BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING BY AVENTURE COMMUNICATION TECHNOLOGY, LLC dba AVENTURE COMMUNICATIONS FOR APPROVAL OF ITS SWITCHED ACCESS SERVICES TARIFF No. 3	)))))	Docket No. TC11-010 **SPRINT'S MEMORANDUM IN SUPPORT OF AT&T's RENEWED MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Sprint Communications Company, LP, ("Sprint"), by and through its counsel, and hereby submits this Memorandum in Support of AT&T's Renewed Motion for Summary Judgment.

AT&T has filed a Motion for Summary Judgment in the above-entitled matter based on the fact Aventure Communication Technology, LLC, ("Aventure"), proposed tariff violates South Dakota law. Sprint files this Memorandum in Support of AT&T's position and joins in the Motion and Brief of AT&T. While Sprint joins in AT&T's Brief and will not restate the arguments of AT&T, Sprint does address herein legal authority that has been issued since the AT&T Motion and Brief were filed and addresses additional authority and analysis that support AT&T's Summary Judgment and also refutes the positions of Aventure's Brief opposing the Summary Judgment and the South Dakota Public Utilities Commission's Staff ("Staff") Brief to the extent Staff concluded a person who is paid to use someone's services can constitute a "customer" under South Dakota law.

A. A Customer/End User of a LEC Must be a Net Payor to that LEC Under South Dakota Law.

1. End users must pay to be deemed a customer for purposes of switched access rates.

AT&T has provided the South Dakota Public Utilities Commission ("Commission") with an analysis of recent Federal Communication Commission ("FCC") decisions on end users in regards to switched access charges. In addition to the authority provided by AT&T, the FCC recently issued an Order regarding Petitions for Reconsideration filed by Northern Valley Communications, LLC ("Northern Valley") and Aventure in an attempt to overcome the rejection of Northern Valley's tariffs by the FCC in the FCC's Memorandum Opinion and Order, *Qwest Communications v. Northern Valley Communications, LLC* (2011), Memorandum Opinion and Order, 26 FCC Rcd 8332. Northern Valley and Aventure both filed petitions seeking reconsideration of the FCC's decision. On October 4, 2011, the FCC issued an Order rejecting the Petitions for Reconsideration. *Order on Reconsideration Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, FCC 11-148, October 4, 2011, 2011 WL 4600858.

The Petitioners sought reconsideration asserting the same arguments previously submitted by Northern Valley to the FCC. *Id.* at ¶ 5. While the FCC found the Northern Valley Petition for Reconsideration procedurally defective because it failed to raise any new arguments and rejected Aventure's Petition based on Aventure not being a party to the original proceeding, the FCC did take the opportunity to reiterate and reinforce its position that traffic to an end user does not qualify as switched access traffic when the end user pays no fee or actually shares in the revenue created by that traffic and access charge. In rejecting the requests for reconsideration, the FCC stressed that end users must pay a fee to actually receive services. *Id.* at ¶ 10. The FCC concluded that any other reading of the law "defies logic." *Id.*

The FCC went on to note that there exists a long standing policy "that users of the local telephone network for interstate calls should be responsible for a *reasonable portion* of the cost

that they cause." *Id.* at ¶ 11 (Emphasis added.) Allowing end users to avoid costs and actually make money on a call received would be inconsistent with "the Commission's goal of ensuring that neither IXCs nor end users are charged an *unfair share* of a LEC's cost in transporting interstate calls." *Id.* at ¶ 11 (emphasis added) (citation omitted). The FCC stressed in reaching its conclusions that the flow of money between the carrier and the conference calling companies was essential to analyze the relationship. *Id.* at ¶ 14.

Since this FCC decision is consistent with the FCC's latest line of decisions concerning traffic pumping, one can expect it to be attacked by Aventure as Aventure's Brief argued the FCC regulations and rules are different from South Dakota law and, therefore, the analogy that AT&T has asked this Commission to make is not complete. While Sprint acknowledges the South Dakota statutes and rules do not perfectly match the federal law, AT&T's analysis that customers must be net payors for services is valid and South Dakota law also requires customers must pay for services provided by Aventure.

At page 15 of AT&T's Brief, AT&T performs an analysis regarding the fact that South Dakota law requires a customer be a net payor. While the term "customer" is not defined, a practical reading and an ordinary, everyday reading of that term should be used. As noted by AT&T, "customer" is defined as someone who pays for goods or services. AT&T Brief, page 15. This conclusion is correct as under South Dakota law the South Dakota Supreme Court has recognized that where a term is not statutorily defined or defined within a contract the plain and ordinary meaning of the term is used. In following this rule, the South Dakota Supreme Court regularly cites to dictionary definitions. See for example, *Kjerstad Realty, Inc. v. Bootjack Ranch, Inc.*, 209 SD 93, ¶ 11, 774 N.W. 2d 797. See also, *Demaray v. DeSmet Farm Mutual Ins. Co.*, 211 SD 39, ¶ 14, 802 N.W. 2d 284; *Prudential Kahler Realtors v. Schmitendorf*, 2003

SD 148, ¶ 10, 673 N.W. 2d 663. Therefore, the dictionary definition should be applied to "customer" and this Commission should reject the tariff as the tariff does not require the payment by customers for services rendered by Aventure.

Furthermore, in its tariff filing, Aventure has attempted to avoid the requirement that end users pay for service by removing from its tariff requirements that end users must be "subscribers" of its services.[1] However, such a requirement is unavoidable given the definition of Switched Access. Switched Access is defined in South Dakota as "a telecommunications service which provides part or all of a communications path between a customer of the service and its end user which utilizes *subscriber loop*, transport, and switching functions." ARSD 20:10:27:01. (Emphasis added.) Setting aside the issue of whether there is a loop at all in the service Aventure intends to provide, there certainly can be no "subscriber loop" unless Aventure is requiring end users to pay a fee for service. Because the South Dakota definition of Switched Access necessarily requires end users to be "subscribers" through the provision of a "subscriber loop," the Commission should reject the tariff as it does not require payments for service.

B. If a Customer of a LEC Receives Payments from or is Not a Net Payor to the LEC for Services Rendered, the Rate the LEC is Charging IXCs is by Law Unreasonable and Unfair.

The conclusion that customers must pay for service is an essential component of the South Dakota regulatory scheme when reading the South Dakota statutes in their entirety. As noted by the Staff's Brief, SDCL § 49-31-12.4 applies to this situation. See Staff Brief, page 1. That statute deals with the filing of new or changed tariffs and establishes a procedure the Commission must follow. That statute requires the procedure be followed whenever "a telecommunication company files with the Commission any tariff stating a new rate or price or

[1] Aventure's original tariff required that "[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." Aventure S.D. Tariff No. 2, §1, Original Page 6.

any new practice affecting any non-competitive telecommunication services." The statute sets forth five procedures the Commission must follow. These procedures include this Commission making a determination that the new practice or rate contained in the tariff constitutes a "fair and reasonable rate or price." SDCL § 49-31-12.4(4). Application of SDCL § 49-31-12.4 is appropriate in this situation pursuant to SDCL § 49-31-19 notwithstanding any supposed exemption granted from the statute to carriers such as Aventure under SDCL § 49-31-5.1.

For every telecommunication company that provides access services, this Commission has promulgated rules to "establish methods designed to determine and implement fair and reasonable access rates." See SDCL § 49-31-18. These rules are generally found at A.R.S.D. Chapter 20:10:27. These rules essentially establish a cost recovery type regime but allows a waiver of cost data filings. See ARSD 20:10:27:02. In situations where a waiver is granted, the Commission generally undertakes a form of price regulation as opposed to a cost study or cost recovery analysis.

The differences between rate regulations and pricing regulations were examined under a different set of statutes in regards to US West Communications, Inc., now generally known as Qwest. How those rates were explained in the context of Qwest can provide some guidance on how to analyze this situation whether the rate proposed by Aventure is "fair and reasonable."

In that situation, SDCL § 49-31-4 required the Commission to use rate of return regulation when determining the appropriateness of charges for non-competitive service unless the Commission has made a determination pursuant to SDCL § 49-31-4.1 to use price regulation. To use price regulation, the Commission had to make a determination "that pricing regulation is appropriate for any non-competitive service because such regulation has a *positive impact on universal service and is more reasonable and fair than rate of return regulation.*" See SDCL §

49-31-4.1. (Emphasis added.) The Qwest rate has been set in this state pursuant to price regulation and not rate of return regulation. See *In re US West Communications, Inc.* 2000 SD 140, ¶ 4, ¶ 31, 618 N.W.2d 847. This legislation provided a "standard of guidance" for the Commission to follow. *Id.* "Here, the legislature requires the PUC to consider 'affordability of the price for service' and the 'impact of the price of the service' in order to carry out the specific purpose of 'preserving affordable universal service.'" *Id.* at ¶ 21.

Similar to the Court's analysis of the obligations of the Commission under the statutes described above, the Commission in regards to Aventure has the obligation to ensure that switched access rates are provided in a way "to enhance and preserve universal service" and are "fair and reasonable." See SDCL § 49-31-18. In this situation, Aventure has proposed a rate and has not performed a full cost analysis. The Aventure's proposed rate then is akin to pricing regulation.

In this situation, it is undisputed that Aventure, pursuant to its tariff, is intending on using its access rate for traffic pumping. The only reason Aventure has even filed this tariff revision proceeding is to strengthen its claim that its tariff applies to traffic pumping. In doing so, Aventure claims customers do not need to pay for services.

However, this state statutory and regulatory regime requirement of a fair and reasonable rate endorses and, in all common sense, requires the Commission conclude that a customer must pay for services.[2] In this situation, Aventure is designing a system that takes the money it makes from its switched access rate and pays a portion of that money to a third party so that third party

[2] There is also a question whether the way Aventure provides pumping services, the placing of a server on the back side of their switch at the switch location, constitutes switched access as such activity does not appear to provide a "local loop facility, or local transport" component of the switched access definition in South Dakota law. See SDCL § 49-31-1(27). This issue is currently not part of AT&T's Summary Judgment Motion.

will do business with Aventure.[3] Based on this undisputed fact, this Commission must determine the tariff invalid as Aventure cannot give away its services or pay people to use its services as such action as a matter of law proves the rate is unreasonable or unfair.

This Commission's obligation is to ensure a fair and reasonable access rates for all users. These users include IXCs, CLECs, ILECs and regular customers. Aventure's business model, which Aventure claims allows it to charge IXCs switched access rates for calls related to traffic pumping and pay part of the switched access charge to third parties to generate that traffic, as a matter of law drives up the affordability of switched access service in the market, constitutes an adverse impact on the price of service and damages the commitment to preserve affordable universal service because it clearly misallocates the cost of resources by allowing third parties to profit, not just ride for free, but profit by signing up for telecommunication services with Aventure.

As noted above, SDCL § 49-31-4.1 requires that before any non-competitive service may be set using price regulation, this Commission must have made a determination that price regulation had "a positive impact on universal service and is *more reasonable and fair than rate of return regulation.*" SDCL § 49-31-4.1. (Emphasis added.) While SDCL § 49-31-4.1 may not apply directly to Aventure's tariff, this Commission's institution of a good cause exception from performing a cost analysis to determine intrastate switched access charge is similar. See ARSD 20:10:27:02. A showing of a good cause would require some reasonable grounds to determine that the access rates are fair and reasonable as required by SDCL § 49-31-18. A company could

[3] Aventure has implied that under the rule making proceeding *In The Matter of Revisions and/or Additions to the Commission's Switched Access Rules*, RM05-002, that it is entitled to its proposed rate without question because it is less than the Qwest rate. That is not correct. A.R.S.D. 20:10:27:02.01 states that "a competitive local exchange carrier shall charge intrastate switched access rates that do not exceed the intrastate switched access rate of the regional Bell operating company operating in the state." Nothing in these new rules establishes a presumption that use of the Bell rate or lower rate is fair and reasonable. These rules set a cap on what a CLEC can charge.

not assert under a rate of return or cost recovery analysis that the rate can be high enough on one customer so that the company can pay other third party customers to use its other services, in essence, give away money. If one is to assume a customer does not have to pay a fee (as asserted and practiced by Aventure) and the LEC can pay customers to use its service out of the rate Aventure is charging IXCs, the rate could not be "fair and reasonable." SDCL § 49-31-18.

Under no circumstances can a business model of paying people to become your customers or giving your services away for free result in a fair and reasonable rate for those you choose to charge to subsidize the payments. Therefore, as a matter of law, this Commission should find that customers must pay a fee and Aventure cannot pay its customers to drive switched access traffic to its switch.

C. The Commission Should Reject the Tariff as a Matter of Law as Traffic Pumping Constitutes a New Practice and the New Practice is Not Explained Within the Tariff

SDCL § 49-31-12.4 establishes the procedures the Commission must follow to approve a new or changed tariff. The concentration in this proceeding has been on the rate or price.[4] However, there is something more being proposed within this tariff change.

Traffic pumping constitutes a "new practice affecting [a] non-competitive telecommunication service." SDCL § 49-31-12.4. As a new practice, the Commission must, under SDCL § 49-31-12.4, take the practice through the procedural analysis set forth in the statute. The Commission is under an obligation as part of this required analysis to examine how the new practice affects non-competitive telecommunication services and determine how that specific practice should be rated or priced. SDCL § 49-31-12.4(4).

[4] It should be noted that, the term rate is often used interchangeably in the cases and in discussions whether the rate is set by price regulation or rate of return.

Aventure's failure to break out this new practice for examination within its tariff for pricing purposes is inappropriate and as a matter of law allows this Commission to reject the tariff on its face with directions for Aventure to refile providing information in the tariff regarding specifically this new practice. Therefore, if this Commission does not reject the tariff as unreasonable on its face, the Commission should reject the tariff as not properly explaining the new practice of traffic pumping or its impact on the non-competitive service.

D. Aventure's Billing and Collections Language contained in this Policy are Invalid Under South Dakota Law.

Sprint agrees with the analysis presented both by AT&T and Staff's Brief on this issue. Aventure's addition of language to its tariff, setting forth that any provisions under the tariff that violate South Dakota law are unenforceable, cannot save its billing provisions.

The purpose of the tariff is to set forth terms and prices that are reasonable and just. If the Commission were to allow Aventure to simply rely on a savings clause to pass through the tariff with these one-sided, anti-consumer billing practices, it would fall on the consumer or customers to go to court or come to this Commission and prove the language violates South Dakota law. In any challenge to the tariff, the customers of Aventure bear the risk and cost of that proceeding. Aventure should not be allowed to design a tariff that allows it to punish people for questioning bills, even when the questions are valid.

Furthermore, such punitive measures appearing in a tariff, which will be perceived as being approved by the Commission, will discourage people from raising legitimate objections to bills. One can also safely assume that Aventure will not point out the fact that its billing provisions are in violation of South Dakota law when seeking to collect under the tariff billing provisions it proposes.

CONCLUSION

Aventure's tariff in this case violates state law and, therefore, this Commission, like the FCC, must reject this tariff without further proceeding. For these reasons, Sprint respectfully request this Commission rejects Aventure's tariff as unlawful.

Dated this 14th day of October, 2011.

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CERTIFICATE OF SERVICE

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