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 VENTURE COMMUNICATIONS POST-HEARING BRIEF

Introduction and Background

This post-hearing brief is filed on behalf of Venture Communications Cooperative ("Venture") following the April 13 – 14, 2023 hearing before this Commission. In a nutshell, this is a collection action to recover short-payment and, ultimately, non-payment by AT&T Mobility ("AT&T")[1] for local trunks ordered from Venture and used by AT&T over many years. These local trunks were utilized by AT&T to create local calling patterns, such that AT&T's customers within Venture's local calling area could receive calls from Venture customers on a local basis. These facilities are necessary to create local calling patterns because AT&T chose to locate its switch in Omaha, Nebraska,[2] instead of making that investment in South Dakota. As the record shows, AT&T ordered facilities from Venture to mimic the local calling pattern that would have existed had it actually established its switch locally.

After ordering and using Venture facilities to its benefit for well over a decade, AT&T decided it no longer wished to pay for them. This process was drawn out between May 2016 and August 2019, when AT&T began short-paying, and then in August 2020, when AT&T stopped payment altogether. In May 2020, Venture filed this Complaint to collect the past due assessments, and ongoing non-payment amounts, as AT&T continued to use Venture facilities without paying

[1] AT&T Mobility is a trade name for New Cingular Wireless PCS, LLC.
[2] Hearing Transcript pg. 32 and Venture Ex. 12 (noting a logical connection "between the AT&T Mobility switch located in Omaha and the Venture Communications switches which are located in three different areas: Highmore, Sisseton, and Britton").

for them. In the summer of 2022, AT&T ordered the disconnection of these trunks, ultimately causing Venture's land-line customers to incur toll charges for calls that were previously "local".

This brief will discuss the specific facts of AT&T's ordering and use of the local trunks. AT&T's defenses will also be discussed, such as claims grounded in "bill and keep" requirements; allegations that a National Exchange Carrier Association ("NECA") FCC tariff controls local trunk pricing here; allegations that Venture's rates are unreasonable under Section 252 of the Communications Act of 1934, as amended ("the Act"); and that, evidently, Venture's trunks should be free, since according to AT&T, Venture does not really do anything to create the local calling patterns. TR pg. 124 (Mr. Le testifying that "Venture is doing a local switching and porting function to connect the T1 point of presence in their end office to their own end users. It's a porting that they do within their own end office. They're not going out. They're not doing any further.").

The evidence and arguments of both parties rely on documents, industry standards, and law which are frequently known by acronyms and this brief will try to address these matters in plain English. The parties' agreement to interconnect, the ordering process, and key points in the dispute are discussed first.

I. Factual Background: History of the Dispute

The basis of the payment dispute and this Complaint proceeding lie in AT&T's use of trunk interconnection facilities which it ordered. Hearing Transcript (hereinafter "TR") pg. 29 (Venture witness Fay Jandreau testified that "type 2B trunks were ordered, type 2B trunks were provisioned, type 2B trunks were tested, type 2B trunks were accepted, and type 2B trunks were provided for many years."). The facilities were ordered pursuant to the parties' interconnection agreement ("ICA") approved by this Commission on April 5, 2004.[3]

[3] The ICA was originally between Venture and WWC License L.L.C. ("Western Wireless"). AT&T succeeded to the ICA sometime before 2012.

As earlier mentioned, AT&T's choice of facilities was principally driven by two factors: first, its choice to locate its switch in another state instead of Venture's local calling area; and second, its desire to avoid having its customers reached by toll calls from Venture's land line customers.

How were such facilities ordered? Two documents in the record demonstrate this. First, the parties ICA describes several forms of wireline to wireless interconnection under Section 3.1. Venture Ex. 3, pg. 5. Specifically, sub-section 3.1.3 describes Type 2B as a type of direct "trunk side" connection conferring local traffic exchange between Venture customers and wireless customers, where both sets of customers are to be served by that telephone company end office. Id., pg. 5.[4] This particular form of interconnection creates local calling on a wireline to wireless basis, see Venture Ex. 12, though it takes Venture's facilities to achieve that local calling pattern. See TR pg. 29, Venture witness Jandreau discussing AT&T's order of Type 2B interconnection. Mr. Jandreau even more emphatically confirmed the necessity of DS0 trunks to achieve local calling in the following discussion with Commission Nelson and with Hearing Examiner Cremer:

> COMMISSIONER NELSON: Mr. Le did testify that DS-0 trunks were not necessary. And so I just want to make clear, is it your testimony that in order for this local calling to be accomplished, that DS-0 trunks are necessary within your switch? Is that correct?
>
> THE WITNESS: That is correct. They are absolutely necessary for the establishment of a two-way talk path between two ends. That happens at a DS-0 level. TR pg. 208.
>
> MS. CREMER: Now following up on Commissioner Nelson's question and your response, DS-0 is necessary. But can a T1 perform the same thing?
>
> THE WITNESS: No. The T1 provides the transport from point A to point Z. It gets them between the offices.
>
> MS. CREMER: And so there has to be a DS-0 or a DS-1? Or just a DS-0?
>
> THE WITNESS: Yes. We provision it at a DS-0 level inside the switch. TR pg. 209.

[4] The Local Calling Area is designated in a diagram attached to the ICA as Exhibit B.

The second document, the Access Service Request ("ASR") demonstrates the second step of the facilities order. As Mr. Jandreau explained in his testimony, the Venture interconnection trunks are ordered via these industry standard ASRs, which were submitted to Venture by AT&T or its agent, TEOCO. TR pgs. 23–25. Mr. Jandreau's testimony included an exhibit (Venture Ex. 4) to show AT&T's ASR submitted for the Highmore exchange.

The additional functions of the local trunks at issue, and the work attendant to providing their local calling patterns, are discussed later herein, in the context of AT&T's defenses. The source of Venture's billing authority itself merits discussion here. As described earlier, AT&T ordered Type 2B interconnection facilities (TR pg. 29: "But make no doubt about it, Type 2B trunks were ordered, Type 2B trunks were provisioned . . . and Type 2B trunks were provided for many years"). Mr. Jandreau pointed directly to the language in the "Remarks" section of the Highmore ASR to demonstrate exactly what AT&T ordered from Venture: "'Establish a new type 2B two-way SS7 . . . DF wireless trunk group . . . T1' – that's the single line that traverses from Omaha to Highmore, so that's the single line in the middle, that's the T1 – 'and 24 SS7 trunks at DS0 rate.'" Venture Ex. 4, pg. 1; TR pg. 34. The language of the actual order—the ASR—could not be much clearer that AT&T ordered 24 DS0 trunks from Venture.

ICA Appendix "A" sets forth pricing sources for the facilities referenced in ICA Section 3.1, such as Type 2B trunk facilities. That section reads as follows:

> FACILITY RATE. To the extent CMRS Provider requires facilities referenced in 3.1, 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.

Venture Ex. 3, ICA Appendix A, ¶5. Though AT&T asserts this section means that Venture's DS0 trunk pricing should come from Venture's interstate switched access tariff (NECA Tariff FCC No. 5), Venture has billed such trunks, which are not interstate access services as AT&T concludes,

from its local pricing catalog, which is authorized in the above language. AT&T has been billed from the relevant rate sheet of this catalog (See Venture Ex. 5 for pricing catalog excerpt) for many years without question or complaint, demonstrating a course of performance, discussed in detail later on the subject of bill and keep. Mr. Jandreau testified that Appendix A of Section 5 of the ICA "specifically states that the local pricing catalog is a valid place for [Venture] to surmise our pricing from" and "In fact . . . since these trunks do not leave our rate center and the numbers are local, it's clearly a local jurisdiction and therefore, our local pricing catalog would be the logical place to find that." TR pgs. 48-49. In sum, Venture has billed from the correct source—its pricing catalog—for these local circuits. The interstate and intrastate access tariffs do not apply, as the local trunks are not access facilities, and neither tariff offers these local trunks. See Venture Ex. 1, at pg. 5 (discussing inapplicability of access tariffs for local trunks, that no such trunk group facility charges are offered in access service tariffs, and leaving Venture's local pricing catalog as the only pricing option); see also Venture Ex. 4, at pg. 3 (demonstrating how the NECA tariff is additionally inapplicable given the representations in AT&T's ASRs that the percent interstate usage (PIU) is zero).

II. "Bill and Keep" Does Not Prohibit the Disputed Charges

Venture would note initially that AT&T's defenses have been a moving target throughout these proceedings. For example, in its Answer, AT&T stated that AT&T issued ASRs *with Venture* for the provision of four DS1 circuits (2 interstate and 2 intrastate). See AT&T Mobility Answer ¶7, pg. 3 (*emphasis added*). At the hearing, AT&T denied submitting ASR's to Venture, or if provided, it was only as a "courtesy" copy. TR pg. 179.

At the hearing, AT&T's primary argument is that the "bill and keep" compensation methodology, adopted by the FCC in the *Transformation Order*[5] and referenced in the parties' amended ICA, mandates that the disputed charges are not compensable. See e.g., TR pg. 126 (in which Mr. Le states "...local traffic is deemed to be no longer compensationable [sic]" and that "neither party can be charging each other for local traffic. It goes to bill and keep"). However, the bill and keep methodology is not nearly as broad as AT&T asserts, and AT&T's focus and reliance on bill and keep is misplaced, for the following reasons. First, under the terms of the ICA, bill and keep only applies to "traffic" charges. The flat-rate monthly billings disputed by AT&T are not "traffic" charges. Second, bill and keep only prohibits compensation for terminating traffic charges, and the monthly billings in dispute are for originating local dialing functions that are fundamentally different than the per-minute reciprocal compensation charges replaced by bill and keep. Finally, although bill and keep is a default methodology, the parties are free to negotiate alternate terms and have done so here. The parties' course of performance demonstrates contractual intent to provide compensation for the disputed trunks, assuming that the bill and keep argument is remotely believable in the first place, which it is not. These points are discussed in order.

a. The Disputed Charges are Not "Traffic" Charges

By its terms, the amended ICA requires that traffic is exchanged on a bill and keep basis: "non-Access Telecommunications Traffic exchanged between the parties . . . shall be exchanged on a bill-and-keep basis." AT&T Ex. 3, pg.1 (*emphasis added*). The amended ICA confirms that bill and keep requires the "per [minute of use] rate for LEC, as set forth in "Appendix A" of the existing Agreement between the parties, shall be $0.00." AT&T Ex. 3, pg. 2. These "per minute"

[5] *In re: Connect America Fund*, 26 FCC Rcd 17663 (FCC 2011) (*"Transformation Order"*).

rates were a feature of reciprocal compensation which, as discussed later, were replaced by bill and keep. Id. However, the DS0 trunks purchased by AT&T are not "traffic." Venture witness Mr. Jandreau explained that such trunks are a "logical asset" within the switch, which provides the environment necessary to screen and route traffic in the manner required by AT&T – i.e., to make calls from Venture landlines to certain of AT&T mobile numbers to be reached as local calls. TR pgs. 28, 67. Mr. Jandreau also clearly refuted the application of bill and keep to the DS0 trunks ordered by AT&T when responding to questions from Commission Advisor Greg Rislov:

> MR. RISLOV: I would like to know your definition of what services are included in the bill-and-keep regime.
> THE WITNESS (Fay Jandreau): Bill and keep is defined as providing relief to the originating carrier from terminating charges from the terminating carrier.
> MR. RISLOV: And the services being provided, would they include the assignment of local trunks as well?
> THE WITNESS: No, they would not. TR pgs. 205-206.

Thus, these trunks are a facility that allows the traffic to flow in a particular calling pattern ordered by AT&T. As Mr. Jandreau explained, the ordered DS0 trunks are priced on a monthly per-trunk basis. They are not, and never were, traffic sensitive, unlike actual per-minute traffic before bill and keep zeroed out those per-minute charges. Accordingly, the flat monthly bills for the local trunks do not represent "traffic" within the bill and keep language of the amended ICA.

b. The Disputed Charges are Not "Terminating" Charges

The bill and keep mechanism finds its roots in the FCC's *Local Competition Order*. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (FCC 1996) ("*Local Competition Order*"). This order implemented the Telecommunications Act of 1996, including interconnection standards. *Local Competition Order* at ¶1, n.1. In determining the terms of interconnection between local exchange carriers and commercial mobile telecommunications carriers ("CMRS") like AT&T, the Commission

determined that symmetrical reciprocal compensation provisions should apply for the transport and termination traffic exchange. *Local Competition Order* at ¶¶1094-95. At that time, the Commission also considered bill and keep between these two classes of carriers and concluded that state commissions could impose bill and keep in some circumstances during the arbitration process. Id. at ¶1111.[6] It is abundantly clear from the *Local Competition Order's* record that reciprocal compensation elements were expressed in minutes of use ("MOU") in interconnection agreements and by the FCC. Id. at ¶¶1082, 1086 and n. 2624.

Following the *Local Competition Order*, the February 2004 ICA was struck establishing, among other things, the per-minute reciprocal transport and termination rates set forth in Appendix A to the ICA. The same paragraph recounts that those rates are not based on a specific costing methodology or company specific cost study. See Venture Ex. 3, pg. 2. Appendix A rates are listed as per-minute rates in paragraphs 1.0, 2.0, and 3.0. Id. at pg. 22. In June 2012, the parties executed the amendment to the ICA, implementing bill and keep traffic exchange. See AT&T Ex. 3. Specifically, the terminating MOU specified in Appendix A was reduced to zero. Id. at pg. 2. However, paragraph 5.0 of Appendix A was untouched by the amendment. This paragraph, which is entitled "Facility Rates," identifies the source for prices for facility interconnection, including Venture's pricing catalog.

As discussed following, the FCC's policy move to bill and keep, and the parties amendment just discussed, effectuated bill and keep by eliminating the MOU charges for terminating traffic. The amendment to the ICA defines bill and keep, in pertinent part, as follows:

> Bill-and-keep, for purposes of this Amendment and the existing Agreement between the Parties, shall mean that the originating Party has no obligation to pay terminating charges to the terminating Party.

[6] Of particular note, the FCC also observed that none of the standards in section 252(d) apply to voluntarily negotiated agreements. But, this is precisely the authority that AT&T relies upon to press its pricing claim despite the fact that the parties ICA here is such a negotiated agreement.

AT&T Ex. 3 at p.1. Mr. Jandreau described the requirement similarly: "Bill-and-keep is in place to protect an originating party from being billed terminating charges from a terminating carrier." TR pg. 49. So in this context, bill and keep would actually protect Venture from receipt of terminating charges from AT&T. He further explained that the "switch port" referenced in Mr. Le's testimony does not require bill and keep, because it allows for traffic originating from Venture to flow in the particular calling pattern ordered by AT&T. Venture Ex. 1 pgs. 4-5.

The FCC's relevant orders have been consistent with both Mr. Jandreau's testimony and the ICA Amendment itself, discussed earlier. The FCC's 2011 *Transformation Order* discussed CMRS/LEC traffic exchange before bill and keep by noting that CMRS providers with reciprocal compensation arrangements with a LEC "must compensate the LEC for terminating traffic" on the CMRS provider's network. *Transformation Order* at ¶976. That *Order* went on to adopt bill and keep as the "default" compensation mechanism for non-access traffic exchange between LECs and CMRS providers. Id. at ¶978. The FCC's *Order on Reconsideration*, released December 23, 2011, which the ICA Amendment purported to implement, simply adjusted the implementation date for the "default" bill and keep methodology, without altering the terminating traffic requirement in the definition. *In re Connect Am. Fund*, 26 FCC Rcd 17633 (FCC 2011).

Thus, according to these two Orders and the explicit language in the parties' ICA Amendment, Venture is not imposing termination charges on AT&T for the calls in question. These calls, which are the only calls handled by the DS0 trunks in dispute here, are originated by Venture. Of course, this argument assumes to begin with that the flat-rated optional calling patterns facilitated by Venture's trunks constitute "traffic," within the meaning of bill and keep, as earlier discussed, which it does not. But, bill and keep is also conditioned by the "default" requirement, as noted above, and the parties have contracted otherwise.

c. The Parties Agreed to Terms that Allow the Disputed Charges

Finally, even assuming for the sake of argument that bill and keep is remotely applicable to a facility that has never been subject to a per-minute charge, and that bill and keep would normally prohibit compensation for the disputed trunks, which is clearly not the case, the parties have nevertheless agreed otherwise. In the *Transformation Order,* the FCC adopted bill and keep as a default methodology, and expressly stated that, "[b]y default, we mean that bill-and-keep will satisfy terminating compensation obligations *except where carriers agree to the contrary.*" *Transformation Order* at ¶ 9944 n. 2096 (*emphasis added*). In testimony at the hearing, Mr. Jandreau noted that "bill and keep is also a default billing arrangement if no other arrangements have been made. And, clearly, in this case we have an Interconnection Agreement that has been made." TR pg. 49. Here, the negotiated amended ICA and the parties' course of performance reflect that the parties agreed to the DS0 trunk facilities and the rates therefor.

For instance, as discussed previously, the Amendment recites that bill and keep shall be accomplished as follows: "Accordingly, the per MOU rate for LEC, as set forth in "Appendix A" of the existing Agreement between the parties, shall be $0.00." AT&T Ex. 3. Thus, the three paragraphs of "Appendix A" of the original ICA, listing minutes of use rates, were reduced to $0.00. Untouched by the Amendment, however, was paragraph 5.0 titled "Facility Rate," which lists facility pricing, including two access tariffs and Venture's pricing catalog, from which the disputed charges were drawn. AT&T, Ex. 2. The parties' written instrument is presumed to reflect their intent to leave necessary facilities subject to the rates in the tariffs and pricing catalog. This omission from the amendment process is logical. Wireless carriers need facilities to configure their networks. If they were permitted, however, to order facilities without any pricing constraints

under the guise of bill and keep, it would be an easy matter to deny competing carriers ILEC interconnection by the simple ploy of overordering of facilities.

In addition to the plain language of the Amendment, which only superseded the reciprocal compensation MOU rates, the parties' conduct also reflects a course of performance at odds with AT&T's arguments here. Under South Dakota law, a course of dealing between the parties, in which they are engaged or of which they are or should be aware, is "relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement." SDCL § 57A-1-303(d).

In this respect, it is noteworthy that AT&T's first post-ICA amendment ASR for trunks was submitted to Venture in 2012. See Venture Ex. 1, pg. 2. This occurred approximately six months after the ICA Amendment was executed. Moreover, as Mr. Jandreau testified, between this first ASR in December 2012 and the October/November 2017 timeframe, AT&T ordered a total of four trunk groups via the ASR document. Id., pg. 4. AT&T tested and accepted the local trunk groups and dialing patterns, utilized them and waited approximately three years to even question its bills for the first ASR. Id., pg. 6. Mr. Jandreau discussed the pricing of these trunks from the Company's pricing catalog and matching the ASRs' DS0 trunk orders with the mobile cellular digital trunk rate in the catalog. TR pgs. 25-27. He noted that, as recently as 2022, AT&T's agent, TEOCO, was submitting claim forms to Venture claiming that AT&T only owed Venture $447.10 per trunk, instead of the $2,364.00 amount billed by Venture, another of several inconsistencies in AT&T's position since true bill and keep would not result in any charges. TR pgs. 27-28.

Considering this history of ordering trunks, testing, accepting, and using the same, it is hardly credible that AT&T was not aware of its conduct. And all of this occurred after AT&T

signed the Amendment, which AT&T now argues subjected these trunk charges to the non-recoverable regime of bill and keep. Indeed, as discussed, AT&T's agent, TEOCO, continued to claim until recently (and inconsistent with bill and keep) that AT&T owed several hundred dollars per month instead of Venture's bills of $2,364.

III. AT&T's Flawed Cost Argument is Unsupported by Fact and Barred by the Communications Act

At the hearing, AT&T argued for the first time that the disputed Venture trunk charges were above cost and "unfair, unjust and discriminatory," in the words of AT&T's witness. TR pgs. 156-57. Relatedly, Mr. Le testified that neither the ASRs ordering the trunks nor the trunks themselves were necessary to provide the local calling patterns. The "unfair, unjust and discriminatory" argument was an attempt to navigate the Telecommunications Act of 1996 with a broken compass. Only an arbitrated agreement, and not a negotiated agreement like the ICA, is subject to these pricing elements. See 47 USC section 252(d), *Local Competition Order* at ¶1111 ("...none of the standards in [section 252(d)] apply to voluntarily negotiated agreements"). Aside from that defect, Mr. Le's testimony and the exhibit he sponsored comparing raw prices without cost information proved little in the way of this irrelevant argument. These points are discussed in order.

Mr. Le's testimony alleged that section 252(d) of the Telecommunications Act requires the pricing of the network elements here to be cost-based and allow for a reasonable profit. TR pg. 122. He also referred to Venture trunk charges as "unfair, unjust and discriminatory." TR pg. 157.[7] But, these pricing standards advanced by AT&T simply do not apply here. As Mr. Jandreau's testimony recounts, the parties' ICA was filed with this Commission on February 18th, 2004, and approved on April 5th, 2004. The applicable standards for a negotiated agreement's approval are

[7] Much of Mr. Le's testimony on the subject was based upon a comparison exhibit (AT&T Confidential Exhibit 6) purporting to show Venture's "unreasonable" trunk pricing by comparison with those of three other South Dakota ILECs. As discussed here, this evidence should be accorded no weight.

narrow. Section 252(e) of the Act specifies the grounds for rejecting such a negotiated agreement as: (i) if the Commission finds that the agreement or a part of it discriminates against a telecommunications carrier not a party to the agreement, or (ii) the implementation is inconsistent with the public interest, convenience, and necessity. In short AT&T's argument on pricing elements attempts to redraw section 252(e), which would have prevented approval of the ICA had the Commission found discriminatory conduct. If such claims had merit (and they do not) they would now be legally foreclosed.

AT&T claims as to the merits of its "unfair, unjust and discriminatory" claim fare no better. In this respect, witness Le principally relied upon the aforesaid AT&T Confidential Ex. 6, comparing trunk prices of other ILECs. Mr. Le's testimony as to the pricing issue was remarkable in its lack of specificity. For instance, no basic rate making calculation was provided on Confidential Exhibit 6, or anywhere else; no facility ordering information was provided to demonstrate comparable pricing; and witness Le was unable to answer many questions about his proffered pricing comparison. For instance, Mr. Le admitted that he had not conducted a cost study of these comparison companies shown on Confidential Exhibit 6. TR pg. 152. He also admitted that he had not reviewed the underlying ICA's—a surprising lapse given the fact that his own company is presumably a party to these agreements. TR pg. 153. He was further unaware as to whether the other companies utilized a local pricing guide, like Venture. TR pg. 156. He also admitted that he was unaware of each comparison company's relationship with SDN—a striking admission since SDN's pricing information is included for each company on AT&T Confidential Exhibit 6. TR pgs. 170-71. Unsurprisingly, while maintaining the complaint about "unfair, unjust and discriminatory" pricing, Mr. Le admitted the following: "You know, is it cost based? I don't

know." TR pg. 156. Against this background Mr. Le's pricing complaint is not worthy of consideration.

IV. The Myth of Unnecessary and Cost-Free Trunks

Perhaps one of the most incredible "defenses" asserted by AT&T, possibly as part of the cost/pricing subject discussed earlier, although it was never clear, AT&T claimed in Mr. Le's pre-filed testimony (see AT&T Ex. 1 pg. 5) and at the hearing that Venture provided no service associated with the DS0 trunks, other than a "local switching and porting" function. TR pg. 124 (Witness Le stating, "It's a porting that they do within their own end office. They're not going out. They're not doing anything further."). As discussed earlier, Mr. Le argued repeatedly that all the Venture trunk functions were covered by bill and keep. Venture's brief here has already addressed AT&T's incorrect bill and keep arguments. The notion that the local calling trunks are unnecessary and/or cost free is simply a myth – a world-is-flat claim thoroughly at odds with the record. As a consequence of this claim, witness Le described the ASRs in Venture's Exhibit 4 as merely a "courtesy copy" tendered to Venture, having really been meant for SDN. TR pg. 132. He also claimed that Venture does not even provide the 24 DS0s ordered on the ASRs. TR pg. 137 (responding to Venture Ex. 10, "I do agree that SDN provides T1 functions in the middle there between AT&T and Venture. I disagree that Venture provides – provided the 24 DS-0s."). Mr. Le characterized the separate charges of SDN for the T1 and Venture for the DS0s as "paying twice" and "double" the price for transport because DS0 functions are just "done (apparently for free) within an end office." TR pg. 138.

In making this claim, witness Le certainly was underinformed. As the Commission may remember, there were two components to the ASRs. One component was a high-capacity transport circuit (i.e., the T1) between SDN in Sioux Falls and Venture's office in Highmore. The other

component was the DS0s directed to Venture at its Highmore office. See Venture Ex. 4. Yet, Mr. Le was unaware as to how the T1 was actually purchased from SDN, TR pg. 167, and equally at sea as to why DS0s were ordered in addition to the DS1 (or T1):

> COMMISSIONER NELSON: In answering a question from Ms. Reiss, you stated, I believe, that DS0 trunks are not necessary for the function that was seeking to be provided, correct?
>
> THE WITNESS: Well, yeah. Yes.
>
> COMMISSIONER NELSON: So, why, on the ASRs, do you mention DS0 trunks if they are not necessary?
>
> THE WITNESS: There is 24 DS zeros on a DS1. So you know, it's on the field.
>
> COMMISSIONER NELSON: Why would you mention something that's irrelevant, in your mind?
>
> THE WITNESS: I mean, it's a standard form that's been used, I mean, before I – you know, for a long time now. So I can't explain the thinking of why they put it on there.

TR pg. 178 (*emphasis added*). Mr. Le, who admittedly is not an engineer, (TR pg. 179) further demonstrated his lack of understanding as to how AT&T's and Venture's networks interconnect in responding to questions on cross-examination. Mr. Le testified that AT&T has "local calls between our customers now regardless of whether we have T1s in place" and that "the DS0s were not necessary." TR pgs. 171-72.

Perhaps consistent with this theory that Venture performed no function other than local switching, Mr. Le testified that the ASR was only supplied to Venture as a "courtesy copy." TR pg. 179. Mr. Le further testified in response to Commissioner Nelson that there was no way to understand to whom an ASR may have been sent. TR pgs. 179-180.

In stark contrast to Mr. Le's lack of knowledge was Witness Jandreau's testimony, which illustrated a clear understanding of interconnection and which paints a markedly different picture. He testified as to why AT&T wanted local dialing patterns for Venture's local markets and explained the dialing patterns requested in the ASRs in the context of AT&T wireless number

blocks. TR pg. 22; Venture Ex. 12. He further explained the function of the ASRs in establishing the interconnection itself. TR pgs. 22-24; he explained that the ASRs were received in the normal course of Venture's business in order to activate the interconnection service and, importantly, described in detail the tasks undertaken to establish AT&T's local calling patterns: "[w]e make sure that the services are meeting their needs. We test them. We provision them. We make adjustments if necessary. They accept the services." TR pg. 24. He further testified that Venture personnel actually speak with the carrier that has submitted the ASRs. Id. He also described in close detail the functions performed by the local trunks themselves to accomplish AT&T local calling. He described the following functions of the call setup process within Venture switch:

- the porting query for local number portability;
- call attestation for robocall mitigation (if no port);
- SS7 messages covering several more functions; and
- TCIC functions to coordinate the call path between the Venture switch and the distant switch.

TR pgs. 37-38; Venture Ex. 10. Mr. Jandreau also refuted Mr. Le's claim that SDN provides the local trunking functionality performed by Venture, as not possible. TR pgs. 40, 49, and 91. He further refuted any suggestion that the trunks are a cost-free enterprise, specifically identifying some of the ongoing costs of maintaining the trunks, including switch maintenance. TR pgs. 96-97. Though clueless about several pertinent facts, as previously discussed, AT&T's witness was adamant about offloading these costs to Venture's customers. TR pg. 128.

Against this evidentiary background, it is hard to accord any credibility to AT&T's contention that Venture doesn't do anything when it receives an ASR from AT&T. Clearly, for many years before AT&T's recent disconnection, and subsequent death blow to local calling, such calling was accomplished precisely because of Venture's local trunks and attendant functions. If

nothing else, AT&T's recent disconnection of those local trunks, with the consequent cessation of local calling patterns, proves this point.

V. AT&T's Counterclaim is Without Merit

AT&T has failed to carry its burden of proof on its Counterclaim. Venture Ex. 1, pg. 6. At the end of the evidentiary hearing, the Hearing Examiner correctly noted that "Both parties have a burden here" and offered both parties the opportunity to supplement the record or testimony if "anybody [is] thinking they need something to make their burden." TR pg. 211. AT&T not only failed to avail itself of that opportunity but also throughout testimony, failed to introduce any evidence to support its Counterclaim.

AT&T first alleges in its Counterclaim that it "placed orders with Venture for four (4) *DS1 facilities* pursuant to Venture's interstate (two (2) DS1s) and intrastate tariffs (two (2) DS1s) via Access Service Requests ("ASRs")." See AT&T Answer and Counterclaim at pg. 9 (*emphasis added*). In its Counterclaim, AT&T claims to have established interconnection facilities between AT&T and Venture with these ASRs. It is important to note that AT&T's Counterclaim is contrary to AT&T's arguments and the evidence produced at the hearing. DS1s provide transport, the same as a T1, and AT&T vehemently asserted that it ordered transport from SDN. TR pg. 124 ("AT&T pays SDN to transport—for the T1s that we have ordered to reach the end offices of Venture . . . SDN delivers, you know, the T1 into the end office of Venture . . ."); see also TR pg. 132 ("Well, AT&T is issuing these ASRs in this instance to SDN . . . So, you know AT&T's ordering a T1 to connect from . . . Omaha to Sioux Falls where its [sic] SDN will transport via the T1 that we ordered to the various end offices of Venture.").

It is also noteworthy that the evidence at the hearing supports the difference in functionality between DS1s and DS0s. DS1s are transport facilities, and DS0s are the local trunks that provide for the establishment of the local dialing patterns AT&T requested. Mr. Jandreau testified:

> Q. Mr. Jandreau, going back to some discussion of architecture, that network architecture we have, specifically concerning the difference between DS-1s and DS-0s, just for clarification, can you tell the Commission whether a DS-1 transport facility such as the type utilized today that exchanges traffic, local traffic, between AT&T and Venture can provide local trunks for the purpose of the local dialing patterns that AT&T is requesting?
>
> A. No, they cannot.
>
> Q. And can the local trunks that they have requested provide long distance transport, pardon the phrase, to get a call from Venture to AT&T's network in Omaha?
>
> A. No, it cannot. TR pgs. 91-92.

AT&T completely failed to produce any evidence that it ordered DS1s from Venture, pursuant to ASRs, and instead changed tactics completely at the hearing. AT&T Witness Le went so far as to deny that AT&T ordered anything from Venture. "AT&T is issuing these ASRs (referring to Venture Ex. 4) in this instance to SDN. We sent a courtesy copy to Venture, you know." TR pg. 132. Nowhere in the record (pleadings or testimony) does AT&T introduce or point to anything in the Exhibits that supports the claim made in its Counterclaim that it ordered DS1s from Venture. AT&T also failed to refute the plain language of the ASRs themselves (i.e., the actual orders for service), which clearly state, "Establish a new type 2B two way SS7 . . . wireless trunk group with one T1 . . . and *24 SS7 trunks at DS-0 rates.*" See Venture Ex. 4 and testimony of Fay Jandreau, TR pg. 34 (*emphasis added*).

AT&T next alleges in its Counterclaim that Venture was improperly billing for the DS1 circuits it was providing because Venture's billings were inconsistent with its access service tariffs. Again, this claim is totally inconsistent with AT&T's arguments and evidence presented at the hearing. AT&T Answer and Counterclaim, pg. 10. AT&T failed to produce any evidence of this and in fact, denied ordering any service from Venture. AT&T introduced Ex. 2, which is the NECA

tariff, but claimed instead that any services provided by Venture were subject to bill and keep. Furthermore, in footnote 2 of its Counterclaim, AT&T states as its position "that this Commission does not have jurisdiction over services provided pursuant to interstate tariffs, and therefore only seeks recovery of those claims related to intrastate services." Not only does this statement muddy the waters as to what AT&T is seeking by way of damages, it also renders any references and arguments concerning the application of the NECA tariff irrelevant.

AT&T alleges in its Counterclaim that Venture improperly applied its pricing catalog and charged amounts in excess of the "appropriate intrastate rates for the DS1 facilities." AT&T Answer and Counterclaim, pg. 11. As addressed in previous sections of this Brief, AT&T has failed to establish any of its ever-changing defenses to refute Venture's Complaint (i.e. bill and keep, NECA tariff, unjust pricing, no services ordered). Certainly those "defenses" do not sustain the heavier burden of AT&T to support its Counterclaim.

AT&T requests a "refund of the amounts paid by AT&T for the DS1 services provided by Venture for the period allowed pursuant to the applicable South Dakota statute of limitations in an amount to be proven at hearing." AT&T Counterclaim, pg. 11. AT&T failed to introduce any evidence or exhibits at the hearing supporting its requested relief. The only testimony proffered by Mr. Le was from Venture's Exhibit 12, and that testimony was unclear and insufficient to support AT&T's burden of proof. Furthermore, even if AT&T would have established any damages at the hearing, which it made no attempt to do, AT&T's claim would be barred by the limitations set forth in the ICA. See Venture Ex. 3, ¶10.

For all of these reasons, AT&T's Counterclaim should be denied.

Conclusion

Venture respectfully urges the Commission to grant the relief prayed for in Venture's Complaint against AT&T for non-payment of the local DS0 trunks ordered and used by AT&T. AT&T's arguments to the contrary are without merit and should be rejected. AT&T's Counterclaim is likewise without merit and should be denied.

DATED this 22nd day of May, 2023.

RITER ROGERS, LLP

BY: Darla Pollman Rogers

Darla Pollman Rogers
Ellie J. Bailey
319 S. Coteau – P. O. Box 280
Pierre, SD 57501-0280
605-224-5825
Attorneys for Venture Communications Cooperative, Inc.

BLOOSTON, MORDKOFSKY, DICKENS & PENDERGAST

BY: */s/ Benjamin H. Dickens, Jr.*
Benjamin H. Dickens, Jr.
Salvatore Taillefer, Jr.
2120 L Street NW Suite 825
Washington, DC 20037