BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF VENTURE COMMUNICATIONS COOPERATIVE AGAINST AT&T MOBILITY	)))))	SD PUC DOCKET CT20-001

AT&T MOBILTY'S POST HEARING BRIEF

For purposes of the post-hearing brief, New Cingular Wireless PCS, LLC dba AT&T Mobility will be referred to as "AT&T." Venture Communications Cooperative will be referred to as "Venture." The South Dakota Public Utilities Commission will be referred to as the "Commission." References to the hearing transcript for the hearing before the Commission on April 13th and 14th, 2023 will be referenced by the notation "TR" followed by the page number being reference. Exhibits of the parties will be referred to "AT&T Ex" and "Venture Ex" followed by the number of the exhibit so referenced.

INTRODUCTION

AT&T files this Post Hearing Brief pursuant to the order of the Commission. Venture at hearing and in its post hearing brief want to categorize the dispute between the parties as a simple collection action. Under Venture's theory, AT&T simply ordered facilities from its pricing catalog. In Venture's opinion these facilities were necessary to complete local calling on a seven digit basis for Venture's own end users. TR 91. In reality, the pricing catalog argument provides a way for Venture to charge, and for years to collect, for that which otherwise would be noncompensable.

What the hearing and testimony demonstrated is that the world of intercarrier compensation has changed. Something we all know. Venture had a long-standing bill it sent to AT&T's predecessors in interest, starting in 2005. Venture Ex 14. This bill was paid for years with no complaints by AT&T's predecessors and by AT&T itself. After placing an order for three additional T1 facilities in late 2017, the billing that had been routinely paid to Venture jumped dramatically. The billings in dispute went from $8,262.00 a month to first $21,366.99 for February of 2018 then settling back to $16,524.00 for March of 2018. Venture Ex. 11. AT&T paid the bill, disputing

the amount, through September of 2019. Venture Ex. 11. When communications between the companies failed to resolve the dispute, AT&T stopped paying. TR 143.

THE BILLING DISPUTE

In reviewing the parties' interconnection agreement, its 2012 amendment, along with the FCC's intercarrier compensation reform order, what appears clear is the course of billing Venture undertook in 2005 became over time, a way for Venture to obtain additional revenue for services it provided as regulatory reform and market changes reduced its traditional revenue. Inappropriately so AT&T believes. As hereinafter described, Venture is being fairly compensated for this traffic through multiple revenue streams. First, AT&T is paying Venture based on usage rates issued pursuant to its NECA tariff. TR 128. Venture is also receiving a portion of the payments that AT&T has made to SDN for the DS1s that were ordered from SDN to transport traffic to and from Venture end offices. TR 61. Finally, Venture is charging its end users for the services they provide. Three revenue streams should be enough for this traffic.

The billing, long under the radar, provided an opportunity for Venture to continue to collect for services it performed in its own end offices in amounts that became more and more disproportional to the services provided. [1] Fees that were disproportional to the number of its own customers utilizing these services. And fees inapposite to the spirit and practical realties of the agreements of the parties.

Once the billings from Venture to AT&T more than doubled in February 2018 the billing agent for AT&T immediately filed a dispute relating to the charge.

> Question: ...in February of that year, the billing went from $8,262 a month to $21,366 a month. Is that what the exhibit [Venture Ex. 11] shows?
> Answer [Fay Jandreau]: Yes, it did.
> Question: Okay, and just so that the Commission isn't left with the impression that AT&T did nothing relating to these charges, that amount was disputed rather quickly, was it not?
> Answer: For those three trunks it was. TR 55

As was described at the hearing, often times AT&T and its billing agents set thresholds or benchmarks in reviewing the thousands of bills it receives per month. TR 141. Practically speaking the company has to take such steps. Once a

[1] Dan Le's calculation was on a per minute basis Venture's collection effort could result in a change of upwards of $524.00 per minute of use. Dan Le, Prefiled Testimony at 8.

threshold is broken, a bill increases by a certain amount or percentage, such as in this case, a review is conducted and if necessary a dispute undertaken. TR 142. For some time in this matter, as the testimony at hearing pointed out, the billing agent for AT&T and AT&T itself had a difficult time ascertaining why Venture was billing as it was. The communication between the parties was not productive in helping determine why Venture was billing such an inflated amount. Dan Le testified at hearing to this:

> We heard a lot of testimony saying AT&T (was)....giving different stories of trying to do this and not being consistent with our defense (of the dispute)...this is like peeling an onion for us...at least 1600 carries, we don't have this dispute...it's kind of hard for our team, when we got this...to get to the point because it didn't make sense to us... TR 135.

Certain statements generated on automated billing disputes did not prove to be accurate as the layers of the onion were peeled. Due to the setup of the billing system, these inaccuracies were not corrected on the automated billing disputes. TR 136. However, there was never a doubt as to what was being disputed between the parties, as reflected by how Venture described the dispute in its own Complaint. TR 135-137, 143. Venture understood at the time of filing its complaint that AT&T was not claiming a proper tariff amount was owed per the TEOCO dispute note. TR 59-60. Claims that those automated billing responses operate as an admission do not withstand simple scrutiny and are further supportive of the claim of AT&T that the inflated billings of Venture caused initial confusion.

THE INTERCONNECTION AGREEMENT TODAY

The Telecommunications Act of 1996 was passed to fully open competition in the local exchange market 47 U.S.C. Section 251(a) of the Act requires all telecommunication carriers to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Section 251(b) sets forth obligations assigned to all carriers. Among the obligations are: provide number portability, provide dialing parity (access to telephone numbers, operator services, directory assistance and listing), and establish reciprocal compensation for the transport and termination of telecommunications. Section 251(c) imposes the duties on Incumbent Local Exchange Carriers (ILECs) to negotiate in accordance with Section 252 the terms and conditions of agreements to fulfill the obligations of 251(b) and provide

interconnection – the duty to provide for the facilities and equipment of any requesting carrier, interconnection with the local exchange carrier's network for the "transmission and routing of telephone exchange service (local calls) and exchange access (long distance calls)."

The negotiations, and interconnections agreement between carrier must be based on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Section 251 (c)(2)(D). Section 252(d) (1) imposes the pricing standards for interconnection and network element charges. Pricing must be based on cost and may include a reasonable profit. This standard applies to the analysis of Section 251(c)(2)(D) and thus is not simply applicable to arbitration determinations made by the Commission under Section 252(b) as suggested by Venture.

In 2004, AT&T Mobility's predecessor and Venture executed an Interconnection Agreement, which was approved by this Commission. Venture Ex 3. The parties stated in that Agreement that this was to fulfill the obligations of reciprocal compensation under Section 251(b)(5).

Section 3.1 of the ICA established the terms, conditions and reciprocal compensation for the exchange of local and interMTA traffic between the two carriers. The ICA sets forth the variety of configuration options for the exchange of traffic. It allowed for either direct interconnection or indirect interconnection.

Section 3.3 allows for additional interconnection methods available to the CMRS Provider. AT&T chose pursuant to Section 3.3.1 of the ICA to use entrance facility and transport from a Third Party Provider, SDN. Under the ICA, AT&T ordered DS1s from SDN. AT&T connected from its Mobility Telephone Switching Office (MTSO) in Omaha to SDN in Sioux Falls, and SDN used the T1s to transports calls from Sioux Falls to the various end offices of Venture. TR 132. AT&T compensates SDN for the full complement of T1s facilities, all 24 DS0s that are part of that T1. TR 132. AT&T Confidential Exhibit 5. The Access Service Requests ("ASRs") in dispute are the same ASRs that ordered the T1 from SDN.

> Question: Is this an order [the ASRs] in dispute of the two separate facilities, or is it the ordering of a singular facility.
> Answer (Dan Le): No. It's one facility, two ways. TR 133
>
> Question: ...But the same ASR, to your knowledge, would have provided for the T(s) 1 to be ordered from SDN for the transportation of that traffic to and from Sioux Falls point of interconnection to your three end offices?

Answer (Fay Jandreau): I do believe that. I don't know specifically what they received for an order, but, yes, I do believe that it would reflect the same. TR 58.

AT&T believes that the service that Venture is providing to AT&T after the T1 reaches each of the Venture end office is the local switching and transport of calls between the Venture's end user's landline and the hand off to the AT&T interconnection facility provided by SDN. TR 146, 167. It would make little sense for AT&T to pay SDN as it does for an entire T1 (and did not dispute) and then pay again to Venture an amount significantly higher for the individual 24 DS0s on the T1 or choose to use only a percentage of the T1 that we have ordered from SDN once the T1 has reached a Venture end office. TR 137-138. AT&T Confidential Ex 5. Venture would have AT&T literally paying double the price for something done in their end office switch vs 150 miles of transportation in one example. TR 138. AT&T Confidential Ex 5. Venture's analysis of the ASRs must be that AT&T was ordering at once a T1 from SDN to Venture's end office and at the same time, in the same order, a request for an additional bank of 24 DSOs, which every DS1, or T1, contains. See, TR 61. This was and is a unique interpretation by Venture as nothing in these ASRs is unusual in AT&T's experience. See, TR 132-133.

Venture in reality is providing a switch port for the interconnection facility, and as such, the port is part of the end office switching and transport services that the FCC requires now to be treated as bill and keep. TR 128. It doesn't matter if the switch port is at a DS1 level as AT&T contends or at the DS0 level as Venture contends. This function has gone to bill and keep as hereinafter described.

The position of AT&T is supported by the ICA and its Amendment. In the ICA, the compensation for the actual exchange of local traffic, including the trunk port where the DS1 provided by SDN connects to the Venture end office switch, and end office switching functionalities, are covered by Section 5.0 of the ICA.

Section 5.1 of the ICA states: The CRMS Provider and the Telephone Company shall reciprocally and symmetrically compensate one another for **Local Traffic** terminated on either Party's Network. The rates at which the Parties shall compensate each other for the transport and termination of traffic are set forth in Appendix A. (emphasis added)

Section 5.1.2 states: The rates applicable to **Local Traffic** are set forth in Appendix A... (emphasis added).

In June 2012, AT&T and Venture amended the ICA to conform to the FCC's Intercarrier Compensation Reform Order. The parties adopted bill and keep compensation for the exchange of non-access (i.e., local) traffic between Venture and AT&T. AT&T Ex 3. **Neither** party was entitled to compensation for **transport and termination** of "non-access telecommunications traffic (emphasis added)." *Id at para 1.*

The ICA and the amendment provide the definition of local traffic. With the 2012 amendment, non-access telecommunications (or local) traffic is defined as telecommunications traffic exchanged between a Venture and AT&T that, at the beginning of the call, originates and terminates within the same Major Trading Area (MTA). AT&T Ex 3. Non-Access telecommunications traffic is defined in the Amendment by referencing 47 CFR § 51.701 (b)(2) which provides:

> Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

The Definition of Local traffic is dependent upon whether the traffic originates and terminates within a local calling area. The 3 Venture end offices (Highmore, Sisseton, Britton) are all in MTA 12 and calls that originate and terminate within this MTA would be defined as local traffic and subject to bill and keep.

Venture claimed at hearing and in its Post Hearing Brief that the catalog charge is what was bargained for in the parties agreements. Bill and keep under their theory would not apply because of that bargain or contract, but also because the limited traffic through Venture's switch originated with their end users. TR 49. Venture Post Hearing Brief at 10. But, the amended ICA was the bargain, the contract, that provided for no compensation for non-access (local traffic) traffic. As stated by Fay Jandreau at hearing defending the applicability of the pricing catalog: "In fact, since these calls do not leave our rate center...or since these trunks do not leave our rate center and the numbers are local its clearly a local jurisdiction...TR 48.

Venture's claim is that Appendix A referenced in 5.1 of the ICA gets them to their pricing catalog allowing for them to charge the per trunk charge. See, Venture's Ex 3 & 5. Venture offers that AT&T agreed to the terms as written in the ICA and

thereby it is the pricing catalog that provides the recovery mechanism they seek. Venture post hearing brief at 10.

However, pursuant to the ICA Appendix A, Section 5: Facility Rate states: "To the extent CMRS Provider requires facilities referenced in **3.1** (emphasis added), such facilities will be made available and the price will be based upon the lowest Telephone Company interstate or intrastate rate published in the Telephone Company's tariff or pricing catalog."

As stated earlier, AT&T interconnects with Venture via facilities ordered from SDN per Section 3.3.1 and not 3.1. The Appendix A reference used by Venture and the Pricing Catalog does not apply to Section 3.3.1 and the facilities that were ordered from SDN.

In order for Venture to charge and recover, it must maintain that the facilities ordered, and not the traffic, provide for the claims. The facility charge however works as an end run; the basis upon which, accurate or not, has allowed Venture to inappropriately bill and collect for the transportation charges associated with local traffic. The position of AT&T is that these charges are not appropriate, have not been appropriate since at a minimum the parties amended ICA, and upon discovery by the company and its agent were objected to properly. The use of a Venture facility charge is not applicable to facilities ordered from a third party, nor does it change the nature of what Venture is billing for. A flat facility rate is no less offensive than a rate based charge on a per minute basis. Venture also in its attempt to describe the services it provides as "logical" states there is no distance or measurement of the of the alleged DS0 trunks it provides. TR67. This again supports AT&Ts position that Venture is performing an end office switching function for the calls it receives at its end office from the DS1 provided by SDN. As Dan Le laid out in his testimony, Venture is performing a port switching function similar to what Century Link does for a few dollars while trying to collect thousands pursuant to its pricing catalog. TR 146. By the carry forward argument from a 2005 billing of the pricing catalog, Venture is collecting for something that it no longer is able to, a local switching function. TR 128.

The traffic itself is not compensable other than as described below through NECA Tariff recovery and Venture's own user rates. Venture's claim is that the trunks it is providing are not access facilities so necessarily the pricing catalog is the appropriate place to bill for the trunks. Venture Post Hearing Brief at 5. But what

Venture seeks to charge AT&T for is simply something approximately 1600 other LECs do not. T130, 135. Venture's facility claim for facilities provided by a third party, and for a function which AT&T believes is an end office port function, literally is creating something new under the sun. Venture seeks to have this Commission enforce their interpretation of the ICA and its amendment, an enforcement which AT&T believes would create an absurd result.

A court in South Dakota, and this Commission acting under its statutory authority, is constrained from interpretating a contract in a manner that would produce an absurd result. *Nelson v. Schellpfeffer, 656 NW2d 740, 743 (SD 2003),* citing *Frost v. Williams 50 N.W. 964 (SD 1892).* "An absurd result is one that is 'ridiculously incongruous or unreasonable'; a result that the parties, presumed to be rational persons pursuing rational ends, are very unlikely to have agreed up." *Nelson at 743,* internal citations omitted.

In *Nelson,* a partner in a partnership was attempting to enforce an agreement between the parties in a manner that the Court found to be unreasonable. The dispute surrounded whether the term "distribution" included a return of capital. If the capital returned was not credited to the partner pursuant to the agreement there would have been produced an unreasonable, or absurd, outcome. Here, AT&T would offer Venture is doing much the same. Seeking the Commission to interpret an agreement between the parties producing an unreasonable result. It would not be a rational end, certainly after 2012 and in light of a Section 251 and 252 analysis, for AT&T to want to pay Venture what it seeks under the Agreements between the parties. As stated by Dan Le at hearing:

> (W)hy would we order a second T1 from another carrier to connect with an end office, you know, so...at a price that's higher than what we paid SDN for transporting it 150 miles? We'd be paying twice – double the price for 150 miles for something that's done with an end office, physical end office. TR 138.

VENTURES OTHER PAYMENTS

Venture attempts to argue in its Post Hearing Brief that a course of performance exists in the transactions between AT&T and Venture. Asserting that the Uniform Commercial Code applies fails in this instance. If the ICA is a service agreement, if an ASR is a request for service and not the sale of goods, the U.C.C. is not applicable. SDCL 57A-2-102. A good is a thing that is movable at the time of

identification to the contract. SDCL 57A-2-105. Fay Jandreau testified what AT&T was purchasing was a logical asset (his term) and not a physical asset. TR 67. It certainly was not a good you could "set...on a countertop and slide it across the table and say, there you go, you just purchased one." TR 32. The UCC is simply not applicable in this matter.

Under ICC Reform, Rate of Return carriers are compensated through their usage rates for costs associated with connecting direct trunks to the end office switch. TR 129, 145. Venture's currently billing AT&T usage rates per NECA Tariff No. 5. TR 129. As defined in Tariff 6.1.3.A.3: Tandem Switched Transport:

> The Tandem Switched Transport rate elements recover a portion of the costs associated with a communications path between a tandem and an end office on circuits that are switched at a tandem switch.
>
> Tandem Switched Transport rates consist of a Tandem Switching rate, a Tandem Switched Facility rate, and a Tandem Switched Termination rate. AT&T Exhibit 2.

Venture is billing NECA Rate Band 2 for Tandem Switching Rates and AT&T has paid these bills. TR 129. The tariff usage rates are applied to interMTA traffic based on the Percent interMTA Use (PIU) factor agreed upon in the ICA. TR 131. The interMTA factor is applied to the total traffic exchanged between the parties. The parties agreed that 3% (see ICA 7.2.3) of the total traffic is interMTA which is compensated at the NECA rates and 97% is local or intraMTA which has gone to bill and keep. Venture is also compensated monthly by SDN directly for the transportation charges SDN collects from AT&T for the T1s ordered. TR 63. Finally, Venture bills its end users for the services they provide.

What has not been disputed is that no other LEC bills AT&T for facilities in a manner like Venture. TR 130, 135. ASRs have not been interpreted in the same manner as Venture by other LECs leading to billing disputes. TR 135. Save one, no other LEC is billing AT&T for DSO trunks, essential in Venture position, for delivering of local traffic. TR 91. As testified to at hearing, in South Dakota another LEC currently in dispute with AT&T has asserted a similar facility charge claim, though all other LECs similar situated have not. See as example, AT&T Confidential Ex 6.

COUNTERCLAIM

Venture's Exhibit 11 and Dan Le's testimony lay out the charges we believe were in error and what AT&T has paid to date. The commission should order Venture to return the payments it received, since the dispute arose in February 2018. Venture was billing, and AT&T paid, from February 2018 through August of 2019 the per trunk charge as testified to by Fay Jandreau and as shown in the billing and payment history provided by Venture at hearing. Venture Ex 11. $2754 per DS1 times four trucks for 18 months. TR 139. The amounts paid for those months in 2018 and 2019 should be returned to AT&T and further claimed amounts of Venture should be denied. TR 139-140. The claims of AT&T and Venture overlap as to the amount billed, paid and remaining in dispute. If the Commission determines the charges were improper the amounts paid were improper.

CONCLUSION

In the end, Venture's claim is not simply about a collection action. It is a reflection of a new paradigm. The changing of intercarrier compensation that has impacted all similarly situated LECs. Venture though stands nearly alone in its claim.

Venture clearly had a billing practice going back to at least 2005 based on its pricing catalog trunk charge. Western Wireless paid it evidently. Alltel must have as well. The amount was such perhaps those companies never disputed it, or prior to 2012 the charge made more sense. However, since that time, the FCCs reform order and the parties amended ICA, the charge is clearly not appropriate. The Commission should deny Venture's claim and order it to refund the amounts paid by AT&T as described at the hearing.

Dated this 12th day of June, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing in the above-entitled action was delivered by electronic mail this 12th day of June, 2023, to the following:

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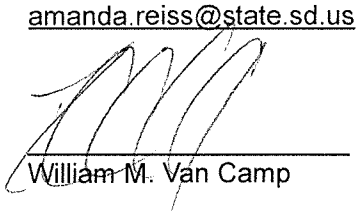

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