BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Aventure Communication Technology, LLC d/b/a Aventure Communications' Access Tariff No. 3	)))	Docket No. TC11-010

AT&T's MOTION FOR SUMMARY JUDGMENT
TO DECLARE AVENTURE'S REVISED ACCESS TARIFF TO BE UNLAWFUL

INTRODUCTION AND SUMMARY

On March 17, 2011, Aventure filed a revised intrastate switched access tariff with the Commission, claiming that the proposed tariff revisions were intended merely to "provide for greater consistency in the terms and conditions associated with its provision of interstate and intrastate access."[1] That is not nearly the full story. Aventure's tariff revisions are primarily designed to allow it to continue engaging in what the Federal Communications Commission ("FCC") has described as a regulatory "arbitrage scheme" that is generally known as "traffic-pumping."[2] Aventure – contrary to its representations in 2006 to this Commission and the Iowa Utilities Board ("IUB") that it would be a "full service" local exchange carrier to "both residential and business customers" and that it would "bring real choice to rural areas"[3] – has

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[1] Letter of S. Thomas, Consultant to Aventure, to P. Van Gerpen, Exec. Dir., S.D. PUC, at 1 (March 17, 2011).

[2] *Connect America Fund*, 26 FCC Rcd. 4554, ¶¶ 635-38 (2011); *id.* ¶ 636 (traffic pumping "occurs when, for example, a [local exchange carrier] LEC enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls. The arrangement inflates or stimulates the amount of access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the 'free' service provider. Although the conferencing or adult chat lines may appear as 'free' to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers.").

[3] *See* Registration of Aventure Comm. Tech., L.L.C., Docket TC-06-047, at 3, 6 (May 16, 2006) ("Aventure SD Registration"). Described in more detail below are even more egregious misrepresentations that Aventure made to the IUB.

since that time done next to nothing besides engaging in traffic-pumping on a truly massive scale, and it apparently now has its sights set on expanding its scheme from Iowa into South Dakota.

Aventure and other traffic pumping LECs, however, suffered a significant setback when the FCC and IUB each issued, and then re-affirmed, decisions holding that traffic-pumping local exchange carriers ("LECs") – including, in the IUB decision, Aventure itself – violated the terms of their switched access tariffs by imposing access charges on calls associated with the schemes.[4] In particular, these decisions held that the LECs' tariffs required that access charges be assessed only on calls terminated by LECs to their "end users," and the FCC and IUB concluded that the free calls associated with the traffic pumping schemes had not been terminated to end users within the meaning of the tariffs.

To attempt to circumvent these adverse decisions and to continue their attempts to plunder moneys from captive long distance carriers and consumers, Aventure and other LECs have filed revised tariffs, like the one before this Commission, with the FCC and other state commissions. Among the revisions is a change to the definition of "end user" that attempts to encompass the LECs' free calling partners. Aventure's proposed tariff revisions should be flatly rejected, and the Commission could do so on any number of grounds.

For one, the FCC and other state commissions have concluded that traffic pumping causes clear and convincing public interest harms – *e.g.*, that it "imposes undue costs on consumers, inefficiently divert[s] the flow of capital from more productive uses," and "harms

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[4] *Qwest Commc'ns Co.* v. *Farmers & Merchs. Mut. Tel.*, 24 FCC Rcd. 14801 (2009), *recon. denied*, 25 FCC Rcd. 3422 (2010) ("*Farmers*"); Final Order, *Qwest Commc'ns Corp.* v. *Superior Tel. Coop., et al.*, 2009 WL 3052208 (Iowa Utils. Bd. Sept. 21, 2009), *recon. denied* (Feb. 4, 2011) ("*IUB Final Order*").

competition."[5] If the Commission were to proceed with discovery and a full investigation of Aventure and its "services," AT&T is confident that the Commission would conclude that Aventure's revised tariff is profoundly flawed in many respects and would agree with the FCC and other state commissions that traffic pumping is contrary to public policy. Such action not only would prevent Aventure from expanding its traffic pumping activities to South Dakota but would send a clear signal to other traffic pumping LECs that are operating in the State.

Further, the Commission would also be required to reject Aventure's tariff because it could not possibly conclude – especially in the compressed schedule applicable to this proceeding – that the revisions comply with the statutory standards applicable to rates. The Commission has a statutory duty to ensure either that a carrier earns only a fair and "reasonable" rate of return (if "rate of return" regulation is used) or, otherwise, that the rates for the carrier's non-competitive services are "fair and reasonable," considering, among other things, the carrier's "fully allocated cost" of providing the service. *See* SDCL 49-31-4; 49-31-1.4; 49-31-1(18). The Commission has never considered either the reasonableness of any compensation for LECs engaged in traffic-pumping or the fully allocated costs of any "services" associated with traffic-

[5] *Connect America* ¶ 637; *IUB Final Order* at **26-27; Report & Order, *In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Docket No. 08-2469-01 (P.S.C. of Utah, April 26, 2010) (revoking operating certificate of traffic pumping LEC and finding its actions to be contrary to the public interest).

pumping.[6] In fact, both the FCC and the IUB have concluded that it is *not* lawful to allow traffic pumping LECs like Aventure – in which LECs incur only extraordinarily low costs – to collect traditional, higher-priced switched access charges associated with the low traffic volumes in rural areas.[7] In these circumstances, allowing Aventure to revise its tariff, so that it can charge rates equivalent to Qwest's switched access rates for calls associated with traffic-pumping, would in effect violate the statutory rate standards.

While the Commission could undertake a full investigation of all of the issues raised by Aventure's revised tariff filing, there is an easier and more efficient way to review the tariff. AT&T is filing this motion because the Commission clearly can and should summarily reject Aventure's revised tariff as patently unlawful. The FCC has just issued a decision finding unlawful a tariff filed by Northern Valley, a traffic-pumping South Dakota LEC which, like Aventure, was attempting to skirt the FCC's *Farmers* decision.[8] Aventure's intrastate access tariff filed with the Commission contains precisely the same language that the FCC found to be improper. Thus, even assuming, *arguendo*, that Aventure's revised intrastate access tariff were

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[6] The Commission's lengthy rulemaking, (RM05-002, Switched Access Rates for Competitive Local Exchange Services), which resulted in a rule allowing CLECs to mirror the switched access rates of Qwest (A.R.S.D. § 20:10:27:02.01), did not examine traffic-pumping in any material way. In fact, it is clear that this rule does not apply to traffic-pumping LECs, because it is common sense that a CLEC can mirror the Qwest rate only when it provides services that are equivalent to Qwest's. *See AT&T Co.* v. *Central Office Tel.*, 524 U.S. 214 (1998) ("Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached."). For numerous reasons, Aventure could not show that the services it provides in connection with traffic pumping are equivalent to Qwest's switched access.

[7] *Qwest Commc'ns Co.* v. *Farmers & Merchs. Mut. Tel*, 22 FCC Rcd. 17973, ¶¶ 21-25 (2007) (subsequent history omitted) (traffic-pumping LEC "vastly exceeded" the prescribed rate of return because the large volumes of calls caused revenues to rise substantially without a significant increase in costs); *IUB Final Order*, *27 (charging high rates on high volumes of calls produces an "unreasonable rate" when such rates are set based on assumptions that low volumes of calls will occur).

[8] Memorandum Opinion & Order, *Qwest Commc'ns* v. *Northern Valley Commc'ns*, File No. EB-11-MD-001, FCC 11-87 (June 7, 2011) (Exh. 1) ("*Northern Valley*").

in fact merely intended to align its terms with its interstate access tariff, the Commission should apply the FCC's rationale in *Northern Valley* and reject Aventure's tariff on the same grounds.

In addition, Aventure's tariff contains patently unfair and unreasonable billing dispute terms that the Commission should find unlawful as a matter of law. The combined effect of these provisions is that customers have no right to withhold payment of any charges Aventure bills, regardless of whether Aventure actually provided the services, and that, even for charges that are timely paid, customers waive rights to obtain refunds for improperly or incorrectly billed charges unless they dispute them within 90 days. These revisions are substantially similar to, if not more onerous than, tariff provisions that have been found unlawful by courts, and also are inconsistent with the Commission's rules. The Commission should reject Aventure's revised tariff on these grounds as well.[9]

Thus, while AT&T contends that Aventure's traffic-pumping activities cause severe public interest harms, and that the Commission would be fully justified in rejecting Aventure's revised tariff as inconsistent with the public interest, given the patent unlawfulness of Aventure's revised tariff, a more efficient use of the Commission's resources would be to reject the revised tariff as a matter of law on the grounds set forth in this motion.[10]

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[9] AT&T contends that numerous other provisions are unlawful and unreasonable, and if the Commission were to deny this motion, AT&T fully intends to contest the lawfulness of these provisions. AT&T's Pet. to Intervene and Request to Suspend the Tariff and Investigate, Docket No. TC11-010 (filed Apr. 8, 2011).

[10] Aventure would suffer no undue prejudice if its tariff were rejected, for it has had a switched access tariff on file with the Commission for years, and if, in fact, Aventure does intend to provide, within the next year, legitimate telecommunications to residents and ordinary businesses in South Dakota – as opposed to chat-line, dial-a-porn and other free calling providers that have no real presence in the State – then its existing tariff, when modified to comply with new rule ARSD 20:10:27:02.01, should be sufficient for that purpose.

FACTUAL BACKGROUND

In 2005 and 2006, Aventure filed applications with this Commission and the IUB to provide local exchange services in South Dakota and Iowa.[11] In these submissions, Aventure represented that it intended, and had a network technically able, to provide local exchange service in numerous exchanges in Iowa and South Dakota and aggressively to market those services to the residents of those communities.[12] However, upon receiving its authorization, Aventure did not provide service to residential and existing business customers. Instead, its only "customers" were free calling partners who were involved in the traffic stimulation schemes described above. In fact, as the IUB concluded, for more than two years, Aventure did not construct any local exchange network, did not market its services at all, and did not serve a single legitimate customer – contrary to the representations it made in obtaining its certificate.[13] And, in South Dakota, Aventure concedes that, since it became authorized to operate in the state in January, 2007, it has "no customers and no telephone traffic."[14]

Although Aventure did not have a local exchange network and did not terminate long distance calls to end user customers during this period, it charged AT&T and other interexchange carriers ("IXCs") for the provision of terminating access services in Iowa. IXCs filed a

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[11] Aventure's recent activities in Iowa are relevant here because Aventure's operations are directed from there, it "does not have a principal office in South Dakota, and it previously represented to the Commission that it "is in good standing with the Iowa Utilities Board." Aventure SD Registration, at 2, 6; *see also* ARSD 20:10:32:03(16) (requiring applicant to report on activities in other states where it is certified).

[12] *See* Certificate, *In re Aventure Communication Tech., LLC*, Docket Nos. TCU-05-18; TF-05-351 (Issued Jan. 20, 2006); Order Designating Eligible Carrier, *In re Aventure Communication Tech., LLC*, Docket No. 199 IAC 39.2(4) (issued March 6, 2006) ("*Aventure ETC Order*"); Aventure SD Registration at 2-6.

[13] Aventure acquired approximately 4 customers in January, 2008, and by September, 2009, still served only about 140 customers. *IUB Final Order* at *29.

[14] Aventure Comm. Tech. Resistance to Motion to Intervene, Docket TC11-010.

complaint before the IUB.[15] After allowing the parties to engage in significant discovery, and after holding a week-long hearing, the IUB determined that the intrastate access charge billings of Aventure and other Iowa-based traffic pumping LECs were improper. In particular, the IUB concluded that the LECs' tariffs required that switched access services be terminated to "end users" of the LECs' local exchange tariffs. *IUB Final Order*, at *7. It found that Aventure and the other LECs violated that aspect of the tariff, because the LECs' free calling partners "did not subscribe to the services in the [LECs'] access and local exchange tariffs . . . Typically, when an end user customer obtains local exchange service that service includes subscription to the access tariffs. . . Therefore, when a customer pays a LEC's invoice, the customer proves that it has obtained local exchange service and that it has subscribed for access service." The IUB concluded that there was no evidence that Aventure or the other LECs had ever billed or collected charges for local exchange services.

Indeed, on this point, the IUB found that Aventure and other traffic pumping LECs had misrepresented facts and engaged in unscrupulous, unethical, and fraudulent conduct in defending themselves against the claim that they had not billed or collected moneys from their free calling partners. The IUB found that some traffic pumping LECs had attempted to "manufacture evidence, after the fact," to make their arrangements with free calling partners "look like something that was not contemplated." IUB Final Order at *13. As to Aventure, the IUB found that Aventure had created bills for some aspects of local exchange services, but that it "never sent" the bills to the free calling partners and that they "were not legitimate bills for which Aventure expected to be paid." *Id.* at *11. As one IUB Commissioner stated, Aventure's

[15] AT&T and other IXCs have sued Aventure in federal court in Iowa to recover interstate access charges and to obtain declaratory relief that other interstate access charges billed by Aventure have been unlawfully billed. *See AT&T Corp.* v. *Aventure Communication Technology LLC, et al.*, 4:07-cv-43-JEG-RAW. That suit remains pending.

basic defense in the prior proceeding was to plead "ignorance of the law" and "ignorance of the facts" while not "undertaking effort to know or follow the rules." Tr. 2340-44.

In addition, Aventure carried out other frauds. As noted above, while Aventure represented that it had a network capable of providing service, and intended to serve business and residential customers in Iowa, it in fact did not do so for many years. As a consequence, the IUB's *Final Order* stated that the IUB intended to conduct a proceeding requiring Aventure "to show cause why [its] certificate[], issued pursuant to Iowa Code § 476.29, should not be revoked." IUB Final Order at *31. That proceeding has now commenced.

In addition, in Iowa, Aventure filed a certification that it was eligible to receive federal "universal service" support. Aventure received more than $3.4 million in cash from the federal Universal Service Fund because Adventure had misrepresented the number of lines that it serves and falsely represented to the IUB and to the federal Universal Service Administrative Company that it would use these moneys to provide services that are eligible for subsidies from the federal Universal Service Fund. IUB Final Order at *29; *cf. Aventure ETC Order* at 1-2. For example, the IUB establishes a number of criteria for entities to become eligible to receive USF moneys, and Aventure represented to the IUB in 2006 that it met all of the criteria, including that it "offers the services supported by the federal universal service fund," that it offers those services "throughout" its service area, and that it "advertises . . . the services throughout its designated service area," as required by the Communications Act and the IUB's Rules.[16] However, Aventure did not provide or advertise the USF-supported services for at least two years, and it

[16] *Aventure ETC Order* at 2; *cf.* IAC § 39.2(3) (an ETC must advertise the "required services and the charges for services using media of general distribution to residential customers. Carrier must advertise at least annually, in a publication of general circulation, throughout its approved service area"); 47 U.S.C. § 214(e).

instead apparently used the USF moneys to subsidize traffic-pumping schemes.[17] In addition, after receiving its eligible telecommunications carrier designation under false pretenses, Aventure proceeded to misreport its line count to the FCC and USAC, thereby inflating the amount of high-cost support it received.[18]

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law.[19] While requiring any facts in dispute to be presumed in the favor of the non-moving party, "summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law.[20] A nonmoving party in a summary judgment motion cannot rely on general allegations or claims and must set forth specific facts to show that a genuine issue of material fact exists in order to successfully preclude the moving party from succeeding on its motion.[21] In this case, summary judgment is appropriate under these standards

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[17] In testimony before the IUB, Aventure's CEO effectively acknowledged what is obvious – that USF funds are not intended for Aventure to fund such activities. Tr. 2331:21-35 (IUB Member Tanner: "Do you think it's the purpose of the universal service fund to ensure that consumers have adequate reasonable cost access to free conference calling services?" Aventure CEO: "I can't answer that").

[18] IUB Final Order at *29. In addition, Aventure exploited rules that the FCC established that allow competitive LECs that meet the FCC's definition of "rural" to assess higher interstate switched access rates than would otherwise be appropriate. *See* 47 C.F.R. § 61.26(e). The FCC's rules require that rural carriers operate only in areas with a population less than 50,000, but Aventure operated in Sioux City, which exceeds that figure.

[19] *Behrens* v. *Wedmore*, 698 N.W.2d 555, 565 (S.D. 2005); *Jerauld County* v. *Huron Regional Medical Center*, 685 N.W.2d 140,142 (S.D. 2004).

[20] *St. Onge Livestock Co., Ltd.* v. *Curtis*, 650 N.W.2d 537 (S.D. 2002) (citing *Hayes* v. *N. Hills Gen Hosp.*, 590 N.W.2d 243, 247 (quoting SDCL §15-6-56(c)).

[21] *Hoaas* v. *Griffiths*, 714 N.W.2d 61,65 (S.D. 2006) (citing *Wulf* v. *Senst*, 669 N.W.2d 135 (S.D. 2003)).

because the provisions in Aventure's tariff at issue in this motion are on their face contrary to South Dakota law.

ARGUMENT

Although the Commission could conduct a detailed investigation into Aventure's proposed tariff revisions and the public policy implications of those revisions, there are at least two sets of provisions that, on their face, are patently unlawful under existing law, and thus the Commission can and should resolve the issues in this proceeding summarily.

First, Aventure's revised tariff defines an "End User" as "[a]ny person or entity that is not a carrier who sends or receives an intrastate telecommunications service transmitted to or from a Customer across the Company's network. . . . *An End User need not purchase any service provided by the Company.*" Aventure Tariff No. 3, § 1, Original Page 7 (emphasis added). The FCC has found this definition to be unlawful, and it also conflicts with the Commission's rules. *Second*, Aventure's revised tariff contains unfair billing dispute resolution provisions that conflict with decision by federal courts and with the Commission's rules.

I. AVENTURE'S REVISED TARIFF IS PATENTLY UNLAWFUL UNDER THE RULE IN *NORTHERN VALLEY* AND THE COMMISSION'S RULES BECAUSE IT INCLUDES RECIPIENTS OF FREE SERVICE WITHIN THE DEFINITION OF "END USER."

In response to the decision by the IUB and FCC in *Superior* and *Farmers*, which found that free calling partners were not "end users" within the meaning of the tariffs at issue, Aventure revised its interstate and intrastate access tariffs, and in particular changed its definition of "End User." Previously, the tariff that Aventure had on file since 2007 defined "End User" as "[a]ny individual, association, corporation, government agency or any other entity other than an Interexchange Carrier which subscribes to intrastate service provided by an Exchange Carrier."[22]

[22] Aventure S.D. Tariff No. 2, § 1, Original Page 6.

This definition is similar to and consistent with the definitions of "End User" that have been promulgated in the Commission's rules and that have existed in LEC tariffs for decades.[23]

In light of *Superior* and *Farmers*, however, Aventure substantially revised its definition of "End User" so that it now reads as follows:

> End User – Any person or entity that is not a carrier who sends or receives an intrastate telecommunications service transmitted to or from a Customer across the Company's Network. A carrier shall be deemed to be an End User when such carrier uses a telecommunications service for administrative purposes, and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an End User if all resale transmissions offered by such reseller originate on the premises of such reseller. Other carriers, including IXCs, are not considered to be End Users under the terms of this tariff unless the Company consents to such classification in writing. *An End User need not purchase any service provided by the Company* and may include, but is not limited to, conference call providers, chat line providers, calling card providers, call center providers, help desk providers and residential and/or business service subscribers.[24]

One of the primary changes to the definition, as emphasized in the italicized text, is that an "end user" can be an entity that obtains services from Aventure for free.

In a recent decision, the FCC addressed very similar revisions to an interstate access tariff filed by Northern Valley ("NVC"), a South Dakota CLEC that has been engaged in traffic pumping. NVC's tariff initially defined "End User" as "any Customer of an Interstate or Foreign Telecommunications Service that is not a carrier." *Northern Valley*, ¶ 7. After the *Farmers* decision, however, NVC revised that definition by adding the statement that "an End User need

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[23] A.R.S.D. § 20:10:29:07 (defining "end user" in relevant part as follows: "[a] customer of an intrastate telecommunications service that is not a carrier is an end user"). *See also Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1192, § 2.6 (1984) ("*ECA Tariff Order*") (requiring that the Exchange Carriers' Association tariff, as the model tariff for exchange access tariffs, define "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier); *Access and Divestiture Related Tariffs (Non-ECA Filings)*, 55 Rad. Reg. 2d 869, 870, ¶ 2 (1984) (requiring Bell Operating Companies and independent LECs "to implement the directives of the ECA Tariff Order....").

[24] Aventure, S.D. Tariff No. 3, § 1, Original Page 7 (emphasis added).

not purchase any service provided by [Northern Valley]" (*see id.*) – language identical to that added by Aventure in its South Dakota intrastate access tariff.

The FCC held that this revised tariff language, seeking to include free recipients of services into the definition of "End User," was unlawful. *Id.* ¶¶ 7-9. As the FCC explained, under federal law, including the federal Communications Act and the FCC's rules and orders, a LEC "may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service for a fee." Switched access services have always required LECs to terminate calls to "end users," and, "end users," in turn has always meant, at least in this context, an entity that pays the LECs for services. *Id.* ¶¶ 7-11. Because NVC's tariff "purports to permit [NVC] to charge IXCs for calls to or from entities to whom [NVC] offers its services free of charge" – as set forth in the revised language providing that "an End User need not purchase any service" – the FCC concluded that the revised tariff is unlawful. *Id.* ¶ 9.[25]

The Commission should apply the rationale from the FCC's decision in *Northern Valley* and find that the identical language in Aventure's revised intrastate access tariff is likewise unlawful under state law. As under federal law, the Commission's regulations define "Switched access" as a service that provides "a path between the customer of the service *and its end user* which utilizes subscriber loop, transport, and switching functions." A.R.S.D. § 20:10:27:01(10) (emphasis added). Further, the Commission's rules provide that access charges should be billed "from the time the originating *end user's* call is delivered" and "from the time the call is received

[25] The Commission also considered and rejected an argument by NVC that the FCC could not find the NVC tariff unlawful because the FCC's Staff declined to suspend and investigate the tariff before a formal complaint was filed. *See id.* ¶ 14. Accordingly, there is also no merit to Aventure's related argument that this Commission is obliged to find Aventure's intrastate tariff revisions to be lawful because the FCC Staff declined to suspend Aventure's interstate tariff. *See* Aventure's Resistance, at 3-4.

by the end user in the terminating exchange." *Id.* § 20:10:29:05 (emphases added). As a consequence, switched access charges can only be assessed when a LEC, among other requirements, originates or terminates a call of an "end user."

As with federal law, the Commission's rules are clear that an "end user" is in this context an entity that pays the LEC for services, and thus a tariff like Aventure's, which purports to allow Aventure to bill access services for calls routed to an entity that does "not purchase any service" from Aventure, conflicts with the Commission's rules and is unlawful. In particular, the Commission's rules, in defining the term "end user," provide that "[a] customer of an intrastate telecommunications service that is not a carrier is an end user." § 20:10:29:07. As explained by the FCC, in the context of billing for switched access services, the term "'customer' clearly means a *paying* customer." *Northern Valley* ¶ 10 (emphasis in original). Indeed, although the Commission's regulations do not further define "customer," the rules are replete with provisions that relate to a customer's obligations to pay for services.[26]

Based on these rules, as well as the Commission's broad discretion in interpreting and applying its own regulations,[27] it is eminently reasonable, and consistent with years of practice in the industry, for the Commission to follow the lead of the FCC and hold that switched access

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[26] *E.g.*, A.R.S.D. § 20:10:07:03 (rule on transmittal of "bills" refers to "all charges" imposed on a customer). Other provisions of the Commission's rules refer to payments by "subscribers" which in this context is virtually synonymous with customer. *See, e.g. id.* § 20:10:07:04 (subscribers may be required "to pay the undisputed portion of a bill"); *id.* § 20:10:10:03 (allowing disconnection of a subscriber for "nonpayment of past due bills"); *id.* § 20:10:07:05 (providing that a carrier must in certain circumstances shall "refund . . . part of the monthly charge" to the subscriber).

[27] *See* SDCL 49-31-3, ("the Commission may exercise powers necessary to properly supervise and control all telecommunication companies"); *Trinity Broadcasting of Fla., Inc.* v. *FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000) (an agency's interpretation of its own rules is accorded an "exceedingly deferential standard of review," which are not accepted only when "plainly wrong"); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (courts accord "substantial deference to an agency's interpretation of its own regulations.").

services must be provided to entities that pay the local exchange carrier for services. Traditionally, end users placing or receiving long distance calls were able to access the networks of long distance carriers by purchasing local exchange services pursuant to intrastate tariffs that imposed monthly recurring charges on the end user. *See, e.g.*, *IUB Final Order* at *10. Accordingly, like the FCC, the Commission should conclude that "End Users" under a LECs' switched access tariffs should generally be defined as entities that are purchasers of the LECs' services, and, based on that holding, should find that Aventure's revisions to its intrastate access tariff are unlawful.

II. AVENTURE'S REVISED TARIFF CONTAINS UNREASONABLE BILLING DISPUTE PROVISIONS.

The Commission should also reject as patently unreasonable revised provisions in Aventure's tariff regarding billing disputes. The revised tariff includes a new section 2.10.4, which purports to (1) require customers to pay all disputed bills and to waive any rights to challenge those bills unless a bill is formally disputed within 90 days, (2) deny its customers the right to withhold payment of disputed charges, even where the customer claims that Aventure did not provide the services that were billed, and (3) require its customers to pay late fees on any withheld amounts even if the dispute is resolved in their favor and to pay Aventure's attorneys' fees for any action Aventure may file to recover charges, regardless whether Aventure loses or that its claims are found to be frivolous.[28]

[28] *See* Tariff No. 3, § 2.10.4. ("All bills are presumed accurate, and shall be binding on the Customer unless written notice of a good faith dispute is received by the company within 90 days (commencing five days after the bill in question has been mailed or otherwise rendered per the Company's normal course of business.) The bill shall be deemed to be correct and the Customer shall be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received").

Aventure's filing offers no justification for these provisions, and there is no valid one. When viewed in combination, these one-sided tariff provisions are unfair to long distance carrier-customers, conflict with the Commission's rules, and should be found unlawful. To begin with, these provisions are inconsistent with the Commission's rules on billing disputes, which provides in its first sentence that "[i]n the event of a dispute between a subscriber and a telecommunications company concerning any bill, the telecommunications company *may* require the subscriber to pay *the undisputed portion* of the bill to avoid disconnection of service for nonpayment." A.R.S.D. § 20:10:07:04. Aventure's proposed tariff revision turns this regulation on its head, turning the limited and conditional right of carriers to demand payment only of the "undisputed portion" of a bill into a broad requirement that purports to force customers to pay all amounts billed, even for services that were not in fact provided or for charges that are disputed and/or improperly billed.

The second sentence of the Commission's rule on billing disputes provides that, upon receipt of a dispute from a customer, the carrier "shall make an appropriate investigation and shall report the results of the investigation to the customer and to the commission, if involved." A.R.S.D. § 20:10:07:04. Aventure's revised tariff contains a number of provisions that are inconsistent with this rule. For instance, Aventure's proposed revisions merely require it to "*attempt* to investigate and resolve a good faith dispute," and then allow the dispute to be "deemed rejected" if Aventure does not respond to the billing dispute. Aventure Tariff, § 2.10.4.D (emphasis added). The "appropriate investigation" called for by the Commission's rules clearly entails more than a mere "attempt" to resolve a dispute, and the requirement that the carrier make a "report" to the customer is clearly not satisfied if, as the tariff purports to legitimize, Aventure fails entirely to respond to the dispute and it is "deemed rejected."

Likewise, the part of the revised tariff providing that Aventure has "a sufficient basis" to deny the dispute simply because the customer "fail[s] to tender payment for disputed invoices" (*id.* § 2.10.4.B) is inconsistent with both sentences of the Commission's billing dispute rule. It improperly penalizes customers who wish to withhold payments of disputed amounts, and an investigation that results in a rejection of a billing dispute regardless of its merits and solely on whether payment has been made is not an "appropriate investigation" within any reasonable interpretation of the Commission's rule.[29]

Aventure's revised tariff also contains a provision that purports to limit a customer's right to raise a billing dispute strictly to the period of "90 days of the invoice date listed on the bill."[30] In the context of billing for switched access services, which is widely recognized as "a complex and time-consuming process" that can result in millions of dollars of disputed charges, 90 days is not a sufficient time period for customers to review the accuracy of their switched access services bills.[31] There are thousands of individual switched access providers and "customers often find numerous inaccuracies after reviewing bills."[32] In these circumstances, Aventure's proposed requirement that its access customers have only 90 days to raise billing disputes, or else

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[29] Likewise, given the well-established principle that "responsibility for correct billings remains with the carriers" providing service, *Tele-Valuation, Inc.* v. *AT&T Corp.*, 73 F.C.C.2d 450, ¶ 8 (1979), the provision of the revised tariff stating that "[a]ll bills are *presumed* accurate" (Aventure Tariff, § 2.10.4.A) is clearly unreasonable.

[30] Aventure Tariff, § 2.10.4.A ("All bills are presumed accurate, and shall be binding on the Customer unless written notice of a good faith dispute is received by the Company within 90 days (commencing five days after the bill in question has been mailed or otherwise rendered per the Company's normal course of business.) The bill shall be deemed to be correct and the Customer shall be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received.")

[31] Policy Statement, *Verizon Petition for Emergency Declaratory And Other Relief*, 17 FCC Rcd. 26884, ¶ 24 (2002) (describing "access bills that run to tens of thousands of pages" and that carrier-customers may "receive up to 1700 such bills per month. These bills often arrive several days after the bill date that starts the clock on the time allowed to pay the bill . . .)

[32] *Id.*

"[t]he bill shall be deemed to be correct and the Customer shall be deemed to have waived any and all rights and claims" is plainly unreasonable.

Notably, the requirement that customers raise disputes "within 90 days" or else waive their rights to seek refunds for overcharges has been previously found to be unlawful by two federal district courts and a federal appeals court. In those cases, a local exchange carrier called Paetec had filed a tariff with language quite similar to the language proposed by Aventure.[33] The United States District Court for the Eastern District of Pennsylvania, following a prior ruling by the Eastern District of Virginia, which was upheld by the Fourth Circuit, correctly explained that:

> the [Eastern District of Virginia] issued an order wherein it found that the 90-day dispute resolution provision in PAETEC's tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff. The Fourth Circuit affirmed. . . . [W]e . . . find that the Fourth Circuit's ruling on this matter was persuasive.[34]

Under this same rationale, the Commission should find that the revised tariff language in Aventure's intrastate access tariff is also unlawful. Under South Dakota law, a customer that has been overcharged for tariff services can bring an action at the Commission or in an appropriate state court to recover the overcharges. S.D. Code § 49-13-1.1. Under South Dakota law, a

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[33] *Paetec Communications, Inc.* v. *MCI Communications Services, Inc.*, Civil Action No. 09-1639, 2010 U.S. Dist. LEXIS 41644, *11 (E.D. Pa. 2010), appeal pending; *MCI WorldCom Network Services, Inc. v. Paetec Commn'cs, Inc.*, 2005 WL 2145499 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006). The applicable language in that case read as follows: "All bills are presumed accurate, and shall be binding on the Customer, and such Customer shall be deemed to have waived the right to dispute the charges unless written notice of the disputed charge(s) is received by the Company within 90 days of the invoice date listed on the bill."

[34] 2010 U.S. Dist. LEXIS 41644, *32-34 (E.D. Pa. 2010).

customer must bring that action within 6 years after it arises.[35] Like the tariffs in *PAETEC*, Aventure's revised intrastate tariff seeks to supersede the limitations period provided for by the Legislature, and is thus unlawful for the reasons set forth in those cases.

Aventure's tariff revisions also purport to punish those that withhold payment as follows: (1) "[i]f payment of the originally billed amount is not made when due, whether or not a notice of dispute has been submitted, the Customer will incur a late payment fee on the unpaid amount"[36] and (2) "[i]n the event the Company pursues a claim in Court or before any regulatory body arising out of the Customer's refusal to make payment pursuant to this tariff, the Customer will be liable for the payment of the Company's reasonable attorney's fees expended in collecting those unpaid amounts."[37] Under these provisions, where Aventure severely overbills customers or bills customers for tariffed services that Aventure never provided, the customer/victim of the overcharges must come up with the money and pay it to Aventure, or Aventure will start charging penalties and initiate a lawsuit which will be paid for by the customer/victim of the overcharges, regardless of how frivolous Aventure's lawsuit might be. Such "shake down" provisions are also facially unjust and unreasonable.

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[35] SDCL 15-2-13. An action upon a contract must be brought within six years after the cause of action arises.

[36] Tariff No. 3, §§ 2.10.4(C).

[37] Tariff No. 3, §§ 2.10.5.

CONCLUSION

The revised intrastate access charge tariff filed by Aventure is an attempt to design a tariff that is more favorable to its traffic pumping efforts and to defeat legal challenges when it enters the market in South Dakota. However, as outlined above, the changes are contrary to South Dakota law.

The definition of end user set forth in the South Dakota regulations requires an end user to be a customer. The definition of end user in the revised tariff goes beyond that definition and turns it on its head by expanding end users to those who do not purchase any service provided by the Company. It effectively defeats the Commission's requirement that an end user be a customer, *i.e.*, purchase service from the local exchange carrier. A full tariff investigation is not needed to examine whether this provision is unlawful. It is unlawful on its face. Likewise, the provisions associated with billing disputes are unlawful without any need to determine any additional facts. Among other things, they require a customer to pay even disputed bills, which is contrary to the Commission's rules which allow withholding of disputed amounts.

Summary judgment is appropriate when the movant is entitled to a judgment as a matter of law and there is no genuine issue as to any material fact. As explained in the foregoing discussion of the tariff provisions at issue, these tariff provisions are contrary to the laws of South Dakota on their face. AT&T respectfully requests that Commission grant its Motion for Summary Judgment.

Respectfully submitted this 21st day of June, 2011.

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CERTIFICATE OF SERVICE

William M. Van Camp hereby certifies that on the 21st day of June, 2011, he filed the foregoing AT & T's Motion for Summary Judgment to Declare Aventure's Revised Access Tariff to be Unlawful electronically with the Public Utilities Commission and served to the following persons electronically:

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