

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE FILING :  
BY AVENTURE COMMUNICATION :  
TECHNOLOGY, L.L.C. d/b/a : DOCKET NO. TC11-010  
AVENTURE COMMUNICATIONS' :  
ACCESS TARIFF NO. 3 :

**RESISTANCE TO AT&T'S MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

AT&T's Motion for Summary Judgment makes allegations against Aventure that would be actionable libel but for the qualified privilege attending court pleadings. AT&T alleges on the first page of its motion that "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 residential and business customers" and that it would "bring real choice to rural areas" 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". (AT&T Motion at page 1-2) The allegation is patently false. Attached hereto as Exhibit BC-9 is a chart showing Aventure's traditional residential and business customers broken down by location in rural exchanges served by Aventure in Iowa. The chart shows that Aventure has in excess of 300 "traditional" local exchange customers. Aventure continues to add customers to its Iowa exchanges. Basic pleading rules require that pleader have some factual justification for its allegations. This basic rule has been violated by AT&T.

AT&T apparently intends by its motion to request that the Commission revisit its rule making (RM05-002) which resulted in a rule allowing CLECs to mirror the switched access rates of Qwest. The rate in Aventure's proposed tariff is actually lower than the Qwest rate. In the

rule making proceeding, AT&T and the other IXCs objected to allowing CLECs to mirror the Qwest rate over concerns for access stimulation. The Commission had the opportunity at that time to consider the rate in the context of access stimulation but did not. Aventure would submit that the present docket is not the proper proceeding to permit the IXCs another opportunity to complain about the switched access rate adopted in that rule making proceeding.

AT&T's motion proceeds from the central premise that Aventure's proposed tariff is "unlawful" because the FCC has rejected a similar tariff filed by a South Dakota LEC, Northern Valley Communications. (File No. EB-11-MD-001, FCC 11-87; (June 7, 2011)) The FCC rejected Northern Valley's tariff because the tariff did not require "End Users" to pay any fee for service. (FCC Northern Valley Order at paragraph 7) Aventure's FCC Tariff No. 3, a copy of which has been previously filed with the Commission, at Section 5.1, provides for an End User Common Line Charge assessed to "End Users" "for each local exchange service line or trunk". Aventure's tariff requires "End Users" to pay a fee for service and the FCC's Order in Northern Valley would be inapplicable to Aventure. The FCC's Northern Valley ruling offers no ground to grant AT&T's Motion for Summary Judgment.

Aventure's FCC Tariff No. 3 as currently filed with this Commission does contain the same definition of "End User" as the Northern Valley definition rejected by the FCC. However, on June 28, 2011, Aventure filed with the FCC an Amendment to its FCC Tariff No. 3 for the purpose of adjusting certain rates and for the purpose of removing the last sentence of the definition of "End User" in Section 1 of the tariff. This sentence read "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". While this proposed

Amendment to Aventure's FCC Tariff has been met by the usual opposition of the IXCs, those petitions in opposition have been rejected by the FCC and Aventure's amended tariff acquired "deemed lawful" status as of July 13, 2011. On July 13, 2011, Aventure filed an identical amendment to its proposed intrastate tariff as discussed below.

As will be discussed in the body of this resistance, Aventure bills its conference calling customers the monthly end user common line charge as part of the monthly recurring line charge as required by its tariff, Aventure's FCC Tariff No. 3, as amended with the filing of June 28, 2011, is "deemed lawful" and there exists no legal ground to reject Aventure's proposed tariff as "unlawful" at this stage of the proceedings.

#### **RESISTANCE TO MOTION FOR SUMMARY JUDGMENT**

I. Aventure's definition of "End User" in its proposed intrastate tariff has been amended to conform to the Amendment of Aventure's FCC Tariff No. 3 which was deemed lawful as of July 13, 2011.

Attached hereto is Aventure's transmittal to the Commission of July 13, 2011, to amend the definition of "End User" in Aventure's proposed intrastate tariff in order to maintain consistency with Aventure's FCC Tariff No. 3 as amended and deemed lawful as of July 13, 2011. Also attached is Aventure's amendment to FCC Tariff No. 3 filed June 28, 2011, and deemed lawful as of July 13, 2011. Aventure removed the last sentence of the "End User" definition to comply with the FCC's ruling on the Northern Valley Communication Tariff. ( FCC File No. EB-11-MD-001, FCC 11-87; (June 7, 2011)) Aventure would note for the Commission that the FCC's Order on the Northern Valley Tariff is now subject to a Petition for Reconsideration filed by Aventure. There is substantial legal doubt as to the validity of the

FCC's Order on that Northern Valley Tariff for the reasons set forth in Aventure's Petition for Reconsideration.

The Northern Valley Tariff that was before the FCC contained no provision indicating that "End Users" would be charged a fee for telecommunication services. Aventure's federal tariffs, the initial FCC Tariff No. 3 filed December 14, 2010, and previously filed with this Commission, and the Amended FCC Tariff No. 3 filed June 28, 2011, and now deemed lawful as of July 13, 2011, both contain, at Section 5.1, an End User Common Line Charge described as follows:

**"The End User Common Line Charge is a monthly, flat rated charge assessed to end users for each local exchange service line or trunk. The End User Common Line Charge is based on a monthly snap shot of end user accounts. No fractional debits or credits will be created. ISDN BRI lines are charged the business rates and ISDN PRI arrangements are charged the business line rate times five (5). At the Company's option, the End User Common Line Charge may be included as part of the monthly recurring line charge assessed to the End User".**

Aventure bills its conference calling customers monthly for the recurring line charge which includes the End User Common Line Charge as specified in Section 5.1 of Aventure's FCC Tariff No. 3. Attached hereto are two exhibits filed with the Iowa Utilities Board in a pending docket<sup>1</sup> and identified as Exhibits BC-3 and BC-4 which contain monthly billings to Aventure's conference calling customers for the fourth quarter of 2010 and the first quarter of 2011. Each exhibit has a cover page that shows "SLC" revenue per invoice. This is the End User Common Line Charge as referenced in Section 5.1 of Aventure's FCC Tariff No. 3. Aventure reports this revenue to the FCC for USF purposes.

AT&T's attempt to treat Aventure's FCC Tariff No. 3 as identical to Northern Valley's is devoid of evidentiary support. Northern Valley's tariff was rejected because it contained no

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<sup>1</sup> Docket No. FCU-2011-0002

provision for charging any fee to any "End Users". Aventure's tariff provides for the End User Common Line Charge and the attached evidence shows that Aventure bills its conference calling customers for this charge. AT&T cites to no South Dakota rule or regulation requiring CLEC's tariffs to include "payment of fees" to acquire the status of "Customer" or "End User". Aventure submits that South Dakota has no such requirement.

AT&T, Qwest and Sprint all filed petitions with the FCC to oppose Aventure's tariff filing of June 28, 2011. The FCC has rejected those petitions in opposition. AT&T's petition in opposition is attached as an example of the IXC filings. It would be anomalous for the Commission to determine, on a Motion for Summary Judgment, that Aventure's proposed intrastate tariff is "unlawful" when it precisely mirrors a tariff the FCC permitted to go into effect over strenuous opposition from the IXC group. At the very least, Aventure is entitled to a hearing to present its evidence supporting approval of its intrastate tariff. The evidence attached by Aventure to this resistance, at the very least, generates issues of fact that must be resolved through a hearing.

II. The billing dispute provisions of Aventure's proposed intrastate tariff will be amended to conform to South Dakota rules.

Aventure is filing an amendment to its proposed intrastate tariff providing that to the extent any of the billing dispute rules are contrary to South Dakota rules, that the South Dakota rule will apply. The amendment will entirely alleviate AT&T's contentions with regard to the billing dispute rules contained in Aventure's proposed intrastate tariff.

**CONCLUSION**

AT&T has presented no legal basis for rejecting Aventure's tariff as a matter of law. At the very least, issues of fact preclude summary judgment and this matter should proceed to hearing as previously scheduled by the Commission.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on July 14, 2011.

BY:     U.S. Mail                       FAX  
          Hand Delivered            Overnight Courier  
          Certified Mail                X ECF

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