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THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE FILING BY  
AVENTURE COMMUNICATION TECHNOLOGY, LLC  
DBA AVENTURE COMMUNICATIONS FOR TC11-010  
APPROVAL OF ITS SWITCHED ACCESS  
SERVICES TARIFF NO. 3

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Transcript of Proceedings  
October 25, 2011

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BEFORE THE PUBLIC UTILITIES COMMISSION,  
GARY HANSON, CHAIRMAN  
CHRIS NELSON, VICE CHAIRMAN  
KRISTIE FIEGEN, COMMISSIONER

COMMISSION STAFF  
Rolayne Ailts Wiest  
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Karen Cremer  
Kara Semmler  
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Dave Jacobson  
Chris Daugaard  
Deb Gregg  
Ross Pedersen  
Ryan Soye  
Demaris Axthelm

APPEARANCES

Paul Lundberg, Aventure Communications (by telephone)  
Kathryn Ford, Midcontinent Communications (by telephone)  
Talbot Wiczorek, Sprint Communications  
Todd Lundy, Qwest Corporation  
Brett Koenecke, Verizon  
William Van Camp, AT&T

Reported By Cheri McComsey Wittler, RPR, CRR

1                   TRANSCRIPT OF PROCEEDINGS, held in the  
2 above-entitled matter, at the South Dakota State Capitol  
3 Building, Room 412, 500 East Capitol Avenue, Pierre,  
4 South Dakota, on the 25th day of October, 2011,  
5 commencing at 9:30 a.m.

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1           CHAIRMAN HANSON: TC11-010, In the matter of the  
2 filing by Aventure Communication Technology doing  
3 business as Aventure Communications for approval of its  
4 switched access tariffs -- access services number 3.

5           And the question -- there are a number of  
6 questions before the Commission. Shall the Commission  
7 grant the Motion for Summary Judgment? And there are a  
8 number of questions on that. Shall the Commission grant  
9 the Motion to Compel? Or how shall the Commission  
10 proceed?

11           We will examine this first by summary judgments  
12 to decide whether or not we need to have a Motion to  
13 Compel.

14           And I'm trying to figure out who's on first  
15 base. Mr. Van Camp?

16           MR. VAN CAMP: Thank you, Mr. Chairman. I will  
17 try to take it not personally that a number of members of  
18 your Staff and counsel got up and departed the room. I  
19 trust that they're downstairs listening dutifully on the  
20 internet.

21           CHAIRMAN HANSON: They wanted to record it.

22           COMMISSIONER NELSON: For what it's worth, we  
23 do still care.

24           MR. VAN CAMP: I appreciate that. I was joking  
25 with one of the other attorneys in the room, Commissioner

1 Fiegen, dockets like this might make you rethink your  
2 decision to take the appointment.

3 With that being said, my name is Bill Van Camp.  
4 I'm here today representing AT&T, and we did file for a  
5 Motion for Summary Judgment in this case.

6 As the Commission is aware, Aventure  
7 Communications filed a revised intrastate switched access  
8 tariff on March 17, 2011 with the Commission. We filed a  
9 Motion for Summary Judgment on June 21. Thereafter, on  
10 July 13 and 18 in response to our Motion for Summary  
11 Judgment Aventure filed revisions to its revised tariff.

12 Now a reasonable reading of our rules and law  
13 can lead to no other conclusion that in South Dakota a  
14 tariff which by its face would allow for billing of  
15 switched access charges based on calls to end users who  
16 do not pay a fee is patently unlawful and turns the  
17 switched access regime on its head.

18 The only purpose for Aventure's revised  
19 definition in its tariff of end users is to engage in the  
20 practice of we all know is called traffic pumping. They  
21 attempt to place in tariff language that avoids the  
22 findings of the FCC in the Farmers and Merchants Decision  
23 and the Iowa Utility Board in the Superior Telecom case.

24 They removed language from their first tariff  
25 that overtly stated that an end user need not purchase

1 any service that Aventure provides, but what they left in  
2 their definition of end users says the very same thing.

3 We would also argue, and it's part of our Motion  
4 for Summary Judgment, that the unfair billing dispute  
5 provisions in the tariff and as revised with the generic  
6 savings clause are impermissibly vague and violate  
7 various rules of law, and this warrants summary judgment.

8 Lastly, in our summary judgment request we argue  
9 that the definition of end users premises is  
10 unreasonable, inconsistent, and discriminates against  
11 various classes of end users and thus warrants summary  
12 judgments as well.

13 Now any of these three failures in the tariff  
14 alone should and do warrant a finding by the Commission  
15 that this tariff must fail as a matter of law.

16 As the Commission and counsel is aware, summary  
17 judgment is appropriate when no genuine issue as to any  
18 material facts exist, and the movement is entitled to a  
19 judgment as a matter of law.

20 Now while requiring any facts and dispute to be  
21 in favor of the nonmoving party, a nonmoving party cannot  
22 rely on general allegations or claims unless it sets  
23 forth its own specific facts to show that a genuine issue  
24 exists in order to preclude a party from being successful  
25 on its Motion for Summary Judgment.

1           Now in this case we will show, as will, I  
2 assume, the other intervening parties, that summary  
3 judgment is appropriate under these standards because the  
4 provisions at issue in Aventure's tariff fail and are  
5 contrary to South Dakota Law.

6           First, as to the end user definition in  
7 Aventure's tariff. Aventure's revised version in part  
8 defines an end user as any person or entity that is not a  
9 carrier who sends or receives an intrastate  
10 telecommunications service. Clearly the person or entity  
11 that sends or receives a call via Aventure's network is  
12 not required under this tariff provision to pay any fee  
13 for this service. They must merely send or receive.

14           Century Link points out in its brief in support  
15 of the Summary Judgment Motion that failing to use the  
16 word "customer" fatally flaws the definition while  
17 showing Aventure's true intent.

18           Now currently Administrative Rule 20:10:29:07  
19 defines an end user in South Dakota as a customer of an  
20 intrastate telecommunications service that is not a  
21 carrier. By rule in South Dakotan an end user is a  
22 customer. Not a person or an entity. There's a  
23 difference. And we'll point that out.

24           Commission rules state that switched access  
25 service is a service that provides a path between a

1 customer of the service and its end user utilizing a  
2 subscriber loop, transport, and switching functions.  
3 Clearly, switched access charges can only be assessed  
4 when a LEC originates or terminates a call.

5 In attempting to draft a definition of end users  
6 in its revised tariff broad enough to encompass its Free  
7 Conferencing Partners, Aventure asked this Commission to  
8 ignore our rules and common understanding of what a  
9 customer is. Our rules are replete with provisions  
10 relating to customers and I would argue interchangeably a  
11 subscriber's obligations to pay for services for which  
12 they receive.

13 Defining an end user as anything other than a  
14 customer who must pay as a matter of law would require  
15 this Commission to ignore the rules relating to switched  
16 access services and the basis on which our switched  
17 access regime is founded. That basis is a customer using  
18 those services paying a reasonable amount for the  
19 services that they are obtaining.

20 The Free Conference Call model seeks to abuse  
21 and avoid paying a fair and reasonable share of those  
22 costs incurred for the delivery of calls to end users by  
23 self-defining end users as Free Conference Calling  
24 Partners or those, in this case, who only send or  
25 receive. It's the same thing.

1           This is only done to avoid the findings of  
2 Superior Telecom and Farmers & Merchants. To, by tariff,  
3 define an end user as someone who must only send or  
4 receive, a telecommunication service must fail as a  
5 matter of law. The FCC has found that the language  
6 before you requires clarity. Customers must pay for  
7 access. It's what the system of access exists for. You  
8 should find something similar in this case as well.

9           Aventure's tariff further would allow suspension  
10 of the South Dakota requirement that a switched access  
11 rate must either be a reflection of a fair and reasonable  
12 rate of return, if rate of return regulation is used, or  
13 a rate that is fair and reasonable based on the carrier's  
14 costs of providing the service.

15           In a world where an end user is someone who  
16 sends or receives only intrastate telecommunication  
17 service and does not have a requirement for paying a fee  
18 we ignore the only two statutory obligations that exist.  
19 It has to be one or the other. There's no third option.  
20 Sprint argues this, in my opinion, very well in its Brief  
21 supporting the Motion for Summary Judgment.

22           As the FCC recently found, placing a limit on  
23 access charges to calls completed to entities that pay  
24 for services consistent with the concept that users of  
25 local telephone networks should be responsible for the



1 costs that they actually cause by using the service,  
2 Aventure in this case would disagree with that. What is  
3 the alternative?

4           Clearly the alternative that they would hope the  
5 Commission adopts is that a service does not have to pay  
6 for the services received and that they ultimately can  
7 then split or share the revenue that is generated for the  
8 services that they didn't pay for. That seems a little  
9 bit odd to me.

10           This is not what access services exist for. It  
11 runs afoul of our own statutes. Our statutes exist. Our  
12 switched access rules provide for a sharing or a recovery  
13 of the fee that's collected for providing of the  
14 services. Their alternative just clearly cannot be  
15 allowed to stand as a matter of law.

16           To assert, as was done by Aventure and allowed  
17 to by Staff, that the federal code defines a customer as  
18 someone who pays where our rule does not define directly  
19 customer unless the tariff language is permissible  
20 ignores sections of our rules and code, the switched  
21 access model in general, and also what is the common  
22 understanding of a customer. I'll acknowledge that we do  
23 not have a definition of customer as they do in the  
24 federal rules.

25           While they continue to engage in traffic pumping

1 under the very tariff that is in front of you today,  
2 Aventure has claimed that this filed tariff at the FCC  
3 level is done to mirror so there is consistency between  
4 what exists at the FCC and what they intend to file here  
5 with the PUC. They wish to have you believe that the  
6 status of that tariff at the FCC somehow affects its  
7 validity in this proceeding. It certainly does not.

8 And as the FCC recently explained in a Complaint  
9 before it, that the failure by the FCC to decline to  
10 suspend and investigate a tariff is not a final decision  
11 and does not keep the FCC from later concluding the  
12 tariff to be unreasonable. Their argument must fail.  
13 Verizon I think clearly points this out better than I am  
14 here in their Motion supporting the summary judgment.

15 Again, much of the same language used by  
16 Aventure and that's before you today has been found  
17 already by the FCC to be unlawful. And so for them to  
18 ask that the tariff be approved to create consistency  
19 between their inter and intrastate tariffs seems to be,  
20 you know, counterintuitive. That language is subject to  
21 review with the FCC and complaint and can be found  
22 invalid as the same language has been found to be invalid  
23 in other proceedings.

24 Also any discussion or argument that the  
25 recently concluded rule making Docket -- and this is what

1 is alluded to by Aventure in its reply to our brief --  
2 somehow affects this tariff is misplaced. We didn't ask,  
3 nor do I think it would be appropriate, for the  
4 Commission to review its current rules. Rather we ask  
5 that the tariff we think has definitions that fail as a  
6 matter of law, that the Commission find that those  
7 definitions fail as a matter of law, and that the tariff  
8 be dismissed or at a minimum Aventure certainly has the  
9 option to refile the tariff asking the Commission to  
10 approve it with new language.

11 I would also add that Aventure has in place a  
12 switched access tariff which will allow it to provide --  
13 it already has, I should say, a tariff in place that will  
14 allow it to provide switched access services in this  
15 state if those switched access services are significantly  
16 similar to that that Century Link provides.

17 That tariff's been in place. They've  
18 acknowledged they don't have any customers, but for them  
19 to claim the rejection of this tariff as a matter of law  
20 will cause them substantive harm is not true because if  
21 they are, in fact, only going to engage in traditional  
22 traffic, that mechanism exists for them now.

23 Well, I would argue that there would be no  
24 factual dispute on the billing provisions in Aventure's  
25 tariff and that they violate South Dakota Law -- and I'm

1 speaking about the provisions that would require a party  
2 who contested a bill of Aventure's to pay Aventure's  
3 legal fees even if they were ultimately successful, which  
4 is not anything that would be allowed under contract law  
5 of South Dakota, to lessen the statute of limitations for  
6 filing a Complaint or a suit to recover improperly billed  
7 or collected charges, the presumptions that are put in  
8 place by the tariff I think improperly violate -- in  
9 violation of your rules, Aventure would argue that those  
10 provisions mirror what is on file with the FCC and thus  
11 this Commission should grant those provisions or find  
12 those provisions to be valid.

13           That same language has been rejected already by  
14 the FCC in filings made by Northern Valley. Aventure  
15 asks the FCC to reject or reconsider those findings by  
16 the FCC, for the FCC to reconsider its own findings they  
17 specifically rejected the Motion to reconsider.

18           So those terms and conditions that reference  
19 what they've done at the FCC have already been rejected.  
20 They just haven't been rejected yet at the FCC, and that  
21 would only come about through a Complaint at that level  
22 concerning Aventure's tariff. And that certainly could  
23 occur.

24           The use of the savings clause, frankly, I found  
25 that interesting, but it effectually becomes a legal

1     dodge. The tariff doesn't exist so that a consumer has  
2     to go out and find legal counsel and obtain an opinion as  
3     to whether or not they have a certain right. A tariff  
4     exists so that all are put on notice what the terms and  
5     conditions are of the service to be provided.

6             To shift that burden to the individual consumer  
7     or company turns on its head, in my opinion, much like  
8     the definition of end user, what a tariff exists for,  
9     and, thus, that must fail as a matter of law.

10            Lastly, in our Summary Judgment Motion we point  
11     out that in their very own tariff they exclude a  
12     carrier's central office from the definition in its  
13     tariff of an end user premises. And it inconsistently  
14     seeks to broaden the definition of premises to include a  
15     customer space in the central office.

16            This is just inconsistent and is done solely to  
17     allow for Free Conference Partner to put a server  
18     immediately adjacent to the equipment of Aventure. And  
19     the tariff, thus -- because it's inconsistent, and also  
20     because it discriminates against classes by seeking to  
21     bar some from using the carrier's office in this case,  
22     and allowing Free Conference Partners to use the office  
23     is invalid under South Dakota Law and should be found as  
24     such.

25            For all of these reasons we would ask that the

1 Commission rule as a matter of law that the  
2 aforementioned provisions of Aventure's tariff are  
3 unlawful. A rejection of any provision, I would argue,  
4 much less all three, would require, in my opinion,  
5 Aventure to refile its tariff so that it could be  
6 properly analyzed in the context of the tariff as a  
7 whole.

8 As any other permutation of the tariff through  
9 partial rejection or resubmittal could frankly lead to  
10 multiple hearings and multiple statutory time frames,  
11 which serves no one's best interest. I don't think it  
12 serves my best interests, this Commission's Staff's best  
13 interest, or any other parties' interests to allow one  
14 provision of the tariff to proceed while another to be  
15 refiled, setting in place again the 120-day statutory  
16 time constraint for the tariff to ultimately be accepted  
17 or to go into effect as a matter of law.

18 If there's a resubmittal and we object to that,  
19 that matter needs to be heard as well, and it doesn't  
20 serve anyone's purpose to have multiple factual hearings  
21 in this case. Although, clearly as I think I've laid out  
22 and the other parties will, we have certainly a record  
23 before us that allows you to find as a matter of law that  
24 the tariff as a whole should be rejected or at least the  
25 provision we've identified.

1           Lastly, I'll leave you with the argument that  
2 the tariff -- it appears that the argument that the  
3 tariff should be allowed to go in place because Aventure  
4 doesn't currently have South Dakota has been made and it  
5 doesn't -- at this point Aventure doesn't plan at this  
6 point to engage in traffic pumping. I think that's a bit  
7 of a ruse.

8           This Commission has a statutory and rule  
9 authority and responsibility to oversee  
10 telecommunications companies that operate and seek to  
11 operate within the State of South Dakota. Under that  
12 duty you obviously must consider what companies have done  
13 in other jurisdictions.

14           You're here to protect, as someone told me, not  
15 only reactively, but you're certainly here to help  
16 protect consumers proactively. As one of the capable  
17 counsels in the room offered to me yesterday, if a  
18 company came before this Commission having left a state  
19 where it improperly had taken monies from consumers,  
20 you'd probably want to know about it. And I think in  
21 this case the consideration of what's occurred in the  
22 other jurisdictions and is still ongoing in the other  
23 jurisdiction is certainly a condition that the Commission  
24 should consider.

25           With that, I thank you for your time, and I'll

1 be available for any questions.

2 CHAIRMAN HANSON: Thank you, Mr. Van Camp. Some  
3 very compelling statements.

4 Is there -- have the Interveners arrived at some  
5 order in which you wish to present? Should I just wait  
6 as you approach the -- the answer is no. Whoever wishes  
7 to step up. And we do have a few folks on the phone  
8 lines as well. So we'll go through the folks that are  
9 here, and then we'll move to the phones.

10 Good morning.

11 MR. LUNDY: Good morning, Your Honor. I'm  
12 Todd Lundy, L-U-N-D-Y. I represent Qwest Communications  
13 Company, LLC that does business as Century Link. So the  
14 references to the Century Link Brief were ours.

15 Qwest agrees with everything that AT&T just said  
16 and has briefed. However, Qwest believes and is asking  
17 the Commission that it can take a much more simple and  
18 relatively narrow analysis of the Aventure tariff that's  
19 been discussed so far today or in the Briefs.

20 What I mean is that summary judgment should be  
21 granted on the basis of an explicit inconsistency of  
22 Aventure's proposed tariff with the South Dakota rules.  
23 The parties and the Staff have proposed interpretations  
24 of certain terms. There's been some disagreement. But  
25 Qwest suggests today that interpretation of those terms



1 is not necessary for you to grant summary judgment.

2 We only need to compare the proposed tariff with  
3 the South Dakota rules. And we suggest that the  
4 Commission should not take the step of making very  
5 consequential interpretations of certain words and terms  
6 without a full record of all the policies that underline  
7 switched access, the public interests that underline  
8 switched access, and how they should be applied to  
9 particular terms.

10 Qwest believes and asserts that summary judgment  
11 can and should be granted and the tariff should be  
12 rejected due to the failure of the tariff to properly  
13 define an end user as a "customer."

14 Now that one word may not seem like much, but  
15 it's a word with more meaning, more substance, than the  
16 words that have been chosen by Aventure. In any event,  
17 it is the word that is in the South Dakota rules, and,  
18 therefore, carries great force and weight.

19 Your Honor, if I may approach the bench with  
20 some documents.

21 CHAIRMAN HANSON: Please, go ahead.

22 Thank you. Does Aventure have these -- this  
23 information?

24 MR. LUNDY: They do not. As soon as I pass it  
25 out, I will tell Aventure exactly what is on this piece

1 of paper so they are aware of its particular content.

2 COMMISSIONER HANSON: Mr. Lundy has indicated  
3 they do not, and he will explain this as soon as he has  
4 passed it out.

5 Excuse me, Mr. Lundy. Our office is going to go  
6 to attempt to place this on the web at this time. Or on  
7 the -- or our -- can find it on our URL.

8 MR. LUNDY: Would you like me to proceed?

9 CHAIRMAN HANSON: Please go ahead, and they can  
10 access it as soon as it's up. It will take minutes to  
11 get that done.

12 MR. LUNDY: And for the folks on the phone I'll  
13 describe the one-page document that I have provided to  
14 the Commissioners, to the Staff, and those in the room.  
15 It's entitled South Dakota Rules v. Aventure's Proposed  
16 Tariff. And then there are three definitions.

17 The first definition is a cut and paste of rule  
18 20:10:29:07 for end users. And then there are two  
19 definitions out of the Aventure proposed tariff, again  
20 cut and pasted in their entirety for end user and for  
21 customer.

22 So if -- and our focus, Qwest's focus, is to  
23 again compare the rules as to the proposed tariff. And  
24 Rule 29:07 says "end users," and it starts with "a  
25 customer of an intrastate telecommunications service that

1 is not a carrier is an end user," and then it continues.

2 The proposed tariff from Aventure says end user,  
3 any person or entity. They did not use the word  
4 "customer" to define the phrase end user there. The  
5 sentence continues to say "any person or entity that is  
6 not a carrier who sends or receives an intrastate or  
7 foreign telecommunications service transmitted to or from  
8 a, capital C, Customer across the company's network."

9 They did use the word "customer" at the end of  
10 the sentence, but then as we move down to Aventure's  
11 definition of customer, it describes the interexchange  
12 carrier, not the end user.

13 So we have the proposed tariff that did not use  
14 the word "customer" to interpret end user. Rather the  
15 term "customer" has been used to interpret the  
16 interexchange carrier. And that is critical.

17 So the words that are used by Aventure to define  
18 end user and to characterize end user, a person or  
19 entity, clearly has a broad meaning. It could mean  
20 anyone. It certainly has a much different meaning than  
21 the word "customer." Customer is much narrower in  
22 meaning in that a customer means some kind of business or  
23 economic relationship between the vendor and a buyer of a  
24 service.

25 Now exactly what the customer means, and then

1 this goes to the interpretations that the Staff and AT&T  
2 and Century Link have discussed in their briefing, the  
3 Commission doesn't have to decide today the exact  
4 definition of customer and whether or not it means paying  
5 a fee or not.

6 All it has to determine is that the word  
7 "customer" has to mean something different than person or  
8 entity and, therefore, the proposed tariff violates  
9 Rule 29:07. And, quite frankly, Qwest asks that the  
10 Commission end the analysis right there. Because the  
11 definition is different than the rule. It violates  
12 South Dakota Law and should be rejected.

13 Now as to the Staff's Briefs and  
14 recommendations, we ask that the Commission consider two  
15 things regarding the issue of end user. And first and  
16 with all respect, the Staff focused on the phrase  
17 "telecommunications services" and distinguished the  
18 South Dakota definition of that phrase from the federal  
19 definition. The Staff did not discuss the word  
20 "customer" in the definition of end user in the rule, and  
21 it didn't address the fact that the rule uses the word  
22 "customer" whereas Aventure uses the phrase "person or  
23 entity."

24 Second, as to the Staff's statement that  
25 "according to South Dakota Law an end user is not

1 required to pay a fee," it's important for the Commission  
2 today to make its rulings in the proper procedural  
3 context of AT&T's Motion.

4           The Motion before the Commission today is  
5 whether the Aventure tariff is invalid as a matter of  
6 law. There's no other Motion up for decision. And as  
7 I've stated and analyzed through this document, we  
8 believe that the absence of the word "customer" from the  
9 definition of end user renders the proposed tariff  
10 invalid as a matter of law.

11           So there's no motion or request for the  
12 Commission to declare it to be the law of South Dakota  
13 that an end user does not need to pay a fee for its  
14 telecom services. And, frankly, that would require a  
15 much different analysis. It would need to take into  
16 consideration the definition of end user in the rule.

17           It would need a thorough analysis of what the  
18 public policy interests of the state are when it comes to  
19 an end user and how that phrase should be determined in a  
20 switched access context. And, quite frankly, would also  
21 have a far reaching and perhaps unintended consequence  
22 that could affect not only how South Dakota could view  
23 the practice of traffic pumping but perhaps other issues  
24 pertaining to switched access.

25           So we ask that before the Commission considers

1 rendering a conclusion recommended by Staff that an end  
2 user does not need to be a purchaser of telecom services,  
3 we ask that you defer that, if needed, until there's a  
4 full record as to all the public policy interests that  
5 are relevant to that issue.

6 But, again, Qwest believes you don't have to do  
7 that to render this tariff invalid on its face. The  
8 tariff is inconsistent with the South Dakota rule. It  
9 uses phrases that are much broader than are contained in  
10 the rule and, therefore, is invalid as a matter of law.

11 On the dispute resolution provisions, Qwest,  
12 Century Link agrees wholeheartedly with the Staff and  
13 AT&T. They have stated correctly that on their face the  
14 dispute resolution provisions are contrary to the  
15 rules -- express language of the rules and statutes.  
16 Aventure's provisions include that the carrier disputing  
17 the Aventure's charges must pay the disputed charges for  
18 the dispute to be valid.

19 That isn't a traffic pumping context. If  
20 they're engaged in traffic pumping and Qwest were to  
21 dispute that that's a valid switched access charge under  
22 Aventure's tariff, we would have to pay that money to  
23 Aventure before the dispute would even be valid.

24 As a side note, and it's tangential to the issue  
25 of summary judgment motions but it's well-known in the

1 traffic pumping model, as soon as monies are received by  
2 the local exchange carrier they are split with the free  
3 calling company. So and the division of split could  
4 vary. But let's assume for the purposes of the  
5 discussion that it's 50 percent.

6 If we were to pay Aventure 100 percent of the  
7 disputed charges, those monies are gone to the free  
8 calling company. Or at least half of them are and are  
9 very difficult to bring back. So that provision is  
10 targeted towards -- from Aventure's standpoint to promote  
11 traffic pumping.

12 But it's invalid, as the Staff accurately points  
13 out, that it violates Rule 07:04, which permits Aventure  
14 to require payment of only the undisputed portion of the  
15 bill, not the disputed portion.

16 That rule would also invalidate the dispute  
17 resolution regarding late fees that are to be paid even  
18 if the dispute is found to be invalid. The provision  
19 about the dispute must be paid 90 days, Staff accurately  
20 states that's inconsistent with South Dakota statutes.

21 And, finally, that a disputing party's to pay  
22 the attorneys' fees of Aventure, if Aventure tries to  
23 collect disputed charges. And it even suggests that  
24 attorneys fees would have to be paid to Aventure even if  
25 Aventure loses the case, and the dispute was valid by --

1 validated by the Commission or a court on its face is  
2 transparent that that's unreasonable. It's transparent  
3 that the underlying intention is simply to punish those  
4 who would dispute a bill even when the dispute is  
5 correct.

6 So to sum up, Mr. Chairman and Commissioners,  
7 thank you for the opportunity to be here. The issues of  
8 traffic pumping do involve several nuance interpretations  
9 of terms and of law and of public interest. And  
10 certainly Qwest has been adamant that this practice of  
11 traffic pumping is illegal. It should not be allowed in  
12 this state or any other.

13 But the Commission doesn't have to go as far as  
14 interpreting some of the terms that are in the Brief.  
15 All you have to do, Your Honors, is to compare the  
16 proposed tariff to the South Dakota Rules and see that  
17 it's invalid on that basis.

18 And I'm available for any questions.

19 CHAIRMAN HANSON: Thank you, Mr. Lundy. We will  
20 have questions after everyone has had an opportunity to  
21 speak.

22 MR. LUNDY: Thank you, Your Honor.

23 CHAIRMAN HANSON: Next up.

24 MR. WIECZOREK: I believe Mr. Koenecke has  
25 volunteered me.



1           CHAIRMAN HANSON: Mr. Wieczorek, welcome.

2           MR. WIECZOREK: Thank you, Mr. Chairman.

3           Talbot Wieczorek with Gunderson, Palmer on  
4 behalf of Sprint Communications today.

5           This is a -- I'm not going to go through the  
6 comments made by the previous counsel in support of the  
7 Motion for Summary Judgment. I do think that one thing  
8 I'd like, though, to reiterate is something that  
9 Mr. Van Camp said.

10           This is a tariff proceeding. I'm kind of taken  
11 aback by Aventure's position that, well, just put the  
12 tariff in place and if we do something you don't like,  
13 then come challenge us in a Complaint case.

14           You know, the purpose of the tariff is to  
15 provide a clear understanding to the parties that are  
16 going to be subject to the tariff what's going on. And  
17 to say from the get-go just put our tariff in place and  
18 then, you know, you can figure it out in litigation  
19 later, whether that litigation is going to be State  
20 Court, Federal Court, in front of this Commission, I  
21 think is an inappropriate way to look at the tariffing  
22 procedure.

23           This Commission -- rest assured that, you know,  
24 if for some reason this tariff would be in place if we're  
25 in Federal Court, it's going to be this Commission

1 approved these activities if they can argue they fit  
2 within this tariff.

3 So I -- you know, AT&T has looked at this from a  
4 cost perspective. Qwest has just given an excellent  
5 analysis of why these definitions don't jive with the  
6 statutes.

7 The Sprint Brief looked at this from a slightly  
8 different way, and that is we looked to the statutes and  
9 what this Commission's going to be bound to do to approve  
10 this tariff.

11 As noted in our brief, 49-31-12.4 requires this  
12 Commission to find this tariff is fair and reasonable.  
13 If this Commission -- while I think Qwest has set forth a  
14 valid argument that may be a threshold question, I think  
15 there's another level to get to on this Motion for  
16 Summary Judgment, and that is, as set forth in our Brief,  
17 that this Commission can find, as a matter of law, that  
18 the tariff is invalid because its -- somebody can argue  
19 under the tariff that they can actually pay other parties  
20 to do business with them.

21 Now everybody knows that's what goes on in  
22 pumping. Now you might get some argument, well, is that  
23 fact established? There is plenty of analysis and  
24 hearings and decisions by the FCC that walk through this  
25 type of activity that I think this Commission can rely on

1 at this point.

2 The FCC has, in fact, talked about the practice  
3 of traffic pumping and actually has made a determination  
4 and said it is unfair to IXCs. This Commission can look  
5 to that FCC. Then it can look to our statutes. Our  
6 statutes call for a rate that needs to be fair and  
7 reasonable.

8 I think clearly a rate that allows somebody to  
9 charge IXCs 5 cents and then to turn around and give half  
10 of that to somebody to do business with them to generate  
11 that traffic back through is not fair and it's not  
12 reasonable.

13 As the FCC in its numerous decisions has  
14 recognized, and I think this Commission as a matter of  
15 law can recognize, that a system where you overcharge one  
16 party so some party gets a direct payment that, as a  
17 matter of law, is unfair and unreasonable. It  
18 misallocates the resource. The FCC has walked through  
19 this and made these conclusions. It misallocates  
20 resources. It makes the cost causer not pay anything.

21 You know, I can't count the number of times I've  
22 been in front of this Commission where somebody's talking  
23 about the cost causer has to carry his burden. He has to  
24 carry a reasonable share of the burden. And all of those  
25 determinations, those legal analysis appear in the FCC

1 decisions and are practical determinations given our law  
2 and can be decided as a matter of law today.

3 This Commission could reject the tariff based on  
4 a finding that it -- as written, it could allow Aventure  
5 to undertake these activities and as a matter of law this  
6 Commission determines that these type of activities do  
7 not meet our state statutes.

8 Now Aventure's activity -- or response is to  
9 say, well, we haven't -- we say we're going to do it. We  
10 don't have clients now. But that goes back to what the  
11 tariff is about, what you can do and setting out what you  
12 can do. So this Commission should decide to put a tariff  
13 in place that would allow this activity's appropriate,  
14 not after the activity's taken place.

15 The other kind of issue raised in the Sprint  
16 Brief not raised by anybody else is if you look at the  
17 statute this Commission has to follow in approving the  
18 tariff, 49-31-12.4, it talks about if there is a new  
19 practice that impacts access service in this case and  
20 noncompetitive service, this Commission has to make a  
21 determination of how that new practice impacts.

22 I think this Commission as a matter of law can  
23 make a determination that pumping clearly is a new  
24 practice that impacts noncompetitive services. And this  
25 tariff does not provide any guidance how this new

1 practice is run, what the standards are going to be, how  
2 the business partners are going to be treated. And that  
3 this tariff could be rejected based on that because if  
4 that is going to be pursued at a minimum, there needs to  
5 be a full description of what that is so this Commission  
6 can make a determination.

7 Now maybe somebody argues, well, we can create  
8 these free conference calling companies and not pay them.  
9 Maybe there's a model for that. Then describe it.  
10 Describe it in depth in your tariff. How is it going to  
11 work? So this Commission can make a determination of  
12 whether it's a fair and reasonable practice.

13 The Staff Brief mentions -- I don't quite --  
14 I'll let Staff speak to their Briefs. I don't quite read  
15 it like Qwest implied, that the Staff made a conclusion  
16 that an end user could be somebody that doesn't pay  
17 anything. I read the Staff's Briefs more that they  
18 thought it had to be more developed, that perhaps there  
19 had to be more testimony on this as to how this was going  
20 to work.

21 The other thing Staff's Brief, though, brought  
22 up that I would endorse is if the Commission would decide  
23 this is a new practice, they should reject the tariff as  
24 this new practice would require a full cost study to see  
25 how it impacts noncompetitive service such as access

1 service. And that would be a minimum to see where the  
2 costs were falling and who is getting paid what and what  
3 the cost is.

4 The FCC has kind of recognized this. The FCC  
5 acknowledged that when you set these switches up and you  
6 just put a server right behind them about the only cost  
7 they might even arguably have is the switching cost. And  
8 they're running so many minutes through that, that cost  
9 begins to plummet on a per minute charge.

10 This Commission faced that in a similar type  
11 proceeding when we did the arbitrations on the Alltel and  
12 Alliance group. What is switching costs. And when you  
13 have that kind of volume you can drive switching costs  
14 almost to zero by all the analysis.

15 Yet Aventure is setting up a plan where they're  
16 saying that they can charge -- and I apologize,  
17 Commission. I don't remember their exact rate off the  
18 top of my head but several cents for a practice and a  
19 cost structure that may be close to zero. And is that  
20 fair and reasonable to put that cost back on us where  
21 they designed the system to line their pockets and free  
22 conference calling companies out of California and Vegas  
23 that they're going to share these revenues with.

24 It's not anything envisioned by our statutes.  
25 It doesn't fit within our statutory scheme, and it

1 violates our statutory scheme.

2 And it's my understanding there might be  
3 questions later unless somebody wants to ask them now.

4 Thank you, Commissioners.

5 CHAIRMAN HANSON: Thank you, Mr. Wieczorek.

6 Next up, Mr. Koenecke.

7 MR. KOENECKE: Morning, Mr. Chairman,  
8 Commissioners and Staff. My name is Brett Koenecke, I'm  
9 a lawyer from Pierre, and I represent Verizon in this  
10 proceeding.

11 We're here this morning to support AT&T in its  
12 Motion for Summary Judgment. And would I state that  
13 generally we agree with them and with Sprint and Century  
14 Link as they presented here this morning.

15 I find it interesting that we're here this  
16 morning on -- standard summary judgment analysis as if  
17 there's no genuine issue of material fact so why should  
18 we have a hearing at which we lay out facts for a later  
19 determination.

20 I would contend before you that that is the case  
21 here, that there is no genuine issue of material fact.  
22 And as support for that I'd look to the filings made by  
23 Aventure. I'm not much of a litigator. You guys keep me  
24 busy up here pretty much. Between you and the  
25 legislature, I'm well tied up. And I don't spend a lot

1 of time in State Court or Federal Court.

2           However, the standard way to defeat a summary  
3 judgment motion is to raise genuine issues of material  
4 fact. If someone's asking for summary judgment against  
5 you, what you do is raise the facts that are going to  
6 preclude summary judgment and get you to a hearing.

7           As I drill into the Aventure filings, I don't  
8 find genuine issues of material fact. I see legal  
9 arguments contained in that document and the previous  
10 documents to which Aventure refers.

11           And so I conclude that apparently summary  
12 judgment must be appropriate here. I don't see what the  
13 genuine issue of material fact is. And if we all get  
14 together on November 29 and 30, what's going to change  
15 and what could change, and I haven't figured out what  
16 that is, I would encourage you to determine for  
17 yourselves whether there is a genuine issue of material  
18 fact here and find out whether we do need to get together  
19 and have that hearing. I would contend that we don't. I  
20 don't think anything's going to change.

21           I was very interested in the arguments put forth  
22 this morning by each of the presenters, but I'll drill  
23 into -- you know, what I said in my Brief was that the  
24 FCC shouldn't be looked to as somehow a beacon or a  
25 lodestar to see, well, if our tariff was approved here,



1 it must be good in South Dakota. I don't think that's  
2 the case at all.

3 And as we drill into what the FCC looked at as  
4 far as approving a standard filed tariff it's pretty  
5 clear to me that Aventure's tariff is not going to hold  
6 up under the later higher scrutiny that's probably likely  
7 to be brought if their business model's allowed to be  
8 continued.

9 I want to point out again that it had scant  
10 review at the FCC, and I don't see them going forward  
11 with that. I was really interested in the Qwest argument  
12 or Century Link. I'm not sure how they'd like to be  
13 referred to up here this morning, but I'll just use both.  
14 It seems to be working for everybody.

15 There's an attempt here to redefine South Dakota  
16 Law, and that seems to be in favor of a provider of  
17 services that really doesn't have a customer who's paying  
18 for it. You know, I like to break things down and make  
19 them as simple as they can be -- they can be seen. And  
20 I'm not seeing the payer benefiting from the redefinition  
21 of South Dakota Law.

22 And as I move forward into that thought process,  
23 I found it very interesting that we've got here an Iowa  
24 company that's had a substantial regulatory lifestyle  
25 down in that state that's under current scrutiny

1 attempting to move here to South Dakota to serve whom,  
2 I'm not really sure -- doesn't seem to be South  
3 Dakotans -- and then redefine South Dakota Law, set up  
4 shop here, and continue moving forward.

5 And I'm not seeing why that should be allowed to  
6 stand for the reasons that have been put forth by my  
7 predecessors in the chair here this morning.

8 If we have a hearing on the 29th and 30th what  
9 could change? I don't think anything. I think the  
10 system that's being laid out here as compliant with  
11 South Dakota Law is clearly not. We've lined that out.  
12 I don't see that it's going to change then it. I think  
13 the matter's ripe to be ruled on this morning and has  
14 been laid out. It's clear that this shouldn't be allowed  
15 to stand in South Dakota under our laws.

16 So with that I'll stand back for any questions  
17 you might have of me. Thank you.

18 CHAIRMAN HANSON: Thank you, Mr. Koenecke.  
19 Mr. Carmon (phonetic), you don't have anything to present  
20 at this time? I believe Mr. Lundy presented that  
21 information. Thank you.

22 We will turn to the telephone. At this time we  
23 have Midcontinent. Kathy Ford. Are you representing --  
24 I know Mary Lohnes is on the line as well.

25 MS. FORD: I am, Mr. Chairman.

1           CHAIRMAN HANSON:  Would you please go ahead.

2           MS. FORD:  Yes.  Thank you.

3           Midcontinent did not file written comments in  
4 support of this Motion but would note for the Commission  
5 that we think Sprint, Verizon, AT&T, and Century Link  
6 have done a very thorough and capable job of explaining  
7 why this tariff conflicts with South Dakota Law.

8           Midcontinent agrees that the tariff is invalid  
9 on its face for the reasons that have been put forth on  
10 these other companies, and we agree that summary judgment  
11 should be granted by the Commission in favor of AT&T.

12          CHAIRMAN HANSON:  Thank you.  We will turn to  
13 Aventure, and then I will turn to Staff.  I believe  
14 that's all of the Interveners.  Are there any other  
15 Interveners?

16          If not, Aventure you have the floor.  
17 Mr. Lundberg.

18          MR. LUNDBERG:  Thank you, Mr. Chairman.

19          The agenda for today's meeting was AT&T's Motion  
20 for Summary Judgment and, depending on what happens with  
21 that, AT&T's Motion to Compel.

22          I would like to point out for the record that  
23 neither Qwest, Sprint, or Verizon filed any motion that  
24 required Aventure to file a response.  All of their  
25 Briefs were filed within the last week or so at the

1 deadline for response to AT&T's Motion.

2 New issues raised in Qwest, Sprint, or Verizon  
3 Briefs that are not in AT&T's Motion I don't believe are  
4 ripe for consideration by the Commission. Our response  
5 focused on AT&T's Motion because that was the Motion  
6 before us.

7 And I want to discuss AT&T's Motion, but I'll  
8 kind of take it backwards. With regard to the billing  
9 dispute provisions of the proposed tariff, Aventure in  
10 discussions with Staff has advised Staff that Aventure  
11 would have no objection if the Commission ordered those  
12 billing dispute resolutions stricken from this new  
13 tariff, substituting the existing billing dispute  
14 provisions that are contained in Aventure's current  
15 intrastate access tariff.

16 With regard to the balance of AT&T's Motion, in  
17 our resistance that we filed we attempted to point out  
18 that what AT&T seeks here is a ruling by this Commission  
19 changing the definition of end user that is currently  
20 contained in 20:10:29:07 we agree with the Staff's  
21 analysis that current South Dakota Law does not require  
22 an end user to pay a fee in order to have that status.

23 In fact, Section 49-31-97 of the South Dakota  
24 Statutes also defines a subscriber. And that definition  
25 merely says a subscriber is any person who contracts with

1 the telecommunications company for telecommunications  
2 service.

3 There's nowhere to look in South Dakota Law to  
4 find any requirement that a -- an end user must pay a fee  
5 or that a tariff must require that an end user pay a fee.

6 AT&T's Motion, if it's granted, would in effect  
7 be a ruling by this Commission changing the definition of  
8 end user as it currently exists. We don't believe this  
9 is the proper docket to do that. That should be done  
10 either in a formal rule making or in a proceeding where  
11 someone has filed a petition seeking a declaratory ruling  
12 as to what that rule means.

13 To change the rule simply in this tariff  
14 proceeding would seem to be an inappropriate use of the  
15 rule making authority.

16 AT&T's Motion also seeks to expand this Docket  
17 by its discussion of what it calls traffic pumping, what  
18 the FCC has called access stimulation. Again -- and I  
19 believe it was Sprint that may have suggested this  
20 morning that the Commission could rule in this tariff  
21 proceeding that access stimulation, henceforth, is  
22 illegal in South Dakota.

23 Again, I think that's an inappropriate use of  
24 this Docket where from the Commission's initial Order of  
25 June 22 of this year the only issue to decide is whether

1 Aventure's tariff should be approved in whole or part and  
2 to expand the inquiry into practices that Aventure  
3 currently is not engaged in in South Dakota and has told  
4 the Commission and Staff it has no current plans to  
5 engage in that type of service, again would be an  
6 inappropriate use of the rule making authority in  
7 connection with a simple tariff Docket.

8 We had an exchange yesterday with Staff  
9 regarding today's hearing, and the question was posed to  
10 Aventure what about Sprint's argument that the Commission  
11 could reject the tariff because the access rate -- the  
12 Qwest/Century Link access rate in South Dakota may not be  
13 appropriate for traffic that falls under that heading of  
14 access stimulation.

15 Our response was that Aventure is willing to  
16 state for the record in this proceeding that if this  
17 tariff is approved, except for the billing dispute  
18 provisions that we talked about, and Aventure begins to  
19 build a network in South Dakota, if it has any thought or  
20 opportunity to engage in what's been termed access  
21 stimulation, it would file the appropriate filing with  
22 the Commission to have a determination made as to what  
23 the appropriate rate should be and/or if that's a  
24 practice that would be allowed in South Dakota.

25 It seems to us, and we've put that in our

1 filings here in response to AT&T's Motion, that AT&T and  
2 the other IXCs want another bite of the apple with regard  
3 to the CLEC access charge rule making that the Commission  
4 concluded with a rule that CLECS should charge the Qwest  
5 rate for intrastate access in South Dakota.

6 A review of that Docket shows that all of the  
7 IXCs that are present here today filed comments in that  
8 proceeding alerting the Commission to the issue of access  
9 stimulation, requesting that the Commission not approve  
10 the rule to the extent it may apply to access  
11 stimulation.

12 The rule was adopted over those comments and  
13 objections and what they want is another review by the  
14 Commission of that rule in the guise of a Summary  
15 Judgment Motion by AT&T. Again, we think that that is  
16 inappropriate.

17 It is our understanding that as early as this  
18 Thursday the FCC may put out an order on intercarrier  
19 compensation that will include provisions regarding  
20 access stimulation. And all public pronouncements by the  
21 FCC to date have been that they do not intend to deem  
22 this practice illegal, but they want to determine what  
23 the proper rates should be for that type of traffic.

24 We've maintained throughout this proceeding that  
25 Iowa proceedings that don't directly focus on this tariff

1 are irrelevant here. But if you want to go to Iowa, even  
2 the Iowa Utilities Board in the Superior telephone case  
3 that was referenced in one of the arguments did not deem  
4 that practice to be illegal. It only deemed it to be  
5 noncompensable until there were appropriate rules in  
6 place, which is now underway in Iowa to determine what  
7 the proper rates should be for that type of practice.

8 But as things stand in this Docket today, all  
9 discussion about whether Aventure would engage in access  
10 stimulation in South Dakota is entirely hypothetical.  
11 And to either reject a tariff or to adopt new rules on  
12 end users or access stimulation based on hypothetical  
13 facts would seem to be improper, and Aventure would take  
14 issue.

15 In sum, as we've indicated, we have no objection  
16 to having the billing dispute provisions ordered stricken  
17 from this tariff and the other old provisions substituted  
18 from the existing tariff.

19 Secondly, we believe, and Sprint's counsel made  
20 the point, that he doesn't think there's any genuine  
21 issues of material fact here. We would tend to agree.  
22 And it would be our intent, if AT&T's Motion is  
23 overruled, to make a Motion today to have the Commission  
24 approve this tariff absent those billing dispute  
25 resolutions with the caveat and Aventure's statement on



1 the record that in the event it decides to do business  
2 with conference calling companies and chat companies and  
3 other types of companies that have been identified with  
4 access stimulation, that Aventure would file a Petition  
5 with the Commission requesting guidance on the  
6 appropriate rate, and such a proceeding would allow all  
7 interested parties to weigh in on the practice itself and  
8 whether the Commission should authorize that type of  
9 service in South Dakota.

10 That's our position. Thank you.

11 CHAIRMAN HANSON: Thank you. One comment, and  
12 then we'll turn to Staff's. The Intervener's comments,  
13 the filings were properly and lawfully filed, and they  
14 will be considered by this Commission.

15 So if you have anything that you wish to comment  
16 on on those, you should do so now.

17 MR. LUNDBERG: I don't have any further  
18 comments, Mr. Chairman. I only wanted to make a record  
19 that the only Motion before the Commission is the one  
20 filed by AT&T. And the grounds for that Motion are set  
21 forth in the Motion itself and not in filings made by  
22 others.

23 CHAIRMAN HANSON: Thank you.

24 We will turn to Staff. Ms. Semmler.

25 MS. SEMMLER: Thank you. This is Kara Semmler

1 for Staff.

2 Staff maintains the arguments that we made in  
3 our Brief pursuant to the tariff definitions and the FCC  
4 proceedings that surround it. And we don't conclude that  
5 portion of the tariff to be unlawful on its face.

6 We also maintain the recommendation we made  
7 regarding the billing dispute portions. And it sounds as  
8 if Aventure will agree to those. We really appreciate  
9 the briefing efforts the parties made, and we appreciate  
10 all the conversation we had with the parties. Each party  
11 presented a unique take and a unique argument regarding  
12 the issues.

13 And we recognize, Mr. Daugaard and I recognize,  
14 we took a conservative approach to this Docket. We  
15 understand Aventure's engaged in activities in other  
16 jurisdictions the parties here today would like to  
17 prevent from happening in South Dakota, but at this point  
18 they have not done any of that in South Dakota. They  
19 aren't guilty in South Dakota. And, in fact, as Aventure  
20 just said, it doesn't plan to engage in traffic pumping  
21 in South Dakota.

22 So how do we engage in a debate regarding the  
23 reasonableness or fairness of traffic pumping when the  
24 company says it won't be doing it? And because of that  
25 conflict, our recommendations remain the same despite the

1       fabulous arguments of all the other Interveners.

2               CHAIRMAN HANSON: Thank you.

3               Ms. Wiest, did you have anything you wish to at  
4 this juncture share with us or not?

5               MS. AILTS WIEST: No.

6               CHAIRMAN HANSON: Okay. Thank you. Did --

7               Oh, that's right. Mr. Van Camp, you get to have  
8 your rebuttal.

9               MR. VAN CAMP: I'll be brief, Mr. Chairman.  
10 Thank you.

11               Initially I'm kind of put off by the thought  
12 that we're going to cut and paste these billing disputes.  
13 I mean, all the billing disputes that we reference in our  
14 Motion for Summary Judgment, what does the tariff look  
15 like after that as the provisions have to interplay?

16               You know, I don't know. So if the Commission  
17 rules in that regard and it's cut and pasted, do we have  
18 a right to object to that if we don't think it works. I  
19 guess I haven't thought that out. And it seems a little  
20 simplistic like throwing in a savings clause to simply  
21 say, oh, take those out and put them back in and  
22 everything will be fine. That's not, as Tal Wieczorek  
23 pointed out, what a tariff exists for.

24               As to the argument that AT&T seeks to redefine  
25 the definition of end user, I think that Century Link

1 more than adequately shows that we do not. In fact, it's  
2 Aventure that seeks to change the definition by removing  
3 the center word, which is "customer."

4 And why do they do that? Again, I have to come  
5 back to that. If they attempt to traffic pump at some  
6 point or to enter into these agreements with free  
7 conferencing partners, they now offer that they will come  
8 before you at that point to seek your guidance. But they  
9 ask at the same time for the tariff to be approved.

10 Well, the only reason -- I'll say it again --  
11 that the tariff exists is to create language in their  
12 definition of an end user that allows them to collect for  
13 services that are provided to third parties that do not  
14 pay a fee.

15 So if you allow this to go into effect and,  
16 again, Mr. Wieczorek was spot on, and this ends up in  
17 Federal Court, the first argument is going to be that  
18 this tariff has been put in place and by statute is  
19 presumed valid.

20 Now they offer to come at some point in the  
21 future, as Staff points out, when they decide -- have  
22 decided or have entered into these agreements and seek  
23 guidance. I don't know what guidance means. If the  
24 tariff's in place, it's in place. That seems to be a bit  
25 disingenuous.

1           If they intend to do that and this tariff exists  
2 for that purpose, why don't they just withdraw it. They  
3 have a perfectly good tariff now for traditional switched  
4 services like those provided by Century Link and the  
5 other competitive LECs in the area.

6           They don't need this tariff. This tariff gives  
7 them a competitive litigation advantage that will be  
8 utilized not only in the State of South Dakota but in  
9 federal and other regulatory proceedings around the  
10 country, and it shouldn't be approved.

11           With that, I'll stick with my earlier comments.

12           CHAIRMAN HANSON: Thank you, Mr. Van Camp. You  
13 wish a second bite?

14           MR. LUNDY: If I may.

15           CHAIRMAN HANSON: Go ahead.

16           MR. LUNDY: Thank you, Your Honor.

17           First of all, as to Aventure's issue regarding  
18 the issues that were raised by AT&T's Brief and whether  
19 the arguments were within the issues raised by AT&T's  
20 Motion, absolutely. The whole issue of the language of  
21 the tariff and the language of the rule, as I have  
22 described this morning, was squarely raised by AT&T's  
23 Motion and I think certainly proper for the Interveners  
24 to discuss.

25           I would also note that Aventure had no statement

1 today, no argument today, as to why they switched the  
2 word "customer" and then inserted the words "person or  
3 entity." They had no discussion or argument about our  
4 point that "customer" is a much narrower class of persons  
5 than the phrase "person or entity."

6 Secondly, I believe Mr. Lundberg said that  
7 there's nowhere to look in South Dakota Law to find out  
8 how the interpretations of end user or customers should  
9 be viewed.

10 Well, quite frankly, Aventure looked at the  
11 rule. Aventure looked at the rule of end user that had  
12 the word a "customer" of interstate telecom service and  
13 they changed that word to "person or entity." They knew  
14 exactly where to look.

15 They went to the definition of end user, which  
16 is crucial in the realm of traffic pumping law that's  
17 being vaulted over the past couple of years, and they  
18 changed that word to "person or entity" to bring in the  
19 free calling companies with whom they've worked.

20 Mr. Van Camp talked about the rule making  
21 authority, that AT&T incorrectly invoked rule making  
22 authority. The rule is right here. And they have  
23 changed the rule through this language of "person or  
24 entity" without requesting a waiver of this Commission  
25 from the South Dakota Rules.

1           Now the offering that was put forth today of  
2 counsel for Staff did inform us that something like this  
3 could be presented, and I appreciate that communication.  
4 But, as I understood Mr. Lundberg, it was if the tariff  
5 is approved and if Aventure begins to build a network --  
6 I'm not sure what that means because traffic pumping  
7 doesn't involve building a network -- and if a thought or  
8 opportunity to engage in access stimulation arises, then  
9 they will file as to what the appropriate rate will be in  
10 the practice of traffic pumping or access stimulation  
11 generally.

12           Well, there seems to be a quid pro quo here that  
13 Aventure is agreeing to file subsequent proceedings if  
14 this tariff is approved. But this tariff is illegal.  
15 The Commission should not consider a deal in which a  
16 tariff is being approved when on its face it's invalid  
17 under South Dakota Law.

18           That would basically result in a tariff being on  
19 file that is contrary to the rules in a trade for  
20 subsequent proceedings that may be filed by Aventure in  
21 the future.

22           I would also agree with the comments of AT&T  
23 that by approving this tariff what Aventure would be  
24 doing is it could possibly be removing very important  
25 arguments for IXCs and others that channel traffic

1 pumping from the case. Because this tariff does  
2 change -- again, takes out the word "customer," which is  
3 crucial, and includes "person or entity."

4 That would remove a vital aspect of the issues  
5 regarding traffic pumping where the traffic pumping LECs  
6 provide free services to the free calling companies and  
7 then share revenue, which is much different than you or I  
8 who pay a monthly bill to get our telecom services and do  
9 not share anything when it comes to access revenues.

10 I have to take issue with Mr. Lundberg's  
11 description of the FCC and Iowa Board rulings. The FCC  
12 repeatedly over the past two years has called traffic  
13 pumping or access stimulation arbitrage. If you look at  
14 the notice of proposed rule making that I believe  
15 Mr. Lundberg was referencing, just in the first two  
16 paragraphs introducing access stimulation they use the  
17 word "arbitrage" about five or six times. They use the  
18 word "exploit," that traffic pumpers are exploiting the  
19 access structure.

20 Mr. Lundberg said that the IUB did not deem this  
21 illegal. They used the word "abusive." They called  
22 traffic pumping an abusive practice. And it was abusive  
23 to share revenues, and that was a key component to any  
24 future proceedings that we had before the Iowa Board  
25 regarding what should be the rate, if any, for access



1 stimulation.

2 Then, lastly, on hypothetical facts, there  
3 aren't hypothetical facts here in terms of future  
4 conduct. Facts are stated right here. The facts are  
5 stated in the language that they use for the tariff and  
6 use the phrase "person or entity" instead of "customer."  
7 That's not hypothetical.

8 Your Honor, Aventure raised the issue of a  
9 potential Motion to approve the tariff. I don't know if  
10 you wish for me to address that now or under the  
11 circumstances of it actually being made. I'm happy to do  
12 either.

13 CHAIRMAN HANSON: Thank you. If there are some  
14 questions, we'll pose them.

15 MR. LUNDY: Thank you. Thank you, Your Honor.

16 CHAIRMAN HANSON: You are compelled,  
17 Mr. Wieczorek? I have to let Aventure speak now after  
18 you folks.

19 MR. WIECZOREK: I just want to clarify a couple  
20 of things. Aventure attributed some things to Sprint.

21 CHAIRMAN HANSON: All right.

22 MR. WIECZOREK: First I don't believe the -- I  
23 believe Aventure meant to refer to Verizon when it was  
24 talking about statements or material facts -- material  
25 facts questions.

1           Sprint's position is this Commission has the  
2 ability today to make a determination that the sharing of  
3 revenues cannot result in a fair and reasonable rate  
4 under the tariff.

5           Regarding Aventure's comments that somehow  
6 Sprint and the other Interveners have filed Briefs that  
7 raised other issues, the scheduling order we were working  
8 on was agreed to by Aventure. And what the parties --  
9 the parties have provided other legal analysis under  
10 which this Commission could grant summary judgment.

11           They tried to -- they necessarily -- they  
12 haven't come at it from some new motion type direction.  
13 It's other legal analysis that supports the rejection of  
14 the tariff. So I don't see it inappropriate on any  
15 level.

16           And, finally, as to Aventure's -- I guess I --  
17 two items. I must admit I am concerned if -- where if  
18 Staff takes the position that if somebody isn't doing  
19 something yet in the state, we should allow a tariff that  
20 would allow them to do it if they so choose. I don't see  
21 that as a statutorily correct interpretation.

22           I think even if somebody says, yeah, my tariff  
23 would allow me to do that but I don't plan on doing it,  
24 that this Commission still has an obligation to look at  
25 that tariff and I have say, no, because I set those

1 rules.

2 Go back to the billing requirements. Now I  
3 understand Aventure's withdrawn them. But anybody who  
4 wasn't here that had listened to the argument, you know,  
5 Aventure could say, well, I'm not going to enforce those  
6 but put them in there.

7 Well, nobody would know that. If you look at  
8 the tariff, they are there. People are going to assume  
9 that unless your sitting here at this meeting.

10 There are numerous other IXCs in the nation. If  
11 traffic pumping would begin or access stimulation, those  
12 other IXCs might not know that Aventure's supposed to  
13 come back here if they start getting bills for it.  
14 They'll just point at their tariff.

15 And the other -- look I have not been involved  
16 in a Iowa case -- you know, I had an RA that was from  
17 Iowa, and I've always had kind of a bad issue with Iowa  
18 ever since.

19 CHAIRMAN HANSON: Speak carefully at this point,  
20 Mr. Wieczorek. I was an RA at Northern. So be careful.

21 MR. WIECZOREK: I was at State. But, you know,  
22 you have the Iowa Board making the conclusion that  
23 Aventure falsified evidence. And now Aventure's telling  
24 this Commission trust us. Before we do anything we'll  
25 come back to you. I think it would be far more likely

1 what we'd see as a Federal Court action they'd be saying,  
2 hey, it's within our tariff.

3 So I should quit while behind on the RA comment.  
4 So I appreciate you letting me clarify those couple of  
5 issues, Commissioners.

6 CHAIRMAN HANSON: Thank you. Seeing no one  
7 else compelled to speak in the room, Ms. Semmler is  
8 compelled.

9 MS. SEMMLER: I would just like to clarify one  
10 point. This is Kara Semmler.

11 I would just like to clarify that Staff's Brief  
12 does not argue the tariff should be approved. Rather  
13 it's centered solely on this Motion for Summary Judgment.  
14 And we don't argue that the language should be approved.  
15 Rather, I argue there's a fact at issue. Is the company  
16 going to engage in traffic pumping or not? And I think  
17 we have that fact. Hence, deny the Motion for Summary  
18 Judgment.

19 CHAIRMAN HANSON: Thank you. That's a very  
20 interesting clarification, one that needs to be made  
21 because it's speaking a little ahead of time at this  
22 point, but I find the arguments that have been presented  
23 by AT&T and the Interveners as being compelling and  
24 searching to see what evidence there is in support of  
25 those as to whether I can support a summary judgment.

1           So it's a little bit of a challenge. And I  
2 appreciate you making that fine line distinction.

3           Avera. Excuse me. Aventure, you have an  
4 opportunity to speak at this point -- this juncture. And  
5 then the Commission will be asking questions.

6           MR. LUNDBERG: Thank you, Mr. Chairman.  
7 Paul Lundberg again. The Iowa Utilities Board has never  
8 entered any order or other pronouncement that Aventure  
9 falsified evidence. For a lawyer to get up before you  
10 who wasn't there and presumably based on his comments has  
11 not even read the orders, I think that's shameful. And  
12 we take issue with that.

13           Back to the real issues here. The question  
14 before the Commission it seems to me is can we reject the  
15 tariff when it may allow a company to engage in a  
16 practice that the Commission or the South Dakota  
17 Legislature has never found to be illegal?

18           Now you might do that in the future, and that's  
19 fine. Or the legislature might do that in the future.  
20 But sitting here today, it seems to me a difficult legal  
21 proposition for the Commission to say we can reject this  
22 tariff because it may allow Aventure to do things in the  
23 future that in the future we may find to be unlawful.

24           The tariff as written today violates no  
25 South Dakota Law. As we sit here today, access

1 stimulation violates no South Dakota Law. And so in sum,  
2 AT&T's Motion for Summary Judgment must be overruled, at  
3 the very least, and we thought maybe if we got everybody  
4 together a day and hashed these issues out maybe we could  
5 avoid a hearing at the end of November.

6 But at the very least if the Commission is going  
7 to reject the tariff based on specific factual findings,  
8 then I think we need to have a hearing.

9 If the Commission's going to overrule AT&T's  
10 Motion and consider a Motion either by Aventure or by a  
11 member of the Commission that the tariff be approved  
12 subject to those -- to that record that Aventure's made  
13 here, then that would seem to be a course of action that  
14 would have some merit.

15 But what doesn't have merit is to grant AT&T's  
16 Motion for Summary Judgment based on language in a tariff  
17 that may allow someone to do something in the future that  
18 is currently lawful that may be judged to be unlawful at  
19 some point down the road.

20 That's all we have. Thank you, very much,  
21 Mr. Chairman and Commissioners.

22 CHAIRMAN HANSON: Thank you, Mr. Lundberg.  
23 While you're on the phone there we're going to turn to  
24 Commission questions. And I have, I guess, a statement  
25 and question for you.

1           You made the statement that if the -- depending  
2 on the Commission's action today, that you might foresee  
3 an opportunity to get together and avoid a hearing  
4 altogether through a meeting with AT&T and I assume  
5 Interveners and, of course, Staff. I find that  
6 incredibly optimistic. I've been surprised before, but  
7 that would surprise me.

8           As we've alluded to earlier today, an action by  
9 this Commission on summary judgment may not have any  
10 indication of how we feel about approving or rejecting  
11 the tariff itself. And with all of the information --  
12 positions that have been presented here, that we will be  
13 struggling to see what can be defined and what can be  
14 supported by evidence, if we did not grant summary  
15 judgment, I'm just curious what -- if it is as simple as  
16 the definition -- which we're talking about, is the  
17 definition, and if, in fact, your tariff is not designed,  
18 as Mr. Van Camp pointed out, to facilitate  
19 discrimination, then why not simply change the verbiage?

20           MR. LUNDBERG: Two comments in response to your  
21 question, Mr. Chairman.

22           First of all, I apologize if my previous  
23 comments were misunderstood. I was not suggesting that  
24 Aventure and AT&T and everyone else get together and work  
25 this out. I agree with you. I don't think that's a

1 workable solution.

2 My comment was only that everybody has made  
3 their filings. Everybody's here today. If there's a way  
4 to look at all the evidence and determine, well, either  
5 as a matter of law this tariff should be rejected or as a  
6 matter of law it should be approved, let's do that today  
7 and avoid a hearing.

8 Aventure's tariff -- and we didn't have  
9 Aventure's consultants on the phone with us today. We do  
10 expect they will testify if there is a hearing at the end  
11 of November. They write Aventure's tariffs for them.  
12 And the question of whether we could simply substitute  
13 the definition for end user is one we would have to talk  
14 to them about in terms of whether that would be  
15 appropriate.

16 I think the tariff as written when it says any  
17 person or entity, anybody looking at that tariff -- the  
18 only people who would ever have an issue with whether or  
19 not someone's an end user would be the IXC's. It would  
20 not be traditional local customers or traditional  
21 business customers.

22 And I think the tariff adequately sets out who  
23 can meet the definition of an end user and if the  
24 South Dakota Law says they must also be a customer, then  
25 that's the law.



1           CHAIRMAN HANSON: Thank you. I'm looking at  
2 this in a number of different respects, and I have a lot  
3 of questions. I'll ask just a few and then let the other  
4 Commissioners ask some.

5           Sounds strange to say that. I'll let you.  
6 Forgive me for that.

7           To an extent I really want to base, and as we  
8 should, our decisions on evidence. And, of course, here  
9 we have the proposed tariff as the evidence. And I'm  
10 wondering if it's as simple as determining that the  
11 proposed tariff is, in fact, in conflict with any portion  
12 of South Dakota Law, regardless of all of the arguments  
13 that have been made. If there is just in one instance  
14 that it is in conflict, then it should not be approved  
15 and summary judgment should be granted.

16           And in searching through here, there are  
17 certainly some conflicts. And I believe Staff made the  
18 statement that it's -- they don't find -- you do not find  
19 it in conflict with South Dakota Law at any juncture.

20           MS. SEMMLER: We do find the billing support  
21 solutions in conflict on its face with South Dakota Law.  
22 And that is why we recommended in our Brief that that  
23 portion be stricken and the existing tariff be  
24 substituted. Now some of the parties today have  
25 expressed a concern with handling it that way, and Staff

1 understands those concerns.

2 CHAIRMAN HANSON: Right. And from that  
3 standpoint in your Brief, as you point that out, that  
4 another section their present tariff would supplant that  
5 portion. Then it seems like we might be right back to  
6 where we are again with the arguments that we would have  
7 to be searching through for the other portions of the  
8 tariff that AT&T has presented.

9 So it's not as simple as determining that it's  
10 inconsistent with South Dakota Rules, any portion of it,  
11 because then they will just simply -- this just goes  
12 on -- this is the never ending story, isn't it?

13 I'm very troubled by the information that's been  
14 provided and the arguments that have been presented. I  
15 don't want to regurgitate all of them by any means, but I  
16 certainly agree that we should grant summary judgment in  
17 the case that we were just speaking of because their  
18 revised tariff provides that it may require a deposit if  
19 the customer's financial condition is not acceptable.

20 And that -- the phrases there is not acceptable  
21 to me. When a customer's creditworthiness is  
22 unacceptable to the company. That's problematic. That  
23 any time Aventure pursues a claim in court or before any  
24 regulatory body arising out of the customer's refusal to  
25 make payment pursuant to this tariff the customer will be

1     liable for the payment of the company's reasonable  
2     attorney fees expended in collecting those unpaid  
3     amounts.

4             I'm challenged with a lot of portions of the  
5     tariff, and I -- I am troubled by the fact that it  
6     appears, at least, that this is designed to facilitate  
7     discrimination. We would need evidence on that.

8             Mr. Wieczorek points out that the tariff is not  
9     fair and reasonable, that I think he makes a good  
10    argument when he says that Sprint argues that if a  
11    customer of a LEC receives payments from or is not a net  
12    payer to the LEC for services rendered, the rate of the  
13    LEC is charged the IXCs by law unreasonable and unfair.

14            Mr. Wieczorek asserted that a company cannot  
15    under a rate of return or a cost recovery analysis  
16    support that the rate can be high enough on one customer  
17    so that the company can pay other third-party customers  
18    to use its other services. In essence, give away money.  
19    If one is to assume a customer does not have to pay a fee  
20    and the LEC can pay customers to use its service out of  
21    the rate Aventure is charging IXCs, the rate could not be  
22    fair and reasonable.

23            Now that's not a -- an argument supported by  
24    evidence necessarily, other than the fact that that  
25    practice is being done. It's a logical argument that

1 makes sense. And I'm -- I -- I agree with that argument,  
2 and I'm curious how -- if Mr. Lundberg could shed  
3 stronger light from his perspective on why I should not  
4 give that the strength I think it deserves.

5 Mr. Lundberg. You are on mute if you're  
6 attempting to speak.

7 MR. LUNDBERG: I'm sorry, Mr. Chairman. Only  
8 our previous comment that I think it would be an  
9 inappropriate use of this Docket to make findings that  
10 certain practices should not be done at the tariffed rate  
11 when there is no evidence before the Commission that any  
12 of those practices are taking place in South Dakota with  
13 respect to Aventure.

14 And this again would be back to my argument  
15 about the end user definition to hold now that this  
16 tariff should be rejected because the rate would not be  
17 fair and reasonable with respect to a practice that is  
18 currently not illegal in South Dakota but may be deemed  
19 unlawful in the future, I think from a legal standpoint  
20 that is getting the cart before the horse in terms of  
21 looking at approval of a tariff based on things that  
22 might be seemed unreasonable or illegal in the future.

23 CHAIRMAN HANSON: Well, it's sort of a circular  
24 argument to an extent, Mr. Lundberg, when we get to the  
25 point that you made that along that very same line that

1 you're stating that PUC would be involved in rule making  
2 in the context of a contested case.

3 But if we approve the tariff using verbiage that  
4 is defined differently or is not defined presently in  
5 South Dakota Rules, would we not be engaged in the same  
6 rule making in the context of a contested case because we  
7 are supplanting verbiage for other verbiage that is  
8 already accepted in the case of end user and customer  
9 argument?

10 MR. LUNDBERG: I see your -- I see your point.  
11 I guess I don't agree with it, though, Mr. Chairman, that  
12 approving this tariff simply requires a determination as  
13 to whether any of the provisions are unlawful and doesn't  
14 require the Commission to amend or adopt any rule.

15 CHAIRMAN HANSON: Now you're arguing on behalf  
16 of AT&T on the other side of what you were arguing  
17 previously, that we would be engaged in rule making.

18 I'm going to allow some of the other -- -- I'm  
19 conflicted here. I want to support the summary judgment,  
20 and I'm searching for whether or not I have just a strong  
21 enough evidence and position to do that at this time. So  
22 I'm going to allow other Commissioners to ask some  
23 questions.

24 COMMISSIONER NELSON: Mr. Van Camp.

25 MR. VAN CAMP: Yes, Commissioner.

1           COMMISSIONER NELSON:  And I think you may have  
2 answered this already, but can you show me specifically  
3 in state law or rule that the end user must be a net  
4 payer?

5           MR. VAN CAMP:  I think -- thank you,  
6 Commissioner.  I think that Century Link points out  
7 clearly that it must be a customer under existing law and  
8 their change of the definition of end user takes customer  
9 out.

10           Where I have argued that they must be a net  
11 payer is found in the generally accepted definition of  
12 customer.  The term "customer," as was pointed out by  
13 Staff, isn't defined in your rules or in statute, but  
14 there is case law on file in the Briefs that a customer  
15 under the general premises is someone who pays for a  
16 service.

17           Secondly, there are numerous provisions in your  
18 rules that use the term "subscriber."  Now keep in mind  
19 these terms were all put in place before the practice of  
20 traffic pumping existed.  That a subscriber has to pay or  
21 can hold payment -- and I don't have my Brief in front of  
22 me, but there are three or four instances in the rules  
23 where it speaks of subscribers paying.

24           And we would argue that to be a subscribe one  
25 has to subscribe.  By the same extent, to be a customer

1 one has to receive. And the law is clear, as was briefed  
2 by the parties, that if the term itself is not defined,  
3 that you will default to the common usage of the term,  
4 and that includes paying for the service.

5 COMMISSIONER NELSON: Thank you. I think that's  
6 all the questions I've got for you.

7 MR. VAN CAMP: Thank you.

8 MS. AILTS WIEST: I have a -- just to clarify.  
9 This is Rolayne Wiest. I thought you said in your Brief  
10 that their current definition of end user doesn't have  
11 the word "customer" in it, does it?

12 MR. VAN CAMP: Their current definition of end  
13 user has customer in it.

14 MS. AILTS WIEST: Look at page 13 of your Brief.

15 MR. VAN CAMP: What it doesn't have is it  
16 doesn't have the term "customer" in the first sentence  
17 where it defines what an end user is.

18 They say "an end user is any person or entity  
19 who is not a carrier who sends or receives a  
20 telecommunication service transmitted." The rule says  
21 customer.

22 MS. AILTS WIEST: I'm saying your --

23 MR. VAN CAMP: Oh, their --

24 MS. AILTS WIEST: I thought you said in your  
25 answer to the Commissioner that they don't use -- they

1 use the word "customer" in their current definition.

2 MR. VAN CAMP: Oh, I'm sorry. I mean, they  
3 don't use the word "customer" in the proposed tariff.  
4 I'm sorry. Yes. As was pointed out by Century Link. I  
5 apologize.

6 MS. AILTS WIEST: Thank you.

7 COMMISSIONER NELSON: I think one question for  
8 Mr. Wieczorek.

9 I'm obviously struggling with whether we've got  
10 enough here to grant summary judgment. And you referred  
11 to 49-31-12.4 and the fact that it requires a fair and  
12 reasonable as the standard.

13 In making a judgment of fair and reasonable is  
14 that something that you believe can be done on summary  
15 judgment without a full record of fact?

16 MR. WIECZOREK: I believe it can, Commissioner.  
17 Thank you for the question. Because it also brings up a  
18 comment Mr. Lundberg made to Commissioner Hanson. And  
19 that is he keeps talking about how you have to make a  
20 rule to make this -- to make traffic pumping, access  
21 stimulation, whatever you want to call it, illegal first.

22 Now that isn't -- every time you get a tariff in  
23 front of you what you do is you look to see if that  
24 tariff as written fits our law. And what I believe the  
25 Commission can do today is say under 49-31-12.4 this



1 tariff does not fit our law because it would allow you to  
2 give people money to do business with you and that can  
3 not as a matter of law be fair and reasonable.

4 Your rate -- your rate or prices can't be fair  
5 and reasonable for an IXC if I can make so much money off  
6 an IXC I can pay people to do business with me to  
7 increase that traffic with the IXC and I can keep paying  
8 more people to do business with me.

9 You know, I drove out this morning, and I'm  
10 driving past Wall. And, you know, I'm thinking Golden  
11 West is in Wall. Well, if Denny Law came to this  
12 Commission and said, you know what, Wall's been really  
13 good to Golden West over the years and we want to give  
14 free service to everybody in Wall and we're going to do  
15 that by jacking up our IXC rates, you'll all look at him  
16 like he's going crazy.

17 But that's essentially what Aventure is saying.  
18 Hey, pass this tariff and because you haven't declared  
19 our ability to take money from IXCs at such a rate and  
20 practically give it to other people because you haven't  
21 declared it illegal yet, you can't stop the tariff law.

22 Well, that's just wrong. The existing law, as a  
23 matter of law, disallows that practice. And that's what  
24 I think the Commission can do today and reject that  
25 tariff.

1           COMMISSIONER NELSON:   Okay.   Thank you.

2           One question for Mr. Lundberg.   Would you agree  
3 with Mr. Van Camp's contention that a customer  
4 necessarily must be a net payer?

5           MR. LUNDBERG:   Mr. Commissioner, no, I would  
6 not.   And I would cite the Commission to Section 49-31-84  
7 that says telecommunications companies may grant  
8 incentives to meet competition.

9           Then there's some discussion of the public  
10 interest involved there.   And then it says "not  
11 withstanding any other provisions of Chapter 49-31, any  
12 telecommunication company may grant any discounts,  
13 incentives, services, or other business practices  
14 necessary to meet competition."

15           I think the South Dakota Legislature has  
16 suggested that there are situations where you could grant  
17 incentives to customers that would result in them not  
18 being a net payer.

19           And that statute doesn't say, well, you can  
20 grant incentives only up to the point where they're still  
21 paying you something.   It doesn't say that.   So I think  
22 there's support in the South Dakota Law for the  
23 proposition that a customer need not be a net payer.

24           COMMISSIONER NELSON:   And so if that is true, I  
25 guess going back to Commissioner Hanson's question, is

1       there any reason that you can't substitute the word  
2       "customer" in your tariff for "person or entity"?

3               MR. LUNDBERG: Not that I know of as we sit here  
4       today. All I pointed out was it's something Aventure  
5       would want to discuss with their consultants. But  
6       regardless of how the -- regardless of how the ruling  
7       comes down today, that's something we will take a look  
8       at.

9               COMMISSIONER NELSON: Thank you. I think that's  
10       all the questions I have at the moment.

11              CHAIRMAN HANSON: Any further questions?  
12       Comments?

13              MS. AILTS WIEST: I have a recommendation.

14              CHAIRMAN HANSON: Ms. Wiest.

15              MS. AILTS WIEST: This is Rolayne Wiest. My  
16       recommendation is that since Aventure has stated it has  
17       no objection to substituting existing billing dispute  
18       provisions, would I take them up on that offer since a  
19       number of the parties have pointed out some problems with  
20       what they are trying to put in for billing dispute  
21       provisions and they have no objection to substituting  
22       their existing billing dispute provisions.

23              To the extent it causes any problems with any  
24       other tariff provisions, I think we can handle that at  
25       some point, later point.

1           With respect to the other issues that were  
2 brought up by the -- by AT&T and the other Interveners,  
3 in my opinion, I don't think that the parties have -- the  
4 Interveners have shown that as a matter of law that the  
5 Commission can grant summary judgment on this, and so I  
6 recommend that the Commission deny that Motion for  
7 Summary Judgment.

8           CHAIRMAN HANSON: So you're recommending that  
9 summary judgment in part but that would only apply to the  
10 billing portion?

11           MS. AILTS WIEST: I recommend denial of the  
12 Motion for Summary Judgment. But, again, since Aventure  
13 has stated that it has no objection to putting in its  
14 what I would call current provisions as opposed to  
15 proposed provisions into its proposed tariff, I would  
16 take that up on that offer, is my point.

17           CHAIRMAN HANSON: Okay.

18           MS. AILTS WIEST: And that would get rid of all  
19 of those arguments, I believe, with respect to the  
20 billing dispute provisions. We just don't have a record  
21 at this point.

22           CHAIRMAN HANSON: Right.

23           MS. AILTS WIEST: On the other provisions.

24           CHAIRMAN HANSON: I understand. And that's what  
25 I'm wrestling with. And we're not in any way giving

1 tacit approval, are we, to their tariff by --

2 MS. AILTS WIEST: Not at all.

3 COMMISSIONER NELSON: Mr. Chairman.

4 CHAIRMAN HANSON: Yes.

5 COMMISSIONER NELSON: Are you looking for a  
6 Motion?

7 CHAIRMAN HANSON: Well, I'm still out in the  
8 ocean somewhere.

9 COMMISSIONER NELSON: Okay. Well, I'm going to  
10 try to bring you closer to shore here.

11 I would move that we deny summary judgment on  
12 the end user and end user premise definitions and that we  
13 allow the sub -- or the billing provisions to remain as  
14 they are in the existing tariff as -- instead of what was  
15 proposed.

16 CHAIRMAN HANSON: It almost sounds like we're  
17 approving portions of the tariff. Thank you.

18 You made your Motion. Do you wish to speak to  
19 it?

20 COMMISSIONER NELSON: I think it comes down to  
21 this: We've got, obviously, two very different  
22 perspectives on this use of the word "customer" versus  
23 "person or entity." And I don't think we've got -- I  
24 don't think that that comes down to a matter of law. I  
25 think that's a matter of fact, and I don't know that

1 we've got the facts on record here today to make that  
2 determination. I wish we did, but I don't believe that  
3 we do.

4 And based on that I believe that we must,  
5 therefore, deny summary judgment on those two accounts  
6 and have a full hearing on that particular question.  
7 Thank you.

8 CHAIRMAN HANSON: Thank you. Any further  
9 discussion on the Motion?

10 As compelling as the arguments are, I start  
11 looking at where do we go from here? And if we grant  
12 summary judgment, then does that go to Circuit Court or  
13 where does it go and how long is this whole process going  
14 to take and are we going to be able to shortcut it a  
15 little bit by at least having a hearing as soon as we  
16 possibly can on this? Because this does need to go to  
17 hearing.

18 I'm going to support your Motion. I really,  
19 really, really don't like the way the tariff is written  
20 based upon the information that we have before us. And I  
21 am -- I am inches away from granting summary judgment, on  
22 voting for summary judgment on all of this, but I do hear  
23 what counsel is saying, that we need stronger evidence in  
24 order to do that.

25 So any further discussion on the Motion?

1           If not, Commissioner Fiegen, this is on the  
2 Nelson Motion to basically grant -- to oppose summary  
3 judgment but to -- provided that there's an understanding  
4 that Aventure will change the portion pertaining to the  
5 billing and supplant with their original -- with their  
6 present verbiage.

7           COMMISSIONER FIEGEN: Fiegen votes aye on the  
8 Nelson Motion.

9           CHAIRMAN HANSON: Commissioner Nelson.

10          COMMISSIONER NELSON: Aye.

11          CHAIRMAN HANSON: Hanson votes aye. The Motion  
12 carries.

13          On the same Docket as we were just working on  
14 there is the Motion to Compel.

15          Mr. Van Camp.

16          MR. VAN CAMP: Thank you, Mr. Chairman.

17          CHAIRMAN HANSON: Are you familiar with this  
18 Docket?

19          MR. VAN CAMP: It looks like I will become  
20 imminently more so.

21          We filed a Motion to Compel in this Docket. We  
22 filed an initial set of discovery requests. They were  
23 denied. We redacted and took out from our discovery  
24 requests items relating to the costs of providing pumping  
25 services and in an attempt to narrow that focus.

1           As of yet, we've only gotten general responses  
2 alluding to the fact that Aventure intends to offer only  
3 the services in the State of South Dakota that  
4 significantly are similar to those of Century Link.

5           It's my understanding that based on the issue of  
6 relevance Aventure objects to our discovery questions  
7 that go into their current practices that go into the  
8 State of Iowa as they transition to business in  
9 South Dakota.

10           As I point out in my brief, I think this  
11 Commission certainly has a statutory right and an  
12 obligation to examine the practices of a company that is  
13 seeking to do business in the State of South Dakota.

14           Aventure offers and has offered to counsel  
15 sitting before you and other counsel of record, including  
16 Staff, the ability to share the information that has been  
17 produced in the many Iowa dockets and cases concerning  
18 Aventure and its practices in Iowa.

19           The methodology to do that is lost on me.  
20 Certainly AT&T has in its possession a boatload, I guess  
21 would be the only way to describe it, of information that  
22 was created in the Iowa proceedings, but the mechanism to  
23 share that is kind of lost on me.

24           It also seeks to, in my mind, turn the discovery  
25 responsibility which is on the party that it has been



1 formally requested to answer the discovery questions.

2           Again, we limited it. I can go through these in  
3 specific if we need to and if we need to take up the  
4 better part of the afternoon. But if the general  
5 question is relevancy, my answer stands on my Brief,  
6 which in South Dakota, which is different than other  
7 jurisdictions, relevancy at the discovery phase is rather  
8 broad. The standard is secure the information that may  
9 lead to admissible evidence at trial.

10           We will certainly argue that the practices of  
11 Aventure in Iowa at hearing are relevant in this Board's  
12 ultimate decision on whether or not to approve the tariff  
13 at hand. And as such, we need to see what they've done  
14 in Iowa, what they continue do in Iowa, and we would ask  
15 that the Motion to Compel be issued for the redacted  
16 discovery requests that are on file and in our briefs.

17           And I'm available for any questions. Thank  
18 you.

19           CHAIRMAN HANSON: Mr. Van Camp, first of all,  
20 just a clarification. We have a number of -- you have a  
21 number of requests for information. And one of those --  
22 that 1-30 is highlighted as an interrogatory to be  
23 answered, but it's excluded by you on page 5 of your  
24 Motion to Compel.

25           Did you intend that?

1 MR. VAN CAMP: Yes, Your Honor -- I'm sorry. I  
2 followed the lead of Century Link in ascribing to you a  
3 robe. Yes, Mr. Chairman. I think that is something that  
4 we would need to know. One of the issues at hand will be  
5 the actual number of legitimate business customers of --  
6 residential customers, excuse me, that Aventure serves in  
7 Iowa and what they charge them for those services under  
8 the tariff that's filed in Iowa.

9 CHAIRMAN HANSON: So 1-30 should be included as  
10 part of your request?

11 MR. VAN CAMP: Yes, Your Honor.

12 CHAIRMAN HANSON: Okay. Thank you. And we will  
13 turn to any Interveners who wish to make a presentation  
14 at this time.

15 Seeing none -- am I hearing none?

16 Ms. Ford, do you have anything?

17 MS. FORD: I do not.

18 CHAIRMAN HANSON: Thank you. Then we will turn  
19 to Aventure.

20 Mr. Lundberg.

21 MR. LUNDBERG: Thank you, Mr. Chairman. I think  
22 through the discussion today the issue for hearing has  
23 been narrowed and identified to the question of the end  
24 user definition in this tariff and the questions of what  
25 persons or entities or customers are, how many customers

1 Aventure has in Iowa or what they charge them in Iowa is  
2 not relevant to that issue.

3 And so we have filed relevance objections and  
4 responded to the Motion to Compel on that basis.

5 Having said that, we have also told Mr. Van Camp  
6 and the others -- and whatever the mechanism is, we will  
7 cooperate -- that all of these IXCs in this Docket have  
8 received substantial discovery from Aventure in Federal  
9 Court cases in Iowa and before the Iowa Utilities Board.

10 I told Mr. Van Camp whatever needs to be done in  
11 terms of waiving the protective orders in Iowa, waiving  
12 the protective order here, allowing all of that  
13 information to be shared by the IXCs, we have no  
14 objection to that.

15 We do object to having them jump through all of  
16 those -- having us jump through all of those hoops again  
17 when they already have the information. And we still  
18 believe that at the hearing on the end user issue here  
19 99 and nine-tenths percent of that discovery if it's  
20 attempted to be introduced into evidence will be found to  
21 be irrelevant to the issues before the Commission.

22 But we have made that offer, and whatever we  
23 need to do in terms of executing waivers of protective  
24 orders in Iowa or in this Docket, we will do that. They  
25 have virtually every scrap of paper ever generated by

1 Aventure since it started doing business in 2005,  
2 including local customer lists, financial statements,  
3 Universal Service Fund filings. I don't have the  
4 complete list, but they basically have everything.

5 And if they all want to share it, that's fine  
6 with us. We don't think any of it will see the light of  
7 day at the upcoming hearing, but we've made that clear  
8 that we don't have any objection to that.

9 Beyond that, we would stand on the resistance  
10 that we've filed to the Motion to Compel with regard to  
11 whether any of this is relevant to the very narrow issue  
12 that's now been defined for hearing. Thank you.

13 CHAIRMAN HANSON: Thank you. Mr. Van Camp.

14 MR. VAN CAMP: As an initial matter, thank you,  
15 Mr. Chairman, I don't believe that the issues have  
16 necessarily been narrowed for hearing. If you read our  
17 Motion for Summary Judgment, we allude to -- and actually  
18 if you go back and read our initial Petition for  
19 Intervention, we have a lot of problems with the tariff  
20 that was proposed.

21 And so to say now that we've been narrowed down  
22 to the definition of end user and whether or not customer  
23 means something is, I think, misplaced, and this Docket  
24 will go as it chooses to go based on the filing of  
25 Aventure and the discovery that's ultimately produced.

1           Again, sharing. I don't know what that means.  
2 I have people that can tell me what's in AT&T's files in  
3 Iowa. I can't see what's in Sprint's files until they  
4 share them with me. Staff has nothing. Midcontinent,  
5 who's an Intervener and a party, has nothing.

6           We generally enjoy in South Dakota reciprocal  
7 discovery in front of this Commission where the parties  
8 freely share. If I have to answer a response from  
9 Mr. Wieczorek's client in a case, I will copy Staff on  
10 that.

11           I think at a minimum Aventure has an obligation  
12 to answer the questions that are put before it and then  
13 to disseminate that information to the other parties.  
14 How they use it is up to them, but certainly Sprint under  
15 the offer that Mr. Lundberg had or Century Link doesn't  
16 have an obligation to come to me and give me what's in  
17 their Iowa filings. I haven't asked for it.

18           CHAIRMAN HANSON: Thank you.

19           Staff, did you have anything? Ms. Semmler.

20           MS. SEMMLER: I have no initial comments.

21           CHAIRMAN HANSON: Thank you. We will take these  
22 in groups as we have them under the first item, if that  
23 would work for everyone.

24           Commissioner Nelson, do you have some questions?

25           COMMISSIONER NELSON: Thank you. I do have

1 questions. And let me be very clear in that the upcoming  
2 hearing is not going to be restricted simply to one  
3 definition of end user or customer or end user premises.

4 My comments in regard to that were simply as it  
5 related to the Summary Judgment Motion. It has no  
6 bearing on the scope of the upcoming hearing.

7 So based on that, Mr. Van Camp, if you would  
8 come forward, I've got a number of questions about some  
9 specific items that you've requested in discovery.

10 And I guess just so you know where I'm coming  
11 from, I am inclined to grant discovery almost entirely,  
12 based on your request, with some specific exceptions.  
13 And these I want to ask you about because I'm not  
14 convinced that these are relevant.

15 MR. VAN CAMP: Absolutely.

16 COMMISSIONER NELSON: These are issues which  
17 you're going to have to convince me that they are, in  
18 fact, relevant. Page 6, 1-23, Subpart C. "All vendor  
19 invoices and contracts for each switch identified in  
20 Subparts A and B."

21 Why are vendor invoices and contracts for  
22 switches relevant?

23 MR. VAN CAMP: I think in the traffic pumping  
24 model oftentimes you'll see that equipment that is  
25 utilized for the provisioning of free conferencing or

1 pumping are provided by the free conferencing companies  
2 themselves and are not, in fact, paid for by these LECs.

3 So if they've paid for some piece of equipment,  
4 we'd like to see it. Otherwise, we're going to argue  
5 that it's being provided solely for the provisioning of  
6 these services.

7 COMMISSIONER NELSON: Okay. Page 11, 1-63  
8 talking about specific amounts paid to nonemployer  
9 suppliers, including the dates of each transaction over a  
10 three-year period.

11 Why is that relevant to that detailed level?

12 MR. VAN CAMP: Traffic pumping, and some of us  
13 have been involved in it for years and years and years,  
14 oftentimes involves different means of paying the free  
15 conferencing partners. And it can be for what could be  
16 termed marketing services. It could be for provisioning  
17 of other types of services to get away from the fact that  
18 you say you're splitting access. No, we're really paying  
19 you a fee for giving us something.

20 And so what we need to do is see what monies  
21 have been paid out by Aventure to suppliers of any  
22 nature, type, or substance.

23 COMMISSIONER NELSON: Thank you. Page 12, 1-66  
24 and 1-67. The texts of advertising. How is that  
25 relevant?

1           MR. VAN CAMP: I think we will show at hearing  
2 that there has been some exploitation of the USF funds in  
3 Iowa. That's already on the record in Iowa, the amount  
4 of money that Aventure's received. And they obviously  
5 didn't comply with some of the USF requirements.

6           The extent to which we will use that or whether  
7 or not we can use it will be determined by this  
8 Commission, I assume, in the equivalent of a Motion in  
9 Limine. But certainly in discovery if we need to ferret  
10 out what Iowa found in its rulings, we have a right to  
11 see it.

12           COMMISSIONER NELSON: Okay. 1-83.

13           MR. VAN CAMP: And this probably goes -- without  
14 having the tariff in front of me, if Aventure claimed  
15 that it can cancel service without liability, there are  
16 rules in place in South Dakota where you can't cancel  
17 service if a amount is withheld for a legitimate dispute.

18           And this gets back to the discussion earlier.  
19 And now we have these substituted provisions. Where do  
20 they fit? What do they say? If they want to answer this  
21 question by just saying, look, we just substituted  
22 through a revised filing this provision with what was in  
23 existence --

24           And that gets back to my concern with the  
25 earlier decision. What is substituted? What isn't



1 substituted? And is that a new filing?

2 If they answer that question then our filing is  
3 based on now what was our original tariff, well, then  
4 that's their answer. But I assume some of these billing  
5 provisions, termination charges at 1-82, that those are  
6 now going to be resubmitted at some level.

7 COMMISSIONER NELSON: Okay. 1-85 -- and my  
8 question not only is relevancy but you may have answered  
9 with probably the same answer, but you're relying on an  
10 ARSD section that is inapplicable to this type of  
11 relationship. And the ARSD that I'd refer you to is  
12 20-10 -- or excuse me. 20:10:5:1.

13 MR. VAN CAMP: Okay. Not 07:04 that's in 1-85?

14 COMMISSIONER NELSON: No. 20:10:05:01.

15 MR. VAN CAMP: Right.

16 COMMISSIONER NELSON: And that talks about the  
17 scope and application of several different chapters of  
18 rules including 20:10:07:04. And it provides an  
19 exception that these do not apply to telecommunications  
20 companies exempt from Commission regulation or to access  
21 services subject to Commission regulation.

22 MR. VAN CAMP: Well, I certainly -- I note  
23 you're correct of review of 20:10:05:01. Certainly that  
24 rule and its applicability is subject, I think, to our  
25 challenging based on their dispute provisions as any

1 other statute or rule would be of the Commission.

2 If there's a -- if that directly contradicts my  
3 request, that's fine, and then it's not relevant. But  
4 they should still be compelled in the Motion of discovery  
5 to answer the request, and you've laid out for them how  
6 they probably will answer the request.

7 COMMISSIONER NELSON: Let's also look at --  
8 actually I think you've answered all the rest of these  
9 with your current answer. Thank you.

10 CHAIRMAN HANSON: Mr. Van Camp, just one other  
11 item. You highlight 1-89, and you don't discuss that  
12 necessarily. I assume, is that one you also want to  
13 include?

14 MR. VAN CAMP: Explain why it's reasonable to  
15 require that a customer that -- I'm sorry. I shouldn't  
16 talk as I think. It gets me into trouble.

17 CHAIRMAN HANSON: I try not to do that while I'm  
18 with my wife.

19 MR. VAN CAMP: Yeah. You know, again, that's a  
20 billing provision that now is in theory going to be  
21 substituted with a previous billing provision. So they  
22 will answer that, I assume, along those lines. That's  
23 what's going to turn into how we have this hearing.

24 What ultimately falls into the tariff now as  
25 replacement, keeping of note as Commissioner Nelson

1 pointed out and I pointed out in any original summary  
2 judgment brief, there are a lot of issues that we wish to  
3 raise at hearing. So if this provision that's referenced  
4 in 1-89 is removed by them in a filing, they can answer  
5 it as such.

6 CHAIRMAN HANSON: Thank you.

7 Any further questions at this time?

8 If not, Ms. Semmler, did you have anything at  
9 this time?

10 MS. SEMMLER: I don't have anything to add.

11 CHAIRMAN HANSON: Ms. Wiest, anything?

12 MS. AILTS WIEST: No.

13 CHAIRMAN HANSON: All right. I will turn to  
14 Mr. Lundberg and see if he has anything he would like to  
15 say at this time.

16 MR. LUNDBERG: Mr. Chairman, we have nothing  
17 further. We would rely or not resistance that we have  
18 filed.

19 CHAIRMAN HANSON: All right. Thank you. If  
20 there's nothing further, I'm going to attempt a Motion.  
21 And I expect some friendly advice on changing it after  
22 I've made the Motion.

23 I move that the Commission grant the Motion to  
24 Compel for requests 1-1 through 1-67 except for 1-3, 1-5,  
25 1-6 through 1-19, 1-22, 1-25 through 1-29, 1-31, 1-33,

1 1-34, and 1-41 through 1-43, and 1-48 through 1-62, 1-64  
2 and 1-65. So those are exceptions to the 1 to 1-67.

3 Additionally, request 1-72 through 1-77,  
4 requests 1-82, 1-83, 1-85 through 1-88, and 1-89 and  
5 1-90, 1-91 should all be included.

6 Are there any that any of the Commissioners feel  
7 I left out that should be included?

8 If not, that is a Motion.

9 MS. AILTS WIEST: Just for clarification.  
10 Essentially, I think you would be granting the Motion to  
11 Compel in its entirety with the possible -- with the  
12 clarification that 1-30 is included.

13 CHAIRMAN HANSON: 1-30 and 1-89. I don't know  
14 that they highlighted --

15 MS. AILTS WIEST: I think 1-89 was highlighted.

16 CHAIRMAN HANSON: It was, but it was not  
17 explained. Correct.

18 MS. AILTS WIEST: So I think you could grant it  
19 in full with the clarification that 1-30 was included.

20 CHAIRMAN HANSON: You just want to make  
21 everything so clear. I'm a complicated elected person,  
22 and you're making it quite easy for everyone to  
23 understand. I appreciate that.

24 The Motion, yes, is to grant the Motion to  
25 Compel in its entirety and add 1-30 to that.

1           Any other questions? Thank you for -- no, no.  
2 Thank you very much for that.

3           Any discussion on the Motion?

4           If not, Commissioner Fiegen.

5           COMMISSIONER FIEGEN: Fiegen votes aye.

6           CHAIRMAN HANSON: Nelson.

7           COMMISSIONER NELSON: Aye.

8           CHAIRMAN HANSON: Hanson votes aye. Motion  
9 carries.

10           And that will dispense with TC11-010, at least  
11 for the moment.

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF SULLY )

4

5 I, CHERI MCCOMSEY WITTLER, a Registered  
6 Professional Reporter, Certified Realtime Reporter and  
7 Notary Public in and for the State of South Dakota:

8 DO HEREBY CERTIFY that as the duly-appointed  
9 shorthand reporter, I took in shorthand the proceedings  
10 had in the above-entitled matter on the 25th day of  
11 October, 2011, and that the attached is a true and  
12 correct transcription of the proceedings so taken.

13 Dated at Onida, South Dakota this 30th day of  
14 November, 2011.

15

16

17

18 Cheri McComsey Wittler,  
19 Notary Public and  
20 Registered Professional Reporter  
21 Certified Realtime Reporter

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