

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| July 1, 2018 Annual Access Charge Tariff Filings |) | WC Docket No. 18-100 |
| |) | |
| South Dakota Network, LLC |) | Transmittal No. 13 |
| Tariff F.C.C. No. 1 |) | |

MEMORANDUM OPINION AND ORDER

Adopted: February 28, 2019

Released: March 1, 2019

By the Commission:

I. INTRODUCTION

1. Section 201(b) of the Communications Act of 1934, as amended (the Act) makes it unlawful for common carriers to charge rates that are unjust or unreasonable.¹ Dominant telecommunications carriers subject to our public tariff filing process must submit explanations and data to support proposed tariff changes, including a cost of service study for the most recent 12 months, a study containing a projection of costs for a representative 12 month period, and estimates of the effect of the proposed changes on traffic and revenues for the affected service.² Such tariff filings provide transparency into the carriers' rates and terms and afford us the opportunity to review and, if necessary, investigate the lawfulness of those tariffs. In this Order, pursuant to our authority in sections 204 and 205 of the Act,³ we conclude the investigation into the lawfulness of tariff revisions South Dakota Network, LLC (SDN) filed on September 17, 2018.⁴

2. As a centralized equal access (CEA) service provider, in determining its tariffed rates, SDN must comply with both our rules governing transitional switched access rates, including the competitive local exchange carrier (LEC) benchmark rule, and those governing cost-based rates.⁵ SDN is required to charge the lower of its cost-based rate or a rate benchmarked to the rate charged by the

¹ 47 U.S.C. § 201(b).

² 47 CFR § 61.38.

³ 47 U.S.C. §§ 204, 205.

⁴ See South Dakota Network, LLC Tariff F.C.C. No. 1, Transmittal No. 13 (filed Sept. 17, 2018) (Transmittal No. 13) (available via the Commission's Electronic Tariff Filing System (ETFS)); Letter from Marlene Bennett, Consortia Consulting, Consultant for SDN, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 13 (filed Sept. 17, 2018) (Transmittal Letter) (available via ETFS).

⁵ See *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, Memorandum Opinion and Order, 32 FCC Rcd 9677, 9690, para. 26 (2017) (*Aureon Liability Order*); *Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 33 FCC Rcd 7517, para. 1 (2018) (*Aureon Tariff Investigation Order*); *pet. for review pending, Iowa Network Servs., Inc. v. FCC*, No. 18-1258 (D.C. Cir. filed Sept. 19, 2018); *Iowa Network Access Division Tariff F.C.C. No. 1*, WC Docket No. 18-60, Order on Reconsideration, FCC 18-171 (Nov. 28, 2018).

competing incumbent LEC for the same switched access services.⁶ In this Order, we find that the benchmark rate applicable to SDN's tariffed interstate switched access service is \$0.002288 per minute of use, the tandem switching rate charged by CenturyLink in South Dakota. SDN's tariffed rate of \$0.004871 per minute of use exceeds that benchmark, and we therefore find it unlawful.

II. BACKGROUND

3. SDN is one of three CEA providers—along with Aureon and Minnesota Independent Equal Access Corporation—that were formed to implement long distance equal access obligations (permitting end users to use 1+ dialing to reach the interexchange carrier (IXC) of their choice) and aggregate traffic for connection between rural incumbent LEC and IXC networks. SDN currently provides CEA switched access service to 35 subtending LECs in South Dakota – 29 incumbent LECs and 6 competitive LECs.⁷

A. Regulatory Treatment of CEA Providers and Recent Precedent

4. Since their inception, CEA providers, including SDN, have been regulated as dominant, rate-of-return carriers subject to the cost-based tariff filing requirements of section 61.38 of our rules.⁸ Historically, rate-of-return carriers have set their tariffed interstate switched access rates at levels designed to provide carriers an opportunity to recover their operating costs plus an authorized rate of return on the regulated rate base (plant in service minus accumulated depreciation).⁹ Under section 61.38, any tariff changes must be supported by explanations and data that include, among other things, the basis for the ratemaking employed and economic information to support the change, including specific cost information and cost projections.¹⁰ SDN files its own tariff pursuant to section 61.38.¹¹

5. In 2011, the Commission comprehensively reformed and modernized its intercarrier compensation regime to facilitate the transition to Internet Protocol-based networks and curtail wasteful arbitrage.¹² In the *USF/ICC Transformation Order*, the Commission immediately capped all interstate switched access rates, as well as many intrastate rates, as of the effective date of the rules.¹³ The Commission also reaffirmed the “CLEC benchmark rule” as a limitation on competitive LECs’ rates.¹⁴

⁶ See 47 CFR §§ 61.38, 51.911(c); see also *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7518, para. 1 (“As a result, Aureon’s tariffed switched transport rate cannot exceed the lower of: (i) Aureon’s rate cap, (ii) its competitive LEC benchmark or (iii) its cost-based rate.”). Pursuant to section 51.911(a) of our rules, SDN was required to cap its switched access rates to those in effect on December 29, 2011. 47 CFR § 51.911(a). The switched access rate filed in the transmittal subject to this investigation is lower than SDN’s switched access rate cap, and therefore SDN’s compliance with section 51.911(a) of our rules is not at issue in this matter. See Transmittal Letter.

⁷ SDN Direct Case, WC Docket No. 18-100, Transmittal No. 13, at 14 (filed Dec. 11, 2018) (SDN Direct Case).

⁸ 47 CFR § 61.38; see, e.g., *Application of Iowa Network Access Div.*, Memorandum Opinion, Order and Certificate, 3 FCC Rcd 1468, 1469, para. 10 (CCB 1988); *Aureon Liability Order*, 32 FCC Rcd at 9692, para. 30.

⁹ *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3215-16, para. 337 (2016).

¹⁰ 47 CFR § 61.38(b).

¹¹ See Transmittal Letter.

¹² See *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17937, para. 807 (2011) (*USF/ICC Transformation Order*), *aff’d*, FCC 11-161, 753 F.3d 1015 (10th Cir. 2014).

¹³ *Id.* at 17932-34, paras. 798, 800-01.

¹⁴ See *id.* at 17937, para. 807. This obligation, adopted in its initial form in 2001, provides that a competitive LEC may not tariff interstate access charges above those of the competing incumbent LEC for similar services. See 47 CFR § 61.26; see also *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

Two years ago, in the *Aureon Liability Order*, the Commission confirmed that as a CEA provider, Aureon is a competitive LEC for purposes of complying with the Commission's transitional switched access rate rules, including the CLEC benchmark rule.¹⁵ As the Commission explained, "Aureon is a LEC under Rule 51.5 because it 'provi[des] . . . exchange access.'"¹⁶ It "is not an ILEC under Rule 51.5 because it neither provided 'telephone exchange service' on February 8, 1996, nor was it a member of NECA on February 8, 1996, (or a successor to a member)." ¹⁷ Therefore, the Commission reasoned, Aureon is a "CLEC for purposes of the rules adopted by the *USF/ICC Transformation Order* because a 'competitive local exchange carrier is any local exchange carrier, as defined in [Section] 51.5, that is not an incumbent local exchange carrier.'" ¹⁸

6. Last year, in the *Aureon Tariff Investigation Order*, the Commission reaffirmed its finding of the applicability of the CLEC benchmark rule to Aureon.¹⁹ The Commission also explained that, as a CEA provider, Aureon does not serve end users and, therefore, the procedure for implementing its benchmarking obligation is contained in subpart (f) of section 61.26 of our rules.²⁰ Under this subpart, "[i]f a CLEC provides some portion of the switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services" ²¹ Our rules define the competing incumbent LEC to which the competitive LEC should benchmark its rates as "the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC." ²²

7. The Commission rejected Aureon's argument that its subtending LECs were the competing incumbent LEC to which it should benchmark its rates.²³ It found, instead, that CenturyLink is the incumbent LEC that would provide the tandem switched services that Aureon provides, if Aureon did not provide them.²⁴ According to the Commission, "only CenturyLink has the network in Iowa currently capable of providing the same tandem switched transport services that Aureon provides." ²⁵ The Commission also found that CenturyLink's switched access rate was the appropriate rate regardless of whether CenturyLink provided equal access functionality because "CenturyLink or its predecessors did provide equal access capability to its customers when it was required . . . thus, it has or had the technical capability to offer that functionality were Aureon not providing it, to the extent still necessary, and Aureon's LECs do not." ²⁶

¹⁵ *Aureon Liability Order*, 32 FCC Rcd at 9689, para. 24; see also *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7518, para. 1.

¹⁶ *Aureon Liability Order*, 32 FCC Rcd at 9689-90, para. 25.

¹⁷ *Id.*

¹⁸ *Id.* (citing 47 CFR § 51.903(a)).

¹⁹ *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7518, para. 1.

²⁰ *Id.* at 7525, para. 21; 47 CFR § 61.26(f).

²¹ 47 CFR § 61.26(f).

²² 47 CFR § 61.26(a)(2).

²³ *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7526, paras. 23-24.

²⁴ *Id.*

²⁵ *Id.* at 7526, para. 23.

²⁶ *Id.* at 7527-28, para. 27 (footnote omitted).

B. Procedural History

8. After release of the *Aureon Tariff Investigation Order*, SDN filed proposed tariff revisions on September 17, 2018, to become effective on October 2, 2018.²⁷ In its proposed tariff revisions, SDN filed a CEA rate of \$0.004871 per minute of use based on its cost support.²⁸ Although SDN takes issue with the Commission's previous determination that the CLEC benchmark rule is applicable to CEA service, SDN also calculated what it calls a "unified benchmark rate" of \$0.014203 per minute of use.²⁹ As described by SDN, its "unified benchmark rate" is a combination of CenturyLink's interstate tandem switching rate (\$0.002288 per minute of use) and an "equal access service benchmark" (\$0.01195 per minute of use).³⁰

9. SDN concedes that to the extent the benchmark rule applies, CenturyLink would be SDN's competing incumbent LEC for purposes of tandem switching.³¹ Thus, the first input to SDN's "unified benchmark rate" is CenturyLink's interstate tandem switching rate. However, according to SDN, its benchmark rate should also reflect the equal access services it provides, and it argues that its subtending incumbent LECs would be the competing incumbent LECs for purposes of providing equal access.³² According to SDN, all but one of its subtending incumbent LECs participate in the NECA tariffed rates for their end office switching.³³ As SDN explains, although the NECA tariff does not include a specific equal access rate, "it does contain a premium and non-premium rate for originating local end office switching, depending on whether the LEC offers equal access with local end office switching (in which case the premium rate applies) or not (in which case the non-premium rate applies)."³⁴ According to SDN, it therefore, determined "a benchmark rate for the equal access portion of local end office switching by isolating the differential between the premium and non-premium rate."³⁵ SDN explains that because its cost-based rate of \$0.004871 per minute of use is lower than its "unified benchmark rate" of \$0.014203 per minute of use, SDN used the former rate for purposes of its proposed tariff revisions.³⁶

10. On September 24, 2018, James Valley Cooperative Telephone Company (JVCTC) and Northern Valley Communications, LLC (NVC) filed a Petition asking the Commission to reject, or to suspend and investigate, SDN's proposed tariff revisions.³⁷ JVCTC and NVC argued that: (1) language in the tariff revisions was discriminatory; (2) SDN's benchmark calculation does not comply with the Commission's previous treatment of CEA services; and (3) SDN's traffic projections should be

²⁷ See Transmittal Letter at 1.

²⁸ South Dakota Network, LLC Tariff F.C.C. No. 1, Centralized Equal Access Service, 2018 Annual Access Tariff Filing, Description and Justification at 2 (filed Sept. 17, 2018) (SDN Description and Justification) (available via ETFS).

²⁹ *Id.*

³⁰ *Id.* at 2-3.

³¹ SDN Direct Case at 5.

³² *Id.*

³³ *Id.* at 14 (noting that four of SDN's subtending competitive LECs mirror the NECA rates in their own tariffs).

³⁴ *Id.* at 13, n.39 (citing NECA Tariff F.C.C. No. 5, pp. 6.32, 6.32.1).

³⁵ *Id.* at 13.

³⁶ SDN Description and Justification at 2-3.

³⁷ See Petition of James Valley Cooperative Telephone Company and Northern Valley Communications, LLC to Reject or to Suspend and Investigate South Dakota Network, LLC's Tariff, Transmittal No. 13 (filed Sept. 24, 2018) (Petition) (available via ETFS).

investigated.³⁸ SDN filed a reply to the Petition on September 28, 2018, requesting that the Petition be denied.³⁹ On October 1, 2018, JVCTC and NVC filed a letter withdrawing in part their objection to SDN's tariff revisions after SDN removed the language from its tariff that JVCTC and NVC argued was discriminatory.⁴⁰

11. Upon review of SDN's tariff revisions, the Wireline Competition Bureau (Bureau) concluded that substantial questions of lawfulness exist regarding SDN's revised tandem switching rate that required further investigation.⁴¹ Therefore, pursuant to section 204 of the Act, the Bureau: advanced the effective date of SDN's tariff revisions for one day to October 1, 2018 and then suspended them for one day, allowing them to become effective on October 2, 2018; imposed an accounting order; and instituted an investigation into the lawfulness of SDN's revised interstate tandem-switched access service rate.⁴²

12. On November 29, 2018, the Bureau released the *SDN Designation Order*, which designated for investigation the appropriate benchmark rate for SDN's interstate switched access service.⁴³ SDN submitted its Direct Case on December 11, 2018, providing its supporting responses and arguing that because it provides both tandem switching and equal access functionality, it is entitled to include rates in its benchmark calculation for tandem switching using CenturyLink rates and for equal access using NECA rates.⁴⁴

13. CenturyLink and JVCTC and NVC filed oppositions to SDN's Direct Case.⁴⁵ In its opposition, CenturyLink argues that SDN should benchmark to the CenturyLink tandem switched access rate and that SDN is not entitled to an additur on top of the CenturyLink rate for equal access service. CenturyLink explains that it offers equal access service in South Dakota and that it imposes no higher rates when providing equal access service in conjunction with switched access services, and therefore the CenturyLink tandem switched access rate alone is the proper benchmark rate.⁴⁶ CenturyLink also argues that allowing SDN the additur for equal access services would result in double recovery from IXC's, because SDN's subtending LECs already recover for equal access functionality through their participation

³⁸ *Id.* at 2-3.

³⁹ See Reply to Petition to Reject or to Suspend and Investigate South Dakota Network, LLC's Tariff, WC Docket No. 18-100, Transmittal No. 13 (originally filed Sept. 28, 2018, refiled Nov. 26, 2018) (SDN Reply).

⁴⁰ See Letter from G. David Carter, Counsel to James Valley Cooperative Telephone Company and Northern Valley Communications, LLC, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 13 (filed Oct. 1, 2018) (available via ETFS).

⁴¹ *July 1, 2018 Annual Access Charge Tariff Filings; South Dakota Network, LLC Tariff F.C.C. No. 1*, WC Docket No. 18-100, Transmittal No. 13, Order, DA 18-1004 at 2-3, para. 6 (WCB Oct. 1, 2018) (*SDN Suspension Order*).

⁴² *Id.* at 3, para. 7 (citing 47 U.S.C. § 204). In response to the *SDN Suspension Order*, SDN submitted Transmittal No. 15 to suspend the revisions made in its Transmittal No. 13. See Letter from Marlene Bennett, Consortia Consulting, Consultant for SDN, to Marlene H. Dortch, Secretary, FCC, Transmittal No. 15 (filed Oct. 5, 2018) (Transmittal No. 15) (available via ETFS). In its tariff SDN refers to its interstate tandem-switched access service as "centralized equal access service." SDN Description and Justification.

⁴³ *July 1, 2018 Annual Access Charge Tariff Filings; South Dakota Network, LLC Tariff F.C.C. No. 1*, WC Docket No. 18-100, Transmittal No. 13, Order Designating Issues for Investigation, DA 18-1214, at 1, 5, paras. 1, 10 (WCB Nov. 29, 2018) (*SDN Designation Order*).

⁴⁴ SDN Direct Case at 3-6, 9-12.

⁴⁵ CenturyLink's Opposition to Direct Case, WC Docket 18-100, Transmittal No. 13 (filed Dec. 18, 2018) (CenturyLink Opposition). James Valley Cooperative Telephone Company's and Northern Valley Communications, LLC's Opposition to the Direct Case of South Dakota Network, LLC, WC Docket 18-100, Transmittal No. 13 (filed Dec. 18, 2018) (JVCTC and NVC Opposition).

⁴⁶ CenturyLink Opposition at 4-5.

in the NECA tariff and their application of the NECA premium rates.⁴⁷ In their opposition, JVCTC and NVC argue that SDN's terminating and originating equal access rates must be examined separately, and SDN should be entitled to an equal access additur only on its originating rate and only where the subtending LEC bills for non-premium local switching pursuant to the NECA tariff.⁴⁸

14. SDN filed an *ex parte* response to these oppositions to further support its use of NECA rates for end office equal access functionality as a component of its tandem switching benchmark rate calculation.⁴⁹ On January 30, 2019, SDN filed another *ex parte* revising confidential data it had previously submitted.⁵⁰ According to SDN, these revised data change the "equal access service benchmark" from \$0.01195 to \$0.012008, but this change "does not affect SDN's cost study or its filed rate."⁵¹ SDN filed another *ex parte* on February 6, 2019 to reiterate "its argument that CenturyLink would not and cannot currently provide equal access to SDN's subtending LECs . . .".⁵² SDN filed an additional *ex parte* on February 13, 2019, offering two declarations, one from its consultant and another from one of its business systems support managers, repeating its claim that CenturyLink "would not provide CEA to SDN's subtending rural" LECs.⁵³

C. Commission Authority to Prescribe Rates

15. Pursuant to section 204 of the Act, when a tariff filing has been suspended, the burden of proof is on the tariffing carrier to show that the new or revised charge is just and reasonable.⁵⁴ At the conclusion of an investigation under section 204, the Commission may, pursuant to section 205 of the Act, "determine and prescribe what will be the just and reasonable charge" or the maximum and/or minimum charge or charges going forward.⁵⁵

III. THE APPROPRIATE BENCHMARK RATE FOR SDN'S INTERSTATE SWITCHED ACCESS SERVICE

16. Upon review of the record, we find that SDN did not properly calculate its benchmark rate as required by the CLEC benchmark rule and our recent precedent.⁵⁶ SDN should have used CenturyLink's interstate tandem switching rate as its benchmark rate rather than creating a "unified benchmark rate" comprised of CenturyLink's interstate tandem switching rate (\$0.002288 per minute of use) and an "equal access service benchmark" (\$0.01195 per minute of use). Because the CenturyLink

⁴⁷ *Id.* at 4.

⁴⁸ JVCTC and NVC Opposition at ii, 2, 15.

⁴⁹ Letter from Benjamin H. Dickens, Jr., Mary J. Sisak, and Salvatore Taillefier, Jr., Counsel to SDN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-100, Transmittal No. 13 (filed Jan. 3, 2019) (SDN *Ex Parte*).

⁵⁰ Letter from Benjamin H. Dickens, Jr., Mary J. Sisak, and Salvatore Taillefier, Jr., Counsel to SDN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-100, Transmittal No. 13 (filed Jan. 30, 2019).

⁵¹ *Id.* at 2.

⁵² Letter from Benjamin H. Dickens, Jr., Mary J. Sisak, and Salvatore Taillefier, Jr., Counsel to SDN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-100, Transmittal No. 13 at 1 (filed Feb. 6, 2019) (SDN Feb. 6 *Ex Parte*).

⁵³ Letter from Benjamin H. Dickens, Jr., Mary J. Sisak, and Salvatore Taillefier, Jr., Counsel to SDN, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-100, Transmittal No. 13 at 1 (filed Feb. 13, 2019) (SDN Feb. 13 *Ex Parte*).

⁵⁴ 47 U.S.C. § 204(a)(1).

⁵⁵ *Id.* § 205(a).

⁵⁶ 47 CFR § 61.26(f); *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7525, para. 21.

rate that SDN should have used as its benchmark is lower than SDN's cost-based rate, SDN should have used the benchmark rate as its tariffed rate.

A. CenturyLink Is the Competing Incumbent LEC to which SDN Must Benchmark

17. We find that CenturyLink is the competing incumbent LEC to which SDN must benchmark its CEA service. As the Commission explained in determining whether CenturyLink or Aureon's subtending LECs were the competing incumbent LEC to Aureon in Iowa, the question to be answered is "whether CenturyLink would provide the portion of the access that Aureon provides if Aureon did not provide it."⁵⁷ Likewise here, the question to be answered is "whether CenturyLink would provide the portion of access that SDN provides if SDN did not provide it." Notwithstanding SDN's assertions to the contrary, the record is clear that CenturyLink would provide both the tandem switching and equal access provided by SDN in South Dakota, if SDN did not provide it; that CenturyLink would not impose any additional charge to provide equal access; and that SDN cannot justify inclusion of an additur to the CenturyLink switched access rate for purposes of complying with the CLEC benchmark rule.⁵⁸

18. In its Direct Case, SDN recognizes that to the extent the benchmark obligation applies, CenturyLink is the competing incumbent LEC for its tandem switched access functionality.⁵⁹ At the same time, SDN alleges, that CenturyLink cannot and would not provide equal access functionality to SDN's subtending LECs.⁶⁰ However, on this fundamental factual issue, SDN is simply incorrect. In its opposition, CenturyLink explains that it does provide equal access in South Dakota, that the CenturyLink switched access rates are the same whether it provides equal access service or not; and therefore there is no reason to allow SDN an additur for providing equal access services.⁶¹

19. SDN attempts to distinguish its equal access service from CenturyLink's by arguing that unlike SDN, CenturyLink does not provide equal access functionality at its tandem switch.⁶² Whether that is true or not, the important facts for purposes of the benchmark rule are that CenturyLink is capable of providing equal access in South Dakota and does so at no additional charge for its switched access services.⁶³ Moreover, SDN's benchmark is itself not based on a comparable rate for equal access functionality provided at a tandem switch, but instead is based on equal access service provided at local switches by NECA participants. As a result, we find unavailing SDN's arguments about where CenturyLink currently provides equal access functionality. As the Commission previously explained, although the networks and facilities of competitive LECs, like SDN, may be different from the networks of the incumbents with which they compete, such differences do not impede the ability to benchmark access services.⁶⁴

⁵⁷ *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7526-27, para. 25.

⁵⁸ CenturyLink Opposition at 5.

⁵⁹ SDN Direct Case at 5.

⁶⁰ *Id.* at 6-8; SDN Feb. 6 *Ex Parte* at 1-2; SDN Feb. 13 *Ex Parte* at 1.

⁶¹ CenturyLink Opposition at 5.

⁶² SDN *Ex Parte* at 6; SDN Feb. 6 *Ex Parte* at 2.

⁶³ CenturyLink Opposition at 5, nn.13, 15 ("Nor is there any record suggesting that CenturyLink would not charge these same rates for performing these [equal access] functions itself in SDN's stead, for traffic originating from the ILECs currently subtending SDN.").

⁶⁴ *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7528, para. 28. For the same reason, we find unavailing the two declarations that SDN recently filed in support of its claim that CenturyLink would not provide centralized equal access to SDN's subtending LECs. See SDN Feb. 13 *Ex Parte*, Declaration of Larry Thompson; Declaration of Joseph Neubauer.

20. Strikingly, although the record demonstrates that CenturyLink can provide equal access functionality, the record does not offer any support for a finding that SDN's subtending LECs have the capacity to provide equal access services.⁶⁵ To the contrary, as SDN explains, when the Commission authorized SDN to provide service, it authorized "SDN to provide equal access functionality instead of the local exchange carriers that use the SDN tandem switch."⁶⁶ Although it is true that by authorizing SDN to provide equal access service, the Commission relieved SDN's subtending LECs of the obligation to provide equal access services, that does not mean that in SDN's absence its subtending LECs are the carriers that would provide equal access services.⁶⁷ SDN also suggests that because CenturyLink's predecessor fought the creation of SDN, CenturyLink should not be considered the competing incumbent LEC for equal access services.⁶⁸ Even if true, this argument does not support a determination that, if SDN were not to offer equal access services, its subtending LECs would provide those services.

B. SDN Provides Insufficient Support for the Equal Access Component of its Benchmark Rate

21. Having determined that CenturyLink is the competing incumbent LEC to which SDN must benchmark the rate for its tandem switched access service, including its provision of equal access service, we need not analyze SDN's approach to creating an equal access component for its benchmark rate. We nonetheless take this opportunity to separately and independently reject SDN's calculations of an equal access component of its benchmark rate.

22. SDN's Direct Case contains a one-paragraph response to the request that it explain and justify its use of a weighted average differential between NECA's premium and non-premium originating local switching rates in an effort to include a rate for its offering of tandem-based equal access functionality in its benchmark.⁶⁹ The relevant paragraph in SDN's Direct Case cites the section of NECA's tariff which describes the difference between NECA's premium and non-premium rates, but that section contains no rates.⁷⁰ SDN acknowledges that "the NECA tariff does not contain a specific rate for equal access."⁷¹ Instead, according to SDN, NECA's tariff for local end office switching contains different rates, premium and non-premium, depending on whether equal access functionality is provided.⁷² SDN thus argues that its benchmark rate for tandem-based equal access service can be captured by the difference between NECA's premium and non-premium rate for originating local end office switching.⁷³ We disagree. Allowing an equal access component to be included in SDN's single tariffed rate applicable to both originating access, which may include equal access functionality, and terminating access, which never includes equal access functionality, would be unjust and unreasonable.

23. In the *SDN Designation Order*, the Bureau also required SDN to "explain and justify including the equal access service component in all originating switched access rates as that functionality may not be provided for all calls originating from every one of its subtending LECs."⁷⁴ SDN asserts that

⁶⁵ The question of whether SDN's subtending LECs are charging for equal access services is beyond the scope of this proceeding.

⁶⁶ SDN Direct Case at 6 (emphasis in original).

⁶⁷ *Id.*

⁶⁸ *Id.* at 7.

⁶⁹ *Id.* at 12-13.

⁷⁰ *Id.* at 13, n.39 (citing NECA Tariff F.C.C. No. 5, pp. 6.32, 6.32.1).

⁷¹ *Id.* at 12-13.

⁷² SDN Reply at 4; SDN Direct Case at 12-13.

⁷³ SDN Direct Case at 14.

⁷⁴ *SDN Designation Order* at 7, para. 15.

including the equal access service component in all originating switched access rates is reasonable because the majority of calls originating from its subtending LECs include equal access functionality.⁷⁵ SDN does not substantiate this claim. Even if true, this claim alone would not justify inclusion of the equal access rate on *all* originating calls.

24. JVCTC and NVC argue that SDN should be required to change its unified tariffed rate structure to have separate originating and terminating rates.⁷⁶ As they explain, the NECA tariff only uses premium charges for originating access service,⁷⁷ and contains the same separate—but lower—charges for all terminating access services.⁷⁸ In its Direct Case, SDN argues that including the equal access service component in its terminating switched access rate is reasonable because its “originating and terminating tariffed switched traffic is generally balanced. . . . Accordingly, to the extent SDN’s terminating rate could be reduced by removing equal access costs, its originating rate would increase, resulting in no net benefit to IXC.”⁷⁹ This unsupported assertion ignores the fact that some IXCs may only deliver predominately terminating traffic to SDN for delivery to its subtending LECs. For those IXCs, SDN’s inclusion of the recovery of equal access costs in the rates it charges these IXCs will result in charges to them for services SDN is not providing. Given that neither CenturyLink nor the NECA carriers to which SDN proposes to benchmark the equal access component of its services imposes an equal access charge for terminating traffic, SDN cannot justify doing so as part of its benchmarking obligation. Indeed, SDN does not explain or justify ignoring the NECA rates for terminating switched access services, which are lower than NECA’s rates for originating switched access services, in its benchmark calculations. Including these lower terminating rates in the benchmark calculation would lower the resulting benchmark rate. Thus, even if it were appropriate for SDN to include an equal access functionality component in its benchmark rate calculation for originating traffic (and it is not, as we conclude above), there is no justification for SDN to include an equal access additur to its rate applicable to terminating access.

25. SDN also asserts that if it were to have separate rates for originating and terminating switched access, this would impose “cost on both SDN and IXCs” to “identify and track traffic as originating and terminating.”⁸⁰ SDN provides no data to support this assertion, which ignores that NECA’s tariff contains separate originating and terminating tariffed switched access charges and thus IXCs (and SDN’s subtending LECs) would have the ability to “identify and track traffic as originating or terminating” when the subtending LECs charge the rates in NECA’s tariff, contrary to SDN’s claim.

⁷⁵ SDN Direct Case at 11.

⁷⁶ JVCTC and NVC Opposition at 5-7.

⁷⁷ *Id.* at 5; *see also* SDN Description and Justification at 3.

⁷⁸ JVCTC and NVC Opposition at 6; *see also* NECA Tariff F.C.C. No. 5, pp. 17-11, 17-11.1.

⁷⁹ SDN Direct Case at 18. SDN suggests that because its traffic is balanced, its rate is reasonable because ratemaking “is not an exact science” and “courts evaluate whether the ‘end result’ of a particular regulatory scheme results in rates that are within a ‘zone of reasonableness.’” (citing *In re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4119 at 4193 (1994) (*Cable Competition Order*)). SDN does not, however, include an explanation of how its tariffed rate fits into a zone of reasonableness, nor does it suggest what such a reasonable zone might be. Moreover, SDN’s suggestion also is inconsistent with the Commission’s purpose in using a benchmark rate here. As JVCTC and NVC observe, “the *Cable Competition Order* does not support the notion that a carrier, like SDN, can take a ‘close enough’ approach to justifying its proposed tariff rates.” Contrary to SDN’s argument, the *Cable Competition Order* addresses the Commission’s authority – *not* a commercial carrier’s authority – to set rates. According to the Commission, the ‘zone of reasonableness’ standard is one applied to *regulatory agencies, not regulated parties*, as they propose future rates” JVCTC and NVC Opposition at 9 (emphasis in original). SDN’s suggestion does not support its inclusion of an end office equal access component in its terminating tandem switching access rates.

⁸⁰ SDN Direct Case at 19.

Indeed, SDN is also “identifying and tracking” originating and terminating traffic as it used only originating traffic volume in calculating its weighted average equal access benchmark rate.⁸¹ We find SDN’s arguments unpersuasive.

C. Calculating an Appropriate Benchmark Rate for SDN

26. Having found that the SDN benchmark rate should be determined using only the tandem switching rates contained in section 6.8.1 of CenturyLink’s Tariff F.C.C. No. 11, consistent with the decision in the *Aureon Tariff Investigation Order*, the benchmark rate to be used by SDN should be calculated as described in Table 1 below.

TABLE 1
SDN Benchmark Rate

| | |
|---|-------------------|
| Tandem Switching per minute of use | \$0.002252 |
| Common Transport Multiplexing per minute of use | \$0.000036 |
| Total per minute of use | \$0.002288 |

27. We find that this calculation of a benchmark rate of \$0.002288 per minute of use is reasonable and complies with our rules. The benchmark rate of \$0.002288 per minute of use is also the rate which SDN calculated using only CenturyLink’s tariffed rates.⁸² And CenturyLink affirms that its tariffed tandem switching rate of \$0.002288 per minute of use applies whether or not

it is providing equal access functionality. The CenturyLink tandem rate of \$0.002288 is the entirety of CenturyLink’s tariffed access charge compensation for the entirety of the SDN access functionality at issue (whether characterized as tandem or end office or both). Under these circumstances, there is no basis whatsoever for arguing that SDN should be permitted to recover a greater amount than CenturyLink’s tariff charges for the same service.⁸³

We agree. SDN’s tariffed rate of \$0.004871 per minute of use exceeds the \$0.002288 per minute of use benchmark, violates the CLEC benchmark rule, and is unlawful.⁸⁴

IV. PROCEDURAL MATTERS

28. We conclude that SDN’s interstate switched access rate of \$0.004871 per minute of use contained in Transmittal No. 13 of Tariff F.C.C. No. 1 is unlawful because it exceeds the allowable competitive incumbent LEC benchmark rate for SDN of \$0.002288 per minute of use. Accordingly, we require SDN to file a revised tariff no later than sixty calendar days from the release date of this Order. The revised tariff must include the allowable competitive LEC benchmark rate of \$0.002288 per minute

⁸¹ SDN Description and Justification at 3. JVCTC and NVC also claim that “SDN’s switching and billing equipment already distinguishes between originating and terminating traffic because the subtending LECs – each of which rely on SDN’s records to render their access bills – had to begin billing different rates for originating and terminating traffic many years ago. This perhaps explains why SDN offers nothing to substantiate its representation that billing two distinct rates would result in any material cost increases for SDN.” JVCTC and NVC Opposition at 8.

⁸² See SDN Description and Justification at 2. SDN claims that “arguments regarding tandem transport” that were raised in the *Aureon Tariff Investigation Order* do not apply here because SDN does not provide transport. SDN Direct Case at 10-11 (citing *Aureon Tariff Investigation Order*, 33 FCC Rcd at 7527, para. 26). Although it is not clear what transport arguments SDN is referring to, we note that the benchmark we adopt does not include transport.

⁸³ CenturyLink Opposition at 5 (emphasis in original, footnote omitted).

⁸⁴ 47 CFR § 51.911(c).

of use. SDN continues to be subject to the accounting order in this proceeding.

29. Given the complexities associated with implementation of the findings made in this Order, we direct the Bureau to ensure that the Commission's findings are properly reflected in SDN's revised Tariff F.C.C. No. 1. We further direct the Bureau to determine any refunds that may be required once revised rates are effective.

V. ORDERING CLAUSES

30. ACCORDINGLY, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, 403, and sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91, 0.291, South Dakota Network, LLC (d/b/a SDN) SHALL FILE REVISED rate(s) in its Tariff F.C.C. No. 1, as described in this Order, no later than sixty (60) calendar days from the release date of this Order.

31. IT IS FURTHER ORDERED that the investigation initiated in WC Docket No. 18-100 IS TERMINATED and that the rates under investigation in this proceeding are unlawful and subject to potential refunds for overearnings.

32. IT IS FURTHER ORDERED that the rates found unlawful herein, which are presently in effect, shall continue in effect pending further Commission order, unless cancelled by a subsequent SDN tariff revision.

33. IT IS FURTHER ORDERED that the accounting order applicable to South Dakota Network, LLC (d/b/a SDN), shall remain in effect until the revised rates are effective.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary