BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE APPLICATION OF WIDE VOICE, LLC FOR A CERTIFICATE OF AUTHORITY TO PROVIDE LOCAL EXCHANGE SERVICES IN SOUTH DAKOTA	**)**	**TC11-088**

WIDE VOICE, LLC's REPLY AND OPPOSITION
TO THE PETITIONS FOR INTERVENTION

COMES NOW Wide Voice, LLC ("Wide Voice") and hereby submits its reply and opposition to the petitions for intervention filed by AT&T Communications of the Midwest, Inc. ("AT&T"), Sprint Communications Company L.P. ("Sprint"), and Qwest Communications Company LLC dba CenturyLink ("Qwest/CenturyLink") (collectively the "Interexchange Carriers" or "IXCs") as follows:

FACTS

1. Wide Voice is a Nevada corporation incorporated on August 27, 2007, and operates as a limited liability company in accordance with South Dakota law. (*See* Wide Voice's Application for Certificate of Authority) ("Application").

2. Wide Voice seeks to offer competitive local exchange service, including exchange access service, within the state of South Dakota, using its own facilities. Wide Voice may also utilize resold services available from the underlying Incumbent Local Exchange Carrier ("ILEC") or other facilities-based carriers. Wide Voice will provide local telephone exchange service and interexchange long distance service to both residential and business customers. Wide Voice will negotiate an interconnection agreement with Qwest/CenturyLink. (*See* Application, pages 2-3).

3. Wide Voice has authority in California, New York, and Iowa to operate as a facilities-

based and resale provider of competitive local exchange services and interexchange services. Wide Voice also has pending applications for local authority in Florida and Texas. (*See* Application, Attachment V).

4. AT&T, Sprint, and Qwest/CenturyLink are all IXCs.

5. AT&T seeks to intervene in this matter because AT&T is required to pay intrastate access fees to Competitive Local Exchange Carriers ("CLECs"). (AT&T's petition, ¶ 4).

6. Sprint seeks to intervene in this matter because of alleged "access stimulation" and concerns with Wide Voice's Application. (Sprint's petition, ¶¶ 4-5).

7. Qwest/CenturyLink seeks to intervene in this matter because of alleged "access stimulation." (Qwest's/CenturyLink's petition, page 7).

ARGUMENT

I. THIS DOCKET IS LIMITED TO WIDE VOICE'S APPLICATION FOR A CERTIFICATE OF AUTHORITY

8. The only issue before the Commission in this docket is whether Wide Voice should be granted a Certificate of Authority in South Dakota.

9. The issue of whether Wide Voice should be allowed to provide telecommunications services has been long-settled by Congress, the Federal Communications Commission, the South Dakota Legislature, and the Commission.

10. The IXCs' intervention petitions provide no legal nexus between the various issues raised by the IXCs and the narrow issue of certification that is before the Commission in this docket. Therefore, the IXCs' "interests" do not warrant intervention.

II. THE IXCs' PETITIONS DO NOT SATISFY THE COMMISSION'S INTERVENTION RULES

11. Wide Voice objects to the IXCs' intervention in this docket for a very fundamental reason - the IXCs do not meet the threshold requirements of the Commission's rules to intervene and pursue party status in this docket. ARSD 20:10:01:15.05 provides in relevant part:

> A petition to intervene shall be granted by the commission if the petitioner shows that the petitioner is [1] specifically deemed by statute to be interested in the matter involved, [2] that the petitioner is specifically declared by statute to be an interested party to the proceeding, or [3] that by the outcome of the proceeding the petitioner will be bound and affected either favorably or adversely with respect to an interest peculiar to the petitioner as distinguished from an interest common to the public or to the taxpayers in general.

12. The IXCs' petitions fail to meet this requirement as they are not (1) deemed by statute to be interested in the matter involved; (2) specifically declared by statute to be an interested party to the proceeding; and (3) will not be bound or affected either favorably or adversely with respect to its peculiar interest as distinguished from an interest common to the public or to the taxpayers in general.

13. The IXCs' clear intent is to unduly lengthen the certification process in this proceeding and stifle competition in South Dakota.

14. AT&T's concern that it may be required to pay intrastate access fees to Wide Voice does not meet the Commission's intervention rules.

15. Sprint's concern with alleged "access stimulation" does not meet the Commission's intervention rules. Also, any concern Sprint has with Wide Voice's Application can be thoroughly addressed by the Commission and its staff in this docket.

16. Qwest's/CenturyLink's concern with alleged "access stimulation" do not meet the Commission's intervention rules.

17. If the IXCs believe that Wide Voice is engaged in improper activities, the IXCs are able to bring legal actions in the appropriate courts and administrative agencies. However, any potential "access stimulation" dispute between the IXCs and Wide Voice is clearly not relevant to the Commission's decision in this docket.[1]

18. While the IXCs are naturally "inquisitive" regarding Wide Voice's Application, the IXCs do not meet the threshold requirements of the Commission's rules to intervene and pursue party status in this docket

19. If the Commission grants the IXCs' intervention requests in this docket, it would establish the unfortunate precedent of allowing an IXC to intervene in every similar application proceeding in our State.

III. THE FEDERAL COMMUNICATIONS COMMISSION HAS NOW RECOGNIZED THE LEGITIMACY AND LEGALITY OF "ACCESS STIMULATION" AND "REVENUE SHARING AGREEMENTS" AND HAS ADOPTED RULES GOVERNING ITS PRACTICE

20. On Friday, November 18, 2011, the Federal Communications Commission ("FCC") released its long-awaited Report and Order ("Order") to reform the Universal Service Fund ("USF") and Inter-Carrier Compensation ("ICC") rules.[2]

21. In its Order, the FCC specifically recognizes the legitimacy and legality of "access

[1] As the Commission is aware, "South Dakota has yet to take a position [regarding traffic stimulation]." *In the Matter of the Filing by Aventure Communication Technology, LLC dba Aventure Communications for Approval of Its Switched Access Services Tariff No. 3*, SDPUC Docket TC 11-010 - Staff Brief, page 4 (dated October 12, 2011).

[2] The FCC's nearly-800 page Order can be found at www.fcc.gov.

stimulation" and "revenue sharing agreements." In fact, the FCC's Order adopts a "bright line definition" to identify when an access stimulating LEC must re-file its interstate access tariffs at rates that are presumptively consistent with the Act. The first condition is met where the LEC has entered into an access *revenue sharing agreement*.[3] The second condition is met where the LEC either has had (a) a three-to-one interstate terminating to-originating traffic ratio in a calendar month; or (b) has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.[4] (Order, ¶¶ 658, 667, 675-678).

22. If a CLEC meets both conditions of this definition, it must file a revised tariff and benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state. (Order, ¶ 679). Specifically, the Order requires a CLEC to file its revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A CLEC whose rates

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[3] This "revenue sharing" condition of the definition is met when a rate-of-return LEC or a competitive LEC:

> [H]as an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account.

(Order, ¶ 669).

[4] In turn, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition (*i.e.*, that the second condition has been met). (Order, ¶ 659).

are already at or below the rate to which they would have to benchmark in the re-filed tariff will not be required to make a tariff filing. (Order, ¶ 691).

23. The FCC's Order also *eviscerates* the IXCs' long-standing claims that "revenue sharing agreements" violate section 201(b) of the Act. In fact, the FCC declares just the opposite:

> [W]e do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act. A ban on all revenue sharing arrangements could be overly broad, and no party has suggested a way to overcome this shortcoming. *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*.

(Order, ¶ 672) (emphasis added).[5]

24. The only issue before the Commission in this docket is whether NAT should be granted a Certificate of Authority. The Commission's decision in granting a Certificate of Authority is limited to the criteria set forth in statute/administrative rules and primarily encompasses an applicant's *financial, technical, and managerial ability* to provide the contemplated services.[6] The IXCs have failed to provide *any nexus* between their intervention

[5] The FCC also rejected several of the IXCs' other spurious suggestions, including (1) adopting a benchmark rate of $0.0007 ("We will not adopt a benchmarking rate of $0.0007 in instances when the definition is met, as is suggested by a few parties. The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely"); (2) adopting an immediate bill-and-keep system ("Nor will we immediately apply bill-and-keep, as some parties have urged. We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here"); and (3) detariffing certain CLEC access charges ("Additionally, we reject the suggestion that we detariff [CLEC] 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"). (Order, ¶ 692).

[6] ARSD 20:10:24:03 provides:

> If an application filed pursuant to SDCL 49-31-3 for *interexchange telecommunications* is incomplete, inaccurate, false, or misleading, the

petitions and the narrowly-tailored criteria that will guide the Commission's decision in this docket.

25. In sum, the IXCs' petitions to intervene fail to meet the Commission's requirements as the IXCs not (1) deemed by statute to be interested in the matter involved; (2) specifically declared by statute to be an interested party to the proceeding; and (3) will not be bound or affected either favorably or adversely with respect to its peculiar interest as distinguished from an interest common to the public or to the taxpayers in general. (*see* ARSD 20:10:01:15.05).

WHEREFORE, Wide Voice respectfully requests that the Commission deny the IXCs' respective petitions to intervene because this docket is limited to whether Wide Voice should be granted a Certificate of Authority in this matter.

Dated this 2nd day of December, 2011.

> commission shall reject the application. If the commission finds that the applicant is not *financially, technically, or managerially able to provide the contemplated service*, the commission shall deny the application for certification.

(emphasis added).

ARSD 20:10:32:06 provides in part:

> A certificate of authority to provide *local exchange service* may not be granted unless the applicant establishes sufficient *technical, financial, and managerial ability to provide the local exchange services* described in its application consistent with the requirements of this chapter and other applicable laws, rules, and commission orders. If an application is incomplete, inaccurate, false, or misleading, the commission shall reject the application. . . .

(emphasis added).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on *December 2nd, 2011, WIDE VOICE, LLC's REPLY AND OPPOSITION TO THE PETITIONS FOR INTERVENTION* was served *via electronic mail (and filed with the SDPUC's electronic docket system)* upon the following:

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