

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

IN THE MATTER OF THE FILING BY)	
AVENTURE COMMUNICATION TECHNOLOGY,)	COMMISSION STAFF
LLC DBA AVENTURE COMMUNICATIONS)	REPLY TO AT&T MOTION
FOR APPROVAL OF ITS SWITCHED ACCESS)	FOR SUMMARY JUDGMENT
SERVICES TARIFF NO. 3)	TC11-010

INTRODUCTION AND PROCEDURAL SUMMARY

On March 18, 2011 Aventure Communications Technology, LLC d/b/a Aventure Communications (herein Aventure) filed a revised Intrastate Switched Access Tariff with this Commission and asked that it be approved. On March 31, 2011 Qwest Communications filed a petition to intervene in the matter and further requested an investigation be opened pursuant to SDCL 49-31-12.4. Later, Midcontinent Communications, Sprint Communications Company, L.P., AT&T Communications of the Midwest Inc., MCI Communications dba Verizon Business Services and Cellco Partnership were also granted intervention.

The parties agreed to a 240 day extended rate suspension period and hearing dates were noticed. Then on July 13, 2011 Aventure substantively amended its original filing. The parties agreed, due to the amendment to "re-start" the 180 day statutory suspension period (SDCL 49-31-12.4). The rate suspension period now expires on January 9, 2012 and hearing dates are set for November 29 and 30, 2011.

On September 7, 2011 AT&T filed its current Motion for Summary Judgment. AT&T makes several specific arguments addressed below. Aside from the specific tariff related arguments, however, AT&T makes policy based arguments regarding traffic stimulation generally. AT&T argues Aventure engages in the practice. AT&T submits the practice causes clear and convincing public interest harm. SD PUC Commission Staff (herein Staff) do not take a position regarding traffic stimulation generally in this brief. Further, Staff do not believe this is the proper docket type to do so. Legislation, rule-making or a request for a declaratory ruling could properly address the issue. This docket, however, is merely a request to modify an intrastate switched access tariff. This Commission is limited to determine the "reasonableness of the rate, price or practice." SDCL 49-31-12.4. The tariff at issue neither specifically defines traffic stimulation nor specifically asserts it will take place.

Regardless of whether staff supports traffic stimulation as a practice, Staff looks to the laws of this state to determine whether the tariff submitted by Aventure should be approved, rejected, or rejected in part. More specifically, for the reasons fully stated below, Staff recommends the Commission:

- 1) Reject AT&T's arguments regarding "End User" and traffic stimulation generally, and
- 2) Find as a matter of law the proposed tariff's billing dispute provisions are unenforceable and improper, and
- 3) Reject AT&T's arguments regarding purported premises inconsistency.

ARGUMENTS RAISED BY AT&T

AT&T raises three arguments specific to the filed tariff language to support its request that the proposed tariff be rejected by this Commission and Summary Judgment be granted. First, it argues the tariff definition of "End User" is unlawful. AT&T also argues the billing dispute portion of the tariff is inconsistent with South Dakota administrative laws and state statutes. Finally, AT&T argues the tariff definition of "end user premises" is inconsistent and unreasonable.

1. END USER DEFINITION

Aventure's filed tariff does not clearly state that it will charge a fee to its *end users*. When companies engage in traffic stimulation, they do not charge the end user a fee. Rather, they provide the end user (often a conference calling company) a portion of the switched access fees generated through traffic stimulation. Specifically, the Aventure tariff defines an end user as, "any person or entity that is not a carrier who sends or receives an intrastate telecommunications service..." AT&T points to both federal law and FCC proceedings to support its argument that the "end user" definition in the proposed tariff is unlawful. The tariff at issue is however, jurisdictional to the South Dakota PUC and as such, South Dakota statutes, not federal code, are relevant. With that said, it is helpful to understand the broader scope of proceedings and law affecting Aventure at this time.

a. Interstate tariff vs. intrastate tariff

The FCC has an approval process for interstate switched access tariffs and has exclusive jurisdiction over them. Alternatively, the SD PUC has exclusive jurisdiction over intrastate

switched access tariffs. There have been multiple proceedings at the FCC regarding the *end user* language Aventure choose to use in its interstate switched access tariff. The FCC relies on the Federal Code and Regulations to determine the legality of the language used. Although similar language appears in the tariff filed in South Dakota, neither the FCC proceedings nor the law it relied upon are binding here. Certainly it is appropriate to look to the federal proceedings for guidance. It is important, however, to recognize the limited usefulness of the federal proceedings due to the difference between the federal code and state statutes.

b. Federal code vs. state statutes

The US Code (USC) and the Code of Federal Regulations (CFR), like South Dakota Codified Law (SDCL) and Administrative Rules of South Dakota (ARSD), require switched access services and charges be tariffed. Under the federal law, Aventure is a “local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an *end user*...” 47 CFR 61.26(1). An *end user* is defined as, “any customer of an interstate or foreign *telecommunications service* that is not a carrier...” 47 CFR 6169.2 (m). A *telecommunication service* is then defined as, “the offering of telecommunications for a fee...” 47 USC 153(46). It becomes problematic when a carrier does not charge the end user (such as a free conference calling entity) a fee due to the code language requiring it.

South Dakota applicable law is quite different. Switched Access is defined as “a telecommunications service which provide part of all of a communications path between the customer of the service and its *end user* which utilizes subscriber loop, transport, and switching functions.” ARSD 20:10:27:01. An *end user* is, “A customer of an intrastate telecommunications service that is not a carrier...” ARSD 20:10:29:07. A *telecommunications service* is, “the transmission of signs, signals, writings, images, sounds, messages, data or other information of any nature by wire radio, light waves, electromagnetic means or other similar means.” SDCL 49-31-1(29). There is absolutely no mention of a required fee.

c. Federal case law vs. state case law

Although the applicable law is different, AT&T argues this Commission should rely on recent FCC proceedings to support a summary judgment dismissal of this docket. The federal proceedings cited by AT&T involve Northern Valley Communications, LLC (herein Northern Valley). The FCC proceedings dealt specifically with the issue that this Commission now faces with Aventure. Aventure drafted the language of its tariff (both interstate and intrastate) based on the findings of the FCC in the Northern Valley FCC proceedings.

On June 7, 2011 the FCC found Northern Valley's interstate switched access tariff allowed it to "violate the Commission's CLEC access rules and orders by imposing tariffed switched access charges for terminating calls to entities to whom Northern Valley offers free service." *In the Matter of Qwest Communications Company, LLC v. Northern Valley Communications, LLC*. FCC11-87. Northern Valley's tariff at issue defined an end user as one that, "need not purchase any service provided by Northern Valley." *Id.* at page 2. As described in the section above, the FCC's "access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers services *for a fee.*" *Id.* at page 5.

Aventure states the purpose of its updated intrastate tariff filing in South Dakota is to mirror its interstate tariff. Originally, Aventure followed Northern Valley's lead and also filed an interstate tariff at the FCC with the "need not purchase any service" language. As a result, we saw that language filed in South Dakota. Subsequent to the June 7 FCC finding, however, Aventure amended its tariff language with both the FCC and at with this Commission. Aventure removed the "need not purchase any service" language just as Northern Valley did. The tariff definition of end user is now filed as, "Any 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."

On June 14, 2011 in response to the previous FCC findings, Northern Valley filed tariff revisions with the FCC. On June 28 the FCC found the revisions failed to comply with the Commission's previous Order and was unlawful. *In the Matter of Northern Valley Communications, LLC Revisions to FCC Tariff No. 3*. DA 11-1132. The revised tariff language removed the "need not purchase for a fee" language from the definition of end use. While that language was removed, language requiring that end users pay for services was not added. The FCC found the tariff revision failed to clarify that end users must pay Northern Valley a fee for telecommunications services. The revised tariff was found in violation and unlawful. *Id.* at page 3.

The language Aventure uses in its intrastate tariff filed with this Commission is nearly identical to the language rejected by the FCC. The FCC based its rejection, however, on federal law cited in the section above. South Dakota rules and statutes are different. This Commission cannot rely on the federal code to define requirements for intrastate tariffs. Without the federal code, this Commission cannot reach the same conclusion as the FCC.

- d. Staff Recommendation: According to South Dakota law, the end user is not required to pay a fee.

Staff appreciates AT&T's frustration with traffic stimulation. We understand other states, such as Iowa, have engaged in a rule-making to establish proper rates for the practice. Although several private parties have attempted legislation, South Dakota has yet to take a position regarding the practice. With that said, the filed tariff at issue does not expressly define or tariff

traffic stimulation. Rather, it defines terms in a way that arguably allow the practice. Despite how the parties or this Commission feel about traffic stimulation, neither SDCL nor ARSD prohibit the definitions established by Aventure in its intrastate tariff. South Dakota law does not require end users pay a fee for services. As a result, this Commission cannot require Aventure add that language to its tariff nor can this Commission find the language unlawful. Staff recommends this Commission reject AT&T's argument regarding the end user definition. Staff recommends this Commission deny the Motion for Summary Judgment as it pertains to this argument.

2. THE BILLING DISPUTE TARIFF LANGUAGE

AT&T also argues the billing dispute sections of the filed tariff are unreasonable and unlawful in some circumstances. AT&T argues summary judgment should be granted, and the tariff rejected based on these unlawful provisions. AT&T specifically cites the following billing provisions: (i) the tariff requires customers to pay all disputed bills and waive rights to challenge bills unless formally disputed within 90 days, (ii) the tariff denies customers the right to withhold payment of disputed charges, (iii) the tariff requires customers to pay late fees on any withheld amount even if the dispute is resolved in the customer's favor and (iv) the tariff requires the customer pay attorneys' fees for any action Aventure initiates to recover damages, even if Aventure loses.

a. State Statutes and Administrative Rules

Aventure's tariff is in direct conflict with the following statutes and rules:

20:10:07:04. Disputes. In the event of a dispute between a subscriber and a telecommunications company concerning any bill, the telecommunications company may require the subscriber to pay the undisputed portion of the bill to avoid disconnection of service for nonpayment. The telecommunications company shall make an appropriate investigation and shall report the results of the investigation to the customer and to the commission, if involved.

15-2-13. Contract obligation or liability--Statutory liability--Trespass--Personal property--Injury to noncontract rights--Fraud--Setting aside corporate instrument. Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within six years after the cause of action shall have accrued:

(1) *An action upon a contract, obligation, or liability, express or implied...*

- b. Staff Recommendation: Aventure's billing dispute section of its tariff contradicts South Dakota code, is unreasonable and should be rejected.

Staff agrees with AT&T's arguments regarding the billing dispute portion of the filed tariff. With that said, should a dispute arise, South Dakota law would be binding regardless of what the tariff includes. It is unreasonable, however, to place the responsibility to know South Dakota law on the consumer. Staff appreciates Aventure's attempt to remedy the tariff by adding language to that affect. However, it is in the customer's best interest for the tariff to be clearly written. Staff recommends the Commission grant Summary Judgment as it pertains to this issue. Section 2.10 of the filed tariff should be rejected and removed from the tariff. Section 2.5.2 from Aventure's previously filed tariff would then stand, as it does now, in its place.¹

3. INTERNAL INCONSISTENCY

AT&T points out what it considers internal inconsistent provisions of Aventure's tariff. The tariff defines "switched access" as a path between an IXC and an end user premises. An end user premises, according to the tariff, can be an "enclosure, utility vault or rack space...in a central office." This definition arguably provides the structure for traffic stimulation. The customer in a traffic stimulation relationship rarely has its own facilities. Rather, its equipment is placed in a central office. While staff agrees the definition of "premises" is different than the usual understanding we find no legally convincing reason to prohibit Aventure from designing the definition as it did. Staff recommends the Commission reject AT&T's argument regarding inconsistency.

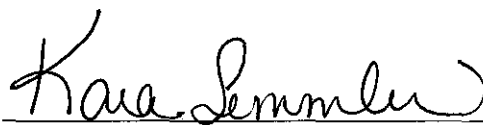
CONCLUSION

In conclusion, the tariff at issue does not include any specific section to address traffic stimulation. Although it is arguable the tariff establishes the structure to allow it, staff does not take a position on the practice generally. While Staff understands this Commission may have strong feelings regarding traffic stimulation, this docket is not the proper mechanism to address it. Staff does not believe the definitions established by Aventure are unlawful. It does, however, find the billing dispute portions problematic. Staff recommends the Commission grant Summary Judgment as it pertains to the billing dispute portion of the tariff.

¹ Section 2.5.2: The Customer shall notify the Company of any disputed items on an invoice within 180 days of receipt of the invoice. If the Customer and the Company are unable to resolve the dispute to their mutual satisfaction, the Customer may file a complaint with the Commission in accordance with the Commission's rules of procedure.

In addition to AT&T's Summary Judgment Motion arguments, it provided a preview of its position should this docket proceed to hearing. Specifically, AT&T argues the rates established in the tariff are as unreasonable. Aventure is, pursuant to applicable rules, using Qwest rates for switched access services. In so far as the services it offers are not provided by Qwest, however, there are not rates to duplicate and a cost study may be appropriate. This analysis is, of course, fraught with factual questions and not appropriate to consider in this proceeding. Staff does, however, look forward to further explore that argument at the November 29 and 30, 2011 hearing should the Commission not summarily dismiss this docket in its entirety.

Respectfully submitted this 12th day of October, 2011



Kara C. Semmler, Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Ph (605) 773-3201

CERTIFICATE OF SERVICE

Kara Semmler hereby certifies that on the 12th day of October, 2011, she electronically filed the foregoing Commission Staff Reply to AT&T Motion for Summary Judgment, and electronically copied the service list including:

Ms. Sharon Thomas
Consultant, Technologies Management, Inc.
sthomas@tminc.com

Brad Chapman
Aventure Communication Technology, L.L.C. dba Aventure Communications
bchapman@aventurecommunication.com

Mr. Paul D. Lundberg: Representing Aventure Communications
Lundberg Law Office
pauill@terracecentre.net

Ms. Kathryn Ford: Representing Midcontinent Communications
Davenport, Evans, Hurwitz & Smith, LLP
kford@dehs.com

Mr. Talbot J. Wiczorek: Representing Sprint Communications Company LP
Attorney at Law Gunderson Palmer Nelson & Ashmore, LLP
tjw@gpgnlaw.com

Jason D. Topp
Corporate Counsel, Qwest Corporation
Jason.Topp@Qwest.com

Mr. David Ziegler
Qwest Corporation
david.l.ziegler@qwest.com

Wayne M. Johnson
State Regulatory Affairs Director, Qwest Corporation
Wayne.Johnson3@qwest.com

Mr. Brett Koenecke: Representing Verizon Business Services
May, Adam, Gerdes and Thompson, LLP
koenecke@magt.com

Mr. William M. Van Camp: Representing AT&T
Olinger Lovald McCahren & Remiers PC
BVANCAMP@OLINGERLAW.NET

Signed the 12th day of October, 2011

A handwritten signature in cursive script, reading "Kara Semmler", written over a horizontal line.

Kara C. Semmler, Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol Avenue
Pierre, SD 57501
Ph (605) 773-3201