

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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

**AT&T'S PETITION TO INTERVENE AND REQUEST TO SUSPEND
THE TARIFF AND INVESTIGATE**

Pursuant to SDCL 49-31-12.4(1), 49-31-12.4(2) and A.R.S.D. 20:10:1:15.02, AT&T Communications of the Midwest Inc. ("AT&T") hereby moves for intervention in the above-captioned docket and requests that the Commission suspend Aventure Communication Technology, LLC. d/b/a Aventure Communications' ("Aventure") Tariff No. 3 pending investigation. As grounds therefore, AT&T states as follows:

1. The Federal Communications Commission ("FCC"), in its recent Notice of Proposed Rulemaking ("NPRM") issued February 9, 2011,¹ made the following observations about "access stimulation" or what is colloquially known as "traffic pumping:"

In broad terms, access stimulation is an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volumes to maximize revenues. Access stimulation occurs when, for example, a 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

¹ *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, Docket Nos. 10-90, 09-51, 07-135, 05-337, 01-92, 96-45, 03-109 (Rel. Feb. 9, 2011).

the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers.²

Access stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition. Although long distance carriers are billed for and pay for minutes associated with access stimulation schemes, all customers of these long distance providers bear these costs and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation system.³

2. Aventure is a known traffic pumper,⁴ and it has filed its Access Tariff No. 3 in an effort to legitimize its traffic pumping practices in South Dakota.

3. Because the rates in Aventure's access tariff are not based upon its costs and do not reflect the volume of traffic generated by traffic pumping schemes, its rates are manifestly unjust and unreasonable in violation of South Dakota law. Moreover, it seeks to apply rate elements to its access stimulation efforts that are not applicable to such services (*e.g.*, end office switching and carrier common line charges). Finally, other terms and conditions within the tariff are inappropriate for application to traffic pumping schemes.

4. In addition to its traffic pumping activities, AT&T offers the following specific challenges to Aventure's Access Tariff No. 3, but notes that this is not an exhaustive list and reserves the right to address further issues associated with the tariff should the Commission open an investigation:

a. Section 1 Definition – "Access Tandem" or "Tandem Switch"

Aventure defines tandem switch and access tandem as "[a] switching system that provides a traffic concentration and distribution function for originating or terminating

² *Id.* at ¶ 636.

³ *Id.* at ¶ 637

⁴ *In re: Qwest Communications Corp. v. Superior Telephone Coop. et al.*, Final Order, Iowa Utilities Board Docket No. FCU-07-2, Order at 77-81 (September 21, 2009).

traffic between End Offices and the Customer's Premises or Point of Presence."⁵ From information publicly available, Aventure may be employing its alleged "tandem switch" to function as a mere gateway possibly performing only protocol conversions for conference bridges. Thus, AT&T objects to this definition as unreasonable. A tandem switch is a switch between switches, not an aggregation point and to the extent that Aventure's network does not actually employ a true tandem switch function it should not be able to charge IXCs for any tandem functions. Therefore, AT&T requests that the Commission determine precisely how Aventure purports to apply this definition to its network and disallow any use that is inconsistent with the tandem switching function.

b. Section 1 Definition – "Constructive Order"

Aventure introduces a definition of "constructive order" into its access tariff, which is as follows:

In the absence of a written or oral order, any delivery of calls to or receipt of calls from the Company's network constitutes a Constructive Order to purchase switched access services as described herein. Similarly, the selection of an IXC as the presubscribed Interexchange Carrier by and [sic] End User constitutes a Constructive Order for switched access service by the IXC.⁶

The introduction of this definition into a known traffic pumper's access tariff attempts to make IXCs pay for "traffic pumped" traffic at excessive rates through an effort to try and exploit the filed rate doctrine. Similar language was recently suspended in Iowa by the Iowa Utilities Board as it investigates Aventure's very similar access tariff. Here, it just another manifestation of an arbitrage scheme aimed at trying to ensure that those harmed by such rates and tariffs have no recourse to argue against and seek refunds of the abusive rates once found unjust and unreasonable.

⁵ Tariff No. 2 at 7.

⁶ Tariff No. 3 at 6.

d. Section 1 Definition – “End User”

In an effort to avoid the definitional problems it encountered during the *Qwest v. Superior*⁷ case in Iowa, Aventure devised the following definition of End User for inclusion in its South Dakota tariff:

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 service 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 IXC’s, 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.⁸

As an initial matter, this definition is so overly broad as to be ridiculous; it defines any individual or entity whether they purchase service from Aventure or not as an “End User.” More importantly, however, Aventure’s proposed definition is internally inconsistent in that it claims on the one hand that carriers are not end users, but then turns right around and says that only those carriers Aventure picks can be considered end users. Thus, it appears to create a discriminatory regime as between those carriers that Aventure decides may be end users and those that may not; it offers no basis for allowing or disallowing such characterization.

In reality, the tariff essentially attempts to clear the way for Aventure to decide that any partner engaged in its traffic pumping scheme regardless of whether or not they

⁷ *In re: Qwest Communications Corp. v. Superior Telephone Coop. et al.*, Final Order, Iowa Utilities Board Docket No. FCU-07-2 (filed Feb. 20, 2007).

⁸ Access Tariff No. 3 at 7.

are actually local exchange customers are declared to be “End Users” to which Aventure will attempt to claim it has “terminated” switched access traffic. Aventure, by definition, must be acting as a CLEC offering local exchange service to charge IXCs for intrastate access service. That is, it must be offering local exchange service⁹ to its local exchange customers. Intrastate “interexchange” service is that service running between local exchanges;¹⁰ intrastate access services facilitate the delivery of interexchange or toll calls that originate with end-users in one exchange and move through the facilities of the IXC to end-users in another exchange. Consequently, AT&T requests that the Commission reject Aventure’s definition of end user.

d. Sections 2.9.2(C) – Jurisdictional Reports & Percent Interstate Usage & 2.23 – Mixed Interstate and Intrastate Access Service

Aventure’s access tariff demands an IXC provide Aventure with a Percent Interstate Usage (“PIU”) projection when it “orders” access service or obtains mixed use access service to allegedly help Aventure distinguish between interstate and intrastate traffic. If the IXC fails to provide such projections for either originating minutes or terminating minutes, Aventure declares that it will split the traffic by employing a 50% PIU thus billing the IXC at intrastate switched access rates. For a known traffic pumper to suggest that an IXC must project the jurisdiction of the traffic flow created by the pumper itself (and which the pumper knows is predominately interstate in nature) is the height of temerity. Therefore, AT&T objects to this section of the tariff as unjust, unreasonable and burdensome. AT&T asks that the Board to reject this section.

e. Sections 2.10.1 & 2.10.2 – Responsibility for Charges & Minimum Period

⁹ “Local exchange service,” the access to and transmission of two-way switched telecommunications service within a local exchange.” SDCL 49-31-1(13).

¹⁰ “Interexchange telecommunications service,” telecommunications service between points in two or more exchanges. SDCL 49-31.1(9).

In this section Aventure purports to make IXCs responsible for the charges incurred by others' use of Aventure-supplied equipment and service. Because Aventure is a known traffic pumper and because the exact scope and application of this provision is not limited to dedicated access service or by some other means that might make it more understandable and fair, AT&T asks that the Commission reject this provision as unreasonable.

Similarly, section 2.10.2's "minimum period for which services are provided and for which rates and charges are applicable" makes no sense in the context of switched access service that is apparently subject to constructive ordering and that is applied to any traffic whether delivered to a local exchange customer or somebody not even buying any service from Aventure. The section should be rejected.

g. Section 2.10.4 – Disputed Charges

These sections disallow challenges to billing that are not brought to Aventure in writing within 90-days of the invoice date, among other things. Contrary to normal business transactions, it demands that IXCs pay all disputed bills prior to bringing a "good faith" challenge in writing. Aventure is apparently the sole judge of "good faith" and it takes money that it may not be due and offers no payment of interest or penalty to the carrier that has disputed and won. In this section Aventure is attempting to do an end-run around the traditional withholding of disputed amounts by customers pending resolution of the dispute. This section is improper especially in the context of a traffic pumper.

5. AT&T seeks intervention in this proceeding because the Commission has granted it a certificate of authority to provide intrastate interexchange service within the State of South Dakota. AT&T purchases intrastate switched access service from carriers operating within South Dakota which may or may not include Aventure. The outcome of this proceeding could have an impact on the intrastate switched access charges billed by Aventure to AT&T in the State of South Dakota and could have an immediate impact on services provided by AT&T in the State. As a result, AT&T believes it has a material interest in the issues of concern in this proceeding and has timely filed this Petition for Intervention.

For all the foregoing reasons and more, AT&T respectfully requests that the Commission suspend Aventure's tariff and open an investigation and grant AT&T intervention in TC11-010.

Respectfully submitted this 8th day of April, 2011.

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/s/ filed electronically
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CERTIFICATE OF SERVICE

William M. Van Camp hereby certifies that on the 8th day of April, 2011, he filed the foregoing AT & T's Petition to Intervene and Request to Suspend the Tariff and Investigate electronically with the Public Utilities Commission and to the following persons electronically:

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