

**BEFORE THE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

In the Matter of)	
the Filing by)	
Northern Valley Communications, LLC)	TC19-052
for Approval of Revisions)	
to Its Access Service Tariff No. 1)	

**AT&T RESPONSE TO NORTHERN VALLEY COMMUNICATIONS, LLC'S
OPPOSITION TO SUSPEND TARIFF**

AT&T Corp. (AT&T) pursuant to A.R.S.D. 20:10:01:15.01 of the Commission's rules and the parties' Joint Stipulation provides the following response to Northern Valley Communications, LLC's (Northern Valley) opposition to the requests by AT&T and Sprint Communications Company L.P. (Sprint) for the Commission to reject, suspend or otherwise modify the tariff revisions sought by Northern Valley Communications, L.L.C. ("Northern Valley").

I. Introduction

The genesis of Northern Valley's tariff modification can be found in the FCC's September 26, 2019, Report and Order and Modification of Section 214 Authorizations in WC Docket No. 18-155, *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage* ("Access Arbitrage Order" or "Order").

Access Arbitration, often referred to as 'traffic pumping' occurs when a local exchange carrier (or "LEC") partners with a provider of "free" calling services, such as "free" conferencing services, "free" chat lines, "free" international calls, and/or "free" streaming radio. *Order* ¶¶ 1. The calls can be free to the users of the calling service, but the costs of these calls are paid by long distance and wireless carriers—and ultimately by their hundreds of millions of customers. *Id.* ¶¶ 20, 25.

The arrangements between a local exchange carrier (“LEC”) and free calling provider generate enormous volumes of calls to the LEC. The LEC typically places its interconnection facilities in a remote rural area—not because doing so is efficient, but precisely because it is inefficient. See Order, ¶¶ 11, 14, 21-23, 31 (access stimulation “rel[ies] on unusually expensive calling paths”). When customers of long distance and wireless carriers place calls to a “free” conferencing service, the LEC chooses an expensive calling path, and then imposes high tariffed charges on the long distance/wireless carriers for completing each call. The LEC then shares this windfall with the free calling provider, which uses it to subsidize the costs of the “free” calls (plus a presumably handsome profit).

As the Commission and the courts long ago concluded, “hundreds of millions of Americans pay[] more on their wireless and long distance bills” because the costs of the “free” calls are passed on via these “hidden, inefficient charges.” In the D.C. Circuit’s words, access stimulation schemes are “a ‘win-win’ for the local carrier and its phone call-generating partner,” but “the losing end” consists of “the public and the interexchange carriers” that foot the bill for “artificially inflated and distorted access charges.” *All American v. FCC*, 867 F.3d 81, 85 (D.C. Cir. 2017) (quotation omitted). In short, everyone that pays for long distance services—including via a “bundle” of services such as those commonly offered with wireless calling plans or “triple play” offers of internet, television, and phone—pays more to subsidize the costs of “free” calling services placed by others. *Id.*; Order ¶¶ 2, 20, 25.

Although the FCC had established initial rules to limit the impact of access arbitrage in its 2011 Order in which it outlined a fundamental change in intercarrier compensation¹, in the Order, the FCC determined that it needed to take additional steps to broaden the scope and

¹ Connect America Fund et al., WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) (“Transformation Order”), *aff’d*, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014)

effectiveness of its previously adopted anti-arbitrage rules, including shifting the financial responsibility for the tandem switching and transport access charges associated with the delivery of traffic from an IXC to an access-stimulating LEC end office. Northern Valley has repeatedly acknowledged that it is engaged in access stimulation, a fact confirmed by the FCC in its January 10, 2020 Order opening an investigation on Northern Valley's filing to modify its interstate access service tariff to comply with the terms of the *Access Arbitrage Order*.

Given this backdrop, it is clear that Northern Valley's proposed tariff revision is simply a blatant attempt to continue a scheme that both courts and the FCC have found to be improper, and which is not in the public interest. As a result, this Commission should find that the proposed tariff is both unfair and unreasonable, and therefore, disapprove of Northern Valley's filing.

I. **Northern Valley's Proposed Tariff Modification is an Impermissible attempt to Avoid Compliance with FCC Order and Rules, and Therefore Neither Fair or Reasonable.**

As noted in AT&T's original filing, since Northern Valley's inception as access stimulator, AT&T has delivered access stimulation traffic to Northern Valley via the South Dakota Network ("SDN") tandem switch in Sioux Falls. While SDN billed AT&T for tandem switching service it provided, Northern Valley has billed AT&T approximately 190 miles of transport from Sioux Falls to its switch in Redfield. Under the requirements of the FCC's Order, the responsibility for the tandem switch and transport would shift from AT&T to Northern Valley.

During the FCC's rulemaking, AT&T anticipated that access stimulation carriers such as Northern Valley might seek to manipulate the existing routing arrangements to avoid the consequences of the proposed rules that would shift costs from IXCs to the such carriers. As a result, in the underlying rulemaking, AT&T explained to the FCC that some access stimulators might play exactly this game—i.e., might seek to force long distance carriers to pay added transport costs by designating new tandem switches in remote locations. Order ¶ 34. Contrary to Northern Valley's characterization of the Order that the FCC rejected AT&T's

recommendation to specifically prohibit the re-homing to a new tandem, the FCC found that additional rule changes were **unnecessary** to address that scenario because there are not “any existing legal requirements” in the first place “that an IXC must agree to a new point of interconnection designated by an access-stimulating LEC should the access-stimulating LEC unilaterally attempt to move the point of interconnection.” Id.

Yet, in spite of this clear statement that such a plan would be impermissible, Northern Valley choose to modify both its interstate and intrastate tariffs to move points of interconnection for its end offices to the newly designated tandem owned by its ILEC affiliate, James Valley Cooperative Telephone Company, precisely the scenario described in paragraph 34 of the Order. In doing so, Northern Valley is attempting to unilaterally re-impose on AT&T the burden of the vast majority of the cost of transport mileage which AT&T paid to terminate access stimulation traffic prior to the FCC's Order.

Further, Northern Valley's attempt to justify its re-homing to a newly designated tandem because the FCC modified the Section 214 authorization for SDN to eliminate the mandatory use requirement imposed upon IXCs delivery traffic to subtending carriers is unsupportable. As is clear from the FCC's Order, the elimination of the mandatory use requirement was designed to provide IXCs an alternative method for delivering traffic to access stimulating carriers, not to create an opportunity for access stimulating carriers to unilaterally require IXCs to modify their traditional routing. One need look no further than the portion of the Order referenced in Northern Valley's Opposition brief to see that the option to use alternative intermediate carriers or establish a direct connect was designed to assist IXCs in mitigating costs associated with access stimulation traffic, not as Northern Valley suggests, to give an access stimulating carrier free reign to avoid complying with the Order.

Northern Valley's suggestion that AT&T's concern regarding the implementation of the intrastate tariff is unwarranted because the FCC's Order opening an investigation only suspended its interstate tariff for one day is also misleading. In typical tariff investigations, the

FCC is examining whether the new rate filed by a carrier is appropriate. Under this scenario, when the FCC allows the challenged tariff to become effective subject to investigation, it also imposes an obligation on the carrier to maintain an accounting of “all amounts received and paid that are associated with the switched access service rates and changes that are subject to investigation.” In fact, Paragraph 10 of the FCC’s January 10, 2020 Order includes such a provision.² However, in the case of Northern Valley’s proposed modification, AT&T would be required to establish a new facility (either by self-provisioning or, if available, leasing a facility from a third-party) to transport the access stimulation traffic from its point of presence (“POP”) in Sioux Falls (where it currently hands off the traffic to SDN, and in turn Northern Valley), to Groton, the location of the James Valley switch. Unlike the typical situation which could be remedied simply by a refund by the charging carrier of any overpayment if a rate were found to be unreasonable, the establishment of the direct facility is likely to take substantial time and require AT&T to incur significant costs, which may not be recoverable. As a result, AT&T has continued to route the access stimulation in the manner previously required by Northern Valley.³

II. Conclusion

Contrary to Northern Valley’s assertions, the modifications it seeks to make to its intrastate tariff are designed to circumvent the Order and rules adopted by the FCC to eliminate the inappropriate practice of access stimulation. Accordingly, Northern Valley’s tariff modifications should be deemed unfair and unreasonable. While AT&T prefers not to impose an unnecessary burden of proceeding with a potentially duplicative investigation on the Commission, to the extent that the Commission’s own rules require a hearing in order to reject the tariff modification sought by Northern Valley, AT&T requests that the Commission suspend Northern Valley’s

² The SDPUC’s rule 49-31-12.5 (4) includes a similar protection.

³ In fact, less than one percent of the access stimulation traffic AT&T delivers to Northern Valley is intrastate. However, any outcome that requires different routing for interstate and intrastate long-distance traffic is likely to require AT&T to engineer its own network in a manner that is contrary to industry standards for efficient engineering.

proposed tariff and set a hearing on the matter. Alternatively, AT&T requests that the Commission stay this proceeding and leave the docket open pending a determination by the FCC on this matter, and make any tariff change that may become effective as a matter of law subject to refund pending resolution of the docket before the Commission.

Dated this 24th day of February, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing in the above-entitled action was delivered by electronic mail this 24th day of February, 2020, to the following:

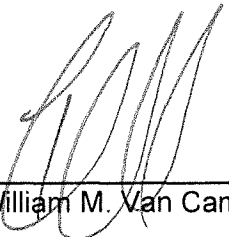
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