BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of Aventure Communication Technology, LLC d/b/a Aventure Communications' Access Tariff No. 3	)))	Docket No. TC11-010

AT&T's REPLY BRIEF IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT TO DECLARE AVENTURE's REVISED ACCESS TARIFF TO BE UNLAWFUL

INTRODUCTION AND SUMMARY

The supporting comments from the Staff and other interexchange carriers ("IXCs") reinforce AT&T's showing that, if a full evidentiary hearing were conducted in this proceeding, Aventure's proposed tariff would ultimately be found unlawful on a variety of grounds. But the Commission can and should make more efficient use of its resources, for the record here also clearly establishes that, as to each of the three grounds raised in AT&T's motion for summary judgment, there are no material facts in dispute and that Aventure's tariff violates South Dakota law.

AT&T urges the Commission to act now and reject Aventure's tariff as a matter of law on each of these three relatively narrow grounds, but a favorable ruling on any one of them would provide a sufficient basis to reject Aventure's revised tariff and would thereby avoid consideration in this case of both i) broad policy issues such as the public interest harms posed by traffic pumping and ii) more detailed and highly fact-intensive questions such as Aventure's violation of South Dakota rate standards. While the Commission should not – as Aventure suggests – put on blinders and entirely ignore the context here, which reveals Aventure's past misconduct and the nefarious purposes of its tariff revisions, AT&T's summary judgment motion does *not* require the Commission to resolve disputes about those facts or to engage in broad policy pronouncements regarding traffic-pumping. AT&T's motion can and should be granted

by applying the plain and ordinary meaning of terms in the Commission's rules and other unambiguous provisions of South Dakota law to the terms in Aventure's revised tariff, and thus summary judgment is entirely appropriate here.[1]

That said, the purpose of Aventure's tariff revisions is quite clear and is also essentially undisputed: Aventure has had an access tariff on file with the Commission for years, and Aventure does not and cannot dispute that its existing tariff is sufficient for billing switched access on calls to the extent Aventure plans to serve ordinary South Dakota residents and businesses, *i.e.*, entities that must pay real, hard-earned money in order to obtain and use telephone services. Aventure's tariff revisions are necessary only because Aventure intends primarily to serve out-of-state conference call and chat line providers that are *not* net payors for service and *not* contributing anything of substance to South Dakota. To the contrary, these entities would receive from Aventure massive payments that would be funded, in the end, by long distance consumers in South Dakota and across the country.[2]

Aventure and others falsely accuse AT&T and other IXCs of "injecting" issues regarding traffic stimulation into this proceeding, Aventure at 4, but the fact is that it is Aventure who has done so, by filing a revised tariff that, if approved, would turn the established access regime in South Dakota upside down: Aventure's tariff seeks permission to charge access services even when *it pays* the recipients of the calls, but for nearly 30 years such charges have been assessed

[1] AT&T thus agrees in part with the Staff that this is not "the proper docket type" to "take a position regarding traffic stimulation." Staff at 1. By resolving this case on summary judgment, the Commission will not be required to address that practice. But if the case goes to a full hearing, the Commission's inquiry into the "reasonableness" of the "practices" in Aventure's revised tariff (*id.*) will necessarily embroil the Commission into myriad factual issues regarding Aventure's planned traffic pumping activities.

[2] *Connect America Fund*, 26 FCC Rcd. 4554, ¶¶ 635-38 (2011) ("Although the conferencing or adult chat lines may appear as 'free' to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers.").

only when calls are terminated to ordinary customers that pay local carriers for services and thus bear some share of the costs of operating local networks. [3] Aventure's revised tariff is drafted with unlawful terms that would allow Aventure to seek revenues from access services even though its so-called "end users" not only bear no part of these costs but actually siphon off the associated revenues out of the system and into their pockets.[4]

In short, if Aventure truly wants to offer legitimate services to ordinary South Dakotans, then its existing tariff is sufficient, and the Commission need not expend valuable resources in conducting a full evidentiary hearing to evaluate tariff revisions which have as their undisputed purpose to facilitate a regulatory arbitrage scheme. The Commission can and should simply reject the revised tariff as a matter of law because it violates South Dakota law in three fundamental ways, as explained in more detail below and in AT&T's motion.

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[3] As explained in a recent order by the Federal Communications Commission ("FCC"), the placement of limits on access charges to calls completed to entities that pay for services is consistent with the goal of "ensuring that neither IXCs nor end users are charged an unfair share of the LEC's costs in transporting interstate calls," because "[t]he concept that users of the local telephone network [] should be responsible for the costs they actually cause is sound from a public policy perspective and rings of fundamental fairness." *Qwest Commc'ns Corp.* v. *Northern Valley Commc'ns*, FCC 11-148, ¶ 11 & n.36 (Oct. 5, 2011).

[4] Further, as will be revealed if this case goes to hearing, a traffic-pumping LEC does not need to operate a genuine local network and incurs very insubstantial costs in running these schemes. Thus, such LECs seek to gain access revenues even though they incur virtually none of the costs that those revenues were intended to recover. *See, e.g.*, *Qwest Commc'ns Corp.* v. *Farmers and Merchants Mut. Tel. Co.*, 22 FCC Rcd 17973, ¶¶ 24-25 (2007) (finding that a traffic-pumping LEC's access "revenues increased many fold during the period at issue, without a concomitant increase in costs"); *Connect America Fund*, 26 FCC Rcd. 4554, ¶ 659 ("the sharing of significant amounts" of access revenues "raises questions whether the underlying access rates remain just and reasonable").

ARGUMENT

None of the arguments raised in opposition to AT&T's motion for summary judgment involve disputes of material fact, but rather involve purely legal claims that the Commission can and should reject as a matter of law. Accordingly, the Commission should grant AT&T's motion for summary judgment on each of the three grounds raised by AT&T.

I. THE COMMISSION'S RULES DEFINE END USER AS A "CUSTOMER," A TERM WHICH IN THIS CONTEXT IS MORE NARROW THAN THE BROAD DEFINITION OF "END USER" IN AVENTURE'S TARIFF.

First, summary judgment should be granted and Aventure's tariff rejected because the tariff has an unlawfully expansive definition of "end user" that is not limited to customers but includes any person that merely "sends or receives" a call. The tariff's definition of "end user," and its omission of the term "customer," is flatly inconsistent with the definition of "end user" in the Commission's rules.[5] Under those rules, "end user" is limited to a non-carrier "customer" of intrastate telecommunications. § 20:10:29:07. The plain and common meaning of the term "customer" – and the one most consistent with multiple provisions of the Commission's rules and years of practice in intrastate access services – is a person that purchases services.[6] As a consequence, a person that does *not* purchase service (or one that nominally "purchases" services but then receives a rebate from the carrier that offsets the fee) is neither a "customer" or an "end user" under a plain and straightforward reading of South Dakota law and § 20:10:29:07. Aventure's revised tariff, which purports to define "end user" far more broadly to include any

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[5] *Compare* Aventure S.D. Tariff No. 3, § 1, Original Page 7 (an "end user" is "[a]ny person or entity that is not a carrier who *sends or receives an intrastate telecommunications service* transmitted to or from a Customer across the Company's Network") *with* § 20:10:29:07 ("[a] *customer of an intrastate telecommunications service* that is not a carrier is an end user.").

[6] *See* AT&T Mot. at 13-15 (citing, *inter alia*, The Amer. Heritage Dictionary, http://dictionary.reference.com/browse/customer. (defining "customer" as "a person who *purchases* goods or services from another; buyer; patron.")).

person that merely "sends or receives" telecommunications, is thus inconsistent with the plain meaning of the Commission's rules.

Aventure and Staff nonetheless assert that "South Dakota law does not require end users [to] pay a fee for services," Staff at 5; Aventure at 2, but they neither cite any affirmative authority for this claim nor explain why Aventure's expansive definition of "end user" is consistent with the Commission's rule in § 20:10:29:07 limiting the term "end user" to a non-carrier "customer." Because they cannot offer any reasonable construction of the term "customer" that supports the broad definition of "end user" in Aventure's tariff, they instead rest their arguments on a backwards interpretation of the FCC cases that hold that the term "end user" in a tariff must be limited to an entity that pays the carrier for service and that actually support AT&T's motion.[7] Although it is true that the FCC relied in part on the fact that federal law defined "telecommunications" as the offering of service "for a fee," the absence of similar language from the Code or Commission's rules does not support the illogical leap made by Aventure and Staff that South Dakota law does not require end users to pay carriers for telephone service. The undeniable fact is that South Dakota law does explicitly require end users to be "customers," and as AT&T and the IXCs have explained, the term "customers" can only be reasonably read in this context to be limited to persons that pay for telecommunications, and cannot be expanded, as Aventure's revised tariff does, to include anyone who merely sends or receives telecommunications.

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[7] *E.g.*, *Qwest Commc'ns Corp.* v. *Northern Valley Commc'ns*, 26 FCC Rcd. 8332, ¶¶ 1-17 (2011) ("*NVC I*"); *Northern Valley Commc'ns, Revisions To FCC Tariff No. 3*, 26 FCC Rcd 9280, ¶ 2 (2011) ("*NVC II*"). Aventure petitioned the FCC to reconsider *NVC I*, and previously informed the Commission that "[t]here is substantial legal doubt as to the validity of" that decision. *See* Aventure Resistance at 3-4 (July 14, 2011). However, the FCC recently denied all petitions to reconsider the *NVC I* order and upheld the decision in full. *Qwest Commc'ns Corp.* v. *Northern Valley Commc'ns*, FCC 11-148 (Oct. 5, 2011).

In particular, neither Aventure nor Staff make any attempt to read the term "customer" in § 20:10:29:07 in context with the Commission's other rules or with the longstanding practices and purposes of the Commission's access regime. The Commission's rules contain many instances in which a "customer" is discussed in terms of its obligations to pay for services billed by the carrier. For example, § 20:10:07:03, entitled "Transmittal of Bills," provides that "[b]ills *to customers* . . . must be provided" annually or monthly and "must contain an itemized list of *all charges*."[8] Such provisions confirm the common understanding of the term customer to be a person that pays for services, not one that merely sends or receives services.

Longstanding industry practice involving switched access services also confirms that the term "customer," as used in the Commission's rules is an entity that pays for services. Indeed, in the many years since access charges were instituted in South Dakota, every access-chargeable call – apart from those associated with recent traffic pumping activity – has been originated by or terminated to a South Dakota resident or business that was paying a carrier for telecommunications services. Ruling in favor of Aventure would turn this established switched access regime on its head, allowing Aventure's free calling provider partners, which contribute nothing, to receive payments and free-load off of residents and businesses that are paying for services. *Cf. Qwest Commc'ns Corp.* v. *Northern Valley Commc'ns*, FCC 11-148, ¶ 11 & n.36 (Oct. 5, 2011).

Aventure (but not Staff) also seeks to rely on its claim that the FCC did not suspend and investigate Aventure's interstate tariff, even though Aventure says it is identical to its revised intrastate tariff at issue here. Aventure at 2. But as the FCC explained in its *NVC I* order, the

[8] *See also, e.g. id.* § 20:10:07:04 (subscribers may be required "to pay the undisputed portion of a bill"); *id.* § 20:10:10:03 (allowing disconnection of a subscriber for "nonpayment of past due bills"); *id.* § 20:10:07:05 (providing that a carrier must in certain circumstances shall "refund . . . part of the monthly charge" to the subscriber).

decision by FCC to decline to exercise its discretion to suspend and investigate a tariff is not a final decision, and does not preclude the FCC from later concluding that a tariff is unreasonable and violates the federal Communications Act. *NVC I* ¶ 14. Consequently, the FCC Staff's decision to allow the Aventure interstate tariff to be filed without suspension provides absolutely no bar to the relief sought here by AT&T, and the Commission clearly has the authority and duty under State law to determine the lawfulness of intrastate tariffs.[9]

Aventure also raises two procedural objections to AT&T's motion, arguing that it is really a request to "revisit [the] rulemaking in RM05-002" and/or a request "to amend [the] Rule [] defining 'end users.'" Aventure at 3, 4-5. Neither claim has merit. First, AT&T's motion does not ask the Commission to revisit the rules it promulgated in RM05-002. AT&T only mentioned that proceeding (in a footnote) so that the Commission would recognize what is clear: that the rulemaking proceeding did not address the particular questions raised in this proceeding regarding the lawfulness of Aventure's tariff, including (if the Commission denies AT&T's motion) whether the particular rates proposed by Aventure for the "services" it purports to provide are justified under the Commission's rules. Consequently, Aventure is simply wrong to assert that AT&T cannot file for summary judgment in this case and instead needs to request the Commission to amend the rules it adopted in RM05-002.

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[9] Aventure also argues that "[a]t the very least, Aventure is entitled to a hearing to present its evidence supporting approval of its interstate tariff. The evidence attached by Aventure to its original resistance, at the very least, generates issues of fact that must be resolved by a hearing." Aventure at 2-3. This claim is patently insufficient to raise a genuine issue of material fact, for Aventure fails to identify with any specificity what "issues of fact" exist that must be resolved via a hearing. *See Hoaas v. Griffiths*, 714 N.W.2d 61, 65 (S.D. 2006) ("The nonmoving party . . . cannot merely rely on general allegations or denials. Rather, the nonmoving party must set forth specific facts which show the existence of genuine issues of material fact"). The very purpose of the summary judgment process is to avoid the expense associated with trial or hearing when (as here) the case can be decided as a matter of law.

Similarly, AT&T's motion is not asking the Commission to amend the definition of "end user" in its rules, but rather is requesting that the Commission *apply* the plain meaning of its rules to hold that the specific terms in Aventure's tariff violate the *existing* rule. This Commission, like other administrative agencies, plainly has the authority to interpret and apply its existing regulations in adjudicatory proceedings, and it is well-established that agencies do not need to engage in new rulemaking proceedings whenever they apply a rule to particular facts in an adjudication.[10] A new rulemaking would only be required if the Commission had promulgated rules that specifically approved of the exact language in Aventure's tariff, which of course it has not.

II. THE COMMISSION CAN AND SHOULD CONCLUDE NOW THAT AVENTURE'S ONE-SIDED BILLING DISPUTE PROVISIONS ARE INCONSISTENT WITH SOUTH DAKOTA LAW.

Second, there is no factual dispute regarding AT&T's showing that the billing dispute provisions in Aventure's tariff violate South Dakota law, and consequently there is no need to defer ruling on this issue until after a full evidentiary hearing. Aventure does not even attempt to justify the inclusion of these one-sided provisions or explain how they are either commercially

[10] In South Dakota, an agency exercising quasi-judicial power has the "functions of interpreting, applying, and enforcing existing rules and laws." SDCL 1-32-1(10).

reasonable or consistent with South Dakota law – and they are plainly not.[11] Aventure instead relies solely on its "savings" clause, but as AT&T, Staff, and the IXCs have explained, such provisions merely restate the obvious and in this case only create confusion about how the tariff is to be applied. The provision does not and cannot transform tariff provisions that are illegal into terms that are lawful.

Aventure relies again on its claim that its interstate tariff has been permitted by the FCC Staff to go into effect, Aventure at 5-6, but that not only overstates the significance of that decision (*see NVC I* ¶ 14) but ignores both i) the FCC's additional decision in *Sprint* that condemns the very language used by Aventure in its tariff[12] and ii) the numerous ways in which AT&T explained that Aventure's billing dispute provisions violate clear and unambiguous provisions of South Dakota law.

III. AVENTURE'S TARIFF EXCLUDES A CARRIER'S CENTRAL OFFICE FROM THE DEFINITION OF AN "END USER'S PREMISES" BUT THEN INCONSISTENTLY SEEKS TO BROADEN THE DEFINITION OF 'PREMISES" TO INCLUDE CUSTOMER SPACE IN A CENTRAL OFFICE.

Third, the Commission should find as a matter of law that Aventure's tariff is vague and internally inconsistent in its use of the term "end user's premises." As AT&T explained, because the tariff provides that an "end user" is not a carrier, an "end user's premises" cannot be a

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[11] Because these provisions identified by AT&T flatly violate the law, and because Aventure makes no attempt to raise any factual issue regarding its compliance with the law, there is no reason for the Commission to go to the trouble of conducting an evidentiary hearing so that the Commission can instruct Aventure on how to conform its tariff to the law. *See* Aventure at 6, ¶ 8) (asking the Commission to hold a hearing and "identify any [unlawful] provision of Aventure's tariff"). In this regard, Aventure's request that the Commission tell it how it should comply with the law is the latest in an ongoing pattern: as one IUB Commissioner explained to Aventure with regard to its misconduct, "[S]urely you understand how this doesn't look good when you say 'Well, we play by the rules' but *you don't really seem to be undertaking any effort to know or follow the rules*. It's kind of an ignorance of the law [or an] ignorance of the facts defense").*Qwest Commn'cs Corp.* v. *Superior Tel. Co.*, FCU-07-2, Hearing Tr., Vol. 6, at 2341 (Feb. 12, 2009) (emphasis added).

[12] *Sprint Commc'ns Co.* v. *Northern Valley Commc'ns*, 26 FCC Rcd. 10780 (2011).

carrier's premises, such as a central office. The definition of "premises" in the Aventure revised tariff appears to be inconsistent with this requirement, and should be stricken or limited. Aventure and Staff do not even address the inconsistency, but merely argue that Aventure's definition of premises is not expressly prohibited by South Dakota law. But in fact it is inconsistent with South Dakota law. For one, South Dakota law obviously prohibits tariffs that are vague and internally inconsistent. The tariff – quite properly – provides that a carrier's premises cannot be an end user's premises, and yet the tariff also appears to provide that select customers can have a "premises" in a carrier's central office.[13] These provisions are simply inconsistent, and the latter cannot be allowed to stand. Further, under the Commission's rules, switched access service must utilize a "subscriber loop," § 20:10:27:01(10), and yet it is difficult to see how there can be any "subscriber loops" where the tariff permits the end user to place its equipment *within* the carrier's central office. Any cabling that would extend from the carrier's switch to any facilities of the end user would not be a subscriber loop but rather intrabuilding cable.

CONCLUSION

For the foregoing reasons, the Commission should reject Aventure's proposed tariff filings, dated March 18, July 13, and July 17, 2011, as patently unlawful and inconsistent with South Dakota law.

[13] Further, and in all events, AT&T explained that the definition of premises is inconsistent with both ordinary understandings of that term and with industry practice – notably, end users are typically not allowed to enter, let alone occupy, space within a carrier's central office. Aventure makes no attempt to respond to AT&T's showing or to explain why its unusually broad definition is appropriate. It also does not explain whether it intends to allow ordinary South Dakota residents and businesses to occupy space in a central office.

Respectfully submitted this 21st day of October, 2011.

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CERTIFICATE OF SERVICE

William M. Van Camp hereby certifies that on the 21st day of October, 2011, he served the foregoing AT&T Aventure Communication's Reply for Renewed Motion for Summary Judgment electronically with Aventure's counsel of record with copies of the same to the following persons electronically:

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