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 RENEWED MOTION FOR SUMMARY JUDGMENT TO DECLARE AVENTURE's REVISED ACCESS TARIFF TO BE UNLAWFUL

INTRODUCTION AND SUMMARY

On March 17, 2011, Aventure filed a revised intrastate switched access tariff with the Commission, claiming that the proposed tariff revisions were intended merely to "provide for greater consistency in the terms and conditions associated with its provision of interstate and intrastate access."[1] As AT&T explained in its initial motion for summary judgment that it filed on June 21, 2011, that is not the full story. In fact, Aventure's tariff revisions – including the most recent ones that it filed with the Commission on July 13, and July 18, 2011 in response to AT&T's initial motion for summary judgment – are primarily designed to allow it to expand its "traffic-pumping" schemes.[2]

Aventure – contrary to its representations in 2006 to this Commission and the Iowa Utilities Board ("IUB") that it would be a "full service" local exchange carrier to "both

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[1] Letter of S. Thomas, Consultant to Aventure, to P. Van Gerpen, Exec. Dir., S.D. PUC, at 1 (March 17, 2011).

[2] The Federal Communications Commission has said that traffic-pumping (or traffic stimulation) is a regulatory "arbitrage scheme" that "occurs when, for example, a [local exchange carrier] LEC enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and 'free' conference calls. The arrangement inflates or stimulates the amount of access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the 'free' service provider. 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." *Connect America Fund*, 26 FCC Rcd. 4554, ¶¶ 635-38 (2011).

residential and business customers" and that it would "bring real choice to rural areas"[3] – has since that time done next to nothing besides engaging in traffic-pumping on a truly massive scale, and it apparently now has its sights set on expanding its scheme from Iowa into South Dakota.[4]

Aventure and other traffic pumping LECs, however, suffered a significant setback when the FCC and IUB each issued, and then re-affirmed, decisions holding that traffic-pumping local exchange carriers ("LECs") – including, in the IUB decision, Aventure itself – violated the terms of their switched access tariffs by imposing access charges on calls associated with the schemes.[5] In particular, these decisions held that the LECs' tariffs required that access charges be assessed only on calls terminated by LECs to their "end users," and the FCC and IUB concluded that the free calls associated with the traffic pumping schemes had not been terminated to end users within the meaning of the tariffs.

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[3] *See* Registration of Aventure Comm. Tech., L.L.C., Docket TC-06-047, at 3, 6 (May 16, 2006) ("Aventure SD Registration"). Described in more detail below are even more egregious misrepresentations that Aventure has made.

[4] Aventure's resistance (at 1) to AT&T's prior motion claimed that statements like this were "actionable libel" but AT&T's statements on this point rely expressly on findings by the IUB that "from late 2005 through 2007, Aventure served only [free calling providers]" and not ordinary local customers. Final Order, *Qwest Commc'ns Corp.* v. *Superior Tel. Coop., et al.*, 2009 WL 3052208, **29, 31 (Iowa Utils. Bd. Sept. 21, 2009), *recon. denied* (Feb. 4, 2011) ("*IUB Final Order*") ("the evidence in this record shows that . . . Aventure ha[s] few, if any, customers"). Aventure's current claim that it now serves more than "300 'traditional' local exchange customers" (Resistance at 1) in Iowa – even if it is true – is hardly the mark of a company truly interested in competing in the local exchange market: 300 customers equates to adding about 50 customers a year since 2006, or about 0.01% of the over 3 million Iowans. Aventure's claim that it now serves about 300 customers is particularly disingenuous considering that it reported in June, 2007 (under penalty of perjury) that it served over *3,000* lines. *See IUB Final Order* *29; *see also* Exh. 2, p. 2 to Aventure Pet. for Waiver (filed with the FCC on Feb. 8, 2008) (http://fjallfoss.fcc.gov/ecfs/document/view?id=6519840714). Inflated line counts like these enabled Aventure to receive substantial at least $3.4 million in federal USF funds through 2009 – or about $11,000 for each local customer that it now claims to serve.

[5] *Qwest Commc'ns Co.* v. *Farmers & Merchs. Mut. Tel.*, 24 FCC Rcd. 14801 (2009), *recon. denied*, 25 FCC Rcd. 3422 (2010) ("*Farmers*"); *IUB Final Order*, **7-24.

To attempt to circumvent these adverse decisions and to continue their attempts to plunder moneys from captive long distance carriers and consumers, Aventure and other LECs have filed revised tariffs, with this Commission, other state commissions, and the FCC. Among the revisions are changes to the definition of "end user" that attempt to encompass the LECs' free calling partners. Aventure's proposed tariff revisions filed with this Commission should be flatly rejected, and the Commission could do so on any number of grounds.

For one, the FCC and other state commissions have concluded that traffic pumping causes clear and convincing public interest harms – *e.g.*, that it "imposes undue costs on consumers, inefficiently divert[s] the flow of capital from more productive uses," and "harms competition."[6] If the Commission were to proceed with discovery and a full investigation of Aventure and its "services," AT&T is confident that the Commission would conclude that Aventure's revised tariff is profoundly flawed in many respects and would agree with the FCC and other state commissions that traffic pumping is contrary to public policy. Such action not only would prevent Aventure from expanding its traffic pumping activities to South Dakota but would send a clear signal to other traffic pumping LECs that are operating in the State.

Further, the Commission would also be required to reject Aventure's tariff because it could not possibly conclude – especially in the schedule applicable to this proceeding – that the revisions comply with the statutory standards applicable to rates. The Commission has a statutory duty to ensure either that a carrier earns only a fair and "reasonable" rate of return (if "rate of return" regulation is used) or, otherwise, that the rates for the carrier's non-competitive

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[6] *Connect America Fund* ¶ 637; *IUB Final Order* at **26-27; Report & Order, *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 (P.S.C. of Utah, April 26, 2010) (revoking operating certificate of traffic pumping LEC and finding its actions to be contrary to the public interest).

services are "fair and reasonable," considering, among other things, the carrier's "fully allocated cost" of providing the service. *See* SDCL 49-31-4; 49-31-1.4; 49-31-1(18). The Commission has never considered either the reasonableness of any compensation for LECs engaged in traffic-pumping or the fully allocated costs of any "services" associated with traffic-pumping.[7] In fact, both the FCC and the IUB have concluded that it is *not* lawful to allow LECs engaged in traffic pumping – in which LECs incur only extraordinarily low costs – to collect traditional, higher-priced switched access charges associated with the low traffic volumes in rural areas.[8] In these circumstances, allowing Aventure to revise its tariff, so that it can engage in traffic pumping and charge rates that are equal or nearly equal to Qwest's switched access rates for ordinary calls completed over Qwest's extensive local network would violate the statutory rate standards.

While the Commission could undertake a full investigation of all of the issues raised by Aventure's revised tariff filing, there is an easier and more efficient way to review the tariff. AT&T is filing this motion because the Commission clearly can and should summarily reject Aventure's revised tariff as patently unlawful. First, as explained in more detail below, Aventure's tariff improperly allows it to assess switched access charges even when calls are

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[7] The Commission's lengthy rulemaking, (RM05-002, Switched Access Rates for Competitive Local Exchange Services), which resulted in a rule allowing CLECs to mirror the switched access rates of Qwest (A.R.S.D. § 20:10:27:02.01), did not examine traffic-pumping in any material way. In fact, it is clear that this rule does not apply to traffic-pumping LECs, because it is common sense that a CLEC can mirror the Qwest rate only when it provides services that are equivalent to Qwest's. *See AT&T Co.* v. *Central Office Tel.*, 524 U.S. 214 (1998) ("Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached."). Indeed, Aventure's revised tariff prohibits Aventure from charging switched access unless its services are "functionally equivalent to the switched access services provided by the incumbent local exchange carrier." Aventure S.D. Tariff No. 3, § 3.1.1., Original Page 41 (issued March 18, 2011); *see also* Discovery Resp. 1-68 (Aug. 9, 2011) (Exh. _A_). For numerous reasons, Aventure could not show that the services it provides in connection with traffic pumping are equivalent to Qwest's switched access.

[8] *Qwest Commc'ns Co.* v. *Farmers & Merchs. Mut. Tel*, 22 FCC Rcd. 17973, ¶¶ 21-25 (2007) (subsequent history omitted) (traffic-pumping LEC "vastly exceeded" the prescribed rate of return because the large volumes of calls caused revenues to rise substantially without a significant increase in costs); *IUB Final Order*, *27 (charging high rates on high volumes of calls produces an "unreasonable rate" when such rates are set based on assumptions that low volumes of calls will occur).

routed to entities that do not make net payments to Aventure for telecommunications services, and that are therefore not "end users" under federal or state law. Second, Aventure's tariff contains numerous unlawful billing provisions that flatly violate the Commission's rules as well as decisions by the FCC and federal courts. Aventure's recent attempts to cure these defects have been ineffective, and the Commission should not hesitate to apply the clear terms of its rules and the FCC's orders to find these tariff provisions unreasonable and unlawful. Third, Aventure's tariff defines "end user's premises" inconsistently and unreasonably.[9]

Thus, while AT&T contends that Aventure's traffic-pumping activities cause severe public interest harms, and that the Commission would be fully justified in rejecting Aventure's revised tariff as inconsistent with the public interest, given the patent unlawfulness of Aventure's revised tariff, a more efficient use of the Commission's resources would be to reject the revised tariff as a matter of law on the grounds set forth in this motion.[10]

FACTUAL BACKGROUND

1. Aventure's Applications to Serve And Its Violations of Law In Iowa.

In 2005 and 2006, Aventure filed applications with this Commission and the IUB to provide local exchange services in South Dakota and Iowa.[11] In these submissions, Aventure

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[9] AT&T contends that numerous other provisions are unlawful and unreasonable, and if the Commission were to deny this motion, AT&T fully intends to contest the lawfulness of these provisions. AT&T's Pet. to Intervene and Request to Suspend the Tariff and Investigate, Docket No. TC11-010 (filed Apr. 8, 2011).

[10] Aventure would suffer no undue prejudice if its tariff were rejected, for it has had a switched access tariff on file with the Commission for years. If, in fact, Aventure does intend to provide, within the next year, legitimate telecommunications to residents and ordinary businesses in South Dakota – as opposed to chat-line, dial-a-porn and other free calling providers that have no real presence in the State – then its existing tariff should be sufficient for that purpose.

[11] Aventure's recent activities in Iowa are relevant here because Aventure's operations are directed from there, it "does not have a principal office in South Dakota," and it previously represented to the Commission that it "is in good standing with the Iowa Utilities Board." Aventure SD Registration, at 2, 6; *see also* ARSD 20:10:32:03(16) (requiring applicant to report on activities in other states where it is certified).

represented that it intended, and had a network technically able, to provide local exchange service in numerous exchanges in Iowa and South Dakota and aggressively to market those services to the residents of those communities.[12] However, upon receiving its authorization, Aventure did not provide service to residential and existing business customers. Instead, its only "customers" were free calling partners who were involved in the traffic stimulation schemes described above. In fact, as the IUB concluded, for more than two years, Aventure did not construct any local exchange network, did not market its services at all, and did not serve a single legitimate customer – contrary to the representations it made in obtaining its certificate.[13] And, in South Dakota, Aventure concedes that, since it became authorized to operate in the state in January, 2007, it has "no customers and no telephone traffic."[14]

Although Aventure did not have a local exchange network and did not terminate long distance calls to end user customers during this period, it charged AT&T and other interexchange carriers ("IXCs") for the provision of terminating access services in Iowa. IXCs filed a complaint before the IUB.[15] After allowing the parties to engage in significant discovery, and after holding a week-long hearing, the IUB determined that the intrastate access charge billings of Aventure and other Iowa-based traffic pumping LECs were improper. In particular, the IUB concluded that the LECs' tariffs required that switched access services be terminated to "end

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[12] *See* Certificate, *In re Aventure Communication Tech., LLC*, Docket Nos. TCU-05-18; TF-05-351 (Issued Jan. 20, 2006); Order Designating Eligible Carrier, *In re Aventure Communication Tech., LLC*, Docket No. 199 IAC 39.2(4) (issued March 6, 2006) ("*Aventure ETC Order*"); Aventure SD Registration at 2-6.

[13] Aventure acquired approximately 4 customers in January, 2008, and by September, 2009, still served only about 140 customers. *IUB Final Order* at *29.

[14] Aventure Comm. Tech. Resistance to Motion to Intervene, Docket TC11-010.

[15] *See IUB Final Order* **1-2. AT&T and other IXCs have sued Aventure in federal court in Iowa to recover interstate access charges and to obtain declaratory relief that other interstate access charges billed by Aventure have been unlawfully billed. *See AT&T Corp.* v. *Aventure Communication Technology LLC, et al.*, 4:07-cv-43-JEG-RAW. That suit remains pending.

users" of the LECs' local exchange tariffs. *IUB Final Order*, at *7. It found that Aventure and the other LECs violated that aspect of the tariff, because the LECs' free calling partners "did not subscribe to the services in the [LECs'] access and local exchange tariffs . . . Typically, when an end user customer obtains local exchange service that service includes subscription to the access tariffs. . . Therefore, when a customer pays a LEC's invoice, the customer proves that it has obtained local exchange service and that it has subscribed for access service." *Id.* *10. The IUB concluded that there was no evidence that Aventure or the other LECs had ever billed or collected charges for local exchange services. *Id.* **11-13.

Indeed, on this point, the IUB found that Aventure and other traffic pumping LECs had misrepresented facts and engaged in unscrupulous, unethical, and fraudulent conduct in defending themselves against the claim that they had not billed or collected moneys from their free calling partners. The IUB found that some traffic pumping LECs had attempted to "manufacture evidence, after the fact," to make their arrangements with free calling partners "look like something that was not contemplated." *IUB Final Order* at *13. As to Aventure, the IUB found that Aventure had created bills for some aspects of local exchange services, but that it "never sent" the bills to the free calling partners and that they "were not legitimate bills for which Aventure expected to be paid." *Id.* at *11. As one IUB Commissioner stated, Aventure's basic defense in the prior proceeding was to plead "ignorance of the law" and "ignorance of the facts" while not "undertaking effort to know or follow the rules." Tr. 2340-44.

The IUB also determined that the Iowa LECs, including Aventure, violated the tariff's requirement that calls be terminated to "end user's premises" because the conferencing and chat equipment to which the calls were routed was located in a carrier's end office, not a valid end user's premises. *IUB Final Order* **16-17. The IUB concluded that, where the free calling

providers merely housed equipment within a LEC central office, there was no evidence that the free calling providers, rather than the LECs, "own or control" the central office, and thus it was not an "end user's premises" under the tariff. *Id.*

In addition, Aventure carried out other frauds. As noted above, while Aventure represented that it had a network capable of providing service, and intended to serve business and residential customers in Iowa, it in fact did not do so for many years. As a consequence, the IUB's *Final Order* stated that the IUB intended to conduct a proceeding requiring Aventure "to show cause why [its] certificate[], issued pursuant to Iowa Code § 476.29, should not be revoked." *IUB Final Order* at *31. That proceeding has now commenced.

In addition, in Iowa, Aventure filed a certification that it was eligible to receive federal "universal service" support. Aventure received more than $3.4 million in cash from the federal Universal Service Fund because Aventure had misrepresented the number of lines that it serves and falsely represented to the IUB and to the federal Universal Service Administrative Company that it would use these moneys to provide services that are eligible for subsidies from the federal Universal Service Fund. *IUB Final Order* at *29; *cf. Aventure ETC Order* at 1-2. For example, the IUB establishes a number of criteria for entities to become eligible to receive USF moneys, and Aventure represented to the IUB in 2006 that it met all of the criteria, including that it "offers the services supported by the federal universal service fund," that it offers those services "throughout" its service area, and that it "advertises . . . the services throughout its designated service area," as required by the Communications Act and the IUB's Rules.[16] However, Aventure did not provide or advertise the USF-supported services for at least two years, and it

[16] *Aventure ETC Order* at 2; *cf.* IAC § 39.2(3) (an ETC must advertise the "required services and the charges for services using media of general distribution to residential customers. Carrier must advertise at least annually, in a publication of general circulation, throughout its approved service area"); 47 U.S.C. § 214(e).

instead apparently used the USF moneys to subsidize traffic-pumping schemes.[17] In addition, after receiving its eligible telecommunications carrier designation under false pretenses, Aventure proceeded to misreport its line count to the FCC and USAC, thereby inflating the amount of high-cost support it received.[18]

2. Aventure's Tariff Filings In This Proceeding And At The FCC.

For many years, Aventure's switched access tariffs at this Commission and at the FCC were virtually identical to the access tariff of the LEC involved in the FCC's *Farmers III* decision, in which the FCC – like the IUB in the *Final Order* described above – found that a traffic pumping LEC violated its switched access tariff because the free calls associated with the scheme had not been terminated to "end users" within the meaning of the tariff.[19] Under the tariff, an "end user" was required to "subscribe" under the tariff to the LEC's services, and the free calling companies had not done so, instead obtaining any services for free and pursuant to separate agreements.[20]

After the *Farmers III* and *IUB Final Order* decisions, Aventure filed new switched access tariffs at the FCC (on December 15, 2010) and at this Commission (on March 18, 2011) in an attempt to circumvent these decisions and to expand and/or continue to engage in traffic-

[17] In testimony before the IUB, Aventure's CEO effectively acknowledged what is obvious – that USF funds are not intended for Aventure to fund such activities. Tr. 2331:21-35 (IUB Member Tanner: "Do you think it's the purpose of the universal service fund to ensure that consumers have adequate reasonable cost access to free conference calling services?" Aventure CEO: "I can't answer that").

[18] *IUB Final Order* at *29. Aventure also exploited rules that the FCC established that allow competitive LECs that meet the FCC's definition of "rural" to assess higher interstate switched access rates than would otherwise be appropriate. *See* 47 C.F.R. § 61.26(e). The FCC's rules require that rural carriers operate only in areas with a population less than 50,000, but Aventure operated in Sioux City, which has a population that exceeds that figure.

[19] *Farmers*, 24 FCC Rcd. 14801. In particular, previously, the tariff that Aventure had on file with this Commission since 2007 defined "End User" as "[a]ny individual, association, corporation, government agency or any other entity other than an Interexchange Carrier which subscribes to intrastate service provided by an Exchange Carrier." Aventure S.D. Tariff No. 2, § 1, Original Page 6.

[20] *Farmers* ¶¶ 10-25.

pumping. Among other things, Aventure revised the definition of "End User" in the tariff to include the following language: "[a]n End User need not purchase any service provided by the Company."[21] Many other traffic pumping LECs, including Northern Valley Communications ("NVC"), filed tariff revisions with similar language.

FCC Proceedings. NVC's revised tariff was challenged in two formal complaint proceedings at the FCC, and on June 7, 2011, the FCC issued an order in the first proceeding finding this definition of "End User" to be unlawful.[22] Among other things, NVC had revised the definition of "end user" in its switched access tariff to include language that is identical to the language in Aventure's December 2010/March 2011 tariff filings, and that stated that "*[a]n End User need not purchase any service provided*" by NVC. *See id.* ¶ 4 (emphasis added). The FCC found the NVC tariff unlawful because its "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 service for a fee." *Id.* ¶ 7.

The FCC ordered NVC to file a revised tariff, within 10 days of the *NVC I* order, providing "that interstate switched access service charges will apply only to the origination or termination of calls to or from an individual or entity to whom [NVC] offers telecommunications services for a fee." *Id.* ¶ 17. NVC filed tariff revisions that deleted two provisions stating that end users under the tariff need not purchase services from NVC, including the language stating that "[a]n End User need not purchase any service provided."[23]

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[21] *See* Aventure S.D. Tariff No. 3, § 1, Original Page 7, issued March 18, 2011; *see also* Aventure Tariff FCC No. 3, § 1, Original Page 8, Issued Dec. 15, 2010 (emphasis added).

[22] *Qwest Commc'ns Corp.* v. *Northern Valley Commc'ns*, 26 FCC Rcd. 8332, ¶¶ 1-17 (2011) ("*NVC I*"). The FCC's Order in the second complaint case is discussed below in Part II.

[23] *Northern Valley Commc'ns, Revisions To FCC Tariff No. 3*, DA 11-1132, ¶ 2 (June 28, 2011) ("*NVC II*").

In an order dated June 28, 2011, the Chief of the Pricing Policy Division of the FCC's Wireline Competition Bureau found NVC's revised tariff to be patently unlawful, and rejected the tariff. *NVC II*, ¶¶ 5-10. The order explained that the *NVC I* decision required CLECs' switched access tariffs to provide that the CLECs' "End Users must pay [the carrier] a fee for telecommunications services." *Id.* ¶ 5; *see also NVC I*, ¶ 17. The NVC tariff revisions did not "make this clear," and were thus in violation of *NVC I* and also unlawfully ambiguous, contrary to the Communications Act and the FCC's rules. *NVC II*, ¶¶ 5-7.

Proceedings Before This Commission. On June 21, 2011, AT&T filed a motion for summary judgment with this Commission, relying in part on the FCC's decision in *NVC I*. On July 13, 2011, however, Aventure filed a proposed tariff revision that sought to modify the definition of end user in its March 18, 2011, tariff filing. The July 13 tariff filing removed language providing that end users need not pay Aventure for services.[24] However, Aventure did not include any language in its tariff providing that "switched access service charges will apply only to the origination or termination of calls to or from an individual or entity to whom [Aventure] offers telecommunications services for a fee." *NVC I* ¶ 17.

On July 14, Aventure filed a resistance to AT&T's summary judgment motion and stated that its "proposed intrastate tariff will be amended to conform to South Dakota rules," and it claimed that this provision "will entirely alleviate" any concern that the Aventure tariffs violate South Dakota law and the Commission's rules. In response to Aventure's filing, the Commission reset the schedule in this case. Because, for the reasons set forth below, Aventure's tariff remains unlawful, AT&T is now renewing its prior motion for summary judgment.

[24] The change filed on July 13 removed the following sentence from the definition of "End User:" "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."

STANDARD OF REVIEW

Summary judgment is appropriate when no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law.[25] While requiring any facts in dispute to be presumed in the favor of the non-moving party, "summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law.[26] A nonmoving party in a summary judgment motion cannot rely on general allegations or claims and must set forth specific facts to show that a genuine issue of material fact exists in order to successfully preclude the moving party from succeeding on its motion.[27] In this case, summary judgment is appropriate under these standards because the provisions in Aventure's tariff at issue in this motion are on their face contrary to South Dakota law.

ARGUMENT

Although the Commission could conduct a detailed investigation into Aventure's proposed tariff revisions and the public policy implications of those revisions, there are at least three sets of provisions that, on their face, are patently unlawful under existing law, and thus the Commission can and should resolve the issues in this proceeding summarily. *First*, the definition of "End User" in Aventure's tariff, even after the July 13 modification, has been found unlawful by the FCC, and it also conflicts with the Commission's rules. *Second*, Aventure's revised tariff contains unfair billing dispute resolution provisions that conflict with i) the

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[25] *Behrens* v. *Wedmore*, 698 N.W.2d 555, 565 (S.D. 2005); *Jerauld County* v. *Huron Regional Medical Center*, 685 N.W.2d 140,142 (S.D. 2004).

[26] *St. Onge Livestock Co., Ltd.* v. *Curtis*, 650 N.W.2d 537 (S.D. 2002) (citing *Hayes* v. *N. Hills Gen Hosp.*, 590 N.W.2d 243, 247 (quoting SDCL §15-6-56(c)).

[27] *Hoaas* v. *Griffiths*, 714 N.W.2d 61,65 (S.D. 2006) (citing *Wulf* v. *Senst*, 669 N.W.2d 135 (S.D. 2003)).

Commission's rules and ii) decisions by the FCC and federal courts. The provision that Aventure proposed on July 18 to address these deficiencies does not cure the illegality and would render the tariff impermissibly vague. *Third*, the tariff's definition of "End User's Premises" is internally inconsistent, and, in any event, unreasonably discriminates in favor of Aventure's free calling partners over ordinary local exchange customers.

I. AVENTURE's REVISED TARIFF IS PATENTLY UNLAWFUL UNDER THE RULE IN *NORTHERN VALLEY I AND II* AND THE COMMISSION'S RULES BECAUSE IT DOES NOT CLEARLY PROVIDE THAT SWITCHED ACCESS CHARGES CAN BE ASSESSED ONLY TO END USERS THAT PAY AVENTURE A FEE FOR TELECOMMUNICATIONS SERVICES.

The first basis for invalidating Aventure's revised tariff is clear. As Aventure concedes, the definition of "End User" in its Revised Tariff, including the change proposed on July 13, 2011, is the "same definition of 'End User' as the Northern Valley definition rejected by the FCC." Aventure Resistance at 2. Aventure's tariff fails to unambiguously provide and "make . . . clear" (*NVC II* ¶ 5) that Aventure will assess switched access services only for the origination or termination of calls to or from an entity to whom Aventure offers telecommunications services for a fee. *NVC I*, ¶ 17; *NVC II*, ¶ 5. This is inconsistent with *NVC I* and *NVC II* and with state law regarding switched access charges.

The tariff that Aventure had on file with this Commission since 2007 defined "End User" as "[a]ny individual, association, corporation, government agency or any other entity other than an Interexchange Carrier which subscribes to intrastate service provided by an Exchange Carrier."[28] This definition is similar to and consistent with the definitions of "End User" that

[28] Aventure S.D. Tariff No. 2, § 1, Original Page 6.

have been promulgated in the Commission's rules and that have existed in LEC tariffs for decades.[29]

As described above, however, Aventure has made a series of revisions to this definition – first, on March 18, 2011, in attempt to circumvent the decision of the FCC in *Farmers III* and the IUB in *Superior*, and then on July 13, 2011, to try to circumvent the FCC's decisions in *NVC I* and *NVC II* and AT&T's summary judgment motion. Aventure's revised tariff now provides in relevant part that 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." Quite clearly, the "person or entity" that can send or receive a telephone call via Aventure's network is not required to pay Aventure any fee at all for any service.

The Commission should apply the rationale from the FCC's decisions in *NVC I* and *NVC II* and find that Aventure's revised intrastate access tariff is unlawful under state law. As under federal law, the Commission's regulations define "Switched access" as a service that provides "a path between the customer of the service *and its end user* which utilizes subscriber loop, transport, and switching functions." A.R.S.D. § 20:10:27:01(10) (emphasis added). Further, the Commission's rules provide that access charges should be billed "from the time the originating *end user's* call is delivered" and "from the time the call is received *by the end user* in the terminating exchange." *Id.* § 20:10:29:05 (emphases added). As a consequence, switched access charges can only be assessed when a LEC, among other requirements, originates or terminates a call of an "end user."

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[29] A.R.S.D. § 20:10:29:07 (defining "end user" in relevant part as follows: "[a] customer of an intrastate telecommunications service that is not a carrier is an end user"). *See also Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, 1192, § 2.6 (1984) ("*ECA Tariff Order*") (requiring that the Exchange Carriers' Association tariff, as the model tariff for exchange access tariffs, define "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier").

As with federal law, the Commission's rules are clear that an "end user" is in this context an entity that pays the LEC for services. Thus, a tariff like Aventure's – which purports to allow Aventure to bill access services for calls routed to any "person or entity" that "sends or receives" a call, notwithstanding a lack of net payments to Aventure – conflicts with the Commission's rules and is unlawful. In particular, the Commission's rules, in defining the term "end user," provide that "[a] customer of an intrastate telecommunications service that is not a carrier is an end user." § 20:10:29:07. As explained by the FCC, in the context of billing for switched access services, the term "'customer' clearly means a *paying* customer." *NVC I* ¶ 10 (emphasis in original). Indeed, although the Commission's regulations do not further define "customer," its rules are replete with provisions that relate to a customer's obligations to pay for services.[30] Further, even apart from this specific context, it is generally understood that a customers is "a person who *purchases* goods or services from another; buyer; patron."[31]

Based on these rules, as well as the Commission's broad discretion in interpreting and applying its own regulations,[32] it is eminently reasonable, and consistent with years of practice in the industry, for the Commission to follow the lead of the FCC and hold that switched access services must be provided to entities that pay the local exchange carrier for services.

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[30] *E.g.*, A.R.S.D. § 20:10:07:03 (rule on transmittal of "bills" refers to "all charges" imposed on a customer). Other provisions of the Commission's rules refer to payments by "subscribers" which in this context is virtually synonymous with customer. *See, 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).

[31] The Amer. Heritage Dictionary, http://dictionary.reference.com/browse/customer. (emphasis added).

[32] *See* SDCL 49-31-3, ("the Commission may exercise powers necessary to properly supervise and control all telecommunication companies"); *Trinity Broadcasting of Fla., Inc.* v. *FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000) (an agency's interpretation of its own rules is accorded an "exceedingly deferential standard of review," which are not accepted only when "plainly wrong"); *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (courts accord "substantial deference to an agency's interpretation of its own regulations.").

Traditionally, end users placing or receiving long distance calls were able to access the networks of long distance carriers by purchasing local exchange services pursuant to intrastate tariffs that imposed monthly recurring charges on the end user. *See, e.g.*, *IUB Final Order* at *10. Accordingly, like the FCC, the Commission should conclude that "End Users" under a LEC's switched access tariff should generally be defined as entities that are purchasers of the LEC's services, and, based on that holding, should find that Aventure's revisions to its intrastate access tariff are unlawful.

In its Resistance to AT&T's initial summary judgment motion, Aventure argued that its tariff should be found lawful because its FCC tariff had a provision stating that it would assess an "End User Common Line" charge to end users pursuant to the tariff. Resistance at 4 (citing FCC Tariff No. 3, § 5.1). However, Aventure's intrastate tariff in South Dakota does not contain this provision, and there is no other provision in Aventure's intrastate tariff that clearly states that Aventure will bill switched access services only to entities that pay fees to Aventure for telecommunications services.

Aventure also argues that it in fact "bills its conference calling customers monthly," *id.*, but this is irrelevant. For one, Aventure appears to be referring to conference calling customers in Iowa, because Aventure has stated that it has no customers yet in South Dakota. Further, and in any event, NVC raised a very similar argument before the FCC in *NVC I*, arguing that its tariff could not be found unreasonable because it was "not allege[d] that Northern Valley has in fact imposed charges for calls to entities that have not purchased services from Northern Valley, or will do so in the future." *NVC I* ¶ 13. The FCC rejected this argument, explaining that no such showing was required and the only question was whether the tariff could be properly construed

to apply to entities that receive services for free. *Id.* As discussed above, that is clearly the case with Aventure's tariff under its proposed revisions.

In any event, the payment of some money by conference companies to Aventure – if it did in fact occur; *but cf. IUB Final Order* *10 (finding that Aventure prepared bills that were not legitimate)) – is not enough to legitimize Aventure's schemes or its charges. If – as is virtually always the case in traffic pumping schemes – Aventure plans to remit large sums of money back to the conference companies, those companies would not pay Aventure, in any meaningful sense, a fee for telecommunications services, and thus could not be "end users" for the reasons discussed above.[33] Further, even assuming that Aventure's free chat line and conference company partners could qualify as valid end users, rebates or other payments like those that Aventure and other traffic-pumping LECs pay only to conference and chat companies, but not to other end users, plainly violate the law.[34]

II. AVENTURE's REVISED TARIFF CONTAINS UNREASONABLE BILLING DISPUTE PROVISIONS.

The Commission should also reject as patently unreasonable revised provisions in Aventure's tariff regarding billing disputes. The revised tariff includes a new section 2.10.4, which, among other things, purports to (1) require customers to pay all disputed bills and to waive any rights to challenge those bills unless a bill is formally disputed within 90 days and (2) deny its customers the right to withhold payment of disputed charges, even where the customer

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[33] *Cf. Farmers III*, ¶ 12 n.49 ("the flow of money between these parties is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to [the LEC], not payments that flow in the reverse direction"). In *NVC I* and *NVC II*, the FCC held that its rules likewise require net payments to the LEC, and not payments that flow from the LEC to the supposed end user.

[34] *See* S.D. Codified. Laws § 49-31-11 ("No telecommunications company may make or give any unjust or unreasonable preference or advantage to any person, nor unjustly or unreasonably prejudice or disadvantage any person, in the provision of any telecommunications service."); 47 U.S.C. §§ 203(c)(2)-(3).

claims that Aventure did not provide the services that were billed, and (3) require its customers to pay late fees on any withheld amounts even if the dispute is resolved in their favor and to pay Aventure's attorneys' fees for any action Aventure may file to recover charges, including one that Aventure loses.[35] Further, Aventure's unprecedented attempt in its July 18, 2011, filing to salvage these unlawful provisions by stating that the South Dakota statutes and Commission rules apply to this section of its tariff has no merit, and should be rejected. Aventure's filing offers no justification for any of these provisions, and there is no valid one. When viewed in combination, these one-sided tariff provisions are unfair to long distance carrier-customers, conflict with the Commission's rules, and should be found unlawful.

1. Aventure's Tariff Provisions on Billing Disputes Flatly Violate The Commission's Rules And Are Unreasonable.

The Commission's rule on billing disputes provides in its first sentence that "[i]n 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." A.R.S.D. § 20:10:07:04 (emphasis added). Aventure's proposed tariff revision turns this regulation on its head, making the limited and conditional right of carriers to demand payment only of the "undisputed portion" of a bill into a broad requirement that purports to force customers to pay all amounts billed, even for services that were not in fact provided or for charges that are disputed and/or improperly billed.[36]

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[35] *See, e.g.*, Tariff No. 3, § 2.10.4. In particular, as discussed herein, Tariff Provisions §§ 2.10.4.A., 2.10.4.B., 2.10.4.D., 2.10.4.E. (in part), 2.10.4.F (in part), 2.10.4.G., 2.10.5., 2.10.6 (in part), 2.12.1, 2.12.2.A., and 2.12.3 are each unlawful in part or in whole.

[36] *See* Tariff No. 3, § 2.10.4.B. ("Any disputed charge must be paid in full prior to or at the time of submitting a good faith dispute and failure to tender payment for disputed invoices or portions thereof is a sufficient basis for the Company to deny a dispute for the Customer's failure to demonstrate that the dispute was made in good faith").

Notably, in a recent FCC decision again involving Northern Valley, the FCC reviewed several bill dispute provisions in a switched access tariff, and concluded that a number of them were unreasonable, including a provision that "requires all disputed charges to be paid 'in full prior to or at the time of submitting a good faith dispute."[37] Requiring payment of disputed bills, "no matter what the circumstances (including, for example, if no services were provided at all)" was not reasonable.[38] The FCC's rationale applies here with greater force, given the Commission's express rule, and clearly mandates that Aventure's tariff be found unlawful.

The second sentence of the Commission's rule on billing disputes provides that, upon receipt of a dispute from a customer, the carrier "shall make an appropriate investigation and shall report the results of the investigation to the customer and to the commission, if involved." A.R.S.D. § 20:10:07:04. Aventure's revised tariff contains a number of provisions that are inconsistent with this rule. For instance, Aventure's proposed revisions merely require it to "*attempt* to investigate and resolve a good faith dispute," and then allow the dispute to be "deemed rejected" if Aventure does not respond to the billing dispute. Aventure Tariff, § 2.10.4.D (emphasis added). The "appropriate investigation" called for by the Commission's rules clearly entails more than a mere "attempt" to resolve a dispute, and the requirement that the carrier make a "report" to the customer is clearly not satisfied if, as the tariff purports to legitimize, Aventure fails entirely to respond to the dispute and it is "deemed rejected." Likewise, the part of the revised tariff providing that Aventure has "a sufficient basis" to deny the dispute simply because the customer "fail[s] to tender payment for disputed invoices" (*id.* § 2.10.4.B) is inconsistent with both sentences of the Commission's billing dispute rule. It

[37] *Sprint Commc'ns Co.* v. *Northern Valley Commc'ns*, File No. EB-11-MD-003, FCC 11-111, ¶ 14 (July 18, 2011) ("*Sprint-NVC*"). It appears the provision at issue before the FCC is virtually identical to that in Aventure's revised tariff. *Compare id.* n.48 *with* Tariff No. 3, § 2.10.4.B.

[38] *Id.*

improperly penalizes customers who wish to withhold payments of disputed amounts, and an investigation that results in a rejection of a billing dispute regardless of its merits and solely on whether payment has been made is not an "appropriate investigation" within any reasonable interpretation of the Commission's rule.[39]

2. Aventure's Tariff Provision Providing That Customers Must Submit Billing Disputes Within 90 Days Is Unlawful.

Aventure's revised tariff also contains a provision that purports to limit a customer's right to raise a billing dispute strictly to the period of "90 days of the invoice date listed on the bill."[40] In the context of billing for switched access services, which is widely recognized as "a complex and time-consuming process" that can result in millions of dollars of disputed charges, 90 days is not a sufficient time period for customers to review the accuracy of their switched access services bills.[41] There are thousands of individual switched access providers and "customers often find numerous inaccuracies after reviewing bills."[42] In these circumstances, Aventure's proposed requirement that its access customers have only 90 days to raise billing disputes, or else "[t]he bill shall be deemed to be correct and the Customer shall be deemed to have waived any and all rights and claims" is plainly unreasonable.

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[39] Likewise, given the well-established principle that "responsibility for correct billings remains with the carriers" providing service, *Tele-Valuation, Inc.* v. *AT&T Corp.*, 73 F.C.C.2d 450, ¶ 8 (1979), the provision of the revised tariff stating that "[a]ll bills are *presumed* accurate" (Aventure Tariff, § 2.10.4.A) is clearly unreasonable.

[40] Aventure Tariff, § 2.10.4.A ("All bills are presumed accurate, and shall be binding on the Customer unless written notice of a good faith dispute is received by the Company within 90 days (commencing five days after the bill in question has been mailed or otherwise rendered per the Company's normal course of business.) The bill shall be deemed to be correct and the Customer shall be deemed to have waived any and all rights and claims with respect to both the bill and the underlying dispute, if a good faith dispute is not timely received.").

[41] Policy Statement, *Verizon Petition for Emergency Declaratory And Other Relief*, 17 FCC Rcd. 26884, ¶ 24 (2002) (describing "access bills that run to tens of thousands of pages" and that carrier-customers may "receive up to 1700 such bills per month. These bills often arrive several days after the bill date that starts the clock on the time allowed to pay the bill").

[42] *Id.*

Notably, similar requirements have been found to be unlawful and unreasonable by the FCC and by federal courts. In *Sprint-NVC*, the FCC struck down tariff provisions requiring customers to "dispute bills within 90 days or waive 'any and all rights and claims'" for the bill.[43] Those provisions were unreasonable and inconsistent with the two year limitations period under federal law.[44] In this regard, the FCC relied on decisions by federal courts regarding similar provisions.[45] For example, the United States District Court for the Eastern District of Pennsylvania, following a prior ruling by the Eastern District of Virginia, which was upheld by the Fourth Circuit, correctly explained that:

> the [Eastern District of Virginia] issued an order wherein it found that the 90-day dispute resolution provision in PAETEC's tariff could not preempt the federal statute of limitations in the context of a tariff because the terms of a tariff are not negotiated like the terms of a contract. If a term in the tariff could supersede the statute of limitations, it would mean that a carrier could unilaterally void federally codified consumer protections simply by filing a tariff. The Fourth Circuit affirmed. . . . [W]e . . . find that the Fourth Circuit's ruling on this matter was persuasive.[46]

Under this same rationale, the Commission should find that the revised tariff language in Aventure's intrastate access tariff is also unlawful. Under South Dakota law, a customer that has been overcharged for tariff services can bring an action at the Commission or in an appropriate state court to recover the overcharges. S.D.C.L. § 49-13-1.1. Under South Dakota law, a

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[43] *Sprint-NVC* ¶ 14.

[44] *Id.* (citing 47 U.S.C. § 415).

[45] *Paetec Communications, Inc.* v. *MCI Communications Services, Inc.*, Civil Action No. 09-1639, 2010 U.S. Dist. LEXIS 41644, *11 (E.D. Pa. 2010), appeal pending. *See also MCI WorldCom Network Services, Inc. v. Paetec Commn'cs, Inc.*, 2005 WL 2145499 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006). The applicable language in that case read as follows: "All bills are presumed accurate, and shall be binding on the Customer, and such Customer shall be deemed to have waived the right to dispute the charges unless written notice of the disputed charge(s) is received by the Company within 90 days of the invoice date listed on the bill."

[46] 2010 U.S. Dist. LEXIS 41644, *32-34 (E.D. Pa. 2010).

customer must bring that action within 6 years after it arises.[47] Like the tariffs in *Sprint-NVC* and in *PAETEC*, Aventure's revised intrastate tariff seeks to supersede the limitations period provided for by the Legislature, and is thus unlawful for the reasons set forth in those cases.

3. Numerous Other Provisions In Aventure's Tariff Are Unreasonable and Unlawful.

In addition to these provisions, Aventure's revised tariff contains a number of other unreasonable and unlawful provisions. For example, in *Sprint-NVC*, the FCC also held that deposit provisions in the tariff were unreasonable because they "established no standard as to when a deposit will be required," which could allow the carrier to engage in discrimination.[48] Here, Aventure's revised tariff provides that it may require a deposit "if the Customer's financial condition is not acceptable" to Aventure and may require an advance payment (which is something Aventure says is different from a deposit) whenever Aventure believes that such a payment would "safeguard its interests."[49] In these provisions, the tariff can be interpreted to allow Aventure to require deposits/advance payments in virtually any situation, and entirely at Aventure's whim, and they are plainly unreasonable.

The FCC also struck down as unreasonable tariff provisions that broadly allowed carriers to seek attorneys' fees from customers, even if a customer succeeds in litigation regarding a billing dispute.[50] As in that case, Aventure's revised tariff broadly provides that anytime Aventure "pursues a claim in Court or before any regulatory body arising out the Customer's

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[47] SDCL 15-2-13 (an action upon a contract must be brought within six years after the cause of action arises).

[48] *Sprint-NVC Order* ¶ 13 (citing *In re Verizon Petition*, 17 FCC Rcd. 26884 (2002)).

[49] Aventure Revised Tariff, §§ 2.12.2.A. & 2.12.3. *See also id.* § 2.12.1 (Aventure may "may refuse to provide service, require a deposit or advance payment, or otherwise restrict or interrupt service to a Customer" when "a Customer's creditworthiness is unacceptable to the Company").

[50] *Id.* ¶ 16.

refusal to make payment pursuant to this tariff, the Customer will be liable for the payment of the Company's reasonable attorneys' fees expended in collecting those unpaid amounts." § 2.10.5. This one-sided provision is entirely unfair and unreasonable – it can be interpreted always to allow Aventure to collect attorneys' fees in a litigation, whereas customers can never recover such fees pursuant to the tariff. Under these provisions, where Aventure severely overbills customers or bills customers for tariffed services that Aventure never provided, the customer/victim of the overcharges must come up with the money and pay it to Aventure, or Aventure will start charging penalties and initiate a lawsuit which will be paid for by the customer/victim of the overcharges, regardless of how frivolous Aventure's lawsuit might be. Such "shake down" provisions are also facially unjust and unreasonable.

4. Aventure's July 18 Revision Does Not Cure The Illegal Provisions Of The Tariff.

On July 18, 2011, in response to AT&T's initial motion for summary judgment, Aventure sought to add a new provision to its tariff, Section 2.10.4.H., which provides that "[t]o the extent that any of the provisions included in this section 2.10.4 are in conflict with South Dakota statutes or administrative rules, the South Dakota statutes or rules will apply." § 2.10.4.H. While no explanation was offered for the filing, Aventure's position appears to be that this provision cures the illegal billing dispute provisions of its tariff and requires the Commission to allow the tariff as currently drafted, *i.e.,* with the unreasonable provisions, to become effective. This unprecedented claim is utterly without merit, and the Commission plainly can and should find that, notwithstanding the presence of Section 2.10.4.H., the revised tariff is unlawful, unreasonable, and cannot become effective.[51]

[51] To begin with, Aventure's "savings" clause on its face applies only to provisions in § 2.10.4 of its tariff, but as explained above, there are also unreasonable and unlawful provisions in other parts of the tariff.

By its terms, Section 2.10.4.H. merely restates a truism of law – for it is obvious and indisputable that where a tariff conflicts with the South Dakota Codified Laws or this Commission's rules, the tariff must yield.[52] Consequently, where – as here – a tariff contains unreasonable and unlawful provisions, the Commission's duty remains to investigate the tariff and issue an order declaring that the provisions in fact violate the law.[53] Thus, Aventure's filing of Section 2.10.4.H. does not divest the Commission of jurisdiction or authority to determine that tariff provisions are unreasonable and inconsistent with South Dakota law.

Aventure's apparent position that § 2.10.4.H. can cure its tariff violations undercuts the very purpose of the tariff filing requirement, which is to inform customers of the rates, terms, and conditions of the services offered in the tariff.[54] Aventure's tariff, however, leaves customers in the dark as to which billing dispute provisions actually apply under the tariff, and which provisions might be superseded because they are later deemed by this Commission to "conflict with South Dakota statutes or administrative rules." § 2.10.4.H. Thus, if Aventure ever does attempt to provide service under the revised tariff, it is entirely unclear how in practice the tariff terms in § 2.10.4. would apply to the customer-carrier relationship. For example,

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[52] *See, e.g., Mobile Electric Serv v. First Tel, Inc.*, 649 NW2d 603 (S.D. 2002). In that case, the South Dakota Supreme Court declared tariff provisions unenforceable that attempted to limit or deny contract and tort remedies. The case is analogous because, through its tariff language, Aventure attempts to subvert South Dakota law. The Court found that the PUC was without authority to approve a tariff that limited the contract or tort rights of consumers. *See also* fn 45 herein.

[53] The Commission has the right at any time to institute an investigation based on a complaint in any case involving any matter which the Commission has jurisdiction over. SDCL 49-13-4. The Commission can also do this without an outside complaint. SDCL 49-13-5. See also, SDCL 49-31-3, which grants the Commission a supervisory role over the telecommunications industry.

[54] *See, e..g., Arizona Groc. Co.*, v. *Atchison Ry. Co.*, 284 U.S. 370, 384 (1932) ("In order to render rates definite and certain . . . the statute required the filing and publishing of tariffs"). Tariffs that are not "definite" and "certain," and that fail to apprise the customer of the applicable terms, are vague and unlawful. *Norfolk & Western Ry. Co.* v. *B.I. Holser & Co.*, 466 F. Supp. 885, 890-91 (N.D. Ind. 1979) (the carrier "has a duty to express its intent in a tariff in clear and plain terms so that those referring to them may readily understand their meaning"); *Capital Network Sys., Inc.*, 7 FCC Rcd. 8092, ¶ 11 (1992) (tariffs "require clear and definite statements of a carrier's rates and regulations as well as the exceptions and conditions contained in the tariffs").

Aventure, relying on tariff provision § 2.10.4.B., would presumably seek to require its access customers to pay disputed amounts that Aventure has billed. Customers, by contrast, would rely on § 2.10.4.H. and contend that § 2.10.4.B. is superseded by South Dakota law. The tariff itself provides no answer as to which tariff provision controls and is thus vague.[55] In fact, if Aventure's position were accepted, then carriers would routinely file tariffs with unlawful terms – for example, providing that rates will be $1 million per minute – but also include clauses like Section 2.10.4.H that attempt to cure the violation and force customers to either abide by the unreasonable terms or sue to have them deemed unenforceable. In short, the tariff is unlawful, even with § 2.10.4.H. because, rather than provide an offer to customers with specified terms, the tariff requires them to litigate the reasonableness of the billing dispute revisions in order to determine which tariff provisions apply.

III. THE REVISED TARIFF'S DEFINITION OF "END USER PREMISES" IS INTERNALLY INCONSISTENT AND UNREASONABLE.

Aventure's revised tariff is also unlawful because it defines "end user's premises" in a way that is internally inconsistent and that appears designed to grant its free calling providers an unreasonable preference. Under the tariff, "Switched Access" is a service that provides a path between an IXC's point of presence and an "End User's Premises." § 3.1.1. Because the tariff provides that an "End User" is an entity "that is *not* a carrier," § 1, Original Page 7 (emphasis added), the tariff excludes any carrier's premises, such as a LEC central office, from the definition of "end user's premises."[56] This reading is entirely consistent with common sense and

[55] Of course, if this matter were subject to litigation, the customer would prevail, for it is clear that any ambiguities in tariffs must be resolved against the carrier as drafter of the tariff. *See Singpiel v. Morris,* 582 N.W.2d 715, 718 (S.D. 1998) (ambiguity in a contract must be resolved against the drafter); *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971); *Farmers III*, 24 FCC Rcd at 14810, n.83; *American Satellite Corp v MCI Telecomm. Corp.*, 57 F.C.C.2d 1165, 1167, ¶ 6 (1976).

[56] *See also* Aventure Tariff, § 1, Original Page 7 (defining "End User Premises" as the "Premises, as defined herein, *of an End User.*").

practice, because only carriers ordinarily place equipment in a central office (*e.g.*, via collocation arrangements) and indeed ordinary end users typically cannot even enter a LEC central office, let alone establish a premises there.

Nevertheless, in response to the IUB's *Final Order*, which held that calls routed to equipment in a carrier's end office was not terminated to an "end user's premises," *IUB Final Order* **16-18, Aventure also revised the definition of "Premises" in its tariff. It now provides that a "Premises" may also "denote a Customer-owned or End User-owned enclosure[,] utility vault or rack space located above or below ground on private property, on Customer or End User-acquired right-of-way, *or in a central office.*" Tariff S.D. No. 3, § 1, Original Page 8 (emphasis added). Under this definition, "End User-owned" space "in a central office" apparently can be a "premises."[57] It is unclear how a "premises" in a central office – even "End User-owned" space in the end office – can be an "End User's" premises since carriers rather than end users are the only third parties who access central office space and a carrier is not an end user under the tariff. Consequently, the tariff appears to be internally inconsistent and thus impermissibly vague.

Further, and in all events, the tariff's definition of "premises" to include "rack space . . . in a central office" is unreasonable and appears to be designed to facilitate discrimination by Aventure against any ordinary local exchange customers and in favor of Aventure's free calling partners. It is commonly the case in traffic-pumping schemes that the free calling providers are allowed by their LEC partners to place conferencing or chat line equipment within a LEC central

[57] Notably, this definition of "premises" is not consistent with the ordinary understanding of the term premises. *See C.F. Commc'ns Corp.* v. *FCC*, 128 F.3d 735, 738-40 (D.C. Cir. 1997) (holding that payphone equipment could not be a "premises" under any common understanding of that term, and explaining that "[t]he term 'premises,' as used in this context, traditionally refers to real property and its appurtenances" and the court is *not aware of any "definition under which personal property located on real property owned by another is considered to be 'premises.'"*) (emphasis added).

office, usually for free, *see IUB Final Order* **16-17 – and based on its definition of "premises" in its revised tariff, it appears that Aventure intends to allow such arrangements to continue. However, there are *no* provisions in Aventure's tariff that provide terms and conditions by which end users can obtain access to space in Aventure's end offices. Indeed, as noted above, LECs typically offer such central office space only to other carriers via collocation tariffs or contracts. Thus, Aventure appears likely to grant its free calling partners a "preference or advantage" – specifically, access to a central office to place equipment therein, possibly for free – that is not made generally available to ordinary local exchange customers.[58] To avoid that unfair result, the Commission should strike Aventure's definition of "Premises" and should make clear that, consistent with the ordinary understanding of "premises," switched access services cannot be charged on calls that terminate to equipment housed in a carrier's central office (at least absent a generalized offering of such space to all end users on fair terms).

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.

Respectfully submitted this 7th day of September, 2011.

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[58] *See* S.D. Codified. Laws § 49-31-11 ("No telecommunications company may make or give any unjust or unreasonable preference or advantage to any person, nor unjustly or unreasonably prejudice or disadvantage any person, in the provision of any telecommunications service.").

CERTIFICATE OF SERVICE

William M. Van Camp hereby certifies that on the 7th day of September, 2011, he served the foregoing AT & T's Renewed Motion for Summary Judgment to Declare Aveture's Revised Access Tariff to be Unlawful, electronically with the Aventure's counsel of record with copies of the same to the following persons electronically:

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