.

\textsuperscript{74} Memorandum Decision at p 18.
\textsuperscript{75} See 47 U.S.C. 214(e) (requiring Commission consent prior to the reduction, impairment, or discontinuance of service).
4. Through its Office of General Counsel, to notify the South Dakota court that its proceeding should be stayed pending Commission action on this Petition.

Respectfully submitted,

SOUTH DAKOTA NETWORK, LLC

[Signature]
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Filed: February 7, 2018
Certificate of Service

I hereby certify that a copy of the foregoing Petition for Declaratory Ruling of South Dakota Network, LLC was sent via United States mail to the following:

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By:
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ATTACHMENT A
Defendant filed, *inter alia*, Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission, and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell. A motions hearing was held on April 12, 2017 in the above entitled matter. Prior to the hearing, both parties submitted briefs to the Court. This Memorandum Decision constitutes the Court’s ruling on the motions.

**BACKGROUND**

Defendant South Dakota Network, LLC (SDN) is a telecommunication carrier that provides, among other things, “Centralized Equal Access” or “CEA” service in South Dakota. James Valley Cooperative Telephone Company (JVT) is a member of SDN. JVT is an incumbent local exchange carrier (“ILEC”) that provided telephone services in Brown County. JVT owns James Valley Communications, Inc. (JVC), which is the sole member of Northern
Valley Communications, LLC (NVC). NVC is a competitive local exchange carrier ("CLEC") that provides telecommunications and information services in certain areas of Brown and Spink Counties in northeastern South Dakota. NVC claims affiliate membership in SDN by virtue of JVT’s membership. Since 1999, NVC has utilized the CEA services of SDN pursuant to lease agreements and other contracts between NVC and SDN.

The dispute between the parties arises from AT&T’s withholding payments to NVC and SDN for access charges starting in 2013. In September 2014, SDN entered into an agreement ("SDN/AT&T Agreement") with AT&T which provided for a contract rate to provide transport for certain telecommunications traffic.

In March of 2015, Plaintiffs filed the present suit against SDN, its managers, and CEO Mark Shlanta. The claims against the managers and Shlanta were subsequently dismissed by this Court pursuant to Defendants’ Motions. As a result, the only defendant that remains in this suit is Defendant SDN. The complaint against SDN includes Count I breach of Operating Agreement, Count II breach of contracts, Count IV intentional interference with business relationship, Count V violation of South Dakota Trade Regulation SDCL 37-1-4; Count VI unjust enrichment, Count VII conversion, Count VIII dissolution, and Count IX declaratory judgment.

Defendant moves to dismiss all of Plaintiffs’ claims or alternatively stay the proceeding and refer some issues to the Federal Communications Commission. It claims all of Plaintiffs’ claims arise under federal law and are preempted. Alternatively, Defendant argues that the FCC has primary jurisdiction and urges this Court to stay the proceeding and refer federal issues to the FCC. Defendant also moves to strike or exclude the opinions of Warren Fischer, Michael Starkey, and Barry Bell.

1 Defendants made the present motions before this Court issued rulings dismissing claims against Managers. Since other defendants were dismissed from the present case, Defendant SDN became the only party making the motion.
ANALYSIS AND DECISION

I. Preemption

A. Legal Standard


The framework for federal preemption is well settled. Generally, a state law claim may be preempted by federal law through express preemption or implied preemption. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015). Implied preemption includes field preemption and conflict preemption. *Id.* Field preemption applies when Congress intended to foreclose any state regulation in the area, irrespective of whether state law is consistent or inconsistent with federal standards. *Id.* (emphasis original). Conflict preemption, sometimes referred to as ordinary preemption, “exists where ‘compliance with both state and federal law is impossible’, or where ‘the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *California v. ARC America Corp.*, 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989)); *Tiede v. CorTrust Bank, N.A.*, 2008 S.D. 31, ¶ 16, 748 N.W.2d 748, 753.
B. Federal Question Jurisdiction

To support its proposition of federal preemption, Defendant reasons that all of the claims in dispute invoke substantial federal questions. However, the mere existence of a federal question cannot be conflated with federal preemption defense. Generally, the preemptive effect of a federal statute does not provide federal question jurisdiction.\(^2\) Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 6, 123 S. Ct. 2058, 2062 (2003); see also, Johnson v. MFA Petroleum Co., 701 F.3d 243, 248 (8th Cir. 2012) (“An assertion that a state claim is preempted by federal law ‘is a defense to ... [the] state law claim and not a ground for federal jurisdiction.’”) Either a state or federal court may entertain a federal preemption defense claim and dismiss the state law claim if preemption is warranted. Carter v. Cent. Reg’l W. Virginia Airport Auth., No. 2:15-CV-13155, 2016 WL 4005932, at *16 (S.D.W. Va. July 25, 2016). Federal question jurisdiction, on the other hand, only renders a claim removable to a federal court. See 28 U.S.C. §1441 (articulating grounds for removal). The proper forum to address federal question jurisdiction is in a federal court on a removal and remand proceeding. See 28 U.S.C. §§ 1446-1447 (procedure for removal and remand). If a federal court exercises its jurisdiction, then it may decide whether claims are preempted. If a federal court declines jurisdiction and remands claims to state court, parties are free to raise a defense of federal preemption in state court. See Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am., 768 F.3d 938, 947 (9th Cir. 2014) (articulating the proper procedure for claiming federal preemption in a state court).

\(^2\) An exception to the general rule is the doctrine of complete preemption. See Beneficial Nat. Bank, 539 U.S. at 6, 123 S. Ct. at 2062. Complete preemption doctrine applies where the preemptive force of a federal statute is so “extraordinary” that it converts an ordinary state law claim into a federal claim and confers exclusive federal jurisdiction. Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318 (1987); Gore v. Trans World Airlines, 210 F.3d 944, 949 (8th Cir. 2000). To that effect, complete preemption, in essence, is a jurisdictional doctrine rather than a preemption doctrine. Dennis v. Hart, 724 F.3d 1249, 1254 (9th Cir 2013). Because the parties agree that complete preemption does not apply to the FCA, this Court need not address this narrow exception.
Here, this Court has not received any notice of removal to federal court. Accordingly, this Court continues to exercise its concurrent jurisdiction, except for claims over which this Court lacks subject matter jurisdiction.

C. Artful Pleading Doctrine

Defendant emphatically argues that all of the claims raised by Plaintiffs are preempted under the artful pleading doctrine. Defendant’s reading of the doctrine is overbroad. The artful pleading doctrine applies when the plaintiff has attempted to defeat removal by failing to plead a necessary federal question. Chaganti & Associates, P.C. v. Nowotny, 470 F.3d 1215, 1220 (8th Cir. 2006). The doctrine is applicable when federal law completely preempts a plaintiff’s state law claim. Rivet v. Regions Bank of Louisiana, 522 U.S. 470, 475, 118 S. Ct. 921, 925, 139 L. Ed. 2d 912 (1998) (emphasis added). Indeed, courts have held complete preemption is prerequisite to the artful pleading doctrine. Minnesota ex rel. Hatch v. Worldcom, Inc., 125 F. Supp. 2d 365, 369 (D. Minn. 2000); Chaganti, 470 F.3d at 1220–21 (refusing to apply the artful pleading doctrine because state law claim was not completely preempted); Connolly v. Union Pac. R. Co., 453 F. Supp. 2d 1104, 1109 (E.D. Mo. 2006) (“The artful pleading doctrine is limited to federal statutes which ‘so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal.’”) Therefore, the artful pleading doctrine only applies in the context of complete preemption in support for removal proceeding. Because Defendant concedes that complete preemption does not apply in this case, the artful pleading doctrine is inapposite.

D. Ordinary Preemption under the FCA

With respect to the federal preemption defenses, Defendant concedes that only ordinary preemption applies. Accordingly, this Court does not address issues of express preemption and
field preemption. To determine whether a state law is preempted under ordinary preemption, the relevant test is “whether compliance with both laws is a ‘physical impossibility,’ or, whether the state law ‘stand[s] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” Tiede, 2008 S.D. 31, ¶ 16, 748 N.W.2d at 753 (alteration original). The ultimate determining factor is Congressional intent. Boomsma, 2002 S.D. 106, ¶ 15, 651 N.W.2d at 242.

Under the conflict test, courts consider the theory of each claim and determine “whether the legal duty that is the predicate” of that claim is inconsistent with the federal regulations. Metrophones Telecommunications, Inc. v. Glob. Crossing Telecommunications, Inc., 423 F.3d 1056, 1075 (9th Cir. 2005), aff'd, 550 U.S. 45, 127 S. Ct. 1513, 167 L. Ed. 2d 422 (2007). To determine whether a state law is an obstacle to a federal law, courts looks to “both the objective of the federal law and the method chosen by Congress to effectuate that objective, taking into account the law’s text, application, history, and interpretation.” Ting v. AT&T; 319 F.3d 1126, 1137 (9th Cir. 2003).

Defendant cites §§ 201, 202 and 207 of the FCA to support its proposition for ordinary preemption. Section 201 declares unlawful any rates, terms, and conditions of telecommunication services that are not just and reasonable. Boomer v. AT & T Corp., 309 F.3d 404, 418 (7th Cir. 2002); 47 U.S.C. § 201. Section 202 prohibits unjust or unreasonable discrimination by a common carrier. 47 U.S.C. § 202. Most courts have held that the uniformity principle embodied in §§ 201 and 202 preempts state law challenges to the rates, terms, and conditions of telecommunication services. In re Universal Serv. Fund Tel. Billing Practice Litig., 619 F.3d 1188, 1197 and 1201 (10th Cir. 2010) (citing In the Matter of Policy & Rules Concerning the Interstate, Interexchange Marketplace, 12 F.C.C. Rcd. 15014 (1997), and
deferring to the FCC’s determination regarding the preemption effect of §§ 201 and 202 following detariffing); Boomer, 309 F.3d at 418; but see Ting, 319 F.3d at 1139 (holding uniformity principle no longer existed following detariffing). Section 207 creates federal causes of action and confers federal government exclusive jurisdiction for violation of §§ 201 and 202, and other duties imposed by the FCA (47 U.S.C. § 207), but it does not serve to exclude state remedies. New York by Schneiderman v. Charter Commc’ns, Inc., No. 17 CIV. 1428 (CM), 2017 WL 1755958, at *5 (S.D.N.Y. Apr. 27, 2017).


Defendant points to various allegations raised by Plaintiffs, including unlawfulness of the SDN/AT&T Agreement, unlawfulness of the cost study, and violations of tariffs. This Court acknowledges that it lacks subject matter jurisdiction over claims for violation of the FCA because the federal courts have exclusive jurisdiction to adjudicate these claims. However, lack of subject matter jurisdiction over these precise areas does not necessarily mean a state law claim must be dismissed.

E. Plaintiffs’ Individual Claims

With the above principles in mind, this Court will address, in turn, each of the Plaintiff’s state law claims.
1. **Count I, Breach of Operating Agreement**

Plaintiffs allege that Article 15 of the Operating Agreement required points of interconnection (POIs) to be established by agreement. Plaintiffs then allege Defendant’s unilateral change of NVC’s POI for AT&T traffic breached the Operating Agreement.

A breach of contract claim may be preempted by the FCA if the award or restitution of the contract claim would affect the rate, terms, and conditions of telecommunication service. *Ramette v. AT & T Corp.*, 351 Ill. App. 3d 73, 85, 812 N.E.2d 504, 513 (2004) (citing *Order on Reconsideration*, 12 F.C.C. Rep. at 15057). Conversely, a state law action that does not challenge the reasonableness of a rate, term or condition, (such as claims based on contract formation and breach of contract) is not preempted. *Manasher v. NECC Telecom*, No. 06-10749, 2007 WL 2713845, at *10 (E.D. Mich. Sept. 18, 2007), *aff'd in part*, 310 Fed. Appx. 804 (6th Cir. 2009). Here, Plaintiffs’ claim is based on breach of contract. The claim does not challenge the rate, terms and conditions of telecommunication service. The resolution of the state law claims of breach of the Operating Agreement is not dependent on any duty created by the FCA.

Defendant claims a predicate question to this claim is whether the Operating Agreement can limit the right of AT&T (which is not a party to the Operating Agreement) to request a different POI with a CLEC. However, the Operating Agreement does not prevent AT&T from requesting a different POI with a CLEC. The Operating Agreement only controls the conduct of the parties to that agreement. If a party to that agreement commits a breach it may properly be held responsible for that breach.

Defendant’s contention that a dispute about POI should be resolved by a federal court or the FCC is an example of arguing for federal question jurisdiction as noted above. However, the issue for this Court is federal preemption, not federal question jurisdiction. See, *Wisconsin v.*
AT&T Corp., 217 F. Supp. 2d 935, 938 (W.D. Wis. 2002) ("In the present context of a
preemption argument, invocation of substantial federal issue jurisdiction would swallow the
well-established rule that a conflict preemption defense does not support federal question
jurisdiction.")

The obstruction prong does not support Defendant’s proposition either. “Conflict
preemption requires that the state or local action be a material impediment to the federal action,
or thwart[ ] the federal policy in a material way.” Mount Olivet Cemetery Ass’n v. Salt Lake
City, 164 F.3d 480, 489 (10th Cir.1998) (alteration original). Here, allowing state law to enforce
a contract between communication carriers cannot be said to be a material impediment, as the
FCC expressly acknowledged that state law still governs formation and breach of a contract.

Interstate Interexchange Marketplace, 12 F.C.C. Rep. at 15057.

In addition, enforcement of the alleged contractual duty would not frustrate the purpose
of the FCA or obstruct the means chosen by Congress. Post detariffing, the market-based
mechanism of the federal regulations seems to encourage, rather than prohibit contract-based
relationships. Defendant argues that allowing this claim to proceed would frustrate the FCC’s
policy in promoting competition. However, it is undisputed that Defendant willingly entered into
the Operating Agreement which Plaintiffs seek to enforce. Defendant does not provide sufficient
explanation why enforcing such a voluntary agreement would be contrary to FCC policy.

Defendant’s conclusory statement that it has such effect is insufficient to meet its burden to rebut
the presumption against preemption. Accordingly, Plaintiffs’ breach of the Operating Agreement
claim is not preempted by the FCA.
2. Count II Breach of Contracts

Likewise Plaintiffs' breach of contracts claim is not preempted. Regarding the breach of contracts claim, Plaintiffs' first theory is that the parties entered into a lease contract and that Defendant had an implied duty to refrain from interfering with NV's ability to collect tariffed transport from long-distance carriers for transportation. Defendant argues such entitlement expectation or monopoly right would be in conflict with the FCC's policies. Defendant again does not sufficiently specify the policies announced by the FCC that would be inconsistent with enforcement of this contractual obligation.

Plaintiffs' second theory is that Defendant and NV had contracts whereby Defendant agreed to provide services to NV on the same terms and conditions as members. Under this theory, Defendant would have a contractual duty to treat NV on equal footing as other members. Treating an affiliate like a member clearly does not violate § 202, which only prohibits unjust or unreasonable discrimination. The contractual duty, if proven, would demonstrate that Defendant voluntarily committed to a higher standard than the standard set forth in § 202. As such, that duty was created by a private contract, and is independent and distinguishable from the duty imposed by the FCA.

Under either theory, Plaintiffs do not challenge the rate, terms, and conditions of a telecommunication service agreement. The alleged contractual obligations do not frustrate the Congressional intent to promote competition either. "As in the context of ratemaking, where private contracts have replaced rigid rate prescriptions, state contract laws provide a background that is not only consistent with, but is integral to, the market-based mechanism of the federal regulations." Metrophones, 423 F.3d at 1076.
Defendant's argument that the contracts are subject to the control and regulation of the FCC is just another argument for federal question jurisdiction. Defendant further argues that allowing the breach of contracts claim will render the FCA meaningless, but does not offer any sufficient explanation to justify that claim. As such, Defendant has failed to meet its burden.

3. **Count IV Intentional Interference with Business Relationship**

To establish a claim for tortious interference with a business relationship, Plaintiffs must allege an intentional and unjustified act of interference on the part of the interferer. *Selle v. Tozser*, 2010 S.D. 64, ¶ 15, 786 N.W.2d 748, 753. Courts consider the following factors in determining whether an interferer’s conduct is improper: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; and (6) the relations between the parties. *Id.*

To survive preemption, the act of interference must be independently wrongful and recognized by statute or common law as wrongful. *Zimmer Radio of Mid-Missouri, Inc. v. Lake Broad., Inc.*, 937 S.W.2d 402, 406 (Mo. Ct. App. 1997). A claim for interference with business relationship is preserved by the savings clause where the wrongful acts complained of constitute breaches of duties distinguishable from those created under the FCA. *Id.*

In *Harbor Broadcasting*, the plaintiff’s complaint for tortious interference alleged that the defendant “failed and refused to take any steps whatsoever to comply with [an FCC order.]” *Harbor Broad., Inc. v. Boundary Waters Broadcasters, Inc.*, 636 N.W.2d 560, 562 (Minn. Ct. App. 2001). The appellate court found that evaluating the claim would necessarily require scrutinizing the FCC order. *Id.* at 567. The court concluded that the claim necessarily implicated
and intertwined technical concerns best left to the FCC. *Id.* The court also concluded the controversy arose from the defendant’s failure to comply with the FCC order under which the parties’ rights and duties are determined. *Id.* at 569. The court then held the claim was impliedly preempted by the FCA due to irreconcilable conflict with the FCC’s exclusive jurisdiction, and rights and duties indistinguishable from those created under the FCA. *Id.* at 570.

In the instance case, however, the wrongfulness of Plaintiffs’ act is not predicated on violations of the FCA. Plaintiffs claim that Defendant violated the contractual intentions of its members and their affiliates and the obligation of good faith and fair dealing by obtaining new contracts with AT&T and diverting revenues due to NVC to members of Defendant. Plaintiffs also claim Defendant’s act is based on improper motives, such as obtaining a settlement payment from AT&T, receiving compensation for transport services that Defendant did not provide, and increasing revenue from cell-site backhaul service. Based on these allegations, the Plaintiffs do not need to assert that Defendant violated the duties imposed by the FCA to support their claim for intentional interference. The alleged breach is not based on any duties imposed by the FCA. Evaluating the Plaintiffs’ claim does not require this Court to scrutinize the SDN/AT&T Agreement or tariffs filed with the FCC. This action is not preempted because the alleged wrongful acts are not premised on duties or obligations imposed by the FCA.

4. *Count V* Violation of South Dakota Trade Regulation SDCL 37-1-4

With respect to the antidiscrimination claim, Plaintiffs assert that Defendant engaged in unfair discrimination by offering AT&T a lower rate for transporting calls for the part of the state served by NVC, as compared to any other parts of the state. Plaintiff claims this was an attempt to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton. SDCL 37-1-4 prohibits unfair discrimination based on geographic locations for the
purpose of defeating or preventing competition. SDCL 37-1-3.5 exempts “noncompetitive and emerging competitive telecommunications service by public utilities pursuant to tariffs or schedules approved by the South Dakota Public Utilities Commission, or pursuant to any other federal or state regulatory authority.” The two state statutes read together show SDCL 37-1-4 regulates nonemerging competitive telecommunications service.

Section 202 prohibits unreasonable discrimination practices and services by a telecommunication carrier, including location based discrimination. 47 U.S.C. §202. The prohibition does not depend on whether a telecommunication service is provided pursuant to a filed tariff or a private contract. Thus, there is an overlapping area that SDCL 37-1-4 and § 202 both regulate—nonemerging competitive telecommunication service. Most courts have held the substantive antidiscrimination regulation in § 202 and related uniformity principle survived detariffing. Universal Serv. Fund, 619 F.3d at 1201 (surveying judicial and agency interpretation of § 202 both before and after detariffing); cf. Ting, 319 F.3d at1139 (holding § 202 survived detariffing but the filed rate doctrine or uniformity principle did not). Under either the majority or minority rule, a state regulation that imposes a different standard of antidiscrimination is in conflict with § 202. The standard of antidiscrimination under SDCL 37-1-4 clearly is inconsistent with the standard of “unreasonable discrimination.” Therefore, Plaintiffs’ claim for violation of SDCL 37-1-4 is preempted. Accordingly, Count V of Plaintiffs’ claim is dismissed.

5. **Count VI Unjust Enrichment**

Plaintiffs’ unjust enrichment claim alleges that Defendant collected payments from AT&T for transport services that were actually being provided by NVC. Accordingly, Plaintiffs claim Defendant would be unjustly enriched if it was allowed to retain those funds. Defendant
asks this court to follow the ruling in *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1010 (9th Cir. 2010).

*Telesaurus* is distinguishable. In *Telesaurus*, the court preempted a state law unjust enrichment claim based on § 332 of the FCA. *Id.* The Court held § 332 expressly preempted state authorities to regulate rates and market entry in commercial mobile radio service. *Id.* The court there reasoned that the state law allegations would require the court to substitute its judgment for the FCC’s regarding a licensing decision, a regulation of market entry.

Unlike § 332, §§ 201 and 202 contain no express preemption provision. The savings clause expressly preserves preexisting state law remedies. 47 U.S.C. § 414. Under the conflict preemption analysis, Plaintiffs’ assertion is not premised on a breach of duty imposed by the FCA. A review of the nature and elements of the unjust enrichment convinces this Court that adjudication of this claim does not require Plaintiffs to prove that the SDN/AT&T agreement was unlawful or Defendant committed any wrong doings. The elements for unjust enrichment only include: (1) defendant received a benefit, (2) defendant was aware it was receiving a benefit, and (3) that it is inequitable to allow defendant to retain this benefit without paying for it. *Stern Oil Co. v. Border States Paving, Inc.*, 2014 S.D. 28, ¶ 18, 848 N.W.2d 273, 279. The duty to return benefits unjustifiably received thus is independently created by the state law and is distinguishable from the duty created by the FCA. The claim for unjust enrichment is not preempted.

6. **Count VII Conversion**

Plaintiffs’ conversion claim alleges that NVC and Defendant had a lease agreement for capacity between Sioux Falls and Groton, and Defendant converted that capacity for its own use and benefit.
The elements of conversion include: (1) plaintiff owned or had a possessory interest in the property; (2) plaintiff's interest in the property was greater than the defendant's; (3) defendant exercised dominion or control over or seriously interfered with plaintiff's interest in the property; and (4) such conduct deprived plaintiff of its interest in the property. *W. Consol. Co-op. v. Pew*, 2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 397.

Citing *Fetterman v. Green*, 455 Pa. Super. 639, 689 A.2d 289 (1997), Defendant argues the conversion claim is actually a claim for breach under § 202. This claim is distinguishable from *Fetterman*. In *Fetterman*, the court found the core of appellant's complaint alleged interference with radio signal transmissions, an area § 333 of the FCA expressly regulated. *Id.* at 645, 689 A.2d at 292-293; 47 U.S.C. § 333. Here, however, Defendant cannot re-characterize Plaintiffs' conversion claim as a breach of duty under § 202. First, it is unclear whether the lease and use of the transport capacity are regulated exclusively by the federal government as Defendant does not cite specific authorities to support its proposition. Second, § 202 does not determine whether Plaintiffs' interest in the property was greater than Defendant's, or prohibit Defendant from interfering with Plaintiffs' interest in the property. Therefore, the duty allegedly breached under the conversion claim is independent and distinguishable from the duty created by § 202. The conversion claim is not preempted.

Defendant's argument that the lease itself created no exclusive right is a defense beyond the scope of federal preemption. Defendant further argues that determination of whether NVC's interests were greater than Defendant's and whether Defendant deprived NVC of its superior interest must be determined within the context of the federal regulatory scheme. That argument, like other arguments for federal question jurisdiction, does not control the issue at hand: whether the conversion claim is in conflict with the FCA and thus preempted. It is not.
7. **Count VIII Dissolution**

Plaintiffs seek judicial dissolution of Defendant based on two theories pursuant to SDCL 47-34A-801(a)(4). The statute provides grounds for judicial dissolution, *inter alia*:

(iii) It is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement; or

(iv) The managers or members in control of the company have acted, are acting, or will act in a manner that is illegal or fraudulent.

Plaintiffs concede dissolution on the ground of illegal or fraudulent conduct by managers predicates on violations of the FCA. Plaintiffs assert alternatively that it is no longer reasonably practicable to carry on Defendant's business in conformity with its Articles of Organization and Operating Agreement. Defendant does not argue this individual claim is preempted, but maintains that this Court should refer the issue of violations of the FCA to the FCC. That alternative claim is not preempted.

8. **Count IX Declaratory Judgment**

Both parties agree that declaratory judgment depends on the determination of substantive claims. Because the Court concluded that not all of Plaintiffs' claims are preempted, this claim is not preempted.

II. **Primary Jurisdiction**

A. **Legal Standard**

Having determined Plaintiffs' claims are not all preempted, this Court must decide whether the FCC has primary jurisdiction over the remaining claims as Defendant argues.

Primary jurisdiction questions arise when both an administrative agency and a court have authority to hear an initial dispute. *Dan Nelson, Auto., Inc. v. Viken*, 2005 S.D. 109, ¶ 7, 706 N.W.2d 239, 242. This common law doctrine is used "to coordinate judicial and administrative decision making." *City of Osceola, Ark. v. Entergy Arkansas, Inc.*, 791 F.3d 904, 908–09 (8th
Cir. 2015) (quoting Access Telecommunications v. Sw. Bell Tel. Co., 137 F.3d 605, 608 (8th Cir. 1998)). This doctrine operates to allow a court to refer a case to the appropriate administrative agency for initial decision. Id. Application of this doctrine is sparse due to the potential expense and delay which may result. Id. Under this doctrine, a court may either stay proceedings or dismiss the case without prejudice. Unigestion Holding, S.A. v. UPM Tech., Inc., No. 3:15-CV-185-SI, 2017 WL 2129302, at *8 (D. Or. May 16, 2017).

In determining whether an administrative agency has primary jurisdiction over an issue, no fixed formula is available. City of Osceola, Ark, 791 F.3d at 909. However, both parties rely on a four-factor test adopted by federal courts:

1. Whether the question at issue is within the conventional experience of judges or whether it involves technical or policy considerations within the agency's particular field of expertise;

2. Whether the question at issue is particularly within the agency's discretion;

3. Whether there exists a substantial danger of inconsistent rulings; and

4. Whether a prior application has been made to the agency.


Applying these factors, this Court concludes a complete referral is unnecessary. First, Adjudication of these state law claims is within the conventional experience of judges. This Court is qualified to decide contractual and tort claims, as well as equitable remedies. Second, determination of whether these state law duties or contractual duties are breached is not within the FCC's discretion. The factual disputes are not highly technical in nature. For example, one critical factual dispute is whether the parties had an agreement during the Groton meeting.
Another factual dispute is whether there was an agreement or arrangement that prohibited Defendant from using the same transport capacity that NVC leased.

On the other hand, the FCC has primary jurisdiction in determining whether Defendant violated the FCA. These issues include: the legality of the SDN/AT&T agreement and the cost study and alleged violations of tariffs. While determination of these federal issues is not a prerequisite to the state law claims, inviting the FCC to submit an *amicus* brief balances the judicial economies and utilizes the benefit of agency expertise and experience. As such, the parties may invite the FCC to provide opinions regarding these issues in the form of an *amicus* brief, if that agency is so inclined.

With respect to the dissolution claim, the parties appear to agree it should not proceed with other claims. Plaintiffs suggest bifurcation while Defendant argues for referral. Therefore, the claim for dissolution is bifurcated and stayed pending determination of other claims.

### III. Expert Opinions

This Court next determines whether the opinions proffered by Warren Fischer, Michael Starkey, and Barry Bell must be stricken or excluded.

Rule 702 governs the admissibility of expert testimony. SDCL 19-9-702.

Under this rule, before a witness can testify as an expert, that witness must be "qualified." Furthermore, "[u]nder Daubert, the proponent offering expert testimony must show that the expert's theory or method qualifies as scientific, technical, or specialized knowledge" as required under Rule 702. Before admitting expert testimony, a court must first determine that such qualified testimony is relevant and based on a reliable foundation. The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony. The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence.

*Tosh v. Schwab*, 2007 S.D. 132, ¶ 18, 743 N.W.2d 422, 428 (quoting *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402–03). Under Rule 702, this Court's function is to determine whether an expert testimony will "assist the trier of fact to

In this case, Defendant does not challenge the qualifications of Fischer, Starkey, and Bell. Defendant’s major challenge to the opinions of Fischer and Starkey is that they prescribe legal standards to be applied to the facts of this case.

The opinions of Warren Fischer are based on a review of the 2014 cost study that was developed by Defendant in support of its interstate access rates. Fischer opines that Defendant overstated the rate charged for its CEA service in its tariff. Based on this finding, Fischer concluded that AT&T was charged below cost under the SDN/AT&T Agreement, and was subsidized by other interexchange carriers that paid the CEA tariff rate.

Fischer’s opinions would prove that the 2014 cost study was unlawful, and that Defendant discriminated against other interexchange carriers, all in violation of the FCA. Because this Court lacks subject matter jurisdiction over claims for violations of the FCA, expert opinions regarding these issues would only serve to confuse the jury in its task of resolving the state law claims before this court. Accordingly, Fischer’s opinions are excluded.

Michael Starkey provides opinions regarding the SDN/AT&T Agreement. He opines that (1) the SDN/AT&T Agreement was not a standard agreement typical of agreements in the telecommunication industry; (2) Defendant’s provision of service between its Sioux Falls office and NVIC’s Groton end office is inconsistent with standard industry practice, its own documentation, as well as rules of the FCC; (3) Defendant’s provision of services pursuant to the SDN/AT&T Agreement on an off-tariff basis was unlawful; (4) Defendant’s CEO and managers should have been aware that offering an exclusive and off-tariff contract for tandem switching services was contrary to the rules of the FCC.
For the same reason discussed above, Starkey’s opinions are excluded to the extent they conclude that the SDN/AT&T Agreement was unlawful and inconsistent with rules of the FCC. Starkey’s opinion regarding duties of the CEO and manager is also excluded because it is no longer relevant since dismissal of claims against them. However, Starkey is allowed to testify other aspects of the SDN/AT&T Agreement and the telecommunication industry in general.

With respect to the opinions proffered by Barry Bell, Defendant argues that they are speculative because they are based on the amounts AT&T has refused to pay Plaintiffs for the transport of traffic from Sioux Falls to Groton. However, the mere existence of the dispute between AT&T and NVC does not make Bell’s damages calculations speculative. Neither does Bell’s assumption that Defendant would be liable render his opinions speculative. His opinions regarding damages are relevant to the case, and the weight and credibility to be assigned to such opinions are properly within the province of the jury. See Johnson v. Schmitt, 309 N.W.2d 838, 842 (S.D. 1981). Accordingly, Bell’s expert opinions are not excluded.

**CONCLUSION**

Defendant’s motion to dismiss is granted in part and denied in part. Specifically, the motion to dismiss Count V is granted; the motion to dismiss Count I, II, IV, VI, VII, VIII, and IX is denied. Defendant’s alternative motion to stay and refer issues to the FCC is granted in part and denied in part. The motion to stay Count VIII is granted; the parties may invite the FCC for an *amicus* brief on the issues whether Defendant violated any provision of the FCA; the remaining motion is denied.

Defendant’s motion to strike or exclude the opinions of Warren Fischer is granted; the motion to strike or exclude the opinions of Michael Starkey is granted in part, denied in part; and the motion to strike or exclude the opinions of Barry Bell is denied.
Counsel for Plaintiffs shall submit any necessary Orders to effectuate these decisions.

DATED this 11th day of July, 2017.

BY THE COURT:

Scott P. Myer
Circuit Judge

ATTEST:
Marla R. Zastrow, Clerk of Courts

By: __________________________, Deputy Clerk
STATE OF SOUTH DAKOTA
COUNTY OF BROWN
JAMES VALLEY COOPERATIVE
TELEPHONE COMPANY, a South Dakota cooperative; JAMES VALLEY
COMMUNICATIONS, INC., a South Dakota corporation; and NORTHERN VALLEY
COMMUNICATIONS, L.L.C., a South Dakota limited liability company,

Plaintiffs,

v.

SOUTH DAKOTA NETWORK, LLC, a South Dakota limited liability company; MARK
SHLANTA; MARK BENTON; ROD
BOWAR; JERRY HEIBERGER; DON
SNYDERS; DENNIS LAW; RANDY
HOUEDEK; and BRYAN ROTH,

Defendants.

Plaintiffs James Valley Cooperative Telephone Company, James Valley
Communications, Inc., and Northern Valley Communications, L.L.C., by their undersigned
counsel, bring this Second Amended Complaint against South Dakota Network, LLC, Mark
Shlanta, Mark Benton, Rod Bowar, Jerry Heiberger, Don Snyders, Dennis Law, Randy Houdek,
and Bryan Roth, and in support thereof, state as follows:

INTRODUCTION

1. This case seeks compensatory damages, punitive damages and injunctive relief
arising out of the unlawful conduct of South Dakota Network, LLC ("SDN") and its CEO and
managers, which have unlawfully interfered with and attempted to prevent Northern Valley
Communications, L.L.C. from collecting its lawfully-assessed telecommunications charges from
AT&T.

2. Northern Valley Communications, L.L.C. ("NVC") is a local telephone provider
that services residences in business in Brown County, South Dakota, including certain high
volume conference call providers. In order for long-distance telephone calls to reach NVC's
customers, long-distance carriers, such as AT&T, pay NVC a fee to transport and terminate their
telephone calls to their intended destination. In the telecommunications industry, these charges
are referred to as "access charges" and the rates for these charges are contained in tariffs
developed by NVC and filed with the South Dakota Public Utilities Commission ("SDPUC") and the Federal Communications Commission ("FCC").

3. Defendant SDN is what is referred to in the telecommunications industry as a Centralized Equal Access ("CEA") Provider. CEA Providers exist by special FCC and state utility commission orders only in a few of the nation's most rural states (including Iowa, Minnesota and South Dakota). They were created, and granted a near monopoly, to provide what is known as "tandem switching" services in these rural locations, in order to make it more cost effective for long-distance carriers, such as AT&T, and rural local exchange carriers, such as NVC, to exchange traffic.

4. Defendants Mark Shlanta, Mark Benton, Rod Bowar, Jerry Heiberger, Don Snyders, Dennis Law, Randy Houdek, and Bryan Roth are officers and managers of SDN.

5. Desperate to win a lucrative new contract with AT&T, SDN, and its officers and managers, conspired to sacrifice Plaintiffs to the giant of the telecommunications market, AT&T.

6. More specifically, when Plaintiffs refused to voluntarily relinquish NVC's right to charge AT&T the access charges associated with carrying the long-distance calls of AT&T's customers from Sioux Falls to Brown County, SDN and its managers conspired in the fall of 2013 to interfere with the business relationship between NVC and AT&T, and in the process deprive NVC of this significant revenue source by offering to provide its own transport service directly to AT&T on a secret, off-tariff basis— a plan that not only harms Plaintiffs, but also violates the law.

7. After hatching this scheme, SDN and its managers attempted to gain Plaintiffs' "cooperation" by threatening to disconnect NVC from SDN's network entirely. But, knowing that disconnection from the network would cause calls to and from NVC's customers to fail and also violate the law, SDN did not stop there. Rather, it compounded its errors by making it known that, after disrupting the telecommunications service of thousands of businesses and residents in South Dakota, it would falsely accuse NVC of "blocking" this telecommunications traffic through a false complaint with the FCC.

8. Plaintiffs protected their interests by demanding that SDN and its managers cease their contemplated unlawful conduct, and making it clear that, if SDN proceeded with their ill-conceived plan, Plaintiffs would sue them.

9. Plaintiffs successfully held SDN and its managers at bay for nearly a year. Ultimately, however, SDN and its managers' greed became too strong to resist and they again returned to their schemes. That is, SDN and its managers did, in fact, enter into a secret, off-tariff deal with AT&T in the fall of 2014. SDN, in violation of law, its Operating Agreement, and contracts with Plaintiffs, has agreed to provide non-tariffed transport services to AT&T solely and exclusively for traffic routed to NVC.

10. Worse still, SDN purportedly provides this transport service to AT&T over transport facilities that are leased and under Plaintiffs' control. In other words, SDN is charging
AT&T for transport services that are, in fact, provided over the very facilities that NVC controls (and for which SDN continues to collect significant lease payments from the Plaintiffs).

11. Plaintiffs bring this complaint in order to seek monetary and injunctive relief against SDN's unlawful conduct.

PARTIES

12. Plaintiff James Valley Cooperative Telephone Company ("JVCTC") is a telephone cooperative that was formed in 1951 to serve the telephone needs of the people of rural Brown County. The Cooperative has since expanded to include members in Brown, Day, Spink, Marshall, and Clark Counties. JVCTC is a founding member and, at all times relevant hereto, has remained a member of Defendant SDN. JVCTC is the sole shareholder of James Valley Communications, Inc.

13. Plaintiff James Valley Communications, Inc. ("JVC") is a South Dakota corporation that was formed to provide telecommunications and information services to residents of South Dakota. JVC's principal place of business is in Brown County. JVC is the sole member of Northern Valley Communications, L.L.C.

14. Plaintiff Northern Valley Communications, L.L.C. ("NVC"), is a South Dakota limited liability company with its principal place of business in Brown County. NVC is a competitive local exchange carrier ("CLEC") that provides competitive telecommunications and information services in certain areas of Brown and Spink Counties not served by JVCTC. NVC is a predominant Internet service provider in northeast South Dakota and provides telecommunications service to thousands of business and residential customers. By virtue of its ownership, NVC is an affiliate member of Defendant SDN.

15. Defendant South Dakota Network, LLC ("SDN") is a South Dakota limited liability company that provides telecommunication services to its members and their affiliates throughout the state of South Dakota.

16. Defendant Mark Shlanta is and, at all times relevant hereto, has been, the Chief Executive Officer of SDN. As the CEO of SDN, Shlanta qualified as a "manager" as defined by the South Dakota Limited Liability Company Act, SDCL § 47-34A-101(10). Upon information and belief, Mr. Shlanta resides in Lincoln County.

17. Defendant Mark Benton is, and at all times relevant hereto has been, a manager of SDN. Upon information and belief, Mr. Benton resides in Brule County.

18. Defendant Rod Bowar is, and at all times relevant hereto has been, a manager of SDN. Upon information and belief, Mr. Bowar resides in Lyman County.

19. Defendant Jerry Heiberger is, and at all times relevant hereto has been, a manager of SDN. Upon information and belief, Mr. Heiberger resides in Deuel County.
20. Defendant Don Snyders is, and at all times relevant hereto has been, a manager of SDN. He serves as Vice President of the SDN Board of Managers. Upon information and belief, Mr. Snyders resides in Minnehaha County.

21. Defendant Dennis Law is, and at all times relevant hereto has been, a manager of SDN. Upon information and belief, Mr. Law resides in Pennington County.

22. Defendant Randy Houdek is, and at all times relevant hereto has been, a manager of SDN. He serves as the Secretary/Treasurer of the SDN Board of Managers. Upon information and belief, Mr. Houdek resides in Hyde County.

23. Defendant Bryan Roth is, and at all times relevant hereto has been, a manager of SDN and President of the SDN Board of Managers. Upon information and belief, Mr. Roth resides in McCook County.

JURISDICTION AND VENUE

24. This Court has jurisdiction pursuant to SDCL 16-6-9(2).

25. Venue is proper in this Court pursuant to SDCL 15-5-6 and/or SDCL 15-5-8 because damages were inflicted on the Plaintiffs in Brown County, South Dakota.

BACKGROUND - ACCESS CHARGES

26. Historically, telephone service in the United States was largely provided by a single, integrated company known as AT&T. In 1984, AT&T was split into "local" and "long distance" companies. The local telephone companies, known as LECs, maintained exclusive franchises to provide telephone service within defined geographic service territories. By contrast, the long-distance portion of AT&T was faced with competition from MCI, Sprint, and others.

27. Long-distance carriers, known in the industry as interexchange carriers or long-distance carriers, generally utilized their own lines to carry calls across a state or across the country. They did not, however, own the telephone lines within the local exchange. Rather, those lines were owned by the LECs. To enable long-distance competition, the FCC required LECs to allow long-distance carriers to use their local lines for purposes of "originating" and "terminating" telephone calls. For example, when a consumer made a long-distance call, the consumer's LEC would "originate" the call and hand it off to the long-distance carrier. The long-distance carrier would carry the call across its network and deliver it to another LEC to "terminate" the call to the dialed customer.

28. To compensate LECs for use of their networks, the FCC required long-distance carriers to pay "access charges" for the LECs' role in "originating" and "terminating" long-distance telephone calls. These access charges were set forth in regulated price lists, known as tariffs, filed with the FCC and applicable state public service commissions. If the call originates in one state and terminates in another state, the access charges that applied have consistently been under the FCC's jurisdiction. If the call originates and terminates in the same state, the
access charges that apply largely fall under the state public service commission's jurisdiction (i.e., the South Dakota Public Utilities Commission).

29. In 1996, Congress overhauled the nation's telecommunications laws with the Telecommunications Act of 1996 ("1996 Act"). As part of the 1996 Act, Congress eliminated the exclusive franchises possessed by the incumbent LECs ("ILECs"). The effect was to compel all states to open their local telecommunications markets to competition from new entrants, known as Competitive Local Exchange Carriers or CLECs.

30. Congress also required all telecommunications carriers — local and long-distance carriers, alike — to interconnect their networks "directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). Interconnection ensures that all consumers can place calls to and receive calls from all other consumers, regardless of their telecommunications carrier.

REGULATORY BACKGROUND - SOUTH DAKOTA NETWORK

31. As noted above, in order to provide their telecommunications services and complete calls to, or accept calls from, residents in South Dakota, long-distance carriers must interconnect their networks with the networks of local telephone companies ("local exchange carriers" or "LECs").

32. Because it would be cost prohibitive for long-distance carriers to build their own network to each rural LEC in South Dakota, JVCTC and other rural LECs came together to form SDN. In 1991, the South Dakota Public Utilities Commission entered an Order ("SDPUC Order") that granted approval for SDN to construct and tariff a "centralized equal access" ("CEA") service in South Dakota. A similar Order was also issued by the FCC. With SDN's CEA service in place, long-distance carriers send their long-distance traffic to SDN's switching facilities in Sioux Falls, where traffic from various carriers is aggregated and picked up and carried back by the applicable LEC whose customer is receiving the long-distance call. That is, SDN and its members have transport facilities in place that allow the traffic to reach the designated LEC without each long-distance carrier separately constructing their own facilities to each of these rural locations. This hub-and-spoke model therefore saves the long-distance carriers considerable expenses.

33. Under the SDPUC Order, SDN was granted a monopoly to provide the tandem switching services necessary to route the long-distance traffic of its members in South Dakota. SDN Order, at 11. The Order recognized that it intended to "discourage the threat of bypass, which is detrimental to the SDN member systems." Id. at 8, ¶ 48. The SDPUC Order has not been modified or changed to eliminate the monopoly granted to SDN.

34. At all times since the formation of SDN, in conformance with the SDPUC Order, SDN has maintained as its official policy the position that SDN members and their affiliated companies must interconnect with SDN and allow SDN to provide the tandem switching for the telecommunications traffic that is being originated or terminated in the LEC's exchange. Indeed,
this not merely a policy, but is a material term of the SDN Operating Agreement, as amended in May 2013. (Section 15.1.1 of the Operating Agreement)

35. Like the other members of SDN, JVCTC has consistently utilized the CEA services of SDN to exchange traffic with long-distance carriers. Specifically, all traffic is exchanged at SDN's facilities in Sioux Falls, where SDN provides the service known as "tandem switching" before passing the traffic to JVCTC. JVCTC then transports that traffic to its local exchange for switching and ultimate termination to the called party. In exchange for transporting, switching and terminating the call, JVCTC is entitled by SDPUC and FCC rules to assess a tariffed "access charge" on the long-distance carrier who sent the traffic to JVCTC's customer.

36. Upon information and belief, other members of SDN operate in a similar manner (i.e., they accept the traffic at SDN's tandem switch in Sioux Falls, and then transport the traffic to their respective exchanges for termination) and also assess their own tariffed access charges for the transport and switching services they provide.

37. When NVC was created in 1999, it requested and was granted permission by SDN to also utilize SDN's CEA services. Specifically, it requested that "SDN services be provided under the same terms, conditions and prices that apply to James Valley and other SDN owners." NVC's request, which is fully consistent with SDPUC's Order creating SDN and SDN's long-standing policies, was granted at the September 28, 1999, SDN Board Meeting. (See Letter of Eidahl, Former President of NVC, attached hereto as Exhibit A.)

38. Since that time, NVC has consistently been responsible for transporting its access traffic from Sioux Falls, SD, to its exchange for termination in and around Aberdeen and Redfield. NVC has also consistently assessed a tariffed transport charge on long-distance carriers.

39. In order to provide its transport services, NVC entered into a series of contracts with SDN to lease capacity on the fiber network constructed by SDN. Those contracts were most recently renegotiated in 2007. In negotiating those contracts, NVC relied upon SDN's long-standing policy preventing long-distance carriers from directly interconnecting with members and affiliates for the exchange of access traffic, and NVC's ability to charge and collect its tariffed access charge for transport from Sioux Falls.

**NVC'S ACCESS STIMULATION AND DISPUTES WITH AT&T**

40. Like many other LECs attempting to provide advanced telecommunication services in rural parts of the country, NVC recognized that an increase in traffic volumes on its network would allow it to collect more access revenue and, in turn, provide more and better services to the residents of rural South Dakota. As such, while it continued to serve traditional residential and business customers, it also began to compete for customers that received high volumes of calls, such as free conference calling services.

41. Over the course of many years, AT&T and other long-distance carriers tried, but failed, to convince the FCC to prohibit LECs like NVC from engaging in "access stimulation" by
providing service to free conference calling services or to prevent LECs from assessing tariffed access charges on these calls. See Connect America Fund, ¶ 672, 574. Rather, on November 18, 2011, the FCC struck a compromise when it adopted Connect America Fund Order that specifically permitted LECs to engage in "access stimulation." The Connect America Fund Order required LECs that engage in "access stimulation" to reduce their rates to match the largest "price cap" ILEC in the state. NVC complied with the Connect America Fund Order when it filed its new tariff effective January 21, 2012.

42. The Commission also required intrastate rates to be phased down to the same levels as the interstate access rates, preemption the state commission's continued ability to set those intrastate access charges. See, e.g., id., ¶¶ 35, 801. Specifically, the Commission required LECs to reduce their intrastate access rates to be equal to the interstate access rates. Id., ¶¶ 688-91. NVC also complied with this portion of the Connect America Fund Order when it filed its revised tariff with the SDPUC on June 26, 2013, which became effective July 2, 2013.

43. NVC's tariffed interstate access rates are fully consistent with the requirements of the Connect America Fund Order. NVC has also reduced its intrastate access rates to mirror its interstate rates as required by the Connect America Fund Order.

44. Even though AT&T has been billed for and received services pursuant to NVC's 2012 federal and state tariffs, since March of 2013, AT&T has refused to pay NVC for much of the access services NVC provides to AT&T.

45. Despite tariffing rates that fully comply with the Connect America Fund Order, as noted above, AT&T began withholding payment from NVC in order to try to obtain even lower rates. AT&T began demanding that NVC either bypass SDN and interconnect directly with it, or transport its traffic from Sioux Falls at rates below those in NVC's federal tariff.

46. Based on the SDPUC Order, the terms of the SDN Operating Agreement, and SDN's long-standing policy against direct connection, NVC refused AT&T's request to directly connect.

47. NVC's refusal to direct connect has been fully supported by SDN's management in the past, which specifically amended the SDN Operating Agreement in May 2013 to make it harder for NVC to take its traffic off of the SDN network by expressly stating that a member (such as JVCTC) must send the access traffic of its affiliate (such as NVC) to SDN. Indeed, over the years, SDN has profited handsomely in the form of tariffed access charges for switching, that

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1 A "price cap" ILEC refers to a category of incumbent carrier whose rates are carefully monitored by the Commission with the aim of ensuring the carrier is operating in a highly efficient manner. Price cap ILEC's generally have high volumes of traffic and the lowest access charges in a particular state. In South Dakota, CenturyLink (formerly Qwest Communications) is the "price cap" ILEC and Northern Valley's 2012 tariff matched CenturyLink's rates in South Dakota.
are assessed by SDN on long-distance carriers, by having the NVC's high traffic volumes pass through its network.

48. SDN, however, suddenly flip-flopped. In early November 2013, Defendant Shlanta began demanding that NVC agree to direct connect with AT&T, or to otherwise significantly reduce the transport charges NVC assessed on AT&T.

49. Shlanta admitted to NVC that the reason for this sudden change was because SDN sought to obtain other business from AT&T, namely a contract to provide backhaul services from AT&T to transport telecommunications traffic from various AT&T cell phone towers in South Dakota and surrounding states. Shlanta represented that AT&T threatened to not move forward with that contract unless and until SDN forced NVC to agree to AT&T's demands regarding the direct connect or rate reductions.

50. Defendant Shlanta not only demanded that NVC give in to AT&T's demands, which are not based on existing law, but made it clear that he would take whatever actions were necessary to get AT&T what it wanted.

51. On November 22, 2013, Defendants Benton, Bowar, Heiberger, Snyders, Law, Houdek, and Roth (collectively, the "SDN Managers"), together with Defendant Shlanta, convened a meeting of the SDN Board of Managers. Plaintiffs' CEO, James Groft, despite being a duly-elected manager of SDN, was specifically asked not to attend the meeting.

52. Without giving Plaintiffs any prior opportunity to address the Managers or provide NVC's perspective on the dispute, the SDN Managers and Defendant Shlanta conspired to breach the SDN Operating Agreement, NVC's contracts for telecommunications circuits with SDN, and to interfere with NVC's ability to collect its tariffed access charges from AT&T for transport services.

53. Specifically, as confirmed by a letter dated November 25, 2013 (Exhibit B), the SDN Managers voted to allow AT&T to receive direct trunk transport directly from SDN, rather than continuing to receive, and pay tariffed rates for, transport services from NVC.

54. The SDN Managers agreed that if NVC would not agree to its scheme, thereby relinquishing its rights under the express terms of the Operating Agreement, its access services tariffs, and its contracts with SDN, SDN would terminate NVC's circuits and use SDN's termination of those circuits as a basis to falsely accuse NVC of "blocking AT&T terminating access traffic..." (Exhibit B)

55. The unequivocal statement of intent to breach the Operating Agreement and existing circuit contracts if Plaintiffs did not relinquish existing rights, was a breach of those contracts and applicable law, and such actions were taken in bad faith and inconsistent with the duty of good faith and fair dealing that applies to all LLC managers in South Dakota. The action was taken in order to create profit for the other members at the Plaintiffs' expense.
SDN AND ITS OFFICERS AND MANAGERS PERSIST IN THEIR WRONGFUL CONDUCT

56. After receiving the November 25, 2013, letter, Plaintiffs informed SDN and its managers that Plaintiffs intended to sue SDN, Shlanta, and the SDN Managers, and seek equitable and injunctive relief to prevent their unlawful conduct. After being so notified, SDN and its managers rescinded their letter and represented to Plaintiffs that they would not take the threatened actions or otherwise interfere with NVC's rights.

57. Despite these representations, SDN, Shlanta, and its managers only refrained from their scheme for a short period of time. When further discussions with AT&T did not yield immediate results to SDN's liking, Shlanta and the managers resumed actions that were intended to provide transport services to AT&T, to the detriment of NVC.

58. On March 5, 2014, SDN filed with the FCC a proposed amendment to its federal tariff. (See Exhibit C.) That amendment would have added a new service to SDN's tariff. It was titled "Terminating Direct Trunk Transport." It would have allowed long-distance carriers like AT&T to request that SDN provide direct trunks for traffic to a carrier "engaged in Access Stimulation." SDN did not advise NVC of its intent to file the amendment, nor did it seek NVC's consent prior to filing the revision, even though NVC is the only SDN member or affiliate that would have been affected by it.

59. On or about March 18, 2014, members of the Wireline Competition Bureau, at the FCC, called SDN and asked that SDN withdraw the proposed amendment. Upon information and belief, the FCC staff believed the tariff amendment was discriminatory and improper, and impermissibly did not contain any prices for this new Terminating Direct Trunk Transport service. The FCC also believed that the proposed new service was in conflict with the FCC Order granting SDN authority to provide CEA services in South Dakota.

60. Since its aborted effort to amend its tariff in March 2014, SDN has not filed a new or revised tariff permitting it to provide Terminating Direct Trunk Transport or its equivalent.

61. Nevertheless, in mid-October 2014, NVC learned, for the first time, that SDN may have entered into an agreement with AT&T. Whether an agreement had been reached between SDN and AT&T that had any connection to transport services, and the extent to which that agreement would impact NVC, was not clear.

62. On November 12, 2014, AT&T sent NVC a notice of dispute. That notice provided, inter alia,

On September 14, 2014, AT&T entered into a Service Agreement with South Dakota Network, LLC ("SDN"), for the purchase of Switched Access Transport – Terminating Service. Pursuant to that Agreement, AT&T has obtained "High Volume Switching and Transport Service" ("HVSTS") to transport switched access traffic from AT&T's Point of Presence through SDN's network for handoff to Northern Valley in Groton, S.D. As a result of this agreement, AT&T rejects any duplicate billing for the same service included in billing statements issued by Northern Valley.
63. Upon receiving this dispute notice, NVC contacted both SDN and AT&T in an effort to obtain the "Service Agreement" discussed in AT&T's letter. Neither SDN nor AT&T would provide NVC with a copy of the agreement between SDN and AT&T. Rather, NVC was only able to obtain a copy of the agreement after it served a subpoena on SDN in connection with its case against AT&T.

64. Upon information and belief, the AT&T/SDN Service Agreement was negotiated with AT&T by Defendant Shlanta.

65. Upon information and belief, Defendants Benton, Bowar, Heiberger, Snyders, Law, Houdek and Roth, individually and collectively, participated in approving or ratifying the AT&T/SDN Service Agreement, and did so with full knowledge of the negative effects it would have on NVC, and despite their fiduciary duties to Plaintiffs.

66. On information and belief, under the AT&T/SDN Service Agreement, SDN provides to AT&T the same service that the FCC refused to permit SDN to amend its tariff to include because the proposed service was discriminatory and not cost-based.

67. Also upon information and belief, NVC is the only SDN member or affiliate that was targeted for special adverse treatment by the secret, off-tariff agreement between AT&T and SDN.

68. On information and belief, when AT&T obtains its off-tariff service from SDN under the AT&T/SDN Agreement, SDN uses the same facilities that NVC leases from SDN to carry its long-distance traffic between SDN's switch in Sioux Falls and NVC's switch in Groton.

69. Further, on information and belief, SDN and AT&T intended for their Agreement to be secret and not publicly available.

70. Upon information and belief, SDN has not filed the AT&T/SDN Service Agreement with any regulatory authority, including, but not limited to, the FCC or the SDPUC.

71. Upon information and belief, SDN never intended for any of the following to occur: (1) the terms of its relationship with AT&T to be made public; (2) to have the offering be available on non-discriminatory terms to other long-distance carriers; or (3) for the agreement to affect any SDN members or affiliate LECs other than NVC.

72. Defendants Mark Benton, Rod Bowar, Jerry Heiberger, Don Snyders, Dennis Law, Randy Houdek, and Bryan Roth are each managers of other South Dakota telecommunications carriers that are members of SDN and that connect to SDN's network. On information and belief, the AT&T/SDN Service Agreement does not permit AT&T to request or demand dedicated facilities be established between SDN's tandem switch located in Sioux Falls, South Dakota, and the local switches of the SDN member companies that Defendants Benton, Bowar, Heiberger, Snyders, Law, Houdek, and Roth are managers of, nor do any of these SDN member companies provide direct trunking to AT&T to their local switches. Defendants Shlanta, Benton, Bowar, Heiberger, Snyders, Law, Houdek, and Roth singled out NVC for this disparate treatment for their own unlawful gain.
After learning of the AT&T/SDN Service Agreement, Plaintiffs have made repeated efforts to convince SDN and the Defendants Shlanta, Benton, Bowar, Heiberger, Snyders, Law, Houdek, and Roth to terminate the AT&T/SDN Service Agreement. One such effort was made by letter dated August 3, 2015. In the letter, Plaintiffs provided facts and legal support demonstrating that SDN was knowingly persisting to operate in a manner that is unlawful, and demanded that SDN vote on the question of whether to terminate the AT&T/SDN Service Agreement. On August 21, 2015, SDN responded and stated that the Managers had refused to vote on the question of whether to terminate the AT&T/SDN Service Agreement as Plaintiffs had requested.

SDN VIOLATES THE OPERATING AGREEMENT
BY SEEKING TO PROVIDE WIRELESS BACKHAUL SERVICE DIRECTLY TO AT&T IN PLAINTIFFS' SERVICE TERRITORIES

SDN's Operating Agreement requires SDN to utilize the facilities of a member or affiliate when those facilities are reasonably available or the member is willing to build the necessary facilities, unless two-thirds of the disinterested members otherwise approve. Operating Agreement, § 15.2.

On or about October 4, 2013, SDN submitted a proposal to AT&T to provide wireless backhaul services. In that proposal, SDN proposed to directly provide services to three locations within Plaintiffs' service territory. SDN failed to comply with the requirements of § 15.2 of the Operating Agreement before offering to provide service to some or all of these locations.

On or about October 27, 2014, SDN submitted a proposal to AT&T to provide wireless backhaul services. SDN proposed to directly provide services to six locations within Plaintiffs' service territory. SDN failed to comply with the requirements of § 15.2 of the Operating Agreement before offering to provide service to some or all of these locations.

Upon information and belief, SDN submitted a proposal to AT&T to provide wireless backhaul services in or about February 2016, and is continuing to work on proposals for other locations in South Dakota to which SDN may provide wireless backhaul service. Based on past practice, there is reason to believe that SDN failed or will fail to comply with the requirements of § 15.2 of the Operating Agreement before offering to provide service to locations in Plaintiffs' service territory.

COUNT I
(SDN and SDN Managers – Breach of Operating Agreement)

Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 77 of this Complaint as if fully set forth herein.

The SDN Operating Agreement requires members and affiliates to have all access traffic flow through SDN, and provides members and affiliates with the right to designate a point of interconnection with SDN.
80. As other SDN members have consistently done, Plaintiffs have designated Sioux Falls as their point of interconnection with SDN. The Operating Agreement does not give SDN a unilateral right to change this point of interconnection. Nor would existing law allow such a change by any party.

81. SDN and its Managers entered into the AT&T/SDN Service Agreement, and agreed to provide AT&T with services directly to NVC's local switch, which breaches the SDN Operating Agreement.

82. SDN's provision of services through the AT&T/SDN Service Agreement causes harm to Plaintiffs.

83. SDN's offer to provide wireless backhaul services in Plaintiffs' service territories directly to AT&T violates the § 15.2 of the Operating Agreement.

**COUNT II**
*(SDN - Breach of Contracts)*

84. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 83 of this Complaint as if fully set forth herein.

85. NVC entered into a contract with SDN whereby SDN agreed to provide NVC with services "under the same terms, conditions and prices that apply to James Valley and other SDN owners."

86. Consistent with that contract, NVC entered into a contract with SDN whereby SDN agreed to provide high capacity transport circuits to NVC, so that NVC may, in turn, transport access traffic from Sioux Falls to its exchanges in Brown County and Spink County. An implied term in that contract was that SDN would not interfere with NVC's ability to collect tariffed transport charges from long-distance carriers for transporting said access traffic from Sioux Falls to Brown County.

87. SDN breached these contracts by agreeing to provide direct trunk transport to AT&T.

88. Plaintiffs are damaged by SDN's breach of the contracts, because Plaintiffs continue to pay SDN for the lease of the same capacity that SDN purports to use to provide transport services to AT&T, and because SDN's actions embolden AT&T to continue to refuse to pay NVC for the transport services provided by NVC. The amount of these damages will be proven at trial.
COUNT III
(Shlanta and SDN Managers – Breach of Fiduciary Duty
and Duty of Good Faith and Fair Dealing)

89. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 88 of this Complaint as if fully set forth herein.

90. South Dakota law expressly imposes upon managers of a manager-managed limited liability company fiduciary duties, and a duty of good faith and fair dealing towards other members of the limited liability company. SDCL § 47-34A-409.

91. Officers of an LLC, such as Shlanta, exercise significant control over the affairs and decisions of the LLC. As such, Shlanta also owes the members of SDN fiduciary duties, and a duty of good faith and fair dealing.

92. The SDN Managers and Shlanta have violated this duty to Plaintiffs by, inter alia, (a) attempting to force NVC to relinquish its existing rights to collect tariffed access charges; (b) threatening to disconnect NVC’s circuits without cause; (c) attempting to extort the relinquishment of these rights by threatening to artificially disrupt the flow of telecommunications traffic in the state of South Dakota; (d) interfering with NVC’s existing business relationship with AT&T; (e) denying Plaintiffs the ability to use the SDN network in the manner in which it always has; and (f) denying Plaintiffs the ability to use the SDN network in the manner that is consistent with applicable law and how other members and affiliates use the network; and (g) refusing to terminate the SDN-AT&T Service Agreement after its illegality became clear.

93. These breaches materially harm Plaintiffs and, in particular, NVC’s business.

COUNT IV
(SDN – Intentional Interference with Business Relationship)

94. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 93 of this Complaint as if fully set forth herein.

95. Plaintiffs had a valid existing business relationship and an expectancy of future business with AT&T pursuant to NVC’s tariffs.

96. SDN knew about the existence of this relationship and business expectancy.

97. SDN purposefully and unjustifiably interfered with this contractual relationship that has damaged NVC in an amount to be determined at trial.

98. SDN interfered with NVC’s relationship with AT&T for an improper purpose, namely to benefit SDN’s other members by gaining new contracts with AT&T and diverting access revenues otherwise due to NVC to SDN’s other members.
99. As a result of the interference with Plaintiffs' business relationships, Plaintiffs suffered and will continue to suffer substantial and irreparable harm, because it interferes with NVC's ability to collect for its transport services. NVC is entitled to damages in a yet undetermined amount, together with equitable relief.

COUNT V
(SDN – Violation of South Dakota Trade Regulation SDCL 37-1-4)

100. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 99 of this Complaint as if fully set forth herein.

101. SDCL 37-1-4 makes it unlawful for any person to attempt to destroy competition from the "regular established dealer" of a commodity by discriminating against different "sections, communities, or first and second class municipalities" of the State of South Dakota by selling the commodity in one location at a lower rate than in other parts of the state.

102. SDN has engaged in unfair discrimination by attempting to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton by offering AT&T – and only AT&T – a lower rate for transporting calls to the part of the state served by NVC, as compared to any other parts of the state.

103. SDN's efforts to restrain trade damages Plaintiffs.

104. SDN is not protected from liability by SDCL 37-1-3.5 for its efforts to restrain trade, because it decided to engage in a secret, off-tariff agreement and, thus, is not providing telecommunications services "pursuant to tariffs or schedules" approved by any regulatory agency. Again, to the contrary, SDN's efforts to tariff such a service were rejected.

COUNT VI
(SDN – Unjust Enrichment)

105. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 104 of this Complaint as if fully set forth herein.

106. SDN is purporting to provide a transport service to AT&T, under the AT&T/SDN Service Agreement, that it is not lawfully permitted to provide.

107. SDN is also utilizing transport capacity that is already leased to NVC, in order to provide services to AT&T under the AT&T/SDN Service Agreement.

108. SDN is collecting revenues from AT&T, under that AT&T/SDN Service Agreement, that should be paid to NVC, the entity that actually provides the transport services.

109. It would be wrongful and unjust to allow SDN to retain the funds it receives from AT&T for transport services pursuant to the AT&T/SDN Service Agreement.

110. The funds obtained by SDN rightfully and equitably belong to NVC.
COUNT VII  
(Conversion – SDN)

111. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 110 of this Complaint as if fully set forth herein.

112. SDN member companies, including JVCTC, own fiber optic cable and other communication devices (Network Assets) in their respective service areas. The service areas are depicted on the South Dakota Telecommunications Companies Service Area Map attached as Exhibit D.

113. JVCTC's service area includes Brown County and its Network Assets are in Brown County.

114. The SDN member companies lease their Network Assets to the Fiber Ring Revenue Pooling Association (FRRPA) of which they are also members.

115. FRPPA leases the Network Assets to SDN. These Network Assets form the statewide transport fiber optic network operated by SDN. SDN is authorized to use the statewide network as part of its lawful operations. SDN leases capacity on the statewide network back to member companies.

116. NVC has a lease agreement with SDN through which NVC leases transport circuits from SDN to transport NVC's interstate and intrastate long distance traffic from SDN's tandem switch in Sioux Falls to Groton, South Dakota. Under that lease, NVC has the exclusive right to the leased circuit capacity and thus a superior interest to that of SDN in such capacity. A portion of that transport circuit includes the Network Assets owned by JVCTC in Brown County.

117. SDN has converted for its own use and benefit the circuit capacity it leased to NVC by purportedly providing AT&T with transport for AT&T's long-distance calls terminating to NVC by and through the same circuits that NVC has leased from SDN and continues to pay for. The SDN/AT&T arrangement was entered into without NVC's consent.

118. SDN has converted for its own use and benefit the Network Assets owned by JVCTC in Brown County by purportedly providing AT&T with transport for AT&T's long-distance calls terminating to JVCTC by and through the Network Assets owned by JVCTC. The SDN/AT&T arrangement was entered into without JVCTC's consent.

119. SDN's purported lease of the same circuit capacity to AT&T constitutes an unauthorized exercise of control or dominion over the circuits NVC leases from SDN and an unauthorized exercise of control or dominion over JVCTC's Network Assets in Brown County, all in a manner that is unwarranted and seriously interferes with JVCTC's and NVC's rights in the property or in a manner inconsistent with their rights in the property.

120. JVCTC and NVC are harmed by SDN's unlawful use of JVCTC's and NVC's property.
COUNT VIII
(Dissolution - SDN)

121. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 120 of this Complaint as if fully set forth herein.

122. SDCL § 47-34A-801(a)(4) provides for the dissolution of a limited liability company on application by a member when it is not reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement, or the managers or members in control of the company have acted, are acting, or will act in a manner that is illegal or fraudulent. SDCL § 47-34A-801(a)(4)(iii-iv).

123. SDN has persisted in providing service to AT&T in a manner that is unlawful because, inter alia, it violates SDN's requirements as a return carrier that is authorized to provide tandem-switching service only on a non-discriminatory basis pursuant to a lawfully-filed tariff.

124. SDN's Managers have each been informed of the company's unlawful conduct. Specifically, on or about August 3, 2015, Plaintiffs provided Defendants with a letter outlining the unlawful nature of SDN's action and, over the course of the preceding months, have provided to counsel for SDN and SDN's Managers relevant documents and testimony that demonstrate that SDN is not legally authorized to provide service to AT&T in that manner in which it has operated since September 2014. The evidence establishes that SDN is not lawfully permitted to provide AT&T with secret-off tariff tandem switching and transport services.

125. Despite this information, on August 21, 2015, SDN informed Plaintiffs that its Managers had refused to exercise good business judgment to cause SDN to bring its behavior into compliance with applicable law. Rather, SDN's managers chose to knowingly continue to operate in a manner that is unlawful.

126. The decision of SDN's Managers to continue providing unlawful services to AT&T is inconsistent with SDN's articles of organization and its operating agreement. Therefore, it is no longer reasonably practicable for SDN to continue operating.

127. The Court enter an order providing for the winding of SDN's affairs and appoint an appropriate receiver to oversee that process.

COUNT IX
(Declaratory Judgment - SDN, Shlanta, and SDN Managers)

128. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 127 of this Complaint as if fully set forth herein.

129. A present, actionable and justifiable controversy exists with respect to the legal rights between the parties. Such controversy arises under the laws of South Dakota. Plaintiffs cannot obtain relief other than through litigation.
130. SDN is violating its tariffs and its contracts with Plaintiffs, and Shlanta and the SDN Managers breached their fiduciary duties, and duty of good and fair dealing to Plaintiffs.

131. Absent a declaratory judgment, SDN will continue its wrongful practices of providing secret, off-tariff services to AT&T.

132. It would be unduly burdensome and inefficient for Plaintiffs to bring new actions for damages each time SDN wrongfully provides such services to AT&T.

133. Accordingly, Plaintiffs are entitled to a declaratory judgment, and such further relief based upon that declaratory judgment as the Court deems proper, determining that:

a. SDN, Shlanta, and each of the SDN Managers individually, breached their duty of good faith and fair dealing and fiduciary duties to Plaintiffs;

b. SDN, and each of the SDN Managers, breached the Operating Agreement;

c. SDN breached its contracts with Plaintiffs;

d. SDN has no authority to provide AT&T or any other long-distance carrier transport services from Sioux Falls to NVC's switch in Groton, South Dakota;

e. SDN must refrain from offering to provide wireless backhaul services directly to AT&T, or any other carrier in Plaintiffs' service territory, unless it first complies with the requirements of § 15.2 of the Operating Agreement.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for the following relief with regard to SDN, Shlanta, and the SDN Managers:

1. A permanent injunction preventing Defendants from taking any further action to interfere with NVC's ability to provide and collect tariffed access charges for transporting AT&T's traffic from Sioux Falls to Brown County, including, but not limited to, preventing Defendants from providing direct trunk transport services to AT&T;

2. Specific performance of the Operating Agreement's provision allowing NVC to designate Sioux Falls as its Point-of-Interconnection with SDN;

3. Specific performance of the Agreement requiring SDN to provide service to NVC "under the same terms, conditions and prices that apply to James Valley and other SDN owners;"
Specific performance of the contract between SDN and NVC requiring SDN to provide high capacity transport circuits to NVC so that NVC may, in turn, transport access traffic from Sioux Falls to its exchange in Brown County;

In the alternative to 1-4 above, a decree finding that SDN has knowingly operated, and persisted in operating, in a manner that is unlawful and that it is otherwise unreasonable for SDN to continue operating, and ordering the dissolution of SDN;

Compensatory damages against SDN, Shlanta, and each of the SDN Managers;

Punitive damages, in accordance with SDCL § 21-3-2, or any other applicable provision of law, against SDN, Shlanta, and each of the SDN Managers;

Prejudgment and post-judgment interest as allowed by law;

For Plaintiffs' reasonable attorneys' fees and the costs of this action;

Such other costs and fees as are allowed by law and which the Court deems to be just and proper; and

An order requiring SDN to refrain from offering to provide wireless backhaul services directly to AT&T, or any other carrier in Plaintiffs' service territory, unless it first complies with the requirements of § 15.2 of the Operating Agreement.

JURY DEMAND

Plaintiffs demand a trial by jury on all issues so triable.

Dated this ______________ day of May, 2016.

BANTZ, GOSCH & CREMER, L.L.C.

/s/ James M. Cremer
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Attorneys for Plaintiffs
CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs hereby certifies that on the _____ day of May, 2016, a true and correct copy of the foregoing Second Amended Complaint was electronically filed with the Clerk of Court through the Odyssey File & Serve, and electronically served to the following through Odyssey File & Serve:

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BANTZ, GOSCH & CREMER, L.L.C.

/s/ James M. Cremer
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605-225-2232
605-225-2497 (fax)
jcremer@bantzlaw.com
September 8, 1999

Richard Scott, CEO
South Dakota Network, Inc.
2900 W. 10th St.
Sioux Falls, SD 57104

RE: NVC’s REQUEST FOR SDN SERVICES TO SUPPORT ITS CLEC OPERATIONS IN THE ABERDEEN USWC EXCHANGE

Dear Rich:

Northern Valley Communications (NVC) is close to turning up its telecommunications network in the Aberdeen USWC’s exchange. NVC currently has dial tone and is testing its network services. We anticipate that NVC will be ready to provide a full line of services in early October. NVC will be remotely switching its Aberdeen traffic via James Valley’s EWSD switch in Groton. Clint Hanson, Russ Claussen, Tony Madsen and myself have all had various conversations with you and your staff over the last year as NVC prepared to provide dial tone, long distance, LNP and other advanced services to our customers in Aberdeen.

Last week we conferenced with Chuck Fejfar and I agreed I would review the various services NVC needs from SDN with you and make a written request, which is the substance of this letter. First, thank you and your staff for your valuable input into our CLEC project. We have sought the advice of SDN’s staff at several points during our planning. By this letter NVC requests the following SDN services:

1. **LNP** That SDN provide NVC with tandem switching capabilities to reach Illuminet and the NPAC database to provide LNP services in the Aberdeen exchange.

2. **SS7** NVC previously received a letter of authority from SDN to allow NVC to use SDN’s SS7 network.

3. **Intrastate and Interstate Equal Access** Like all other LECs in South Dakota, NVC intends to provide Intrastate and Interstate equal access to its customers. Therefore, NVC requests this CEA capability from SDN. SDN is uniquely suited to provide this service. Like other ILECs in the state, we believe our customers would be best served by SDN’s equal access capabilities and having the ability to access IXC’s interested in providing long distance in Aberdeen at SDN’s Sioux Falls tandem.

4. **Operator Services** NVC requests to use SDN’s operator services vendor for all NVC provided operator services.

Eldahl Service Request[1][1].doc Page 1 of 2
Exhibit A - Page 1 of 2
5. **911 Services**  NVC requests that SDN route our 911 trunks consistent with the same methods that James Valley's trunks are routed today.

To the extent possible, NVC requests that the above SDN services be provided under the same terms, conditions and prices that apply to James Valley and other SDN owners, unless our CLEC status requires a different treatment. Please provide a written quote for the prices you would charge for the above services. Also, NVC is willing to sign a written contract with a reasonable term commitment. With our plan to launch services in early October and the time needed to set up these services, we would appreciate a response to our request as soon as possible.

If you have any questions please contact me. Larry Hettinger and Don Lee have been working with NVC on our long distance options and tariff issues. Thanks in advance for your consideration of the above request and we look forward to working with SDN.

Sincerely,

Doug Eidahl  
CEO

Cc: Chuck Fejfar  
Mark Shlanta  
Clint Hanson  
Dennis Hagny  
Larry Hettinger  
Don Lee
November 25, 2013

VIA ELECTRONIC MAIL

James Groft
General Manager
Northern Valley Communications, LLC
235 East 1st Avenue
Groton, SD 57445

Subject: ATT Dispute with South Dakota Network and Northern Valley Communications

Dear Mr. Groft:

As we discussed at the recent SDN board meeting, the board discussed the dispute between Northern Valley Communications, LLC (“NV”), South Dakota Network, LCC (“SDN”) and ATT regarding the transport and termination of access traffic destined for high volume entities that exist in NV’s service territory where ATT uses the SDN access tandem to reach NV’s transport and local switching facilities. From SDN’s perspective the negotiations to resolve this matter are at an impasse because NV is not willing to supply Direct Truck Transport (DTT) or significantly reduce its price to ATT for transport between SDN and NV. The impasse is imperiling the business and financial interests among ATT, SDN and the members of SDN.

Based on that status, the SDN Board has asked that SDN prepare a proposal to ATT for SDN to provide by contract the tandem switching and the direct trunk transport for traffic terminating to NV that ATT has identified as being stimulated and which appears to meet the criteria for stimulated traffic as defined in 47 CFR 63.1. If ATT agrees to the proposal, SDN will bring the proposal to NV for its review and to determine whether NV will agree to accept the proposal negotiated between SDN and ATT for traffic delivery. NV can agree to the transport pricing and provide the transport using transport network supplied by SDN. If NV rejects the proposal and/or refuses to terminate the traffic, SDN is authorized by its board to take whatever legal or other action it deems necessary to require NV to terminate the traffic. This could include the termination of circuit agreements between SDN and NV that NV uses to transport stimulated access traffic and a complaint to the FCC alleging an unreasonable practice because NV is blocking ATT terminating access traffic delivered to NV by SDN.

This letter is provided at your request to share the SDN board’s position in this matter with the NV board at a meeting of that board on Monday, November 25, 2013.

Sincerely,

Bryan Roth
President
SDN Board of Managers
March 5, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: South Dakota Network, LLC
   Centralized Equal Access Service
   Revised Access Tariff Filing
   FRN 0005-0974-07

Dear Ms. Dortch:

The accompanying tariff material issued by South Dakota Network, LLC ("SDN"), and bearing FCC No. 1, effective March 20, 2014, is sent to you electronically for filing in compliance with the requirements of the Communications Act of 1934, as amended.

The revised tariff allows for direct trunk transport for a customer terminating high volumes of access minutes to a Routing Exchange Carrier or other entity engaged in Access Stimulation, as defined by the FCC. The tariff filing consists of the revised tariff language and check sheets. In compliance with Section 61.14 of the Commission’s Rules, the transmittal, FCC Form 159 and the statutory processing fee are being sent via the Commission’s Electronic Tariff Filing System.

All correspondence and inquiries, including petitions against the filing, should be directed to Marlene Bennett at: Consortia Consulting, 2100 Highland Way, Suite V, Mitchell, South Dakota 57301, Phone 605.990.2918, Fax 866.372.5733, email mbennett@consortiaconsulting.com.

Sincerely,

/s/ Marlene Bennett

Marlene Bennett
Consultant for South Dakota Network, LLC

Attachments
# CENTRALIZED EQUAL ACCESS SERVICE

## CHECK SHEET

Title Page 1 and Pages 1 to 166, inclusive, of this tariff are effective as of the date shown. Revised pages as set forth below contain all changes from the original tariff which are in effect on the date hereof.

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**Issued:** March 5, 2014  
**Effective:** March 20, 2014

**By:** Chief Executive Officer  
2900 West 10th Street  
Sioux Falls, South Dakota 57104

Exhibit C - Page 2 of 5
CENTRALIZED EQUAL ACCESS SERVICE
CHECK SHEET - Cont'd

Title Page 1 and Pages 1 to 166, inclusive, of this tariff are effective as of the date shown. Revised pages as set forth below contain all changes from the original tariff which are in effect on the date hereof.

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Sioux Falls, South Dakota 57104

Exhibit C - Page 3 of 5
CENTRALIZED EQUAL ACCESS SERVICE

5. Ordering Options for Switched Access Service

5.1 General

(A) This section sets forth the regulations and other related charges for Access Orders for Access Service. These charges are in addition to other applicable charges as set forth in other sections of this Tariff.

An Access Order is an order, in a form or format acceptable to SDN and the customer, to provide the customer with Access Service, access related services, or to provide changes to existing services.

Transport is provided as tandem switched only. Direct-Trunked Transport as defined in Section 2.5 is not available to a Routing Exchange Carrier's end office since equal access is provided through the SDN centralized access tandem (Federal Communications Commission No. DA 90-1964), unless the conditions outlined in 5.1(B) following apply.

Unless covered under another separate contract or agreement (i.e. transiting traffic service agreement), all traffic delivered by an IC to the SDN access tandem will be considered access traffic and billed accordingly.

(B) Terminating Direct Trunk Transport may be ordered by a customer terminating high volumes of access minutes to an end office served by a Routing Exchange Carrier or any other entity engaged in Access Stimulation (as defined by the FCC) if the following conditions are applicable:

1. The Routing Exchange Carrier or any other entity engaged in Access Stimulation has a interstate terminating to originating traffic ratio of at least 3:1 in a calendar month and the minutes are terminating to an end office within a single operating company number (OCN), or

2. The Routing Exchange Carrier or any other entity engaged in Access Stimulation has had more than a 100% growth in interstate terminating switched access minutes of use in a month compared to the same month in the preceding year for a single end office within an operating company number (OCN).

This exception allowing Direct Trunk Transport is only available for an end office within a single OCN for a Routing Exchange Carrier or any other entity engaged in Access Stimulation. Direct Trunk Transport is not available for an end office within an OCN for a Routing Exchange Carrier not engaged in Access Stimulation.

Certain material formerly found on this page now appears on Original Page 67.1.
CENTRALIZED EQUAL ACCESS SERVICE

5. Ordering Options for Switched Access Service (Cont'd)

5.1.1 Ordering Conditions

Access Service may be ordered from SDN. Switched Access Service is provided in Feature Group D with Signaling System Number 7 (SS7) arrangements only between the customer's point of termination at SDN's central access tandem and a Routing Exchange Carrier's point of interconnection. Access Service between a customer's premises and the customer's point of termination at the SDN access tandem is solely the responsibility of the customer and must be provided by the customer or ordered from another carrier. Access Service from the Routing Exchange Carrier's point of interconnection to an end office must be ordered from a Routing Exchange Carrier or other Exchange Telephone Company. SDN will determine the Transport facilities to be provided between a Routing Exchange Carrier's point of interconnection and SDN's central access tandem on the basis of the capacity ordered.

The customer shall supply all the necessary information to provide service, (e.g., customer name, customer address, customer contact and facility interface, etc.)

Orders for Access Service between SDN's central access tandem and the Routing Exchange Carrier's point of interconnection shall be in BHMC's.
ATTACHMENT C
September 1, 2017

VIA EMAIL
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Jacob Lewis, Esq., Associate General Counsel, Litigation Division
Richard Welch, Esq., Deputy Associate General Counsel, Litigation Division
Federal Communications Commission
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Re: James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC, Civ. 15-134 (Brown County, SD Cir. Ct.): Invitation to Submit an Amicus Brief

Dear Ms. Tatel:

The undersigned are counsel to the Plaintiffs in the above-captioned litigation. We write in response to an order released by the Hon. Scott P. Myren, Circuit Judge, in the litigation directing the parties to invite the Federal Communications Commission to submit an amicus brief on certain discrete legal issues that are relevant to one of Plaintiffs’ claims against South Dakota Network, LLC (“SDN”), a Commission-approved Centralized Equal Access (“CEA”) Provider.¹

We note that while the Court entertained a motion asking for the case to be stayed and referred to the FCC, the Court opted instead to seek the Commission’s view through amicus briefing on discrete questions that are narrowly tailored and framed as legal questions. The Commission’s response to these questions will guide the Court in making determinations relevant to questions that remain pending before the Court, specifically whether Plaintiffs are

¹ See James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, L.L.C. v. South Dakota Network, LLC, Civ. 15-134, Memorandum Decision on Defendant’s Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell (Brown Cty. S.D. Cir. Ct. July 17, 2017), at 16-18, attached hereto as Exhibit A.
entitled to seek dissolution or judicial intervention in the affairs of SDN in light of alleged violations of the FCC’s rules governing the provision and tariffing of CEA services.

The relevant and undisputed facts are as follows:

1. As an FCC-sanctioned CEA provider, SDN’s interstate switched access tariff contains rates developed pursuant to part 61.38 of the Commission’s rules governing rate-of-return carriers.

2. In September 2014, SDN entered into a contract with AT&T Corp. to provide AT&T with tandem switching and transport services for rates below those contained in SDN’s FCC-filed tariff (the “SDN/AT&T Agreement”).

3. Neither AT&T nor SDN filed the SDN/AT&T Agreement with the Commission or otherwise made it publicly available.

4. The SDN/AT&T Agreement requires SDN to provide AT&T with “High Volume Switching and Transport Service,” for long distance traffic AT&T terminates to Northern Valley Communications, LLC (“Northern Valley”).

5. The High Volume Switching and Transport Service includes both SDN’s tandem switching and, allegedly, transport services. The rate for the High Volume Switching and Transport Services in the contract is $0.001044/minute of use.

6. If AT&T obtained those two services at the rates contained in SDN’s FCC-filed tariff, the total charge would have been $0.0011806/minute of use for the period July 2014 – July 2016 and $0.011123/minute of use for the period July 2016 – present.

7. Northern Valley is a CLEC that provides services to residential and business customers in and around Aberdeen, South Dakota. Northern Valley also provides services to high-volume customers, including conference call providers. Northern Valley has a switched access tariff on file with the Commission and mirrors the rates in CenturyLink’s tariff, as provided by the Commission’s rules governing tariffed rates for CLECs engaged in access stimulation.

The Court has invited the Commission to provide an amicus brief responding to the following question:

For the period September 2014 to present, have the FCC’s rules permitted an FCC-approved Centralized Equal Access Provider to provide tandem-switching

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3 AT&T/SDN Service Agreement, Confidential, September 18, 2014, attached as Exhibit B.

4 SDN Tariff F.C.C. No. 1, 7th Revised Page 134, attached as Exhibit C (Eff. July 1, 2014) (Access Transport rate is $0.006001 and Centralized Equal Access is $0.005802).

5 SDN Tariff F.C.C. No. 1, 8th Revised Page 134, attached as Exhibit D (Eff. July 1, 2016) (Access Transport rate is $0.006001 and Centralized Equal Access is $0.005122).
services to an IXC pursuant to a private, unfiled contract, at a rate that is below the rate contained in the CEA Provider’s FCC-filed tariff?

To the extent that the Commission answers the prior question in the negative, what portion(s) of the Communications Act or Commission rules are implicated by SDN’s decision to enter into the unfiled, off-tariff contract with AT&T?

In addition to the issue of SDN’s unfiled contract with AT&T, Plaintiffs have also learned that in preparation of SDN’s 2014 CEA cost study, SDN significantly reduced the projected traffic volumes that would be switched by its tandem switch. The undisputed facts are as follows:

1. In its 2012 Tariff Review Plan, SDN projected it would switch 837,258,000 minutes\(^6\) of interstate long distance traffic for the study period.
2. In its 2014 Tariff Review Plan, SDN projected only 370,269,443 minutes\(^7\) of interstate long distance traffic for the study period.
3. A primary reason for SDN reducing the projected volumes is because AT&T had been withholding payment from SDN and SDN was preparing to enter into the off-tariff contract with AT&T described above.
4. AT&T’s traffic to Northern Valley has continued to be switched by SDN’s tandem switch after SDN entered into the SDN/AT&T contract.

Therefore, the Court has invited the Commission to provide an amicus brief responding to the following additional question:

Did SDN violate the Commission’s rules governing rate development as an FCC-approved CEA provider by omitting traffic volumes related to AT&T traffic from its 2014 cost study, even though AT&T’s traffic continued to be switched by SDN’s tandem switch?

To the extent that the Commission answers the prior question in the affirmative, what portion(s) of the Communications Act or Commission rules are implicated by SDN’s 2014 cost study filing?

We appreciate the assistance of your office in responding to these questions based on existing FCC law and look forward to your response. Should you require any additional information, please do not hesitate to contact the undersigned.

\(^6\) See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2012 Annual Access Tariff Filing, Description and Justification, at 3, attached as Exhibit E.

\(^7\) See, e.g., South Dakota Network, LLC, Tariff F.C.C. No. 1., Centralized Equal Access Service, 2014 Annual Access Tariff Filing, Description and Justification, at 2, attached as Exhibit F.
Sincerely,

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Counsel for James Valley Cooperative
Telephone Co., James Valley Communications,
Inc. and Northern Valley Communications,
L.L.C.
ATTACHMENT D
This case began with a state court complaint filed in Brown County, Fifth Judicial Circuit, South Dakota, back in 2015. Doc. 3-2 (Complaint dated March 25, 2015); Doc. 1 (Notice of Removal indicating service occurred on June 6, 2015). On August 30, 2017, Defendant South Dakota Network, LLC (SDN) filed a Notice of Removal in this Court, asserting federal question jurisdiction under 28 U.S.C. § 1331. Doc. 1. SDN filed with its Notice of Removal two motions: 1) a Motion to Consolidate Related Actions, Doc. 5, seeking to consolidate this case with the factually related case of Northern Valley Communications, LLC v. AT&T Corp., 14-CV-1018-RAL, long pending in this Court; and 2) a Motion for Modified Confidentiality Agreement and Access to Certain Filings in 14-CV-1018-RAL, Doc. 7.
Plaintiffs James Valley Cooperative Telephone Company, James Valley Communications, Inc., and Northern Valley Communications, LLC (collectively “Plaintiffs”) filed a Motion to Remand on September 14, 2017. Doc. 17. This Court held a motion hearing on October 25, 2017, on the pending motions. For the reasons explained below, Plaintiffs’ Motion to Remand, Doc. 17, is granted; the Motion to Consolidate Related Actions, Doc. 5, is denied as moot; and the Motion to Modify Confidentiality Agreement, Doc. 7, is denied without prejudice to seeking relief otherwise.

I. Summary of Facts Relevant to Pending Motions

SDN is a South Dakota limited liability company existing under Federal Communications Commission (FCC) and State Public Utility Commission orders. SDN provides for centralized equal access (CEA) service in South Dakota using an access tandem switch in Sioux Falls. SDN is owned by a group of 17 incumbent local exchange carriers (ILECs) and provides a centralized point for the aggregation and exchange of long distance telecommunication traffic. SDN is governed by a board of managers.

Plaintiff James Valley Cooperative Telephone Company (JVT) is a member of SDN. JVT is an ILEC that provides telephone services in Brown County, South Dakota. JVT owns Plaintiff James Valley Communications, Inc., which is the sole member of Plaintiff Northern Valley Communications, LLC (NVC). NVC is a competitive local exchange carrier (CLEC) that provides telecommunications and information services in certain areas of Brown County and Spink County in northeastern South Dakota. Over 90% of NVC’s telecommunications business comes from a practice known as “access stimulation,” by affiliation with out-of-state entities that generate high volumes of calls, such as free conference calling services. Access stimulation is a controversial business practice that has led to litigation before the FCC and elsewhere.
NVC's access stimulation business and its dispute with AT&T over billing for those calls gave rise to both this lawsuit and the related lawsuit pending as 14-CV-1018-RAL. AT&T is an interexchange carrier (IXC), which is responsible for carrying telephone traffic between local exchange carriers (LECs) and different geographic areas, enabling long-distance phone service. As a LEC, NVC is responsible for a service known as "exchange access," which connects local customers to the IXC in order to call and receive calls from other LECs. NVC has used SDN's access tandem switch services to do so.

Because of uncertainty with the rules surrounding access stimulation and charges resulting therefrom, AT&T and NVC have had and settled disputes in the past regarding AT&T's payments to NVC. Doc. 1-1 at 42 of 86. The FCC addressed the access stimulation practice in In re Connect America Fund, A National Broadband Plan For Our Future, 26 FCC Red. 17663, 17874–90 (2011) [hereafter Connect Am. Fund Order], in which the FCC sought to provide greater clarity to the access stimulation practice. Id. at 17667, 17676. After the Connect Am. Fund Order, NVC filed a new tariff with the FCC that took effect in January of 2012. AT&T paid NVC's invoices until the March 2013 invoice, after which AT&T paid NVC for its end office switching charges, but not for transport charges. Doc. 1-1 at 42 of 86. FCC decisions have provided some guidance on how CLECs like NVC can collect from an IXC like AT&T when the CLEC is engaged in access stimulation. In short, NVC may collect from AT&T based on either a negotiated rate with AT&T or a properly "benchmarked" rate. See Quest Commc'ns Co. v. N. Valley Commc'ns, LLC, 26 FCC Red. 8332, 8334–35 (2011); Connect Am. Fund Order, 26 FCC Red. at 17886; see also N. Valley Commc'ns v. AT&T Corp., 245 F. Supp. 3d 1120, 1130 (D.S.D. 2017). However, an IXC like AT&T may be able to install a direct trunk from the IXC's point of presence to the end office of the CLEC, thereby avoiding tandem
switching functions and the transport charges that make access stimulation potentially so profitable to an entity like NVC. In re Access Charge Reform, 26 FCC Rcd. 2556, 2565 (2008) (decision known as “PrairieWave”); N. Valley Commc’ns, 245 F. Supp. 3d at 1131.

As part of its CEA services, SDN provides tandem switch services for the exchange of telecommunications traffic between LECs like JVT and NVC with IXC s like AT&T. Doc. 3-53 at 3. NVC has utilized the CEA services of SDN since 1999 pursuant to lease agreements and other contracts. Doc. 3-53 at 3. SDN bills AT&T separately for its services related to the CLEC NVC’s calls connected to the IXC AT&T. A month after AT&T began withholding payment from NVC, AT&T in April of 2013 began withholding payment from SDN as well. Doc. 3-53 at 4.

Some communications had occurred between NVC and AT&T for some alternative arrangement for handling the access stimulation generated volume of calls, but no agreement resulted. Doc. 3-53 at 4. SDN’s board of managers met in November of 2013 without the Plaintiffs’ participation to address the billing dispute with AT&T. Doc. 3-53 at 4. After that meeting, SDN notified NVC that it intended to negotiate separately with AT&T, NVC objected and sent a cease and desist letter to SDN, and SDN then attempted to work with NVC to resolve the dispute with AT&T. Doc. 3-53 at 4. In early December of 2013, SDN and NVC representatives met in Groton, South Dakota, to discuss matters relating to nonpayment of bills by AT&T and related issues. SDN and NVC dispute whether an agreement was reached during the meeting. Doc. 3-53 at 4.

1 Document 3-53 cited here is South Dakota Circuit Judge Scott P. Myren’s Memorandum Decision dated March 9, 2017, in the state case sought to be removed. This particular Court makes no factual findings in this Opinion and Order, but draws information from Judge Myren’s decision that appears to be not genuinely disputed.
In July of 2014, NVC sued AT&T in the United States District Court for the District of South Dakota. 14-CV-1018-RAL, Doc. 1. Thereafter, on September 18, 2014, SDN entered into a separate agreement with AT&T which provided for a contract rate to provide transport for access stimulation traffic between Sioux Falls and Groton. Doc. 3-53 at 4–5. NVC had been billing and was seeking to collect from AT&T a tariff rate for transport charges including for the mileage between Sioux Falls and Groton. The effect of the SDN-AT&T agreement was to undercut NVC’s damage claim against AT&T for those transport charges and to provide AT&T an argument of a defense to that portion of NVC’s damage claim. As this Court previously put it:

AT&T argues that it is not responsible for any transport charges after September 2014 between Sioux Falls and Groton because SDN, rather than NVC, was providing that transport pursuant to a negotiated agreement with AT&T. Despite AT&T’s arguments to the contrary, it is a material issue whether SDN had the ability to enter into an agreement with AT&T or had a binding agreement with NVC such that it could not. After all, the FCC has deemed it a violation of 47 U.S.C. § 201(b) for a LEC to bill an IXC for transport services that offered no advantage to the IXC. Thus, if AT&T and SDN have a valid agreement under which SDN is providing to AT&T the transport services between Groton and Sioux Falls, NVC cannot collect for that service.

N. Valley Commc’ns, 245 F. Supp. 3d at 1143–44.

Plaintiffs in this case sued SDN in state court in 2015 through a complaint alleging various state law claims. Doc. 3-2. When SDN filed its answer, defenses, counterclaim, and third-party complaint on July 20, 2015, SDN alleged a federal law preemption defense, Doc. 3-4 at 11, and made certain state law counterclaims against Plaintiffs under theories of breach of contract, state law civil conspiracy, and expulsion of JVT from the SDN operating agreement,

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2 NVC makes that damage claim for transport charges between Sioux Falls and Groton against AT&T nevertheless in 14-CV-1018-RAL.
Doc. 3-4. Plaintiffs subsequently have twice been allowed to amend their state court complaint, with the Second Amended Complaint having been filed in or around April of 2016.

In state court in this case, SDN filed a Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the FCC and a Motion to Strike or Exclude certain expert opinions. Through that motion, SDN argued that all of Plaintiffs’ claims arise under federal law and are preempted. Doc. 3-60 at 2. The Honorable Scott P. Myren granted the motion in part and denied the motion in part. Judge Myren carefully navigated through the remaining claims, defenses, and expert opinions to confine the case to state law claims. Judge Myren recognized:

This Court [state trial court for Brown County] lacks subject matter jurisdiction over claims for violation of the [Federal Communications Act] because the federal courts have exclusive jurisdiction to adjudicate those claims. However, lack of subject matter jurisdiction over these precise areas does not necessarily mean a state law claim must be dismissed.

Doc. 3-60 at 7. Judge Myren then went through each state law claim to explain how the claims were based strictly on state law and not a federal statute or claim. See Doc. 3-60 at 8-10 (clarifying that Plaintiffs’ breach of contract claims did not and could not challenge “rate, terms or conditions of telecommunications service”); Doc. 3-60 at 11-12 (explaining that intentional interference with business relationships claim was not predicated on alleged violation of federal law). Judge Myren dismissed Plaintiffs’ claim for violation of a South Dakota Trade Regulation statute, SDCL 37-1-4, because that claim was preempted by federal law. Doc. 3-60 at 12-13. Judge Myren also concluded that Plaintiffs could not proceed in state court on one of their two theories for dissolution of SDN under SDCL 47-34A-801(a)(4) because that theory—alleged illegal or fraudulent conduct by SDN’s managers—was predicated on alleged violations of the FCA, but that the alternative theory for dissolution—that it is not otherwise reasonably practical
to carry on SDN’s business—may proceed.\textsuperscript{3} Doc. 3-60 at 16. Judge Myren’s decision left Plaintiffs with state law claims of breach of the SDN operating agreement, breach of lease contracts, intentional interference with business relationships, unjust enrichment, conversion and legal claims for dissolution and declaratory judgment. To underscore how serious Judge Myren was to purge Plaintiffs’ case of federal law issues, Judge Myren substantially restricted Plaintiffs’ proposed experts’ testimony including debarring opinions about the SDN-AT&T Agreement allegedly being unlawful under FCC rules. Doc. 3-60 at 19–20.

SDN nevertheless filed a Notice of Removal to this Court on August 30, 2017. Doc. 1. SDN asserted that an ex parte filing made by Plaintiffs to the FCC on August 4, 2017, first brought to SDN’s attention that Plaintiffs’ state law claims actually articulated a federal claim. Docs. 1, 1-1. In particular, the Notice of Removal asserts that Plaintiffs are making a federal law claim to exclusive authority for or a monopoly over certain transport services, are using the Protective Order in 14-CV-1018-RAL to take inconsistent positions in litigation, and are basing their dissolution claim in state court over an allegation that SDN’s contract with AT&T was illegal under federal law. Doc. 1. SDN also filed a Motion to Consolidate the cases, Doc. 5, and a Motion for Modification of the Confidentiality Agreement to Access Certain Records Under Seal, Doc. 7.

Plaintiffs responded with a Motion to Remand. Doc. 17. In its brief in support of Motion to Remand, Plaintiffs make clear multiple times that their state law claims do not require the state court to resolve any questions of federal law. For instance, on page two of the brief in support of Motion to Remand, Plaintiffs state, “there are no questions of federal law that the state

\textsuperscript{3} Comments by Plaintiffs’ counsel suggest that the claim for dissolution of SDN, added by amending the complaint after SDN sought expulsion of JVT, is not the relief that Plaintiffs want in this case.
court must resolve in deciding whether Plaintiffs are entitled to recover from SDN for its breach of those agreements [referencing SDN’s operating agreements and SDN’s circuit lease with NVC].” Doc. 18 at 2. As for SDN’s assertion that Plaintiffs are claiming “that federal law grants [Plaintiffs] an exclusive transport monopoly binding upon both SDN and AT&T,” Plaintiffs state unequivocally: “Of course, SDN never bothers to point to anything in which Plaintiffs actually claim that, and it is certainly not in Plaintiffs’ complaint. That is unsurprising, because it is not Plaintiffs’ position.” Doc. 18 at 6. Later, Plaintiffs state “that Plaintiffs never claim any ‘monopoly’ right under federal law to carry any particular traffic [but rather claim that] [a]ny right that NVC has to carry AT&T’s traffic springs, first and foremost, from SDN’s Operating Agreement and its lease for the transport circuit with NVC.” Doc. 18 at 10. Plaintiffs repeat these positions in their reply as well. Doc. 27 at 5, 10. (“There is simply no way in which Plaintiffs’ claims can be morphed into a dispute about federal law.”).

Plaintiffs, however, equivocate on the existence of a federal law issue pertaining to their dissolution action against SDN. For instance, Plaintiffs in their brief in support of the Motion to Remand argue:

SDN’s breaches of federal law are but one of its unlawful acts, and the state court could well find that SDN should be held liable solely for its oppression of a minority member after that member and their affiliate highlighted for SDN and its management that they were proceeding down an unlawful path.

Doc. 18 at 12. Likewise, in Plaintiffs’ reply, Plaintiffs make clear that they want to press a claim of a violation of federal law only as it relates to the dissolution claim and not to the other state law claims:

Judge Myren and the jury can decide whether SDN is liable for any of Plaintiffs’ state law claims without regard to federal law. SDN’s violations of federal law may provide additional bases for Judge Myren’s decision to dissolve SDN, but he can just as readily find that SDN’s pattern and practice of state-law violations and related minority-member oppression are sufficient.
Doc. 27 at 8; see also Doc. 27 at 9 (“[A]ny embedded federal issue is, at most, an alternative theory upon which judgment could be rendered in their favor (i.e., the court could dissolve SDN either for violation of state or federal law”). Thus, Plaintiffs make judicial admissions that there is no federal law issue pertaining in any way to any of their state law claims, except on an alternative theory for dissolution of SDN.

II. Discussion

A. Motion to Remand

A case may be removed to federal court only where the federal court would have original jurisdiction. 28 U.S.C. § 1441(a); Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987). The defendant removing the case from state to federal court bears the burden of proving that removal was proper and that federal subject matter jurisdiction exists. In re Business Men’s Assurance Co. of Am., 992 F.2d 181, 183 (8th Cir. 1993) (per curiam); State v. Wayfair, Inc., 229 F. Supp. 3d 1026, 1030 (D.S.D. 2017). Federal courts, of course, have a “virtually unflagging” obligation to hear and decide cases within federal jurisdiction. Colo. River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976). Yet, “[f]ederal courts are to ‘resolve all doubts about federal jurisdiction in favor of remand’ and are strictly to construe legislation permitting removal.” Dahl v. R.J. Reynolds Tobacco Co., 478 F.3d 965, 968 (8th Cir. 2007) (quoting Transit Cas. Co. v. Certain Underwriters at Lloyd’s of London, 119 F.3d 619, 625 (8th Cir. 1997)).

SDN references federal question jurisdiction under 28 U.S.C. § 1331 as supporting removal. Under § 1331, “district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. Typically, to determine whether a claim arises under a federal law, district courts examine the “well pleaded allegations of the complaint and ignore potential defenses.” Beneficial Nat’l Bank v. Anderson,
539 U.S. 1, 6 (2003). That is, “absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.” Id. at 6; Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 27–28 (1983). Indeed, as the master of the claim, a state court plaintiff generally can avoid removal to federal court by alleging only state law claims. Moore v. Kansas City Pub. Sch., 828 F.3d 687, 691 (8th Cir. 2016); Johnson v. MFA Petroleum Co., 701 F.3d 243, 247 (8th Cir. 2012). Defendants in turn are not “permitted to inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law” through removal papers. Centr. Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc., 561 F.3d 904, 912 (8th Cir. 2009) (quoting Gore v. Trans World Airlines, 210 F.3d 944, 948 (8th Cir. 2000)).

SDN does not assert that federal jurisdiction exists based on the allegations of the Complaint, First Amended Complaint, or Second Amended Complaint; indeed, SDN would be tardy in filing for removal as the most recent of those apparently was filed in April of 2016. See 28 U.S.C. § 1446(b)(1) & (3) (setting 30-day period for defendant to file notice of removal). Rather, SDN relies on certain excerpts of Plaintiffs' August 4, 2017 ex parte filing with the FCC and invokes § 1446(b)(3) that allows a notice of removal to be filed “within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may be first ascertained that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3). SDN asserts that the ex parte filing with the FCC is such an “other paper” and then argues for removal under Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308 (2005).

In Grable, the Supreme Court of the United States acknowledged that “in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal
issues.” Id. at 312. The dispute in Grable involved a seizure and sale by the Internal Revenue Service of real property owned by Grable & Sons Metal Products, Inc. (Grable) to satisfy its federal tax delinquency. Id. at 310. Grable received notice of the seizure and sale, but did not exercise its right to redeem the property. Id. at 310. After the sale, the Government provided Darue Engineering & Manufacturing (Darue) a quit-claim deed to the property. Id. at 311. Grable later brought a state quiet title action, arguing that a federal statute required personal service for the notice of any seizure, rather than service by certified mail as Grable had received. Id. The Supreme Court held that the district court had federal question jurisdiction over the case because “[w]hether Grable was given notice within the meaning of the federal statute is . . . an essential element of its quiet title claim.” Id. at 315. The Supreme Court in Grable ultimately adopted the following four-part test for determining whether a federal court has jurisdiction over a state claim: “does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.” Id. at 314.

Since Grable, the Supreme Court has made clear that only a “special and small category” of cases will satisfy this four-part test. Empire Health Choice Assur., Inc. v. McVeigh, 547 U.S. 677, 699 (2006). In Empire, the Supreme Court held that a private insurance carrier’s claim for reimbursement of benefits did not meet the Grable test even though the insurance carrier had contracted with the government under federal law to administer a health-care plan for federal employees and the contract obligated the carrier to make reasonable efforts to recover payments it was entitled to. Empire, 547 U.S. at 682–83, 685, 699–701. In holding that no federal jurisdiction existed in Empire, the Supreme Court identified several differences between Empire and Grable. First, the dispute in Grable focused on the action of a federal agency and its
compliance with a federal statute whereas the reimbursement claim in Empire was triggered by the settlement of a personal-injury action in state court. Empire, 547 U.S. at 700. Second, Grable presented a “nearly pure issue of law” that was dispositive of the case and would thereafter “govern numerous tax sale cases.” Empire, 547 U.S. at 700 (citation omitted). In contrast, the reimbursement claim in Empire was too “fact-bound and situation-specific” for its resolution to affect numerous other cases. Id. at 700–01. Third, unlike in Grable where the meaning of the federal tax statute was “an important issue of federal law that sensibly belong[ed] in federal court,” Grable, 545 U.S. at 315, the Supreme Court in Empire found it “hardly apparent why a proper federal-state balance would place such a non-statutory issue under the complete governance of federal law, to be declared in a federal forum.” Id. at 701 (citations omitted).

This case is far closer to Empire than to Grable. To begin with, Plaintiffs’ state-law claims do not “necessarily” raise the issue that federal law gives them a monopoly over certain transport traffic. Not only has Judge Myren narrowed Plaintiffs’ claims to those involving only state law, but Plaintiffs have made a judicial admission in this Court that any right to carry particular traffic comes from the operating and lease agreements rather than federal law. Unlike in Grable, where deciding an issue of federal law was inescapable, no issue of federal law needs to be resolved in Plaintiffs’ state case. Next, Plaintiffs’ claims do not present a pure issue of law that is significant to the federal system as a whole, but rather involve fact-intensive questions that are only relevant to these parties. For instance, Plaintiffs’ breach of contract claims will require interpretation of the parties’ agreements and application of state contract law. Similarly, Plaintiffs’ claim for intentional interference with a business relationship will require the finder of fact to consider whether SDN violated the parties’ contractual intentions as well as SDN’s
motives for contracting as it did with AT&T. See Doc. 3-60 at 12. Finally, given the absence of any substantial federal issue, exercising jurisdiction over this case would upset the balance of federal and state judicial responsibilities.

True, Plaintiffs maintain that the SDN and AT&T contract was contrary to federal law and that this is an alternative basis for their claim for dissolution of SDN. But Judge Myren’s decision recognized that this claim for dissolution predicated on an alleged violation of federal law is preempted, Doc. 3-60 at 16, and clearly debarred Plaintiffs’ expert from testifying about the SDN-AT&T Agreement being unlawful or inconsistent with FCC rules, Doc. 3-60 at 20.

At the hearing on these motions, SDN’s argument changed somewhat, with SDN arguing that part of its defense to the state court claims will be to argue that SDN had an obligation to provide AT&T rate relief and that SDN discussed how to do so with the FCC before entering into the 2014 agreement with AT&T. This is a different theory for removal than what SDN asserted in its Notice of Removal, perhaps because Plaintiffs’ judicial admissions largely remove SDN’s initial grounds argued as supporting removal. Still, a defendant like SDN cannot “inject a federal question into an otherwise state-law claim and thereby transform the action into one arising under federal law.” Centr. Iowa Power Coop., 561 F.3d at 912; (quoting Gore, 210 F.3d at 948). Moreover, that defense argument has long existed in this case and did not arise with the ex parte filing to the FCC on August 4, 2017, or otherwise within 30 days of the filing of the Notice of Removal. See 28 U.S.C. § 1446(b)(1) & (3) (setting 30-day time period within which to file notice of removal). SDN has not met its burden to demonstrate federal jurisdiction or the removability of the case.

4 There is the added issue of whether an ex parte filing to the FCC truly qualifies as an “other paper” under § 1446(b)(3) upon which removal can be based. This Court need not resolve that question because removal is otherwise improper.
B. Remaining Motions

SDN has filed a Motion to Consolidate Related Actions, Doc. 5. Certainly, this case is related to the pending case that this Court has between NVC and AT&T. However, because the case is not removable, the Motion to Consolidate Related Actions, Doc. 5, will be denied as moot.

SDN also has filed a Motion to Modify the Confidentiality Agreement so that it may have access to certain filings made under seal, Doc. 7. In particular, SDN desires access to Documents 85–89, 93–96, 99–102, 104–107, 109–111, 121, 139–144, 151–154, 161–164, and 171–172. Document 121 has been unsealed. AT&T, a party to the Confidentiality Agreement, did not participate in the October 25 hearing. The Court encourages NVC and AT&T to allow SDN access to documents filed under seal in 14-CV-1018-RAL, but will deny without prejudice to refiling otherwise the Motion to Modify Confidentiality Agreement. Because there is an absence of federal jurisdiction here and because AT&T, a party to the Confidentiality Agreement has not weighed in, granting the motion to modify the confidentiality agreement is improper.

C. Plaintiffs’ Request for Fees

In the brief in support of Motion to Remand, Plaintiffs argue that they should be awarded their fees in securing the remand under 28 U.S.C. § 1447(c). Section 1447(c) provides that “an order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Awarding fees under § 1447(c) is discretionary, as the statute uses the verb “may require.” Certainly, a court ought to require payment of costs and fees when there is a question about improper motive behind the attempted removal, although the statute does not require a finding of bad faith or improper motive as a

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5 A lawyer for AT&T was at the motion hearing in this case, but did not identify himself until the end of the hearing and merely observed rather than participated in the hearing.
condition to awarding fees and costs. See, e.g. Dakis v. Allstate Ins. Co., No. Civ. 02-3679 (PAM/RLE), 2003 WL 118245 at *2 (D. Minn. Jan. 8, 2003) (collecting cases). Here, the removal was improvident, although the reason for removal does not appear to be driven by bad faith. The case for removal did strike this Court as thin, particularly when considering that it came long after the Second Amended Complaint, well after SDN was aware of federal issues surrounding some of the claims, after Judge Myren’s decision limiting Plaintiffs’ claims and experts to state law theories and matters, and upon the approach of a trial date in early March of 2018. This Court wants to give the award of fees and costs under § 1447(c) further thought and invites Plaintiffs to file an affidavit setting forth their requested fees and costs. This Court does not want further briefing or argument on the matter, however.

III. Conclusion

For the reasons contained in this Opinion and Order, it is hereby

ORDERED that Plaintiffs’ Motion for Remand, Doc. 17, is granted. It is further

ORDERED that the Motion to Consolidate Related Actions, Doc. 5, is denied as moot. It is finally

ORDERED that the Motion to Modify Confidentiality Agreement, Doc. 7, is denied without prejudice.

DATED this 13th day of November, 2017.

BY THE COURT:

[Signature]

ROBERTO A. LANGE
UNITED STATES DISTRICT JUDGE
November 17, 2014

VIA EMAIL

Mr. William Heaston  
South Dakota Networks  
2900 W. 10th Street  
Sioux Falls, SD  57104-2543

Re: Cease and Desist Regarding Services to AT&T

Dear Bill:

As you know, I am counsel to Northern Valley Communications, L.L.C. ("NVC"). I am writing regarding a recent agreement South Dakota Networks ("SDN") appears to have reached with AT&T Corporation ("AT&T").

NVC first learned that SDN may have reached an agreement with AT&T in mid-October. SDN did not consult with NVC prior to entering into the agreement with AT&T. At the time NVC learned of the agreement, I contacted you to inquire whether the agreement would have any impact on NVC's provision of tariffed access services to AT&T. You assured me that the agreement SDN reached with AT&T would not impact NVC; nevertheless, you refused to provide me with a copy of the agreement. I also contacted AT&T's counsel, who similarly refused to provide me with a copy of the agreement.

NVC continues to provide and bill AT&T for transport services from SDN's tandem switch in Sioux Falls to its facilities, just as it always has since the formation of NVC. On November 12, 2014, however, AT&T sent the following dispute notice to NVC:

On September 14, 2014, AT&T entered into a Service Agreement with South Dakota Network, LLC ("SDN"), for the purchase of Switched Access Transport – Terminating Service. Pursuant to that Agreement, AT&T has obtained "High Volume Switching and Transport Service" ("HVSTS") to transport switched access traffic from AT&T's Point of Presence through SDN's network for handoff to Northern Valley in Groton, S.D. As a result of this agreement, AT&T rejects
any duplicate billing for the same service included in billing statements issued by Northern Valley.

AT&T's dispute notice calls into question the accuracy of your representation to me that SDN's agreement would not harm NVC's interest in collecting the tariffed access charges for the transport services that NVC provides (and has always provided). As such, I hereby renew my request that SDN promptly provide me with a copy of the agreement referenced by AT&T's dispute notice. (I note that no "High Volume Switching and Transport Service" is available under SDN's published tariff.)

Moreover, I feel compelled to remind SDN, as NVC was forced to do in November 2013 when SDN first threatened to harm NVC's interests with regard to collecting for its tariffed access services, that SDN is not entitled to provide transport services to AT&T because those services are provided by NVC pursuant to its deemed-lawful tariff.

In addition, and pursuant to your request, in my letter of March 31, 2014, I outlined the significance of the 2011 CAF Order as it relates to NVC's business relationship with AT&T. As set forth in my letter, the CAF Order set out specific guidelines for companies engaging in access stimulation. NVC's 2012 tariff not only fully complies with the CAF Order, but it has not been challenged by any IXC. My March 31 letter specifically warned SDN against filing a revised tariff that would jeopardize NVC's claims under its tariff. It now appears that SDN, through its secret agreement with AT&T, has done precisely what NVC warned SDN against.

Therefore, it should be readily apparent to SDN that its actions have and will continue to cause significant harm to NVC. As a result, NVC is prepared to take legal action to stop such conduct. As we have previously noted, purporting to offer AT&T transport services on the facilities under the control of NVC will give rise to liability for the following causes of action for SDN, its officers, and/or board members:

A. **Breach of Operating Agreement and Contract:** SDN's operating agreement and its contracts with NVC do not permit SDN to provide transport services to AT&T utilizing facilities that are leased by NVC and in a manner that is inconsistent with the services provided to other members and affiliates of SDN;

B. **Good Faith & Fair Dealing:** Managers of an LLC have a statutory duty of good faith and fair dealing that would be breached if SDN and its managers have interfered with NVC's ability to collect its tariffed access charges;

C. **Tortious Interference:** If SDN has purported to offer transport services to AT&T, in violation of the operating agreement and its contracts with NVC, then SDN's actions constitute tortious interference with NVC's business relationship with AT&T under NVC's tariffs; and

D. **Violation of SD Trade Statutes:** SDCL 37-1-3.1 provides that "[a] contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful." SDN's concerted efforts with AT&T to prevent NVC from receiving the benefit of it lawful tariff would implicate this statute.
If, as you previously represented, SDN has not done anything that will hinder NVC's ability to collect for the transport services it provides, I request that SDN promptly provide a copy of the agreement and written assurance that SDN will not provide, or purport to provide, any transport services to AT&T for AT&T's long distance traffic bound for NVC.

Please provide your written response to me no later than November 21, 2014. NVC continues to reserve all of its rights regarding this matter.

Sincerely,

James M. Cremer
JAMES M. CREMER

JMC:crh

cc: Via email:
   G. David Carter
   James Groft
ATTACHMENT F
March 31, 2014
VIA EMAIL

08475-075
Mr. Bill Heaston
South Dakota Networks
2900 W. 10th Street
Sioux Falls, SD  57104-2543

Re:  SDN's New Proposed Tariff

Dear Bill:

This follows our discussion of March 28, 2014, concerning Northern Valley’s request that SDN not re-file its tariff or, in the alternative, no tariff modification be filed without the consent of Northern Valley. In that discussion, I advised you that it is our opinion that Northern Valley has a strong legal position that its 2012 tariff is not only valid, but that, under the 2011 CAF Order (FCC 11-161), AT&T is required to pay pursuant to the terms of that tariff. You advised me that you had not reviewed this from the perspective of the validity of Northern Valley’s tariff under the 2011 CAF Order and, therefore, requested a highlighted summary of that Order to assist you in your review.

Pursuant to your request, I am enclosing a copy of Section XI of the Order, and have highlighted the pertinent provisions. It is our opinion that a fair reading of this Order leads to the following conclusions:

1. **Access Stimulation is Approved.** Access stimulation, as defined in paragraph 658 of the Order, adopts a two-prong definition of access stimulation. Northern Valley meets the definitions. The Order requires that “if both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic.” Northern Valley did file a new tariff pursuant to the Order. (Northern Valley's F.C.C. Tariff No. 3, Transmittal No. 9 which became effective and was deemed lawful by operation of law on January 21, 2012);
2. Payment of Access Charges. Under paragraph 672, the Commission rejected the arguments that stimulated traffic is not subject to tariff access charges. It specifically stated “nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases;” (emphasis added)

3. Access Rate for Stimulated Traffic. Paragraphs 688 and 689 benchmarked stimulated traffic to “the interstate switched access rates to the rate of the BOC in the state in which the competitive LEC operates….” Northern Valley’s tariff is benchmarked to this rate, which is the Qwest rate. That rate is .876 cents per minute.

Furthermore, paragraph 692 provides as follows:

Additionally, we reject the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition. Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure. We expect that the approach we adopt will reduce the effects of access stimulation significantly, and the intercarrier compensation reforms we adopt should resolve remaining concerns;

4. Validity of NVC Tariff. Paragraph 696 required that “Any issues that arise in these refilled tariffs can be addressed through the suspension and rejection authority of the Commission…..” Neither AT&T, nor any other IXC, has challenged Northern Valley’s tariff. Likewise, Northern Valley has not received a dispute letter from AT&T; and

5. Non-Payment Disputes. The Commission addressed the issue of self-help by IXCs refusing to pay. The Commission reiterated its position that “we do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions.” However, the Commission also went on to “caution parties of their payment obligations under tariffs…. The new rules we adopt in today’s Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.”

6. Direct Connect. The Order not only provides clarity, but certainty with respect to the validity of Northern Valley’s tariff and AT&T’s obligation to pay. It does not give AT&T the right to demand a direct connect.

Northern Valley has engaged in settlement discussions with SDN and AT&T in an attempt to avoid litigation. However, Northern Valley views SDN’s proposal to file the new tariff as a failure to recognize the compelling legal position the CAF Order provides to Northern Valley, and that SDN’s new tariff filing may jeopardize that legal position. Therefore, Northern Valley requests the following:

1. No New Tariff Filing. That SDN does not re-file this tariff. It is neither necessary nor required under the Order. If the parties agree to a direct connect as
a part of a settlement, that can be accomplished through a contractual arrangement; or

2. **Consent of Northern Valley.** If SDN believes it is necessary to proceed with the filing of this tariff, that it not file without Northern Valley consenting to the language; and

3. **Notice to Northern Valley.** If SDN does not agree to comply with either of the first two requests, that SDN give Northern Valley advance notice of its intention to re-file the tariff.

**We ask for a response from SDN by 5:00 p.m. on Thursday, April 3, 2014.**

It is our intention to continue to work cooperatively with SDN to try to resolve this. If a reasonable settlement cannot be reached, Northern Valley is prepared to sue AT&T. Northern Valley has been successful in every other conference calling case it has filed. Because of the clarity and certainty in the CAF Order, Northern Valley has a stronger legal position than the previous cases. As a result, it is our opinion that Northern Valley would be successful in its litigation against AT&T. If Northern Valley wins, SDN wins and it preserves the CEA status in South Dakota.

Sincerely,

*James M. Cremer*

JAMES M. CREMER

JMC:crh

Enclosure
ATTACHMENT G
Defendant’s Reply to Plaintiffs’ Sur-Reply in Support of All Defendants’ Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission [Filed Under Seal]

Comes now Defendant South Dakota Network, LLC (“SDN”), by and through its respective counsel of record, and hereby respectfully submits the following Reply to Plaintiffs’ Sur-Reply in Support of All Defendants’ Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission.

I. INTRODUCTION

On March 9, 2017, this Court issued a Memorandum Decision, which, among other rulings, granted summary judgment in favor of the individual Defendant Managers on all of the claims asserted by Plaintiffs. As a result of the recent Memorandum Decision, the sole remaining defendant in this litigation is SDN and, therefore, the prior arguments advanced in this Motion relating to the improper claims against the individual Managers are now moot. This Brief will address only the remaining improper claims against SDN.
This case is squarely within the artful-pleading doctrine. Plaintiffs acknowledged during this litigation that they intentionally chose not to pursue the alleged violations of the Federal Communications Act (“FCA”) so as not to damage SDN in the long-run.¹ Brief in Support of Motion, Ex. A (Letter from Plaintiffs’ Counsel to Defendants dated August 3, 2015). Therefore, Plaintiffs are undeserving of any benefit of the doubt that they were somehow ignorant of the appropriate avenue of relief under the FCA. Rather, Plaintiffs intentionally chose to pursue their sham State law claims while simultaneously arguing the alleged violations of the FCA and raising and implicating numerous complex issues of federal law. Plaintiffs have attempted to persuade the Court that the numerous and repeated protestations about the alleged violations of federal law, which included retaining two expert witnesses solely to discuss certain technical issues of federal law, somehow only related to the two claims against the Managers and the claim against SDN for dissolution as discussed in prior pleadings in this Motion. Dissolution was not even pleaded in this action until SDN pleaded for expulsion. That argument, which is so completely inconsistent with Plaintiffs’ own actions and statements in this case, is unworthy of credibility. Instead, Plaintiffs’ assertions that the significant and interwoven issues of federal law are not even relevant to their state law claims should be recognized for what the arguments actually are in reality: transparent attempts to avoid preemption or referral to the Federal Communications Commission (“FCC”) at all costs, even if it means haphazardly and prejudicially leading the Court to act outside its jurisdiction.

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¹ Again, like their responses to this Motion, Plaintiffs’ words do not match their actions. Plaintiffs assured SDN that they “intentionally” did not pursue the alleged violations of the FCA because that would damage SDN in the long-run, but yet Plaintiffs nevertheless requested leave to conduct punitive damage discovery and even pleaded for dissolution of SDN.
At minimum, Plaintiffs’ claims contain embedded issues of federal law that are actually disputed, which the federal forum can entertain without disturbing any balance between federal and state judicial responsibilities. Even after this Motion was filed, and Plaintiffs attempted to retroactively change their prior arguments, Plaintiffs still were unable to keep their story straight. Plaintiffs stated that the “true dispute” in this case is whether SDN can treat its long-distance tandem switching as an unregulated service. See Ex. A. (Dep. of Mr. Gillan at 70:4-9). In addition to that issue, which Plaintiffs characterize as the true dispute of this litigation, are other substantial federal questions such as whether the AT&T/SDN 2014 Service Agreement is unlawful because it violates certain provisions of the FCA, whether Northern Valley Communications (“NVC”) has an underlying right to the traffic between Sioux Falls and Groton, whether a private Operating Agreement can even limit the movement of a point of interconnection (“POI”) for a third-party IXC, whether the service that SDN is providing is a dominant or non-dominant service, whether a CEA can provide access service pursuant to a private contract, and the interpretation of multiple federal orders. These are all issues that are implicated by this litigation and must be resolved, and in many instances Plaintiffs have essentially raised and asked to be resolved. The Court need only review the transcript of the depositions of Expert Witnesses Mr. Gillan and Mr. Starkey to understand the complex and highly-technical embedded issues of federal law that Plaintiffs have put at issue in this case.²

². And indeed, critical to Plaintiffs’ case is an alleged confirmation by FCC staff of Plaintiffs’ interpretation of federal regulations barring SDN from providing transport services by contract in lieu of tariffed rates. See SRB at 22. That allegation forms the basis for several conclusory statements by Plaintiffs by which they seek to have this Court assuaged that it will not have to decide federal law issues. Not so; the FCC has not determined the issues and is the proper agency to address these matters in the first instance as more fully explained herein.
While SDN can only speculate as to why Plaintiffs chose to plead their case in state court rather than under the FCA, the claims against SDN must be dismissed before this case advances any further than the case already has. As cited in prior pleadings in this Motion, state courts have routinely dismissed artfully-pleaded federal claims, including, for example, claims for breach of contract, unjust enrichment, violation of state statutes, and tortious interference. In the alternative, and at minimum, the highly-technical federal issues underlying the claims against SDN must be referred to the FCC, which has the appropriate experience and expertise to resolve the issues under the doctrine of primary jurisdiction.

II. ANALYSIS

A. PLAINTIFFS’ CLAIMS ARE PREEMPTED BY FEDERAL LAW.

Each of Plaintiffs’ claims is preempted by federal law. Plaintiffs’ claims are preempted either under the doctrine of artful pleading—which Plaintiffs scarcely even acknowledge in their combined 76-pages of responsive briefing—3—or are preempted under the alternative and independent substantial federal question doctrine. In fact, Plaintiffs failed to even address, much less mention, many of the cases cited in earlier pleadings supporting the conclusion that Plaintiffs’ claims are preempted. See, e.g., Boomer v. AT&T Corp., 309 F.3d 404, 423 (7th Cir. 2002); Dreamscape Design, Inc. v. Affinity Network, Inc., 414 F.3d 665, 669 (7th Cir. 2005). Despite Plaintiffs’ clever and extensive efforts in completely recasting the numerous arguments they already made in this litigation in a brazen attempt to survive dismissal or referral, there is simply no escaping the looming federal issues in this case, which have firmly latched on to each

3. Despite a second bite out of the apple with their Sur-Reply, Plaintiffs continue to fail to address the relationship between the artful-pleading doctrine and the embedded-question doctrine, which are independent and separate doctrines. Both doctrines support the conclusion that Plaintiffs’ claims are preempted.
and every single issue pending before the Court. There is no delicate severance of the federal issues from this case without uprooting the entire tree.

1. Federal Court Action.

Before engaging in an analysis of the numerous federal issues and the improper individual claims, it is first necessary to address the misrepresentations Plaintiffs made in the opening paragraphs of their Sur-Reply. Plaintiffs cite to a recent Opinion and Order from the United States District Court for the District of South Dakota (the “Federal Court”) to apparently support their argument that this Court has jurisdiction and that the Court should “bring this case to trial expeditiously[.]” Plaintiffs’ Sur-Reply in Opposition to Motion at 3 (“SRB”). First, it must be emphasized that the Federal Court made no findings or conclusions regarding this Court’s jurisdiction, or lack thereof, over the claims and issues pending before this Court.4 Instead, the Federal Court appeared to merely acknowledge the existence of the claims pending before this Court, and did not undertake its own analysis of the proper jurisdiction of those claims. The Federal Court’s Opinion and Order have no bearing over the question of whether this Court has jurisdiction to hear Plaintiffs’ claims.

Second, Plaintiffs are plainly incorrect insofar as they represent to this Court that the District Court concluded that the “existence of the SDN-AT&T contract interferes with Northern

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4. The pleadings in the District Court action are sealed and, as a result, SDN and this Court are unable to determine what information and facts the District Court even considered, including whether it was even aware of the individual claims at issue and the numerous federal issues that are implicated. Given that the Federal Court devoted less than one page of its 40-page Order and Opinion to addressing this lawsuit, it is reasonable to assume that issue was not extensively briefed. Again, Plaintiffs are leveraging the Federal Court action while simultaneously selectively disclosing only certain information to this Court.
Valley’s ability to obtain summary judgment[,]”5 SRB at 2 (emphasis added). The District Court did not reach any such conclusion. Instead, the District Court made no inquiry into whether the AT&T/SDN 2014 Service Agreement (the “Agreement”) was a “valid agreement” as that was not a question that had been presented to the District Court for its determination. See Affidavit of Cremer dated March 29, 2017 (“Aff. of Cremer”), Exhibit 1 (“Ex. __”) at 38. Again, the appropriate forum to resolve whether the Agreement is a “valid agreement” is through the FCC under the express provisions of the FCA. The tenuous relationship between the FCC, the Federal Court, and this Court could have been easily avoided altogether had Plaintiffs simply filed a complaint with the FCC at the outset. Rather than properly planting both feet at the doorstep of the FCC, Plaintiffs have one foot in state court and the other foot in federal court. Curiously, the FCC—which has the jurisdiction, expertise, and experience to resolve the complex issues in this case—has been shut out of the process completely.

Third, Plaintiffs further misrepresent that “SDN’s decision to enter into the SDN-AT&T Agreement now is the undisputed cause for NVC not receiving summary judgment against AT&T[.]” SRB at 2 (emphasis added). However, it would appear from the Opinion and Order that there is still a factual question, which would provide an independent basis to deny summary judgment in Federal Court, regarding whether “NVC spurned an unconditional offer from AT&T for AT&T to install a direct link at AT&T’s cost[.]” Aff. of Cremer, Ex. 1 at 39 (citing In re Access Charge Reform, 23 FCC Rcd. 2556 (2008)). The Federal Court concluded that NVC “may be required to accept a direct trunk connect, contingent on AT&T designing, installing, and implementing it at AT&T’s cost without conditions.” Id. at 21 (emphasis in original). In

5. Nowhere in the District Court’s 40-page Opinion and Order did the Court conclude that the Agreement interfered with NVC’s ability to obtain summary judgment. See generally Aff. of Cremer, Ex. 1.
other words, the Opinion and Order does not appear to be a large victory for NVC because AT&T ultimately has the legal ability to compel NVC to accept a direct connect. However, “[t]he record [was] unclear whether AT&T offered to install a direct trunk at its own expense at NVC, or instead negotiated for or demanded that NVC do so or pay for any costs of doing so.” Id. at 20. Thus, irrespective of whether the Agreement is valid or not, a factual question remains and NVC can still be denied summary judgment on a separate and independent basis. To now argue that the Agreement interferes with and is the undisputed reason that NVC did not obtain a summary judgment is incorrect.

Fourth, the Opinion and Order is not even a final decision. Moreover, AT&T may elect to appeal the Opinion and Order to the Eighth Circuit Court of Appeals and challenge the conclusions and orders rendered by the District Court. For Plaintiffs to use the non-binding and non-final Opinion and Order as a sword in this case, including encouraging this Court to expedite its consideration of this Motion, is improper and prejudicial. Again, Plaintiffs made the decision to litigate their claims in state court rather than properly attempt to seek relief through the FCC. SDN should not continue to bear the burden of Plaintiffs’ short-sighted decision.

In all, Plaintiffs embellish the non-final conclusions reached in the Opinion and Order and cite the same as apparent evidence that this Court somehow has jurisdiction over the not-so-artful claims at issue herein, despite the fact that the District Court did not consider whether this Court has jurisdiction. In fact, Plaintiffs appear to even encourage the Court to now “expeditiously” resolve this Motion in light of the non-binding and non-final Opinion and Order. Yet, at the same time, SDN and the Court are left in the dark about what arguments and information the District Court heard and considered in reaching its conclusions and the extent to which it was even aware of the claims and issues in this case. See Aff. of Cremer, Ex. 1 (“This
dispute regarding the NVC-SDN lease and the AT&T-SDN Agreement is currently the subject of
a separate lawsuit in the Fifth Judicial Circuit in Brown County, South Dakota.”). Nevertheless,
as stated above, the Opinion and Order should not bear on the independent legal question of
whether this Court has jurisdiction, and Plaintiffs hurried attempts to conflate the two should be
rejected.

2. Plaintiffs’ Own Prior Statements Undermine and Contradict Their
Arguments in this Motion.

Plaintiffs’ prior statements and arguments do all of the necessary talking in this Motion.
See Brief in Support of Motion, Ex. A. At all times, except for this Motion, this litigation has
always been about the alleged unlawfulness of the Agreement. See id. To be sure, Plaintiffs
retained an expert witness—Mr. Starkey—to conclude (1)

See Brief in Support of Motion, Ex. I, at 6, 38.

In fact, this Court need only examine Plaintiffs’ Second Amended Complaint, which
specifically seeks declaratory relief because “SDN will continue its wrongful practices of
providing secret, off-tariff services to AT&T” and because “SDN has no authority to provide
AT&T or any other long-distance carrier transport services from Sioux Falls to NVC’s switch in
Groton, South Dakota[].” See Second Am. Complaint at ¶¶ 131, 133(d).
Revealing the true nature of the claims against Defendants, Plaintiffs legal counsel sent a letter to counsel for Defendants on August 3, 2015—near the commencement of this litigation—addressing the alleged unlawfulness of the Agreement based upon the premise that the Agreement violated certain provisions of the FCA:

“[I]t is time for SDN to make a simple choice: will it continue to operate in defiance of law and to the detriment of one of its members, despite the significant consequences that come with doing so, or will it do the right thing by terminating its unlawful agreement with AT&T?”

Id. (Letter from Plaintiffs’ Counsel to Defendants dated August 3, 2015) (emphasis added).

In that same August 3, 2015 letter, Plaintiffs further acknowledged that they intentionally chose not to bring claims against SDN for violations of the FCA because they allegedly did not want to “weaken [SDN] in the long-term[.]”  Id.

JVC and NVC have, as we have repeatedly stated to you, made decisions that were intended to insulate SDN from events that might weaken it in the long-term (e.g., by intentionally choosing not to bring claims for violation of federal telecommunications law against SDN that might squarely put at issue the monopoly that SDN tries to maintain with regard to its members’ access traffic).

Id. Putting aside the inherent inconsistency of Plaintiffs’ representation that they did not want to harm SDN in the long-term despite their subsequent decisions to seek punitive damages and the dissolution of SDN, the important point of emphasis is that Plaintiffs acknowledged that they intentionally decided not to pursue alleged claims for violation of the FCA. Instead, Plaintiffs brought sham state law claims, which presuppose that SDN violated the FCA without actually proving those claims much less raising them in the proper forum. Perhaps Plaintiffs believed they could simply obtain an expedited settlement and termination of the Agreement, and the improper federal claims would never be litigated or even reach the stage of a jurisdictional analysis.
To make matters worse, even after this Motion was filed and Plaintiffs assured SDN and the Court that the issues of federal law are not relevant to their claims for damages against SDN, Plaintiffs still have trouble keeping their story straight. On March 9, 2017, Plaintiffs’ legal counsel asked SDN’s expert witness, Mr. Gillan, whether he understood that the “true dispute” in this litigation is whether SDN can provide non-regulated tandem switching to AT&T for the exchange of long-distance traffic:

**Q:** Okay. And you understand that the true dispute in this litigation is whether or not, with regard to regulated or non-regulated, is whether or not SDN can provide tandem switching to AT&T and treat it as a non-regulated service with regard to centralized equal access for the exchange of long-distance traffic.

*See Ex. A. (Dep. of Mr. Gillan at 70:4-9).* These are Plaintiffs’ own words. According to Plaintiffs, the “true dispute” is not, inter alia, whether NVC and SDN agreed to move the POI, whether SDN breached certain circuit lease contracts, or whether SDN converted Plaintiffs’ property; instead, the “true dispute” involves a complex and perhaps novel federal question, which relies on multiple federal regulations under the FCA and has required each party to retain an expert in the field of FCC regulations to solely address the issue—i.e., Mr. Gillan and Mr. Starkey.

Plaintiffs cannot erase from the record the numerous instances in which they have argued that the unlawfulness of the Agreement is at the heart of this litigation. There is no reason to believe that anything will change after this Motion is heard and argued. The true federal nature of the claims against SDN will undoubtedly continue to show its face throughout the rest of the litigation and during trial. The appropriate course of action is to dismiss the causes of action now before further irreparable harm is done, i.e., wasted time, effort, and resources expended in litigating this dispute in an improper forum.

Each of Plaintiffs’ claims for damages is preempted by federal law either under the doctrine of artful pleading or separate and independent substantial federal question doctrine. See Defendants’ Reply Brief in Support of Motion at 3-6; see also, e.g., Connolly v. Union Pacific R. Co., 453 F. Supp. 2d 1104, 1109 (E.D. Mo. 2006) (quoting M. Nahas & Co., Inc. v. First Nat’l Bank of Hot Springs, 930 F.2d 608, 612 (8th Cir. 1991)); Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg., 545 U.S. 308, 312, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005).

As the court in Mellman v. Sprint Communications Company acknowledged, an examination of Plaintiffs’ “state law claims reveals that those claims are either preempted by the FCA, or necessarily implicate the FCA[.]” 975 F. Supp. 1458, 1461 (N.D. Fla. 1996).

a. Breach of Operating Agreement.

Plaintiffs now argue that their claim for breach “is rooted in the provision in Article 15 [of the Operating Agreement] that requires points of interconnection to be established by agreement.” SRB at 5. However, this is not a dispute about an ordinary contract provision. Rather, it is a dispute about a POI and such disputes are not resolved in state court. These disputes are resolved by regulatory agencies. Expert Witness Mr. Gillan opined as follows:

Q: Is it your – is it nevertheless your opinion that SDN – that the operating agreement and the commitment in the operating agreement to establish points of interconnection for member and affiliate traffic is somehow governed by federal law as compared to State of South Dakota contract law? Are you rendering an opinion on that?


A: And having heard all that, let me say you have a POI dispute. A big part of the dispute really involves AT&T’s POI which in effect has been moved. I’m not a lawyer, but I don’t understand at all an argument that any operating agreement between – that doesn’t include AT&T could have changed AT&T’s rights to request service at a POI.
I keep looking at this and keep coming to the conclusion that this is a POI dispute, period. Next step. Where do you go to resolved POI disputes? You take them to regulatory agencies because they’re highly technical in nature, and regulatory agencies have the charge to resolve these disputes looking at the broader consequences on networks, consumers, you know, efficiencies, social justice, universal service, everything – everything in the world.

And I don’t see any – I don’t know what – I’m not rendering a legal opinion about your operating agreement, but I’m just pointing out AT&T is not a party to that, so I don’t see how you can answer a question involving AT&T’s POI by looking inside an agreement that doesn’t involve them.

Ex. A (Dep of Gillan at 142:8-143:13). There is no dispute here for this Court to resolve. This claim implicates more than simply whether NVC consented to the movement of the POI. It necessarily involves a broader predicate question relating to whether an operating agreement can limit the right of an IXC that is not a party to the operating agreement to request a different POI with a CLEC.6 This is an issue that is actually disputed—as evidenced by the competing expert reports of Mr. Gillan and Mr. Starkey—and involves a substantial federal question that is necessary for the FCC to resolve and one that must be resolved prior to the question of whether NVC consented to the movement of the POI. Indeed, the FCC’s pervasive regulation of interstate communications includes a policy of transport competition. Plaintiffs’ lawsuit based upon the operating agreement is merely a lever to defeat competition in the transport market. It appears that CLECs, like NVC, possess the smallest bundle of rights – based upon market abuses – and lack the right to even determine how traffic is routed in the first instance. In Re: Access

6. And, SDN must point out, the entire discussion about movement of the POI and revenue sharing with NVC by SDN arose from the context of the obligations to AT&T under the requirements of the FCA, specifically the Connect America Fund Order. In the Matter of Connect America Fund, 26 FCC Rcd. 17663 (2011). This is clearly a federal law issue, as raised by Plaintiffs in their correspondence and claims before and throughout this litigation.
Breach of Contracts.

Plaintiffs’ Sur-Reply denies that its breach of contract claim is based upon federal law; instead, it contends that SDN’s provision of transport capacity is “private carriage” governed by South Dakota state law. SRB at 7-8. Plaintiffs’ claim that this count is unrelated to federal law should first be measured against the claim itself. The initial paragraph in this count repeats and realleges the background paragraphs in the complaint – and of course this breach count relies upon many of the legal conclusions and federal regulations therein. One such incorporated legal allegation is that NVC has a “right to charge AT&T the access charges associated with carrying the long-distance calls of AT&T’s customers from Sioux Falls to Brown County.” Second Am. Complaint at ¶ 6. Indeed, in the language of the cause of action itself, Plaintiffs allege that an “implied term” of a transport agreement “was that SDN would not interfere with NVC’s ability to collect tariffed transport charges for long-distance carriers for transporting special access traffic from Sioux Falls to Brown County.” Id. at ¶ 86.

The FCC rules and competition policy clearly intersect with NVC’s breach claim here. As an initial matter, Plaintiffs acknowledge in their claim for conversion that whether a service is provided on a common carrier or private carriage basis requires certain interpretations of federal law. In addition, the FCC’s rules are invoked in Plaintiffs’ claim to ‘entitlement’ to bill for transport, and an entitlement as an “implied term” to protect it from competition. Aside from the public policy implications arising from Plaintiffs’ implied non-compete claim, it is clear that a ruling finding such an entitlement expectation or monopoly right would run headlong into the FCC’s policies. Because this claim necessarily implicates substantial issues of federal law that
are actually disputed in this litigation, and because the balance of federal and state judiciary responsibilities weigh in favor of federal jurisdiction when the FCA has an articulated avenue for relief, this claim is undoubtedly preempted under both the artful pleading doctrine and the substantial federal question doctrine.

iv. Intentional Interference with Business Relationship.

This fourth cause of action for intentional interference with a business relationship is also preempted. Courts have routinely found that such claims are preempted by the FCA. See Zimmer Radio of Mid-Missouri, Inc. v. Lake Broadcasting, Inc., 937 S.W.2d 402, 407 (E.D. Mo. 1997) (“Zimmer’s common law action for tortious interference with business expectancies was preempted by federal law.”); Harbor Broadcasting, Inc. v. Boundary Waters Broadcasters, Inc., 636 N.W.2d 560, 567 (Minn. Ct. App. 2001) (“[T]he FCA and appellants’ state-law claim for tortious interference with business expectancy are in irreconcilable conflict, and we affirm the district court’s dismissal.”); Fetterman v. Green, 689 A.2d 289, 294 (Penn. Super. 1997) (affirming dismissal of claim for tortious interference with existing and prospective contractual relations); Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1011 (9th Cir. 2010) (affirming dismissal of claim for intentional interference with prospective economic advantage because it was preempted by the FCA).

There is little question that this claim implicates the alleged unlawfulness of the Agreement, whether NVC has the underlying right to the transport between Sioux Falls and Groton, and whether SDN has the authority to enter into a private, off-tariff contract with AT&T, which it does. See generally Ex. A (Dep. of Gillan). Because there is a specific avenue to pursue these issues under the FCA, the savings clause does not preserve this claim in state court. “[T]he savings clause preserves only those causes of action that are based upon breaches of
duties distinct from, and not created or contemplated by, the FCA.” *Zimmer*, 937 S.W.2d at 406. “[T]he act cannot be held to destroy itself.” *Telesaurus*, 623 F.3d at 1011. Because allowing this cause of action to proceed would render the FCA meaningless, this cause of action is preempted.

Moreover, the embedded issues of federal law satisfy all four elements of the *Grable* test. *Grable*, 545 U.S. 308, 312, 125 S. Ct. 2363. The issue is necessarily raised because this claim makes the assumption that the Agreement is unlawful and that NVC has the underlying right to the transport between Sioux Falls and Groton. These issues are not only “actually disputed” between the parties, but the parties have offered competing expert reports. As has been repeatedly expressed in the prior pleadings in this Motion, these are substantial federal issues that must be weighed by a federal court or, more appropriately, the FCC. Simply put, this sham claim should not and cannot be salvaged by the savings clause of the FCA.

v. Violation of South Dakota Trade Regulation SDCL § 37-1-4.

Once again, Plaintiffs attempt to leverage a state claim from SDN’s interstate operations. Plaintiffs contend that there is “no conflict” between SDCL § 37-1-4 and the FCA. SRB at 14-15. But, the opposite is true as evidenced by the actual language supporting this cause of action in the Second Amended Complaint: “SDN has engaged in unfair discrimination *by attempting to displace NVC as the regular established dealer of transport services from Sioux Falls to Groton* by offering AT&T – and only AT&T – a lower rate for transporting calls to part of the state served by NVC, as compared to any other parts of the state.” Second Am. Complaint at ¶ 102 (emphasis added).

To the extent that this law is intended to apply to interstate traffic, which it is not, it is certainly preempted. The term “regular established dealer” has no application, nor any
definition, in the pervasively regulated field of interstate telecommunications. Plaintiffs claim SDCL § 37-1-4 prohibits “geographic discrimination” within the state. See SRB at 14. But, discrimination is already regulated by Section 202(a) of the FCA, which prohibits “unreasonable” discrimination, not “geographic” discrimination as does the state statute. Kellerman v. MCI Telecoms. Corp., which is relied upon by Plaintiffs, indicates that state law remedies are preserved where they “do not interfere with the federal government’s authority over interstate telephone charges or service” or do not otherwise conflict with the FCA. See SRB at 14.

Plaintiffs’ application of SDCL § 37-1-4, which in any event is completely misplaced, undoubtedly interferes with the federal regulatory scheme. For instance, the charges are for interstate service where South Dakota is only one end-point of the call. The State of South Dakota would therefore be unlawfully regulating interstate traffic. Moreover, protecting NVC as the “regular established dealer” would flatly contradict the FCC’s transport competition policy. Regardless, Plaintiffs’ application of this state statute is misguided insofar as the regulation of telecommunications services are expressly preempted from this trade regulation, which the South Dakota Legislature almost certainly recognized and intended when it enacted this chapter. See SDCL § 37-1-3.5 (“The provision of . . . noncompetitive and emerging competitive telecommunications services by public utilities pursuant to tariffs or scheduled approved by the South Dakota Public Utilities Commission, or pursuant to any other federal or state regulatory authority, do not constitute a violation of this chapter.”).

This claim is plainly preempted and should be dismissed.
vi. Unjust Enrichment.

Plaintiffs’ unjust enrichment count is predicated upon the premise that SDN “is not lawfully permitted” to provide the transport service to AT&T. Instead, Plaintiffs claim that NVC is “the entity that actually provides the transport services.” See Second Am. Complaint at ¶¶ 106-110.

SDN earlier demonstrated that this claim is in reality an artfully pleaded federal claim sounding in Section 202 and is, therefore, preempted by the FCA. Interestingly, Plaintiffs challenge whether this cause of action even implicates the Agreement, and concludes that the unjust enrichment claim does not conflict with FCC regulations. SRB at 15-17 (“Nor does [SDN’s Reply Brief] explain why ‘this claim necessarily implicates and relates to the AT&T/SDN Agreement,’ or why, even if it did, the claim is preempted.”). But, the actual language in Plaintiffs’ Complaint belies their argument. See Second Am. Complaint at ¶¶ 106-109. Specifically, Plaintiffs claim that “SDN is not lawfully permitted to provide” the transport service at issue, and further mentions the “AT&T/SDN Service Agreement” four times in four paragraphs. Id. ¶¶ 106-109. The FCA and authority granted to SDN under Section 214 thereof determines which interstate services SDN may lawfully provide. These rights cannot be cabined by state common law without an invasion of the FCC’s jurisdiction over interstate traffic and facilities.

Not only is this an artfully-pleaded federal law claim, but it also necessarily raises a substantial issue of federal law under Grable, which is certainly actually disputed in light of the contested record, and raises an important federal issue specifically governed by the FCA. See Telesaurus, 623 F.3d 998 (affirming dismissal of state-law claim for unjust enrichment because
it was preempted by the FCA). The unjust enrichment claim is preempted and should be dismissed.

vii. Conversion.

Plaintiffs claim that SDN wrongfully used facilities and equipment leased to NVC in providing transport of terminating telephone calls from Sioux Falls to Groton, SD. The claim of conversion in South Dakota applies to unwarranted exercise of control or dominion over personal property, where the plaintiff has a greater right to the property than defendant, and where the defendant’s conduct deprived plaintiff of his interest in the property. The South Dakota Supreme Court stated in *W. Consolidated Co-op v. Pew* as follows:

“Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right.” *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 38, 756 N.W.2d 19, 31 (quoting *Chem–Age Indus., Inc. v. Glover*, 2002 S.D. 122, ¶ 20, 652 N.W.2d 756, 766). In *Rensch v. Riddle's Diamonds of Rapid City, Inc.*, 393 N.W.2d 269, 271 (S.D.1986), we quoted *Poggi v. Scott*, 167 Cal. 372, 375, 139 P. 815, 816 (1914), for the following proposition:

The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action.

(Emphasis added.) Furthermore, in order to prove conversion, the plaintiff must show

(1) [plaintiff] owned or had a possessory interest in the property; (2) [plaintiff's] interest in the property was greater than the [defendant's]; (3) [defendant] exercised dominion or control over or seriously interfered with [plaintiff's] interest in the property; and (4) such conduct deprived [plaintiff] of its interest in the property.

2011 S.D. 9, ¶ 22, 795 N.W.2d 390, 396–97. The initial element of this tort to be addressed is whether SDN’s action was unauthorized. That undertaking requires review of the circuit capacity lease at issue. NVC has at most a lease of SDN equipment capacity “at will” under no written lease agreement for any specific term. The “lease” between SDN and NVC consists of a few emails from 2007 with spreadsheets setting forth rates. See Exhibit B. Nothing in this or any agreement creates any exclusive right to transport of access traffic or a specific duration for any use of the circuit capacity.

In short, the exclusivity which would support any conversion claim can only arise from rights of NVC under the FCA. NVC must have rights that limit the ability of SDN to offer transport services (that is, a monopoly over transport services under the FCA) in order to establish dominion and control over this property as to the AT&T access traffic.\(^7\) The only way for NVC to establish a superior possessory right to support a conversion claim, NVC must rely on federal law monopoly or a prohibition on SDN providing transport services. The federal regulatory scheme at issue must be examined to see if such a claim is supportable, and if so, whether it preempts the state law claim or would require the FCC to make a determination of the rights of the parties in the first instance.

Here AT&T was seeking a direct connection or its functional equivalent to transport access stimulation traffic (nearly all of which was interstate traffic) to NVC. The entirety of the negotiations and eventual agreement between AT&T and SDN address that issue and the federal regulatory framework. NVC cannot establish or control the right to transport traffic through a state law claim that interferes or is in conflict with the FCA. To allow a conversion claim would

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7. NVC cannot bootstrap a breach of contract claim into a conversion claim, and therefore reliance on the SDN Operating Agreement will not establish a state law claim of conversion. That contract claim is addressed above, and is preempted.
“trump” the arrangement between AT&T and SDN providing the service while sharing revenues with NVC, and thereby would materially interfere with the provision of interstate telecommunications services. That claim is preempted.

Likewise, the issue of capacity and use of the leased facilities to provide the transport service, goes directly to the issue of whether NVC has a monopoly and can dictate how transport services are provided to AT&T. Its lease rights must be superior to those rights of SDN in order to establish two elements of conversion: NVC’s interests were greater than SDN’s interests, and that SDN deprived NVC of its superior interests in the personal property. *W. Consol. Co-op.*, 2011 S.D. 9, ¶ 22, 795 N.W.2d at 396–97. The central question of whether AT&T requested and was denied a direct connection, and the obligations that flow from that issue, are matters that will determine whether NVC had exclusive rights to transport of the traffic and how the parties (and AT&T) were obligated to interact under federal regulatory requirements. Whether the interference was unwarranted will be determined within the context of the federal regulatory scheme – the biggest part of which is the dispute over the movement of the POI. *See* Ex. A (Dep of Gillan at 142:8-143:13), set forth supra, at 10 (“Where do you go to resolve POI disputes? You take them to regulatory agencies because they’re highly technical in nature, and regulatory agencies have the charge to resolve these disputes . . . .”).

Conversion elements are thus determined by the embedded federal law issue of the right to transport the AT&T traffic, i.e., whether SDN was authorized – or even obligated – to provide a functional equivalent to a direct connection in this situation, and whether SDN could provide an off-tariff transport service. Both questions are determined by federal law under regulations that occupy the field of transporting interstate traffic. A state law conversion claim that gives NVC control over the transport would conflict with the FCA and is preempted.
Finally, other federal issues related to the interpretation of the FCA will dictate whether SDN was authorized or obligated to provide the transport services at issue. Even Plaintiffs acknowledge that this claim requires certain interpretations of federal law regarding whether the lease transmission capacity is provided on a common-carrier basis or private carriage basis. Determining the use of telecommunications facilities and whether such use is inconsistent with the rights of the parties squarely places this claim within the four corners of the FCA. It simply cannot be determined without making decisions wholly within the jurisdiction of the FCC. This is the exact kind of fact pattern that the doctrine of artful pleading was designed to resolve. See Connolly, 453 F. Supp. 2d at 1109.

viii. Dissolution.

The claim for dissolution will be addressed in more detail below in Section D, which discusses Plaintiffs’ invitation to the Court to bifurcate this claim from the other remaining claims against SDN.

B. IN THE ALTERNATIVE, PREDICATE FEDERAL ISSUES SHOULD BE REFERRED TO THE FCC UNDER THE DOCTRINE OF PRIMARY JURISDICTION.

SDN has demonstrated in its prior pleadings that the four-factor test outlined in Advamtel, LLC v. Sprint Communications Co. is satisfied. 105 F. Supp. 2d 476, 480 (E.D. Va. 2000). The question at issue involves technical and policy considerations within the FCC’s particular field of expertise, the questions at issue are within the particularity within the FCC’s discretion, there exists a substantial danger of inconsistent rulings if this Court decides those issues, and no prior application has been made to the FCC. See id.

In their Sur-Reply, Plaintiffs claim that “Referral Remains Unnecessary” because there is no danger of inconsistent rulings between this Court and FCC policy if no referral were to be
made by this Court. *See* SRB at 20. The reality is that, at bottom, Plaintiffs’ lawsuit requests that this Court declare unlawful a contract that relates to interstate traffic traversing AT&T’s facilities and transport facilities entirely within the state of South Dakota. Plaintiffs’ request not only hinges upon the interpretation of FCC rules and precedent, but further asks this Court to ignore the FCC’s jurisdiction over interstate traffic, as well as the facilities used to carry it.  

This is true even if those facilities are solely located within the state of South Dakota. Accordingly, the FCC’s policies relating to a CLEC’s exclusive right to carry such traffic are necessarily invoked, and are impacted by any decision made by this Court. Indeed, each one of Plaintiffs’ claims and the FCC’s pro-competitive policies are inextricably intertwined, and nothing in Plaintiffs’ Sur-Reply changes this fact. These points are discussed below.

1. **The Danger of Inconsistent Rulings is Clear.**

   There are two key FCC access policies implicated by the SDN/NVC dispute. The first is the FCC’s long-standing goal to promote competition for interstate transport services; the second is the FCC’s recognition that there are certain market failures in the terminating access market that require regulatory correction. This dispute involves both because Plaintiffs, through their attacks on the Agreement, are effectively attempting to eliminate SDN’s ability to contract with an IXC and, in doing so, surreptitiously extend its terminating monopoly. For instance, the

8. The dividing line between the regulatory jurisdictions of the FCC and states depends on “the nature of the communications which pass through the facilities [and not on] the physical location of the lines.” *National Ass’n of Regulatory Util. Com’rs v. FCC*, 746 F.2d 1492 (D.C. Cir. 1984) *quoting* California *v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), cert. denied, 434 U.S. 1010 (1978).  

9. Indeed, the FCC’s jurisdiction has been upheld over physically intrastate terminal equipment even against evidence that “[a]pproximately 97% of telephone calls” were intrastate. *See North Carolina Utilities Commission, et al. v. FCC*, 552 F.2d 1036, 1044 n. 7 (4th Cir. 1977).
Second Amended Complaint asserts that Plaintiffs refused to relinquish NVC’s “right” to transport AT&T’s traffic, see Second Am. Complaint at ¶ 6, and that SDN interfered with NVC’s “expectancy of future business with AT&T pursuant to NVC’s tariffs,” id. at ¶ 95. NVC’s rationale for its protected status in the interstate transport market is thin (as one would expect). NVC has argued variously that its “right” to transport arises because its tariff was “deemed lawful,” that SDN promised to accord NVC “the same terms and conditions” which apply to NVC’s ILEC owner and SDN’s other owners, see Second Am. Complaint at ¶ 85, (and thus implicitly agreed that NVC has an exclusive transport arrangement), and that the FCC’s Connect America Fund Order cemented, in an unspecified way, NVC’s exclusive transport rights.

As early as 1991, the FCC began to restructure its Part 69 Rules governing access in order “to promote competition for interstate switched transport.” See In Re: Transport Rate Structure and Pricing, 7 FCC Rcd. 7006 at ¶ 1-6 (FCC 1992). That order adopted an interim rate structure and interim pricing rules in order to accomplish that result. Id. In a companion proceeding, the FCC took a series of steps to increase competition in the long-distance access market through expanding interconnection including for switched access transport, particularly given the emergence of the competitive access provider (“CAP”) industry, and tandem switching. See In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase I, 8 FCC Rcd. 7374 (FCC 1993) at ¶¶ 1-4 (“Transport Phase I”); In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II, 9 FCC Rcd. 2718 (FCC 1994) at ¶¶ 2-4 (“Transport Phase II”). Though access competition did develop as intended by its decisions and the Telecommunications Act of 1996, it also emerged that LECs retained market power over terminating traffic that required FCC intervention in order to discipline anticompetitive CLEC behavior. Specifically, in imposing access charge benchmarks
upon the CLEC industry, the FCC noted the market power enjoyed by CLECs over their end users:

[T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates. Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

In Re: Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 16 FCC Rcd. 9923 (FCC 2001) at ¶¶ 34 (“Seventh R&O”). The Seventh R&O went on to find that “IXCs are subject to the monopoly power that CLECs wield over access to their end users,” and established benchmark pricing rules, described as a “restriction on the CLEC’s exercise of their monopoly power . . . .” Id. at ¶¶ 38-40; see also, In Re: ACS Anchorage, Inc., 22 FCC Rcd. 16304 (FCC 2007) at ¶ 59 (stating that “interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers’ carrier charges cannot be fully deregulated.” (footnote omitted)).

After plugging that hole in the regulatory paradigm, principally caused by the CLEC manipulation of internet service provider (“ISP”) bound traffic, the FCC was shortly faced with new access stimulation schemes like that of NVC. Once again, the FCC stepped in with new benchmarking rules, finding that CLECs were at least partially insulated from the effects of competition in the case of terminating access. See In Re: Connect America Fund, 26 FCC Rcd. 17663, at ¶¶ 656-701 (“Connect America Fund Order”). The FCC recognized that terminating switched access presents evidence of market power. Id. at ¶ 674. Accordingly, the FCC took steps to prevent CLECs from charging “unjust and unreasonable” interstate switched access rates. Id. at ¶ 661.
Plaintiffs undercut their own argument when they state that there is “virtually zero chance of an inconsistent ruling because of the limited number of CEA providers.” SRB at 20. On the contrary, this misapprehension of Mr. Gillan’s statement highlights the subtle and complex nature of the issues at hand and in actuality supports referral of the matter to the FCC. As Mr. Gillan continued in his report, “In contrast to the three operating CEA providers that I am aware of, the FCC reports that there are 754 ILECs and 969 CLECs in the nation.” See Affidavit of Counsel dated March 7, 2017 in Support of Reply Brief, Ex. C at 2-3 (Gillan Expert Report) (emphasis in original). Any ruling by this Court will necessarily impact the FCC’s policy not only with regard to the CEA providers, but to potentially hundreds of CLECs, like NVC.

Finally, it should be noted that access stimulation is often based in rural areas and those are the only areas where CEAs exist because of their nature. This reinforces the need for the FCC to rule on these issues rather than to have piecemeal and potentially contradictory rulings in state and federals courts. Although perhaps limited in number, the sheer economics of access stimulation by rural LECs – both as to call volume and the amount of money involved – give rise to an increased likelihood of litigation. The courts would be well-served to have the agency make a determination on the issues in this case. A state court ruling which authorizes a CLEC to impose an exclusive right to transport interstate traffic, let alone access stimulation traffic, will have significant interstate consequences which are likely to be challenged elsewhere.

In light of the FCC’s policies, which are aimed directly at increasing competition in the access market and curbing CLEC monopoly power, an assertion like NVC’s claiming a monopoly on interstate transport is contradictory. As such, the danger of inconsistent rulings is immense and the Court should refer the matter to the FCC under primary jurisdiction.
2. Effects of the Federal Court Order.

The District Court's Order also shows that there is a danger of inconsistent rulings. In the Order and Opinion, the District Court makes clear that NVC has no right to require AT&T to use its tariffed access transport service and that AT&T can establish a direct connection to NVC's end office and thereby avoid NVC's access transport service and charges. The District Court also makes clear that NVC can only charge AT&T for the services provided by NVC. However, Plaintiffs' claims for breach of contract, intentional interference with business relationship, violation of South Dakota trade regulation and unjust enrichment are based, at least in part, on Plaintiffs' insistence that NVC is entitled to bill AT&T for transport services via its federal access charge tariff. A ruling by the Court in favor of Plaintiffs on this point would immediately establish an inconsistent ruling with a federal court.

In its Order and Opinion, the District Court also states that the resolution of how much AT&T owes NVC “appears to depend on the outcome of an ongoing lawsuit between NVC and SDN,” and that NVC cannot collect its tariffed transport charges between Sioux Falls and Groton from AT&T after September 2014 “if AT&T and SDN have a valid agreement under which SDN is providing to AT&T the transport services between Groton and Sioux Falls.” Aff. of Cremer, Ex. 1 at 38. Specifically, the District Court states that “it is a material issue whether SDN had the ability to enter into an agreement with AT&T or had a binding agreement with NVC such that it could not.”

As shown herein, however, the services at issue are entirely interstate and any determination as to the manner in which SDN provides interstate services is entirely within the jurisdiction of the FCC. Accordingly, notwithstanding the District Court language, this issue should be referred to the FCC.
Finally, Plaintiffs—even after the District Court decision was issued—have continued to rely upon their interpretation of communications with FCC staff as dispositive as to lawfulness of SDN’s provisions of services to AT&T under an agreement outside SDN’s tariff. See SRB at 21-24; Aff. of Cremer, Ex. 4. The March 10, 2015 email relied upon by Plaintiffs, between counsel for them and FCC staff, plainly sets forth a conclusion that is based on “Tandem switched transport services provided by ILECs[.]” Aff. of Cremer, Ex. 4. Of course, neither SDN nor NVC are ILECs – SDN is a CEA and NVC is a CLEC. Outside the acronyms, there is a real dispute over this issue because both Plaintiffs’ counsel and expert claim to have discussed the same issues with FCC staff that SDN and its expert (Mr. Gillan) discussed with the FCC staff, with allegedly different determinations. Compare SRB at 22-23 with Ex. A (Dep. of Mr. Gillan at 94:15-97:10). Instead of deciding which of the parties before it has the proper interpretation from the FCC, the agency itself must be given the opportunity for a complete and full hearing and decision. This issue fairly begs for resolution by the FCC under the provisions of a complete presentation of the facts and arguments in a contested proceeding. That is also one reason why an amicus brief is insufficient as more fully explained below.

C. AN AMICUS BRIEF IS INSUFFICIENT TO SATISFY PRIMARY JURISDICTION CONCERNS.

While courts have found agency amicus briefs to be useful in dealing with questions that could potentially be referred on primary jurisdiction, it is usually where such questions are narrow or minor. The federal policy questions involved in this case, elucidated above, are not narrow in any sense of the word. If Plaintiffs are primarily concerned with saving time, then the Court can request that the FCC, upon primary jurisdiction referral, act on the matter within a certain time frame. This would avoid unnecessary delay in the proceeding while ensuring that inconsistent rulings do not occur.
Indeed, in each of the cases cited by Plaintiffs in support of its argument that an amicus brief would be a suitable substitution for primary jurisdiction referral, the specific issues being considered for referral were comparatively narrow. *Distrigas of Massachusetts Corp. v. Boston Gas Company* is particularly instructive in this regard, as the court only held that amicus participation was sufficient because the question for the agency to consider was narrow:

Parties are *ordinarily* required to enter into full-blown administrative proceedings because only then can the agency adequately resolve the complex issues of fact and policy that underlie the usual primary jurisdiction case. In this case, however, the agency’s task is only secondarily to make traditional factual findings and policy judgments; the primary question before it is simply what it meant to do when it approved the Long Term Program in December 1978.

693 F.2d 1113, 1119 (1st Cir. 1982) (emphasis added). The First Circuit Court of Appeals recognized that the ordinary course of proceeding in situations such as this would be to refer the case on primary jurisdiction. It was only because a narrow issue—the agency’s intention behind a single action—was all that needed resolution. Similarly, in *TGC New York, Inc. v. City of White Plains*, in deciding that an amicus brief was appropriate rather than referral, the court noted that it was significant that the parties in that case had stipulated to the facts. 305 F.3d 67, 74 (2nd Cir. 2002). Likewise, in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, the court’s reference to the usefulness of an amicus brief in lieu of primary jurisdiction referral was mere dicta – the court actually declined to invoke primary jurisdiction because it was “unable to find any issue presented that is within the jurisdiction of the administrative or regulatory agencies.” 648 N.E.2d 641, 648-649 (Ind. 1995).

As demonstrated above, the federal policy issues involved in the instant case are in no way narrow or minor. On the contrary, NVC’s claims are steeped in federal law and any of the relief requested by NVC would, if granted, run headlong into decades of pro-competitive federal policy and result in inconsistent rulings—the very situation primary jurisdiction referral is meant
to avoid. In light of the deep-seeded federal policies underpinning the parties’ dispute, and the fact that the ordinary course of addressing such situations is to refer the issue on primary jurisdiction, it is highly unlikely that the inclusion in the record of an amicus brief by the FCC would be sufficient. If NVC is concerned with undue delay, the Court may allow termination or modification of the stay based upon undue delay by the FCC. See, e.g., Demmick v. Cellco Partnership, 2011 WL 1253733 (D.N.J. March 29, 2011); Ex. C (Order in Demmick v. Cellco).

D. THE CLAIM FOR DISSOLUTION NEED NOT BE BIFURCATED.

Plaintiffs invite the Court to bifurcate the dissolution claim from the remaining claims. This invitation is convenient to Plaintiffs for several reasons. First, Plaintiffs already testified that this claim was pleaded in retaliation for SDN’s expulsion claim. Plaintiffs’ directors each testified about not wanting SDN to be dissolved and admitted not even planning for such an occurrence. Second, as a result, Plaintiffs have now seized the opportunity to recast all of their numerous federal claims and arguments onto their undesired claim for dissolution. In this respect and according to Plaintiffs’ misguided arguments, the Court could then refer the federal issues to the FCC without impacting their remaining claims. However, as already demonstrated, their remaining state law claims are artfully-pleaded federal claims. At minimum, each of the causes of action contains substantial embedded questions of federal law that must be resolved. Bifurcation will not solve the remaining federal issues contained in the other causes of actions.

Rather, all bifurcation would serve to accomplish is allowing Plaintiffs to remove an undesired claim from the rest of the litigation and further complicating this procedural labyrinth. Part of the reason this litigation, including this specific Motion, is so overly complicated is because Plaintiffs have chosen such an unusual and unprecedented avenue for alleged relief. In many respects, this case is a novel case because litigants, especially those intimately involved in
the industry of telecommunications, would raise their concerns and issues with the forum that is designed to address those concerns and issues—the FCC. See 47 U.S.C. §§ 206-208. To that end, there is not much case law to draw from with a comparable set of facts because, presumably one would expect, most cases are commenced in the appropriate forum. The few cases that are improperly commenced in state court are often dismissed. See Brief in Support of Motion at 14-16; see also Reply Brief in Support of Motion at 6, 9-11. Despite acknowledging an alleged basis for bringing claims under the FCA, see Brief in Support of Motion, Ex. E, Plaintiffs intentionally chose to bring their claims in an improper forum while still attempting to litigate the federal issues.

In all, the claim for dissolution should be either preempted or the underlying predicate issues should be referred to the FCC. As noted, SDN is a “heavily regulated corporation.” It is licensed to provide interstate CEA service pursuant to Section 214 of the FCA. Importantly, carriers subject to Section 214 are required to seek prior FCC approval for any discontinuance, reduction, or impairment of service. See 47 U.S.C. § 214(a).

Given SDN’s federal mandate to provide interstate service, and Section 214’s requirements on discontinuance, a strong case can be made that NVC’s dissolution claim is in

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10. SDN’s Reply Brief demonstrates that the dissolution count should be referred to the FCC, to the extent not subject to federal preemption. See Reply Brief in Support of Motion at 25. In support, SDN noted the heavy FCC regulation to which it is subject, and how FCC expertise is first necessary to resolve this claim. NVC now suggests that SDN has waived the preemption argument, see SRB at 4, and that the Court can proceed with a jury trial with the dissolution, id. at 27-28. But, this argument is wrong. SDN’s Reply Brief reads in pertinent part:

To the extent the Court concludes that this cause of action is not preempted because it seeks equitable relief and not monetary damages, the appropriate remedy is to refer the predicate issues of the violations of the FCA to the FCC[.]

Reply Brief in Support of Motion at 25 (emphasis added).
fact preempted. At minimum, as SDN argues, the substantial federal issues underlying the claim for dissolution should be referred to the FCC under the doctrine of primary jurisdiction.

III. CONCLUSION

SDN respectfully requests that Plaintiffs’ claims be dismissed under the doctrine of preemption. At minimum, Plaintiffs request that specific implicated federal issues be referred to the FCC for its consideration because the FCC has primary jurisdiction over the highly-technical predicate issues in this case.

Dated this 7th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney does hereby certify that on this 7th day of April, 2017, I have electronically filed the foregoing using the Odyssey File & Serve system which will effectuate service upon the following:

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ATTACHMENT H
version of events in which they claim that the plaintiffs had
given them the right to take over transport capacity for the
AT&T traffic while ignoring all of the things that plaintiffs
discussed would be a necessary condition or prerequisite if
SDN was going to take over that transport capacity.

And so this case has proceeded along with SDN asserting
time and time again that there was an agreement by the parties
reached in the Groton meeting that permitted SDN to begin
providing transport capacity. Only during depositions did we
finally have testimony from again SDN's CEO and the two
managers who participated in the Groton meeting that
acknowledged the fact that there was, indeed, conditions and
that those conditions included protection for Northern Valley
against AT&T's wholesale traffic manipulation in the included
protections in which AT&T would have to pay both a piece for
the outstanding balance as well as a commitment to paying
owing/going rate elements.

And so it was only when we were conducting these
depositions that we appreciated that, indeed, if SDN's view of
the facts is correct, then their conduct amounts to an
interference with the settlement agreement that they testified
we should have received if they were going to begin to take
over of the transport capacity.

And so we believe that, contrary to SDN's assertions, this
path for the same claim, it's still the same claim, it's still
tariffs. NVC and AT&T, however, did not have a healthy, robust business relationship. Moreover, neither JVCTC or JVC had any contract or business relationship with AT&T with which SDN could have interfered." Very similar to the arguments they presented here today.

Ironically, defendants really present the best argument against that theory of the case just a few sentences later in the brief where they say, "This was not the first time AT&T had withheld payment from NVC because of access stimulation. Less than a year before the commencement of the March 2013 dispute, NVC and AT&T entered into a settlement agreement."

To me, that's the perfect example of the fact that a business entity or business entities can have serious disputes and continue in their business relationships or reengage in their business relationships. That's the nature of big businesses is people keep going on even when they have disputes. And sometimes, despite their disputes, they come back later and reengage in their relationships.

There is a material issue of fact about whether a valid business relationship or expectancy existed. There is a material issue of fact about whether SDN engaged in an intentional or unjustified act of interference. A finder of fact could conclude that the evidence establishes damages caused by SDN. And for those reasons, the Court is going to deny the motion for summary judgment on the intentional
interference with business relationship claim.

Next I'll talk about the motion for summary judgment on the claim of conversion. A recurring theme in each of the motions for summary judgment is the argument that the plaintiffs should not be allowed to pursue alternative theories related to the same conduct. Under South Dakota law they clearly can; however, they cannot recover duplicative damages. And I'm hoping to talk about that briefly after we get all done because that's going to be one of the really tough parts of this case as we go forward.

The conversion claim is a good example. A depiction of this is contained in SDN's brief in support of the motion for summary judgment on conversion. Here is how they describe the circumstances. "At no time did SDN interfere with the NVC use of the circuit capacity. It merely agreed with AT&T on transport charges and services which NVC claims the right to control. Thus, there is no serious interference with the right of NVC to control the chattel because the calls continue to be transported, and NVC never had such control as to be able to exclude SDN from using its own property or the other network elements through FRPPA (sic) or to dictate to AT&T that access traffic would be transported to Groton. The SDN/AT&T agreement to transport access traffic to NVC from Sioux Falls to Groton was done with the intention of splitting revenues with NVC to resolve nonpayment of transport charges..."
by AT&T to the benefit of both SDN and NVC; and, therefore, it was not a use that interfered with any alleged possessory right by NVC."

Here is my translation. When I read it, here is what I read. NVC was using the circuits that it leased from FRPPA (sic) to transport the calls for AT&T and other carriers. NVC was charging AT&T X amount for those services. AT&T wanted to pay less. SDN agreed to transport the same calls over the same circuits for less than X amount. This was okay, according to SDN, because SDN was simply helping to resolve the dispute between AT&T and NVC by removing NVC from the equation. In return, SDN intended to share some portion of that "amount less than X" with NVC.

Any member of SDN would rightfully be alarmed at SDN's claim in that paragraph. If that very scenario were believed by a finder of fact and found to have occurred, it could possibly be the basis for a finding of breach of contract. It could also be the basis for a finding of a conversion claim. Essentially, SDN's theory is that there is no limitation on how it may use the FRPPA (sic) circuits even though it has leased certain capacity to a specific member with specific purposes in mind. Inherent in that claim and the paragraph quoted above is the theory that SDN is authorized to use those circuits in a manner that is contrary to the rights of the member entities that have leased back the same use of that

Kristi A. Brandt, RPR
circuitry contributed to FRPPA (sic). SDN's theory is that as long as they left NVC with the ability or the possibility of carrying the same traffic, as a matter of law they could not have interfered in the manner that would constitute conversion.

This is based on an incorrectly narrow view of the idea of conversion. Instead, as described in the restatement, "One who is authorized to make a particular use of a chattel and uses it in a manner exceeding the authorization is subject to liability for conversion to another whose right to control the use of the chattel is seriously violated." A finder of fact could find and conclude that SDN utilized the circuits in a manner that exceeded their authorization and, as a result, violated the plaintiffs' right to utilize their circuits in that manner. That's my conclusion that there are material issues of fact in dispute and that that motion for summary judgment is denied.

Lastly, the motion for summary judgment on plaintiffs' claim for punitive damages. It's my determination that plaintiffs have a viable claim for the intentional interference with a business relationship. My review of the evidence still shows that there is sufficient evidence to justify submitting the issue of punitive damages to the jury. A finder of fact could certainly conclude that SDN's conduct when entering into a contract with AT&T in which SDN replaced...