

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

**In the Matter of the Filing by Aventure
Communication Technology, LLC dba
Aventure Communications for Approval of
its Switched Access Services Tariff No 3**

Docket No. TC11-010

**QWEST COMMUNICATIONS COMPANY'S MOTION TO INTERVENE
AND REQUESTS TO OPEN AN INVESTIGATION AND SUSPEND
TARIFF DURING THE INVESTIGATION**

On March 17, 2011, Aventure Communication Technology LLC ("Aventure") filed a replacement access tariff with this Commission. Qwest Communications Company ("QCC") files this motion to intervene and requests that the Commission open an investigation pursuant to SDCL Chapter 49-31-12.4(1). QCC also respectfully requests that the Commission suspend the tariff pending an investigation as is provided for in SDCL Chapter 49-31-12.4(2).

Aventure's proposed tariff seeks to authorize traffic pumping, a practice that has been found illegal by the Iowa Utilities Board and the FCC.¹ The FCC also recently issued proposed rules to prevent traffic pumping on the interstate level.²

¹ *Qwest Commc'ns Corp. v. Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa*, 24 FCC Rcd 14801 ¶¶10-22 (Second Order on Reconsideration, "Merchants II") (2009), recon. den'd and clarifying, 25 FCC Rcd 3422 (2010); *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, 2009 WL 3052208 *7, 10 (Sep. 21, 2009), recon. den'd, 2011 WL 459685 (Feb. 4, 2011).

² *In the Matter of Connect America Fund ... Establishing Just and Reasonable Rates for Local Exchange Carriers*, 2011 WL 466775, FCC 11-13, ¶¶7, 36, 635-636, 663-669, 675 (FCC Rel. Feb. 9, 2011) (Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking).

Aventure's tariff is largely identical to an Iowa proposed tariff, which the Iowa Utilities Board has suspended while it investigates Aventure's traffic pumping and the Board's rules addressing traffic pumping.³

This Commission has expressed an interest in exploring traffic pumping on a generic basis as a part of its switched access charge rulemaking hearing held on March 18, 2011. Allowing Aventure's tariff to take effect would impair that process and would instead provide Aventure with a tariff that it could use in an attempt to carry out such practices.

The Commission also has before it at least two complaint actions regarding traffic pumping: *In re South Dakota Network, LLC against Sprint Communications Company L.P. Regarding Failure to Pay Intrastate Centralized Equal Access Charges and to Immediately Pay Undisputed Portions of SDN's Invoices/In re Third Party Complaint of Sprint Communications Company L.P. against Splitrock Properties, Inc., et al.*, Docket No. TC09-098; and *In re Sprint Communications Co. L.P. v. Native American Telecom, LLC*, Docket No. TC10-26. Allowing Aventure's tariff to take effect while the Commission has before it complaints regarding the same or similar traffic pumping by other LECs would complicate the pending actions --the other traffic pumping LECs would likely file similar tariffs. When the Commission rules on those complaints in favor of the IXC (as Qwest believes the Commission should), the Commission would then have additional issues to resolve if Aventure's tariff is allowed to go into effect in the meanwhile.

³ See, *In re Aventure Communication Technology, LLC*, Docket No. TF- 2010-0087, Order of August 10, 2010 (Iowa Utilities Board) at 5-6 (suspending Aventure's proposed intrastate access tariff and establishing procedural schedule for objections to same; Aventure withdrew and replaced with a 2011 proposed tariff); *In re Aventure Communication Technology, LLC*, 2011 WL 585178 (Docket Nos. TF-2011-011, TF-2011-012), (Iowa Utilities Board Feb. 17, 2011) at 3-4 (suspending Aventure's 2011 proposed intrastate access tariff while investigating).

Because the practice of traffic pumping results in the inappropriate transfer of significant funds to conference calling, pornographic chat, and international calling providers that neither reside nor are physically located in any meaningful way in the state of South Dakota, QCC alleges that the proposed tariff is improper and unreasonable and should be rejected pursuant to SDCL Chapter 49-31-12.4(2). QCC has identified the following objections to the tariff:

- **“Access Tandem” or “Tandem Switch” Definitions:** The tariff defines tandem switch and access tandem as a switching system that provides a traffic concentration and distribution function for originating and terminating traffic between end offices and the customer’s premises or point of presence. Based on publicly available information, QCC contends that Aventure does not employ a true tandem switch and should not be allowed to charge IXCs for tandem or end office switching functions.

- **“Constructive Order” Definition:** The definition provides that anyone who delivers or accepts switched access traffic over Aventure’s network is deemed to have ordered service, irrespective of whether an access service request has been submitted. Thus, the mere delivery or receipt of calls on Aventure’s network constitutes an order, for which Aventure would require payment. QCC contends that the introduction of “constructive ordering” into a known traffic pumper’s access tariff is directly at odds with Iowa’s HVAS rules, and obligations that calls be delivered to end users with a premises within the state of South Dakota. This is because the constructive ordering definition would mean that any IXC’s traffic crossing Aventure’s network would be automatically subject to the new access

tariff, when in reality only intrastate toll traffic originated from or terminated to legitimate local exchange customers should be subject to this switched access tariff.⁴

- **“End User” Definition:** To avoid the definitional problems of “end user” encountered in other jurisdictions, Aventure’s tariff states that an end user need not purchase any service provided by the Company. Thus, the obvious target for inclusion under the definition of end user would be the free calling service companies (FCSC) that partner with Aventure to increase Aventure’s switched access revenues. This is an attempt to eviscerate the historic constant of access charges: that calls be delivered to an end user as a condition precedent to access charges being assessed.⁵ Before the LEC can bill an interexchange carrier for access services on calls, an end user is obligated to purchase services from the local exchange carrier.⁶ Aventure’s contrary definition is a massive expansion of the access charge regime, and seeks to avoid the impact of the rules implemented in Iowa and proposed by the FCC to prevent traffic pumping.

- **“End User Premises” Definition:** The tariff defines “End User Premises” as the premises of an end user. Thus, under this definition, the end user premises would include, among other things, an FCSC rack in Aventure’s central office. The definition is

⁴ See, e.g., *Qwest Commc’ns Corp. v. Farmers and Merchants Mutual Tel. Co. of Wayland, Iowa*, 24 FCC Rcd 14801 ¶¶10-22 (*Second Order on Reconsideration, “Merchants II”*) (2009), recon. den’d and clarifying, 25 FCC Rcd 3422 (2010); *Qwest Commc’ns Corp. v. Superior Tel. Coop.*, 2009 WL 3052208 *7, 10 (Sep. 21, 2009), recon. den’d, 2011 WL 459685 (Feb. 4, 2011); *In re 360Networks (USA) Inc.*, 2006 Iowa PUC LEXIS 376, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) (order rejecting tariff in part because “access charges can only be collected by local exchange carriers that are actually providing service directly to end users, that is, to retail customers.”).

⁵ See, e.g., *Merchants II* ¶10; *Qwest v. Superior*, 2009 WL 3052208 *7-15; 47 C.F.R. § 61.26(a), (f) (defining tariffing obligations for interstate competitive LEC access services as access services to or from an end user); *Paetec Commc’ns Inv. v. CommPartners, LLC*, 2010 WL 1767193 *3 (D.D.C. Feb. 18, 2010) (applying 47 U.S.C. § 251(g) to interstate traffic, “[u]nder the 1996 Act, reciprocal compensation is the norm; access charges apply only where there was a ‘pre-Act obligation relating to inter-carrier compensation.’” quoting *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433-34 (D.C.Cir. 2002)); cf. *Hypercube LLC v. Comtel Telecom Assets LP*, 2009 WL 3075208 (N.D. Tex. Sep. 25, 2009) (CLEC can be intermediary in providing access service to end user, but must be providing service necessary for a customer’s call before interexchange carrier must purchase the CLEC’s interstate access service).

⁶ *Merchants II* ¶¶10-26; *Qwest v. Superior*, 2009 WL 3052208 *7-15.

contrary to the accepted industry definition: a residential home or business that is owned or otherwise controlled by the end user from where a telephone is used to originate and receive telephone calls.⁷

- **Responsibility for Charges & Minimal Period:** These two sections of the tariff may make sense for dedicated access but do not make sense in a switched access tariff and should be rejected as unreasonable.

- **Payment for Service:** One tariff section states that Aventure will typically bill monthly, while another section says Aventure's failure to bill for up to six months does not affect the Customer's obligation to pay. This provision appears to be an effort to protect Aventure from the situation observed by the FCC in *Merchants II*, where back bills were "manufactured" in an effort to hide the arrangement between the LEC and the FCSC,⁸ which did not require the FCSC to pay anything for the LEC's service.⁹ This back billing time should be reduced to 90 days.

- **Disputed Charges:** The tariff disallows challenges to billing that are not brought to Aventure's attention within 90 days of the invoice date. It also requires the IXC to supply Aventure with "all documentation" to support the challenges.

- **Attorney Fees:** The tariff would allow Aventure to recover attorney fees if Aventure pursues collection from a Customer. There is no requirement that Aventure obtain a judgment in its favor in order to recover attorney fees – only that it pursue a claim. Thus, the tariff provides that if Aventure loses its collection case, it would still recover its attorney

⁷ *Qwest v. Superior*, 2009 WL 3052208 at *15-18.

⁸ See *Merchants II* ¶7-9.

⁹ See also *Qwest v. Superior*, 2009 WL 3052208 at *11-13.

fees. AT&T also notes there is no comparable provision that permits an IXC to recover attorney fees from Aventure in the event the IXC wins in a bill dispute proceeding.

- **Cancellation of Contract Services:** The tariff augments a service contract with cancellation terms that should more properly be addressed within the contract itself. Specifically, the tariff provides for collection of “termination liability charges,” which is an undefined term and could potentially mean anything Aventure claims it to be. Aventure should deal with contract cancellation within the confines of a contract. To do otherwise confuses the use of contracts and tariffs.

- **Cancellation by Company:** The tariff allows Aventure to “refuse, suspend or cancel service without incurring any liability” when there is an unpaid balance for service that is past due. Aventure should not be allowed to block service. If Aventure were in a dispute with an IXC related to its billing and the IXC withholds the disputed amount, Aventure should not be allowed to block calls, and it should be liable to both the IXC and the end user customer if it has wrongly suspended or refused service.

- **General Construction Ordering Provision for Wireline & Wireless:** Consistent with the tariff’s “Constructive Order” definition, section 3.1.3 asserts that if an IXC does not submit an access service request but the end user customer actually employs the IXC’s toll service, then the IXC will be held to have constructively ordered Aventure’s access service. Similarly, section 3.1.4 purports that wireless carriers that terminate intrastate interMTA3 traffic are automatically subject to the rates, terms, and conditions of this access tariff. Since Aventure’s business model is primarily built upon its traffic

pumping scheme, it is unjust and unreasonable to allow this sort of constructive ordering provision in its tariffs.¹⁰

- **Rounding of Charges and Minutes:** The tariff says it will round the charges showing four decimals down to two decimals using the rates shown, but it does not specify how it will determine to round up or down. The tariff also states that Aventure will accumulate and round access minutes monthly and round up to the next whole minute. There is no reason why Aventure cannot round down when a fractional minute is less than half and round up when a fractional minute is half or more. QCC objects to the provision and contends the rounding mechanism needs to be investigated.

- **Rates and Charges:** QCC challenges all the rates as unjust and unreasonable on at least two grounds: (1) that its mirrored rates (of the incumbent LECs) assume it has low volumes of traffic in rural areas and that it is entitled to the implicit subsidies built into those rates; and (2) that it is a known traffic pumper whose business model is aimed primarily at gaming the access system, and it has very few, if any, local exchange end user customers actually located in rural South Dakota. The Iowa Board so found, as to Aventure's operations in Iowa, and will open a proceeding for Aventure to show cause why its Iowa certificate should not be revoked.¹¹ The Board and the FCC also recognized this very problem – that a LEC's access rates premised on low rural volumes are unjust and unreasonable when the LEC traffic pumps.¹² In addition to the mirrored rates, QCC also challenges Aventure's non-mirrored 8XX toll-free per query rate found in subsection 3.7.4.

¹⁰ See, e.g., *Qwest v. Superior*, 2009 WL 3052208 at *31; “the evidence in this record shows that ... Aventure ha[s] few, if any, customers”).

¹¹ *Qwest v. Superior*, 2009 WL 3052208 at *31.

¹² *Qwest v. Superior*, 2009 WL 3052208 at *26-27; *In re High Volume Access Services*, 2010 WL 2343199 (IUB Jun. 7, 2010) (Order Adopting Rules); 199 IAC § 22.14 (high volume access rules); *In re Connect America Fund*, 2011 WL466775 at ¶¶36, 636, 648, 650, 659.

QCC challenges Aventure's 8XX rate as unjust and unreasonable, and it requests that the Commission order Aventure to produce its costs allegedly supporting this inflated 8XX rate and all its rates.

- **Percent Interstate Usage (PIU):** The tariff provides that a customer must provide a PIU report so that Aventure can distinguish between interstate and intrastate traffic. If no PIU report is filed, the tariff assigns a default rate of 50 percent. QCC objects to the PIU section of the tariff as unreasonably burdensome and states that Aventure should be required to demonstrate a real need for this type of report.

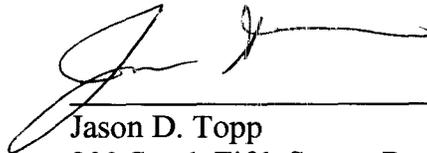
The issues listed in this petition represent issues identified by QCC thus far. QCC reserves the right to raise more objections and continues to recommend that the Tariff modifications filed by Aventure be rejected in their entirety.

CONCLUSION

For all of these reasons, QCC asks that the Commission reject Aventure's tariff and suspend the tariff modifications pending a hearing ordered pursuant to SDCL Chapter 49-31-12.4(2).

Dated this 31st day of March, 2011.

QWEST COMMUNICATIONS COMPANY



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