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 REPLY TO AT&T MOBILITY'S POST-HEARING BRIEF

Venture Communications Cooperative, Inc. ("Venture") files this Reply Brief to address the numerous factual and legal errors contained in AT&T Mobility's ("AT&T's") Post Hearing Brief ("AT&T Brief") of June 12, 2023, filed in response to Venture's Post-Hearing Brief of May 22, 2023 ("Venture Brief"). As discussed in greater detail below, AT&T's own failure to properly review Venture's invoices is irrelevant to the fact that AT&T nevertheless ordered and made use of the trunks at issue. These trunks are correctly billed pursuant to the interconnection agreement ("ICA") between the parties, as amended in 2012, and not subject to bill-and-keep. AT&T's novel pricing analysis, which suggests that Venture is already adequately compensated for any service it may or may not provide, ignores established principles of compensation that AT&T itself has supported in the past. Contrary to AT&T's assertions, there is a clear course of performance between the parties for the past decade confirms Venture properly billed AT&T for the trunks at issue.

I. <u>Summary</u>

Venture's initial brief discussed the background and history of the parties' dispute over AT&T's non-payment of its bills. As noted therein, Venture provided trunk facilities that were ordered pursuant to the parties' interconnection agreement ("ICA") that was approved by the Commission on April 5, 2004. These trunk facilities and associated transport were necessary because AT&T decided to locate its mobile switch outside of South Dakota, but still desired local calling patterns between Venture's exchanges and AT&T's customers. In an extreme contortion of telecommunications policy, AT&T now suggests that Venture's customers pick up AT&T's unpaid tab for the facilities and local calling functionality AT&T ordered.

The facilities were ordered through Access Service Requests ("ASRs"). The DS0 trunks ordered by AT&T were "absolutely" necessary to create the local calling pattern desired by AT&T. Hearing Transcript ("TR") p. 208. During the hearing, Venture's witness Fay Jandreau

refuted AT&T's witness Dan Le, who claimed in this respect that the DS0 trunks were not necessary. *Id.* Mr. Jandreau recounted that AT&T ordered "Type 2 B" trunks in the ASRs (e.g., for the Highmore exchange) and described the difference between the ASR's T1 order, connecting AT&T's Omaha switch to Highmore, and the 24 DS0 trunks ordered from Venture, creating the environment necessary for the local calling pattern. TR p. 29.

Mr. Jandreau explained the ICA's provisions for pricing the "Type 2 B" trunks beginning with Appendix "A" to the parties' ICA. This language requires that "...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." TR p. 117. AT&T has argued that the correct source for pricing those trunks is both Venture's interstate access tariff – National Exchange Carrier Association ("NECA") FCC Tariff No. 5 and the South Dakota Local Exchange Carrier Association ("LECA") tariff. AT&T Brief at p. 9. Specifically, according to AT&T, the trunk price should be zero because the South Dakota intrastate tariff – LECA – mirrors the NECA tariff No. 5, and because NECA No. 5 contains no facilities nor pricing element for local trunks. *Id. See also*, Venture Ex. 1 p. 4; New Cingular Wireless PCS, LLC d/b/a AT&T Mobility's Answer to Complaint of Venture Communications Cooperative and Counterclaim, at p. 7, Third Defense.

Mr. Jandreau further explained the numerous inconsistencies with this access tariff-based theory. He explained, for instance, that the trunks were local, within Venture's rate center, and necessarily not interstate access service. TR p. 48-49. Moreover, AT&T's argument that the NECA tariff results in free trunks is contradicted by AT&T's representation in the ASR ordering document that the Percent Interstate Usage ("PIU") is zero. A PIU of zero means that none of the traffic is interstate, which makes the NECA tariff (an interstate tariff) inapplicable. This theory is further contradicted by the fact that any interstate access ordered directly from Venture would violate South Dakota PUC and FCC Orders, which require Venture-related switched access to be ordered through South Dakota Network LLC. *See* Venture Ex. 1 p. 5 and n. 5. The only pricing option for these local trunks is Venture's pricing catalog. TR p. 48-49. As earlier discussed, this pricing source is explicitly listed as a pricing alternative in Appendix "A" to the ICA.

Against this background, this brief discusses the principal arguments in AT&T's brief. These arguments are, in order: (a) that AT&T was challenged in discovering the nature of its

billing dispute with Venture; (b) that the unpaid trunk charges were forgiven by the parties' ICA amendment imposing bill-and-keep for transport and termination charges; and (c) that Venture has other revenue streams that "...should be enough for this traffic." AT&T Brief at p. 2.

II. AT&T's Own Failure to Properly Review Venture's Invoices is Irrelevant

AT&T's first argument appears to be an excuse for its lax diligence in reviewing its co-carrier bills, which does not deserve credit in the first instance.[1] AT&T Brief, pp. 2-3. AT&T ordered, tested, accepted, utilized, and paid for the local trunks, and had done so for many years. Venture Ex. 1, pp.1, 5, 6. Venture contends that this pattern of ordering, utilizing, and paying for the now disputed trunk facilities constitutes a "course of performance" under contract law. Such pattern undercuts AT&T's argument that the parties actually intended for the trunks to be subject to a "bill-and-keep" amendment to the ICA between the parties (along with Transport and Termination charges). TR p. 49.

AT&T's excuse boils down to a less than timely examination of its bills, occasioned by volume. As was described at the hearing, often times AT&T and its billing agents set "threshold amounts" or benchmarks in reviewing the bills it receives every month. TR p. 141.

> Practically speaking the company has to take such steps. Once a 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 p. 142; AT&T Brief, pp. 2-3. AT&T further argues on this score that it does not have this kind of dispute for 1600 carriers and that Venture's "inflated bills" caused confusion. AT&T Brief at p. 3.

But, the record undercuts these claims. First, AT&T's management decision to only review based on benchmarks or thresholds is part of the problem. It was AT&T's own failure to timely cancel redundant trunk facilities which it had earlier ordered and which caused a billing spike in Venture's case. Mr. Jandreau addressed this in the hearing, by noting that AT&T had not

[1] AT&T's purported factual account of the parties' billing dispute contains gratuitous argument that a) Venture has inappropriately evaded regulatory reform and; b) that Venture already receives "enough" revenue from other revenue streams and its fees were "disproportional" to the number of its customers utilizing the trunk service. *See* AT&T Brief at p. 2.

disconnected certain trunk groups between 2012 and February 2020. *See* Venture Ex. 11; TR p. 202, 203.

AT&T's claim that it does not have this problem for 1600 carriers is likewise dubious. As the Commission knows, negotiated agreements between carriers are subject to the puts and takes of typical contract negotiations. Further, the interconnection pricing standards in Section 252(d) do not apply to these negotiated agreements. 47 U.S.C. §242(d); *see* Venture Brief at p. 12. How many of the alleged 1,600 interconnecting carriers have negotiated agreements versus arbitrated agreements with AT&T? This would be important to know, but AT&T did not supply this information at the hearing. Indeed, given AT&T's stated billing review process, it is entirely possible that AT&T is paying for similar trunk charges now and is just not aware of it.

AT&T discusses the "difficult time" it had in figuring out Venture's bills, stating that it was like "peeling an onion" and "kind of hard for our team." AT&T Brief at p. 3. AT&T also admits that its own automated billing dispute systems "did not prove to be accurate" as the "layers of the onion were peeled." Yet, AT&T lays the blame on Venture, suggesting that its "inflated" billings "caused initial confusion." AT&T Brief at p. 3.

Common sense suggests that a purchaser of telecommunications services and facilities would be able to understand its invoices sooner than years after receipt and use of the purchase, let alone a purchaser as sophisticated as AT&T. It is a matter of public record that AT&T reported approximately $81.7 billion in operating revenues for 2022. AT&T Inc. (2022). *Complete 2022 Annual Report* at p. 9. Retrieved from https://investors.att.com/financial-reports/annual-reports/2022, last visited June 26, 2023. Venture's operations are a rounding error by comparison and can hardly be blamed for AT&T's failure to understand its bills. The Commission should not allow AT&T to escape responsibility for its lax review of its bills.

III. The Disputed Trunks are Not Subject to Bill-and-Keep

Venture has already recounted that neither the FCC's orders nor the amended ICA apply bill-and-keep requirements to the local trunks. Venture Brief at pp. 5-12. In this respect, Venture discussed the elements of bill-and-keep requirements and demonstrated that the parties' ICA and the trunk charges under dispute exhibit none of them. *Id.* at pp. 6-12. First, the flat-rated monthly

trunk charges do not qualify as "traffic charges" under the FCC's *Transformation Order* and the parties' amended ICA. *Id.* at p. 6-7. Second, bill-and-keep only prohibits terminating traffic charges, while Venture's monthly billings are for originating local dialing functions, fundamentally different than the per-minute reciprocal compensation charges replaced by bill-and-keep and explicitly addressed in the parties' ICA amendment. *Id.* at p. 7-9. Finally, the parties have contracted around the FCC's default bill-and-keep requirements, as demonstrated by the language and structure of the ICA amendment and course of performance by the parties themselves. *Id.* at pp. 11-12.

In its Brief, AT&T advances a number of arguments, which Venture addresses below in the order in which they are presented. Venture notes that AT&T's brief does not proceed in linear fashion, and thus Venture's own reply brief may reflect that fact. AT&T's first argument under the "The Interconnection Agreement Today" heading is that Section 251(c)(2)(D) requires "just, reasonable and non-discriminatory pricing." AT&T Brief, pp. 3-4. This is just a bald assertion by AT&T, as AT&T never explains how this section has actually been violated. Regardless, this point is purely academic because Section 251(c) does not even apply to the parties' negotiated agreement to begin with. The parties' ICA explicitly disclaims Section 251(c) ILEC obligations, noting instead the parties' agreement that the ICA is based upon Sections 251(a) and 251(b) of the Act. AT&T's Section 251(c) pricing argument is thus irrelevant. Venture Ex. 3 at p. 2.

AT&T next argues that the interconnection agreement pricing standard contained in Section 252(d)(1) applies to negotiated agreements. *Id.* Again, AT&T does not provide any discussion of how these pricing standards have been violated. And again, this point is academic because, as Venture discussed in its initial brief, Section 252 does not apply. Venture Brief at p. 12-14. Both the Communications Act and the FCC explicitly contradict this language.

AT&T's next argument is that "in reality," Venture is only providing a "switch port," which is subject to the bill-and-keep. AT&T Brief at p. 5. But Mr. Le, who advocated this point, failed to substantiate his claim with any reference to the parties' ICA or FCC Orders. Instead, he relied only upon his "belief" that "this is an end office function that has gone to bill-and-keep." TR p. 128.

The ASR's submitted by AT&T to Venture did not order "ports" or "switch ports" – rather, as relevant here, "24 SS 7 trunks at DS0." *See* Venture Ex. 4, Attachment #1 at p. 1.

"Remarks." And while Mr. Le couldn't explain, upon Commissioner Nelson's examination, why 24 DS0's were identified on the Highmore office ASR, Mr. Jandreau explained in detail the efforts expended by Venture to establish the trunks and the detailed functions and costs associated therewith. Venture Brief at p. 17. Indeed, Mr. Jandreau testified that when AT&T ordered the trunks disconnected, Venture's customers lost toll free dialing to the AT&T "478" exchange customers. This clearly illustrates that AT&T did not order "switch ports" but rather Venture's DS0 trunks, which enabled the toll-free dialing AT&T sought.

The balance of AT&T's argument under "The Interconnection Agreement Today" heading consists of claims that (a) the parties ICA and amendment is controlled by the definition of "local traffic" and this leads to the legal conclusion that the trunks are free of charge; (b) that the parties did not contract around the "default" condition described in Venture's brief (*See* e.g. Venture Brief at p. 10); and (c) that Venture's pricing catalog (from which AT&T's ASR order emanated) does not apply under the particular terms (Section 3.3.1) of the ICA under which AT&T claims it ordered. AT&T Brief at pp. 5-7. These meritless arguments are addressed in order.

AT&T's "non-access" argument represents a cherry-picked analysis of the parties ICA. Venture analyzed the roots of ILEC-CMRS traffic exchange in the FCC's Local Competition Order ("Order") implementing the Telecommunications Act of 1996, including interconnection standards. Venture Brief at p. 2. Venture demonstrated that, under the Order, symmetrical reciprocal compensation applied to transport and termination, and that pricing elements for such traffic exchanges were expressed in Minutes of Use ("MOU") in interconnection agreements. *Id.* at pp. 7-8. The parties' ICA established such MOU rates in Appendix A. In the ICA's amendment, bill-and-keep traffic exchange was reduced to a zero minute of use rate for terminating traffic.[2] AT&T argues that the FCC now requires that trunk charges go to bill-and-keep. *See* AT&T Brief at pp. 5-6.

But, AT&T's focus is myopic and it can once again provide no authority to support this result. The ICA amendment, as earlier referenced, was deemed to mean that the originating party has no obligation to pay terminating charges to the terminating party. And, as Venture further explained, the explicit terms of the ICA amendment only address the terminating MOU charges.

---

[2] The ICA's amendment defines bill-and-keep as meaning the originating Party has no obligation to pay the termination charges to the terminating Party. *See* Venture Brief at p. 8, n. 6.

Venture Brief at pp. 10-12. Paragraph 5.0 of Appendix "A" titled "Facility Rate" and referencing Venture's pricing catalog, was untouched by the amendment. *Id.* Thus, the parties' agreement to continue the pricing of the trunks from the pricing catalog remained intact.[3] Put another way, the bill-and-keep language added in the amendment did not alter these provisions of the ICA.

AT&T attempts to counter the amendment of the ICA, unfavorable to AT&T's sweeping bill-and-keep claims, by the following: "But, the amended ICA was the bargain, the contract, that provided for no compensation for non-access (local traffic) traffic [sic]." AT&T Brief at p. 6. As is no doubt obvious, this rationale falls considerably short of contract analysis. If the trunk pricing was wiped out by the bill-and-keep amendment itself, even at odds with the provisions discussed in Venture's initial brief, what was Venture's end of the bargain? Where is the contract consideration for Venture? This analytical lapse, delivered as a summary conclusion, is a telling weakness in AT&T's argument.

AT&T's final gambit to discredit Venture's reading of the ICA concerns AT&T's interconnection with SDN. AT&T Brief, pp. 7-8. AT&T there argues that, since it ordered facilities from SDN under Section 3.3.1, Paragraph 5.0 of Appendix "A" (which authorizes Venture's use of its pricing catalog) does not apply. *Id.* AT&T argues that Appendix "A" only applies to facilities ordered pursuant to Section 3.1 of the ICA. *Id.* It concludes, therefore, that Venture's trunk charges are not "applicable to facilities ordered by a third party..." *Id.*

The record hardly favors this argument. AT&T witness Le was questioned as to why Venture was provided an ASR if Venture's DS0s were not necessary (as opposed to T1 service provided by SDN). Mr. Le's answer was: "So I can't explain the thinking of why they put it on there." TR p. 178. The SDN billings would not occur if the AT&T switch was located within these South Dakota rate centers. Thus, it is ridiculous to expect the SDN billing to offset Venture's billing for the local trunk charges. On the other hand, Venture discusses in detail its receipt of the ASRs from AT&T, the interaction between Venture and AT&T personnel to provision the local calling patterns requested by AT&T, and the number of important tasks performed within Venture's switch as a result. *Id.* p. 16. Mr. Jandreau also flatly contradicted Mr. Le's testimony that SDN could provide this trunking functionality within Venture's switch. *Id.*

---

[3] As earlier mentioned, the parties' course of performance across many years, both pre and post ICA amendment, demonstrates intent to purchase and use Venture's trunk facilities. This Reply brief later discusses AT&T's ineffectual attempt to distance itself from that pattern of conduct.

The fact that AT&T ordered the disputed trunks via the ASRs demonstrates that Appendix A does apply.

In sum, AT&T's efforts to distance itself from financial responsibility here fail. It ordered the trunks because it wanted to have local calling without a switch in the State. The ICA's billing provisions apply to these trunks. *Id.* at pp. 16-17.

IV. AT&T's Novel Pricing Analysis Should Be Rejected

AT&T's final argument, entitled "Venture's Other Payments," mounts a truly novel pricing analysis (AT&T Brief, pp. 8-9). Here, AT&T argues that it is paying "usage rates" issued pursuant to Venture's NECA tariff. It also argues that Venture is receiving payments from SDN for transport between SDN and Venture end offices. And it also argues that Venture is charging its end users "for services they provide." *Id.* p. 2. In a striking note of non-analysis, AT&T states: "Three revenue streams should be enough for their traffic." *Id.*

That any of these revenue streams constitute a piggy bank excusing AT&T's debt is unfathomable. Mr. Le's allegation that AT&T's payment of NECA tariff-based "usage" rates provides a basis for non-payment of trunk charges is hardly convincing. He testified on cross examination that "I believe there's recoverable costs for them there. I mean, I'm not sure what is supposed to be billed." TR. 162. Neither could he testify whether the tandem switching charges at issue were applicable to Highmore, Sisseton, and Britton – the Venture offices from which DS0 trunks had been provided. TR. p. 166. Given the paucity of authentication for this claim, this aspect of AT&T's argument deserves no weight.

AT&T's attempt to divert DS1 revenue paid to Venture is in the same boat. Commissioner Nelson questioned Mr. Jandreau about Venture's role in providing such transport. After noting that this issue was new, and not part of the complaint, he put it succinctly: "…why are you getting paid by SDN?" TR p. 64. Mr. Jandreau then explained, using the example of Sisseton, that SDN's closest transport facility was Webster, South Dakota. Venture stepped in and completed the circuit to Sisseton to fulfill AT&T's request. *Id.* SDN then compensated Venture for its part of the circuit. TR 64-65. Mr. Jandreau explained that the same arrangement would apply to the Highmore office and added the phrase "channel term" to describe the Venture-provided facility from the SDN meet point into Venture's central office. *Id.* Against this explanation on the record, there is clearly no financial windfall for AT&T to appropriate on the

transport side. Venture provides a service – based upon its facilities in which it has invested – to provide AT&T's transport service.

The final, most troubling of AT&T's suggestions is that Venture's customers should be required to pick up AT&T's unpaid tab. This suggestion is plainly inequitable and flies in the face of basic principles of cost-causation – a ratemaking tenet long espoused by AT&T's ultimate parent, AT&T Corp. *See, e.g., In re: Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 3 FCC Rcd 2774, 2776 (¶18), (FCC 1988); *In re: Amendment of Part 69 of the Commission's Rules and Regulations,* 4 FCC Rcd 765, 71 (¶42) (FCC 1988). Cost causation generally aligns costs (such as tariff rates) with those customers who cause such costs. Here, it is plain that AT&T itself is the cost causer, incurring the trunk costs by ordering and using the trunks (likely as a marketing tool for its local wireless service) for more than a decade. TR p. 49-50.

AT&T's related argument that Venture has revenue streams that "should be enough for this traffic" merely compounds this ill-advised request. If AT&T desires the Commission to descend into this "know it when you see it" standard, then AT&T's multibillion dollar revenue stream surely should be fair game. Indeed, perhaps AT&T's damages should be <u>increased</u> under their ratemaking theory. Its 2022 revenues are almost twice the estimated economic output of the State of South Dakota in 2022 – estimated to be approximately 49.81 billion (U.S.D.). Moreover, its cancellation of local calling ability has undoubtably imposed costs on South Dakota consumers. While Venture doubts the Commission desires to go in this direction, AT&T should be subject to their own policy if it does.

V. There is a Clear Course of Performance Between the Parties

AT&T argues that no course of performance exists in the transactions between AT&T and Venture because the U.C.C. does not apply in this case.[4] This is simply incorrect. "Course of performance" as a legal concept is not limited to the U.C.C. In fact, courts have upheld the use of the "course of performance" doctrine by state utility commissions in reviewing ICAs, exactly as this Commission should do here. Accordingly, even though the U.C.C. may not apply to the

[4] AT&T Brief at p. 8.

parties' ICA, AT&T's attempt to show that no course of performance exists between the parties is weak.

Courts have relied upon legal concepts that are integrated in and informed by the U.C.C. where the U.C.C. itself does not apply. For example, in *Ameritech Mich. v. Mich. PSC*, the court held that the term "economic loss," as used in a state statute, did not include attorneys' fees. 599 N.W.2d 760, 766 (1999). Specifically, the court found that the term "has acquired that meaning in the interpretation and application of the Uniform Commercial Code," and under that meaning it did not include attorney's fees – even though the U.C.C. did not apply to the dispute before the court. *Id.* The same rationale applies to the term "course of performance."[5]

And indeed, courts have specifically upheld reliance on the course of performance doctrine by public service commissions, even where the U.C.C. does not apply. In *Verizon Del., Inc. v. AT&T Communs. of Del., LLC*, the court upheld a public service commission's reliance on the parties' course of dealing to find that Verizon owed AT&T reciprocal compensation for certain traffic. 326 F. Supp. 2d 574, 585 (D. Del. 2004). Specifically, the commission found persuasive the fact that Verizon had been paying reciprocal compensation on the traffic in question for three years before discontinuing payment. *Id.* On appeal, the court found that the commission properly relied on the parties' course of dealing, and that its analysis and conclusion were sound. *Id.* at 588. Given the court's holding and the striking factual similarities to the instant proceeding – including the fact that AT&T was the beneficiary of the course of performance analysis – the Commission should not hesitate in considering the decade-plus course of performance between AT&T and Venture.

Finally, Venture notes that although the cases discussed above were not decided in South Dakota, South Dakota also applies the course of performance concept outside the U.C.C. In *Ebert v. Fort Pierre Moose Lodge No. 1813*, the court ruled that introduction of evidence "was not erroneous as it helped establish a course of conduct between the parties." 312 N.W.2d 119, 124 (S.D. 1981). This case dealt with automatic renewal of insurance policies – to which the U.C.C. is also not applicable – and a course of conduct that was established between insurer and broker. Specifically, the broker claimed that the insurer had automatically renewed policies for

[5] Venture notes that in the cited decisions, the terms "course of performance," "course of conduct," and "course of dealing" appear to be used interchangeably.

years and this established a course of conduct. *Id.* The court ruled that the trial court did not err in allowing evidence of past conduct and custom between the parties. *Id.* at 122.

VI. AT&T's Counterclaim Should Be Denied

AT&T has produced scant evidence in support of its counter claim. It principally relies on an exhibit prepared and submitted by Venture to support its claim of owed amounts. AT&T Brief p. 10. Absent from the record is any concrete evidence to support the claim that the charges were "in error" as AT&T alleges. *Id.* This is simply a tactical approach by AT&T to distract from the real issue at hand: its failure to pay Venture. AT&T has failed to meet its burden of proof and the counterclaim should be denied.

VII. 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 should be rejected. AT&T's Counterclaim is meritless and should be denied.

DATED this 27th day of June, 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

BLOOSTON, MORDKOFSKY, DICKENS & PRENDERGAST

BY: */s/ Benjamin H. Dickens, Jr.*

Benjamin H. Dickens, Jr.
Salvatore Taillefer, Jr.
2120 L Street NW Suite 825
Washington, DC 20037

Attorneys for Venture Communications Cooperative, Inc.