BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Filing by Aventure Communication Technology, L.L.C. d/b/a Aventure Communications for Approval of its Switched Access Services Tariff No. 3	)	Docket No. TC11-010

VERIZON'S RESPONSE IN SUPPORT OF
AT&T'S RENEWED MOTION FOR SUMMARY JUDGMENT

Verizon[1] hereby submits its response in support of AT&T's Renewed Motion for Summary Judgment to Declare Aventure's Revised Access Tariff to Be Unlawful ("AT&T Renewed Motion").[2] For the reasons set forth in AT&T's Renewed Motion, the Commission should reject the tariff filed by Aventure Communication Technology, L.L.C. ("Aventure") as a matter of law.

AT&T submitted its initial motion for summary judgment on June 21, 2011, explaining that this is ***not*** simply a straightforward case in which a competitive local exchange carrier ("CLEC") serving traditional residential and business customers in South Dakota has decided – as Aventure suggests – to file a revised tariff to "provide greater consistency in the terms and conditions associated with its provision of interstate and intrastate access."[3] To the contrary,

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[1] As used herein, "Verizon" refers collectively to MCI Communications Services, Inc. d/b/a Verizon Business Services and Cellco Partnership and its subsidiaries providing wireless services in the state of South Dakota, collectively d/b/a Verizon Wireless.

[2] AT&T's Renewed Motion was filed on September 7, 2011. AT&T originally filed its Motion for Summary Judgment to Declare Aventure's Revised Access Tariff to Be Unlawful ("AT&T Initial Motion") on June 21, 2011.

[3] AT&T Renewed Motion at 1 (quoting Letter of S. Thomas, Consultant to Aventure, to P. Van Gerpen, Exec. Dir., S.D. PUC, at 1 (Mar. 17, 2011)).

Aventure admittedly does not provide any services at all in South Dakota at this time.[4] And its proposed tariffs are more about allowing Aventure to expand its "traffic pumping" activities into South Dakota than they are about actually serving traditional South Dakota residential and business customers.

Verizon therefore previously filed a response in support of AT&T's Initial Motion, noting that Aventure heretofore has operated exclusively in Iowa, where its business practices have been the subject of numerous proceedings before the Iowa Utilities Board ("IUB").[5] Indeed, not only did the IUB determine that Aventure's traffic pumping activities violated its intrastate switched access tariff and were unlawful, but that the IUB would be initiating proceedings to determine why Aventure's certificate of public convenience and necessity should not be revoked.[6] When Aventure filed revised tariffs and proposed high volume access services rates with the IUB that would have permitted Aventure to continue engaging in traffic pumping, the IUB initiated a proceeding regarding those rates and formally requiring that Aventure show cause why it should be entitled to maintain its certificate.[7] That proceeding is ongoing, with discovery completed, written testimony already submitted, and a hearing scheduled before the IUB on December 13, 2011.

It is no coincidence that, ***after*** the IUB declared Aventure's traffic pumping activities to be unlawful and indicated its intent to initiate proceedings regarding revocation of Aventure's

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[4] *See Aventure Communication Technology, L.L.C.'s Resistance to Motion to Intervene and Request to Open an Investigation and Suspend Tariff during the Investigation* (July 14, 2011) ("Aventure's Resistance to Initial Motion") at 1 ("Currently Aventure has no customers or telephone traffic in South Dakota.").

[5] *See* Verizon's Response in Support of AT&T's Motion for Summary Judgment (July 14, 2011) at 1-2.

[6] *Qwest Communications Corp. v. Superior Tel. Coop.*, 2009 WL 3052208, Docket No. FCU-07-2, Final Order (Iowa Utilities Bd., Sept. 21, 2009), *recon. den'd*, 2011 WL 459685 (Iowa Utilities Bd., Feb. 4, 2011) ("*IUB Order*").

[7] *See Aventure Communication Technology, L.L.C. v. Qwest Communications Corp., et al.*, Docket No. FCU-2011-0002 (Iowa Util. Bd.).

certificate, Aventure then filed a proposed tariff with this Commission.[8] Through its proposed tariff, Aventure sought to engage in the same kind of activities in South Dakota that the IUB was putting a stop to just across the border.

However, as AT&T detailed in its initial summary judgment motion, the Commission would be justified in rejecting Aventure's tariff filing on public policy grounds. The FCC and other state commissions have recognized, among other things, that traffic pumping "imposes undue costs on consumers, inefficiently divert[s] the flow of capital from more productive uses," and "harms competition."[9] Moreover, AT&T pointed out at least two specific sets of provisions in Aventure's proposed tariff that were facially unlawful,[10] including a proposed definition of "End User" that the FCC already has found to be unlawful and that conflicts with this Commission's rules[11] and billing dispute resolution provisions that conflict with the Commission's rules and with federal court decisions.[12]

Aventure subsequently made certain amendments to its proposed tariff.[13] But, as AT&T explained in its Renewed Motion, those changes do not change the fundamental nature of

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[8] The IUB denied Aventure's request for reconsideration of its decision on February 4, 2011. Aventure filed its proposed tariff with this Commission just over a month later, on March 18, 2011.

[9] *In the Matter of the Connect America Fund*, 26 FCC Rcd. 4554, ¶ 637 (2011); *IUB Order* at **26-27; *In the Matter of the Consideration of the Rescission, Alteration, or Amendment of the Certificate of Authority of All American to Operate as a Competitive Local Exchange Carrier within the State of Utah*, Docket No. 08-2469-01, Report & Order (P.S.C. of Utah, Apr. 26, 2010).

[10] *See* AT&T Initial Motion at 10. In addition, as AT&T points out, the Commission also would be required to reject Aventure's tariff because Aventure cannot demonstrate that its proposed intrastate switched access rates would provide it with a "reasonable" rate of return or otherwise are "fair and reasonable," as required by statute. *Id.* at 3. Qwest Communications Company ("Qwest") also identified numerous objectionable tariff provisions in its motion to intervene in this proceeding and to suspend Aventure's tariff. *See* Qwest Communication Company's Motion to Intervene and Requests to Open an Investigation and Suspend Tariff during the Investigation at 3-8.

[11] AT&T Initial Motion at 10-14.

[12] *Id.* at 14-18.

[13] *See* Aventure's Resistance to AT&T's Renewed Motion for Summary Judgment (Aventure's Resistance to Renewed Motion") at 1 (citing June 13, 2011 and July 18, 2011 revisions).

Aventure's proposed tariff – nor do they solve the fundamental policy and legal problems that plagued the proposed tariff that was subject to AT&T's initial motion for summary judgment. Aventure's proposed tariff still would permit – and legitimize – traffic pumping in South Dakota and, on this basis alone, should be rejected for policy reasons. Moreover, Aventure's proposed revisions do not solve the defects with its proposed definitions of "End User" and "End User's Premises" or other unlawful billing provisions. Indeed, the FCC rejected the very same proposed definition of "End User" when another carrier proposed it for inclusion in its interstate access tariff.[14] Accordingly, the Commission should enter summary judgment rejecting the proposed tariff.

Aventure's primary argument in opposition is that the Commission nevertheless should approve its proposed tariff because similar provisions are contained within its own interstate tariff.[15] Aventure claims that, because the FCC allowed those provisions to go into effect, then they cannot be deemed unlawful or contrary to public policy here. However, the FCC tariff approval process for non-dominant carriers (such as Aventure) is mechanistic and does not necessarily include the same sort of involved substantive review that Aventure suggests or that this case requires. Indeed, the FCC itself refers to the federal tariff process under Section 204(a)(3) as the "deemed lawful" status[16] and – as part of the pending intercarrier compensation/universal service fund reform docket – has questioned whether this process should be amended to account for access stimulation considerations like those presented here:

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[14] *See* AT&T Renewed Motion at 13 (citing Aventure's Resistance to Initial Motion at 2; *Qwest Communications Corp. v. Northern Valley Communications*, 26 FCC Rcd. 8332 (2011) ("*NVC I*"); *Northern Valley Communications, Revisions to FCC Tariff No. 3*, DA 11-1132 (June 28, 2011) ("*NVC II*")).

[15] *See* Aventure's Resistance to Renewed Motion at 2-3, 5-6.

[16] *In the Matter of the Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 4554, ¶ 653 (Feb. 9, 2011) ("*Connect America Fund NPRM*").

> Section 204(a)(3) provides that filed tariffs are "deemed lawful" unless suspended by the Commission within specified time periods. In practice, deemed lawful status means that a carrier providing service pursuant to a "deemed lawful" tariff cannot be subject to refund liability. However, the D.C. Circuit has recognized that the deemed lawful provision is not an unqualified right, but may be subject to reasonable limitations. In this context, whether a LEC has met a proposed access stimulation trigger might not be readily apparent when the tariff is filed. As a result, the LEC could invoke the "deemed lawful" protection to avoid refund liability, and effectively evade the operation of our proposed rules at least for a period of time, such as until a new tariff is filed. We accordingly propose to require LECs that meet the trigger to file tariffs on a notice period other than the statutory seven or fifteen days that would result in deemed lawful treatment. Both competitive LECs and incumbent LECs would be required to file on not less than 16 days' notice.[17]

Moreover, as the FCC demonstrated in July, approval of a tariff in the streamlined process does not prevent that same tariff from being held unlawful in a more thorough complaint docket.[18] And – again – in that context, the FCC has rejected the very same proposed definition of "End User" that Aventure proposed here.[19] Accordingly, the Commission should not feel bound to uphold this or any other such provisions here.

For the reasons set forth in the AT&T Initial and Renewed Motions, the Commission should reject Aventure's revised tariff filing as a matter of law.

Respectfully submitted this 14th day of October,2011.

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BY: _____

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[17] *Id.* at ¶666 (footnotes omitted).

[18] *In the Matter of Sprint Communications Company, L.P., v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, FCC 11-111 (July 18, 2011).

[19] *See* AT&T Renewed Motion at 10-11 (citing *NVC I* and *NVC II*).

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CERTIFICATE OF SERVICE

Brett Koenecke of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 14th day of October, 2011, he electronically filed or mailed by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above captioned action to the following at their last known addresses:

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