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 AVENTURE COMMUNICATIONS' ACCESS TARIFF NO. 3	:	DOCKET NO. TC11-010

AVENTURE'S RESISTANCE TO AT&T'S RENEWED

MOTION FOR SUMMARY JUDGMENT

Aventure Communication Technology, L.L.C. ("Aventure"), for its resistance to AT&T's Renewed Motion for Summary Judgment, states:

1. Presumably AT&T filed a Renewed Motion for Summary Judgment in light of Aventure's tariff revisions filed on June 13 and July 18, 2011. However, AT&T's renewed motion is simply a rehash of its initial motion with some small exceptions in Section II of the motion concerning billing dispute provisions of Aventure's tariff. Those provisions will be discussed as part of this resistance.

2. Aventure incorporates its Resistance to AT&T's initial Motion for Summary Judgment and all exhibits attached to that resistance as part of Aventure's Resistance to AT&T's Renewed Motion for Summary Judgment.

3. AT&T continues to assert that Aventure's intrastate access tariff that is the subject of this proceeding should be rejected in light of FCC rulings on the interstate access tariff of Northern Valley Communications. Aventure addressed this contention in its resistance to AT&T's initial motion. (See page 2-3 of Aventure's initial Resistance) 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". On July 13, 2011, Aventure's FCC Tariff No. 3 was amended to remove that part of the definition of "End User" in Section I of the tariff that 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, health desk providers, and residential and/or business service subscribers". The same amendment was made to Aventure's intrastate tariff now pending before the Commission. This amendment was also filed on July 13, 2011.

With regard to Aventure's intrastate tariff pending before the Commission, there is no South Dakota rule requiring that a tariff state that an "End User" must pay for service to be deemed an "End User". Rule 20:10:29:07 defines "End Users" as follows: "a customer of an intrastate telecommunication service that is not a carrier is an end user". Rule 20:10:29:09 provides that charges for End User Common Line are not included in intrastate switched access service. For intrastate switched access service there is no requirement in South Dakota that an end user pay any fee.

AT&T, Qwest and Sprint all filed petitions with the FCC to oppose Aventure's tariff filing of June 28, 2011, which removed the last sentence of the "End User" definition in Section 5.1 of the tariff. The FCC rejected those petitions in opposition. In its initial resistance to AT&T's Motion for Summary Judgment, Aventure attached AT&T's Petition in Opposition as an example of the IXC filings. Once again, Aventure would state that it would be anomalous for the Commission to determine, on a Motion for Summary Judgment, that Aventure's proposed intrastate tariff is "unlawful" as a matter of law 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 its original resistance, at the very least, generates issues of fact that must be resolved through a hearing.

4. AT&T's Renewed Motion for Summary Judgment is another attempt by AT&T to have the Board revisit its rulemaking in RM05-002 which resulted in a rule allowing CLECs to mirror the switched access rates of Qwest for intrastate access. (Aventure's proposed intrastate rate is actually lower than the Qwest rate.) AT&T asserts that the Commission's rulemaking in RM05-002 "did not examine traffic pumping in any material way".
(AT&T Renewed Motion at page 4, footnote 7) This assertion is disingenuous at best. AT&T, Qwest, Sprint and Verizon all filed comments in that rulemaking proceeding requesting that the Commission consider the rule in light of "access stimulation" or "traffic pumping" as the IXCs like to call it. The Commission adopted the rule in question over this opposition from the IXC group. AT&T also baldly asserts that "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". (AT&T Renewed Motion at page 4, footnote 7) The Commission has never so held and Aventure respectfully submits that this proceeding is not an appropriate proceeding to determine the applicability of that rule to any type of traffic.

Under Section 1-26-15 SDCL, AT&T is free to file a petition for a declaratory ruling with respect to the scope of the rule adopted in RM05-002. The statute provides that "rulings disposing of petitions have the same status as agency decisions or orders in contested cases". The statute contemplates that a petition for declaratory ruling is a separate proceeding and not one that can be invoked by a party to a tariff proceeding unless the party seeks leave of the Commission to expand that existing docket. Under Section 1-26-13 SDCL, AT&T, as an interested person, could petition the Commission requesting the amendment or repeal of a rule.

AT&T has not followed the procedure set forth in Section 1-26-13 for filing a petition for amendment or repeal of a rule. This is not a proper proceeding to consider amendment or repeal of any rule. Under Section 1-26-4 SDCL, adoption of rules requires a public hearing and an opportunity for all interested persons to submit amendments, data, opinions or arguments regarding any proposed rule.

While Aventure has a South Dakota Certificate of Authority in good standing, before Aventure could actually provide local exchange service in South Dakota it would be required to file for an amended Certificate of Authority applicable to the area to which the Company proposes to provide local exchange service. (Rule 20:10:32:02) When Aventure files an application for an amended certificate to serve specified local exchanges in South Dakota, AT&T and the other IXCs would then have the opportunity to object to issuance of an amended certificate and to inquire into the nature of the local exchange service proposed by Aventure. In filing its intrastate access tariff in South Dakota, Aventure has not in any way triggered the process to determine where it will provide local exchange service in South Dakota and what that service will look like. It would be premature for the Commission to consider the nature of local exchange service to be offered by Aventure in South Dakota when Aventure has not yet sought an amended Certificate to provide local exchange service in any South Dakota exchange. As Aventure has attempted to point out many times so far in this docket, the only issue here is whether Aventure's tariff should be approved. AT&T's attempt to inject other issues into the case via its Motion for Summary Judgment should be rejected.

5. AT&T's amended motion also requests the Commission to amend Rule 20:10:29:07 defining "End Users". At page 15 of its renewed motion, AT&T states that "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". (AT&T Renewed Motion at page 15) At page 16 of its motion, AT&T states that "accordingly, like the FCC, the Commission should conclude that "end users" under a LEC switched access tariff should generally be defined as entities that are purchasers of the LEC services, and based on that holding, should find that Aventure's revisions to its interstate access tariff are unlawful". (AT&T Renewed Motion at page 16) What AT&T suggests is that the Commission amend the rule defining "End Users" that does not require an "End User" to pay anything to attain that status. Again, this would be rulemaking in the context of a contested case proceeding which is improper under South Dakota administrative procedure. AT&T needs to file a petition for amendment or repeal of a rule under Section 1-26-13 and cannot have that process go forward in this tariff proceeding. AT&T could also file a petition for declaratory ruling under Section 1-26-15 with respect to the rule defining "end users". It would not be proper to permit consideration of amendment of that rule in this contested case proceeding.

6. In Section II of its renewed motion, AT&T challenges the billing dispute provisions of Aventure's proposed intrastate access tariff. On July 18, 2011, at the suggestion of Commission staff, Aventure filed an amendment to the proposed tariff stating that South Dakota statutes and Commission rules apply to the billing provisions of the tariff to the extent tariff language is inconsistent with those statutes or rules. This should alleviate any concern about inconsistencies, if any, between the tariff language and the statutes and rules.

7. The billing dispute provisions of which AT&T complains mirror the billing disputes provisions of Aventure's FCC Tariff No. 3 as deemed lawful by the FCC as of December 31, 2010. The fact that the FCC may have rejected similar provisions in the Northern

Valley tariff does not change the fact that Aventure's tariff is permitted by the FCC to go into effect over objections of the IXCs.

8. Rather than reject the entire tariff should the Commission find that any dispute resolution provision does not comply with South Dakota law, Aventure would urge that the Commission, after evidentiary hearing now scheduled to commence November 29, 2011, identify any such provision of Aventure's tariff and allow Aventure to amend that provision to conform to South Dakota law.

9. In Section III of its revised motion, AT&T challenges the definition of "End User Premises" as set forth in the proposed tariff. There is no South Dakota statute or rule defining "End User Premises". Likewise, there is no South Dakota statute or rule prohibiting the definition of "End User Premises" contained in Aventure's tariff. AT&T attempts to use this definition as another route to inject the issue of access stimulation into this tariff proceeding. As stated above, AT&T and the other IXCs will have another opportunity to object to any application filed by Aventure to amend its Certificate to provide local exchange service in any particular exchange and issues regarding access stimulation can be raised at that time.

There is no South Dakota statute or rule that would prohibit a local exchange carrier in South Dakota from permitting any customer to locate equipment in the carrier's central office. Rule 20:10:27:17 permits a telecommunication company to enter into a contract with a customer whereby agreed switched access rates are set by a contract between the carrier and a customer. Section 49-31-84 SDCL provides that any telecommunication company may grant any discounts, incentives, services or other business practices necessary to meet competition. Entering into a contract with a customer to permit the customer to locate equipment in the carrier's central office

would be an incentive, service or other business practice within the meaning of the statute. AT&T can point to no authority which would prohibit this practice in South Dakota.

10. Aventure should be allowed to present its evidence for approval of its tariff at the scheduled hearing. The Commission should not allow AT&T to inject irrelevant issues into the proceeding and dress it up as a motion for summary judgment. Under traditional legal analysis, genuine issues of fact with regard to whether Aventure's tariffs should be approved preclude the grant of summary judgment rejecting the tariff as a matter of law.

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 October 7, 2011.

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

/S/ PAUL D. LUNDBERG