

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

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**IN THE MATTER OF THE AVENTURE )  
COMMUNICATION TECHNOLOGY, LLC )  
D/B/A AVENTURE COMMUNICATIONS' )  
ACCESS TARIFF NO. 3 )**

**Docket No. TC11-010**

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**QWEST'S BRIEF IN SUPPORT OF AT&T'S RENEWED MOTION FOR  
SUMMARY JUDGMENT TO DECLARE AVENTURE'S  
REVISED ACCESS TARIFF TO BE UNLAWFUL**

Qwest Communications Company LLC, a Delaware Limited Liability Company, doing business as "CenturyLink" (hereinafter referred to as "Qwest"), hereby submits this brief in support of AT&T's Renewed Motion for Summary Judgment to Declare Aventure's Revised Access Tariff to be Unlawful.

AT&T's Motion is well-founded, and Qwest respectfully requests that the South Dakota Commission grant the Motion, rendering Aventure's proposed Access Tariff No. 3 invalid. Qwest concurs with both aspects of AT&T's Renewed Motion -- that both the "end user" definition and the dispute resolution provisions are invalid as a matter of law.

Qwest will try not to repeat the material contained in AT&T's Renewed Motion, but writes separately on the "end user" issue to apprise the Commission of additional legal support.

**BACKGROUND**

**The three phases of the LECs' traffic pumping schemes**

The South Dakota Commission is witnessing the latest phase to the schemes perpetrated by Aventure and other LECs to engage in traffic pumping, which attempts to bilk long distance carriers from tens of millions of dollars. The first phase was the commencement of the traffic pumping scheme itself when rural ILECs and CLECs entered into business relationships with free calling companies. The FCC has defined a traffic pumping arrangement as "*an 'arbitrage*

*scheme*' by which a telecommunications carrier [Aventure in this case] 'enters into an arrangement with a provider of high volume operations such as chat lines, adult entertainment calls, and free conference calls' in order to generate elevated traffic volumes and maximize access charge revenues."<sup>1</sup>

After Qwest and other IXCs filed complaints in 2007 against traffic pumping LECs, some LECs engaged in the second phase, which was to create, manufacture, and forge documentation to make the relationships between the LECs and the free calling companies appear to be legitimate, when in fact they were not. AT&T's Renewed Motion (on page 7) describes the manufacturing of evidence by some traffic pumping LECs (not Aventure) as found by the Iowa Board. The FCC was a forum in which fabricated documents were submitted as evidence in the case, this time by Farmers & Merchants. The FCC described Farmers' misconduct as follows:

Farmers realized that it would not be entitled to the access revenues that its plan was designed to generate unless it could persuade the Commission that the [conference calling companies] were its customers under tariff. It thus undertook to fabricate evidence of a tariffed customer-carrier relationship that did not in fact exist, sending backdated bills to the [conference calling companies] and executing contract "addenda" purporting to have taken effect months or years earlier. Farmers then selectively submitted some of these documents into the record in this proceeding without any indication that they had not been issued contemporaneously with the provision of service, while withholding other contemporaneous documents that showed the nature of the fabrication.<sup>2</sup>

Qwest is not aware of evidence that Aventure engaged in the same misconduct as Farmers & Merchants, however, Aventure was not immune to creating and treating documentation in a way to create a misimpression of the true relationships it had with free calling companies, as stated in AT&T's Renewed Motion, page 7. The complete Iowa Board ruling relating to Aventure's billing conduct in Iowa is as follows:

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<sup>1</sup> In the Matter of Qwest Communications Company, LLC, v. Northern Valley Communications, LLC; File No. EB-11-MD-001; Memorandum Opinion and Order; Released June 7, 2011, at footnote 1, citing Connect America Fund, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4758, ¶ 636 (2011) (emphasis added).

<sup>2</sup> In the Matter of Qwest Communications Corporation, v. Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001, Second Order on Reconsideration Released: November 25, 2009, at ¶ 9.

With respect to Aventure's assertion that it specifically charged the FCSCs associated with Aventure a \$5 per line, per month fee, QCC provided convincing evidence that the invoices created by Aventure were never sent to the FCSCs. (QCC Initial Brief, pp. 40-41). Instead, they were sent to an intermediary broker and Aventure did not receive payment on any of those invoices. (Tr. 2292-93; Exhibit 1381). Further, there is no evidence that Aventure took any action to attempt to collect on the invoices. It is not clear when Aventure sent the invoices for this untariffed rate, but they were not legitimate bills for which Aventure expected to be paid.<sup>3</sup>

Despite these attempts by traffic pumping LECs, the Iowa Board and the FCC ruled that the free calling companies were not legitimate "end users" and thus the LECs' switched access tariffs were not applicable to traffic delivered to free calling companies. The Iowa Board found that the traffic pumping LECs did not send the free calling companies ("FCSCs") monthly local exchange invoices, did not bill FCSCs the EUCL charges, did not bill for federal USF, and did not bill the FCSCs for the services they received, such as ISDN Line Ports and ISDN PRI and BRI arrangements.<sup>4</sup> Thus, for these and other reasons, the free calling companies were not legitimate end user customers of the traffic pumping LECs in Iowa. This ruling was affirmed by the Iowa District Court on October 12.<sup>5</sup>

Faced with these adverse orders, the traffic pumping LECs proceeded to engage in their third phase in an attempt to continue perpetrating their schemes, and which is evident in Aventure's revised switched access tariff. This third phase is to file tariffs in an effort to override and avoid the legal principles and rulings set forth by the state and federal commissions in noted traffic pumping cases. In particular, traffic pumping LECs such as Aventure have tried unilaterally to effectuate a change in law on the critical definitions of "end user" and "customer" as these terms relate to switched access tariffs. This phase is certainly evident in the Aventure's proposed tariff filed with the South Dakota Commission.

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<sup>3</sup> In re: Qwest Communications Corporation v. Superior Telephone Cooperative, et al., Docket No. FCU-07-2, Final Order, issued September 21, 2009, recon. denied (Feb. 4, 2011) ("IUB Final Order"), at p. 26.

<sup>4</sup> Id., at 25.

<sup>5</sup> Farmers Telephone Company, et al. v. Iowa Utilities Board, Case No. 05771 CVCV 008561, Polk Co. Dist. Ct. (October 12, 2011).

**Aventure's proposed tariff is for the purpose of traffic pumping.**

Aventure contends in its response that AT&T's motion is premature and objections to potential traffic pumping activities should not be heard in this proceeding. Aventure's Resistance, ¶4, at pages 4-5. Also, Aventure is quite coy in its responses to Qwest's discovery requests when asked whether Aventure will charge interexchange carriers under its proposed South Dakota switched access tariff for calls delivered to free calling companies. Rather than providing a straightforward "Yes" or "No," Aventure transparently reveals its intentions by stating that "it has no **current** traffic in South Dakota and no **current** plan to provide service to customers who may offer free calling services to their customers." (Emphasis added).<sup>6</sup>

There should be no mistake that Aventure has evidenced its intention to use the proposed tariff for traffic pumping purposes, and is simply attempting to deflect the Commission's attention away from traffic pumping. The absence of a candid response to the discovery request cited above is proof enough. Further, the tariff filing that triggered the instant proceeding, submitted by Aventure's on March 18, 2011, clearly disclosed its plan to use the tariff when it defined an "end user" as follows:

An End User need not purchase any service provided by the Company and may include, but is not limited to, **conference call providers, chat line providers, calling card providers, call center providers, help desk providers and residential and/or business service subscribers.** (Emphasis added).

The entities highlighted in the above quote are free calling companies that Aventure partners with to engage in traffic pumping activities.

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<sup>6</sup> The entire request and Aventure's response is as follows:

**DATA REQUEST 3-1.** Will Aventure charge interexchange carriers under its proposed South Dakota switched access tariff for calls delivered to FCSCs?

**RESPONSE:**

See general objections above and previous objections to Qwest's First and Second Sets of Discovery Requests. Without waiving those objections, Aventure states that it has no current traffic in South Dakota and no current plan to provide service to customers who may offer free calling services to their customers.

Importantly, the LEC's switched access tariff is the operative document evaluated by regulatory agencies in determining whether access charges apply to free calling traffic. And, Aventure may eventually contend that Commission approval of the proposed tariff constitutes evidence that the rates or prices are fair and reasonable under Section 49-31-12.1. Thus, Aventure's contention that the Commission should approve the proposed tariff without assessing its traffic pumping implications belies Aventure's apparent strategy of obtaining an approved traffic to legitimize its traffic pumping activities. In sum, absent a clear commitment from Aventure that it will not use the proposed tariff to assess switched access charges upon the delivery of traffic to free calling companies, this Commission should assume that Aventure will use the proposed traffic in such a fashion, as it has in Iowa.

### ARGUMENT

#### **Aventure's proposed tariff illegally changes South Dakota's definition of an "end user."**

Qwest agrees with and supports AT&T's Renewed Motion and its recitation of the law governing "end users" in the context of valid switched access tariffs. Qwest writes separately here to present additional arguments that, under South Dakota law, the proposed tariff improperly removes the requirement that the entity receiving the delivery of traffic under a switched access tariff be a "customer," which has been defined as a person receiving telecommunications services **for a fee**.

The South Dakota rules governing switched access define an "end user" as follows:

**20:10:29:07. End users.** A *customer* of an intrastate telecommunications service that is not a carrier is an end user. However, a carrier other than a telecommunications company is considered an end user when the carrier uses a telecommunications service for administrative purposes. A person or entity that offers telecommunications services exclusively as a reseller is considered an end user if all resale transmissions offered by the reseller originate on the premises of the reseller. (Emphasis added).

Thus, the inclusion of a "customer" is essential to the structure of South Dakota telecommunications law on switched access.

This definition is critical because of the some differences in language between South Dakota and other jurisdictions. Many jurisdictions define “telecommunications services” as “offering of telecommunications **for a fee** directly to the public,” South Dakota defines “telecommunications services” differently, as “the transmission of signs, signals, writings, images, sounds, messages, data, or other information of any nature by wire, radio, lightwaves, electromagnetic means, or other similar means.” This difference in language, however, does not make a material difference under South Dakota law, because, as explained below, the use of “customer” in South Dakota’s definition of an “end user” injects the important principle that the person or entity that is receiving or sending telecommunications is **paying a fee**.

As correctly stated by AT&T, a “customer” is a person that is paying purchaser of services.<sup>7</sup> And, the FCC clearly has interpreted a “customer” in the switched access context as one that purchases telecommunications for a fee:

Northern Valley [argues] that a “customer of ... telecommunications service” need not pay for such service. According to Northern Valley, the “*Collins English Dictionary* recognizes that, in addition to ‘a person who buys,’ a customer may also be ‘a person with whom one has dealings.’” In the context relevant to this dispute, however, “customer” clearly means a *paying* customer. As discussed, the Commission defines “end user” to mean a customer of a “telecommunications service,” which, under the statute, is the “offering of telecommunications *for a fee*.” The Commission has explained that, “in order to be a telecommunications service, the service provider must assess a fee for its service.” (Italics that of the original).<sup>8</sup>

Indeed, the FCC noted that Northern Valley’s proposed tariff was internally inconsistent, because it included language stating that an “end user” was a “customer,” which Northern Valley interpreted as a person that did not pay a fee. That is, accordingly to the FCC, a “non-paying” “customer” is a contradiction in terms.<sup>9</sup>

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<sup>7</sup> AT&T Renewed Motion, at 15.

<sup>8</sup> Northern Valley, at ¶10.

<sup>9</sup> See id., at footnote 34.

The FCC's decision in the Farmers & Merchants case also relies on the principle that a legitimate switched access tariff includes the concept of a paying "customer":

[T]he facts developed on reconsideration show a purposeful deviation from the tariff's terms that allowed the conference calling companies to reap benefits from **a free service** offered only to them, which thereby enabled Farmers to dramatically increase its access charge billing to Qwest. These facts make apparent that Farmers and the conference calling companies never established - - and in fact purposefully avoided - - a **"customer" relationship** cognizable under the tariff.<sup>10</sup> (Emphasis added; quotes those of the FCC).<sup>11</sup>

South Dakota's use of the term "customer" is therefore significant. A "customer" under South Dakota's rule defining an "end user" means a person purchasing telecommunications for a fee.

Aventure's proposed tariff violates this requirement. The proposed Aventure switched access tariff omits the word "customer" from its definition of an end user and instead uses the terms "person or entity":

End User – Any ***person or entity*** that is not a carrier who sends or receives an interstate or foreign telecommunications service transmitted to or from a Customer across the Company's Network. A carrier shall be deemed to be an End User when such carrier uses a telecommunications service for administrative purposes, and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an End User if all resale transmissions offered by such reseller originate on the premises of such reseller. Other carriers, including IXCs, are not considered to be End Users under the terms of this tariff unless the Company consents to such classification in writing.

That is, the word "customer" is nowhere to be found in Aventure's tariff, and thus is in violation of the definition of an "end user" under the South Dakota rules.

In sum, Aventure's proposed tariff violates South Dakota law in at least two ways. First, it fails to include the language of "customer" in its definition of an "end user." And second, it removes the concept of a "customer" as a paying purchaser of telecommunications services.

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<sup>10</sup> Id., at ¶21.

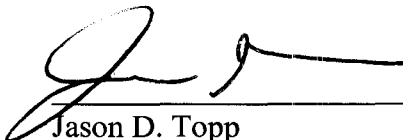
<sup>11</sup> Farmers & Merchants, at p. 10.

## CONCLUSION

Qwest joins in AT&T's request for the Commission to issue an order summarily rejecting Aventure's proposed switched access tariff. Aventure clearly intends to use its proposed switched access tariff to import its traffic pumping schemes into South Dakota. Even after the issuance of the Iowa Board's decision, Aventure shrugs off the Board's admonishment for engaging in an abuse of that state's switched access regulatory structure, and comes to this state with a tariff that simply eliminates the regulatory obligations deemed essential to switched access by the Iowa Board and the FCC, as well as being inconsistent with South Dakota's Rules governing switched access. The invalid definition of an "end user" is dispositive of this case, and the granting of summary judgment would not only save the parties and the Commission ample time and resources, but also would send the correct signals to traffic pumping LECs that their practices are not tolerated in this state.

Dated this 14<sup>th</sup> day of October, 2011.

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