

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

In the Matter of	)	
	)	
Petition for Expedited Declaratory Ruling	)	WC Docket No _____
of South Dakota Network, LLC	)	
	)	
<b>To: The Commission</b>	)	

**PETITION FOR EXPEDITED DECLARATORY RULING  
OF SOUTH DAKOTA NETWORK, LLC**

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## **Executive Summary**

South Dakota Network, LLC (“SDN”) respectfully requests the Commission to issue a declaratory ruling asserting its jurisdiction over a dispute between SDN and Northern Valley Communications, Inc. (“NVC”) concerning interstate traffic and associated facilities at issue in a South Dakota case; and declaring that (a) a contract between SDN and an interexchange carrier (“IXC”), entered into for the purpose of terminating large volumes of traffic bound to a competitive local exchange carrier (“CLEC”) engaged in access stimulation or “traffic pumping,” is lawful under the Communications Act of 1934, as amended (the “Act”) and (b) that CLECs enjoy no exclusive right to transport terminating traffic to their end offices (or elsewhere), including the related matter that the filing of a CLEC federal tariff does not confer a right to compel other carriers to use the tariffed services.

NVC’s circuit court complaint concerns a physically intrastate trunk facility carrying almost entirely interstate traffic. Furthermore, NVC’s complaint and other papers filed in the state proceeding are replete with references to SDN’s interstate tariff filings, the Act, the Commission’s rules, as well as arguments that SDN has violated NVC’s rights under the Act. It is well established that it is the nature of the traffic, and not the physical location of the facility, that determines whether the Commission has jurisdiction. In addition, the issues before the state court are inextricably intertwined with federal issues in the areas of competition policy, interconnection, and statutory responsibility over its licensees. Thus, the state court’s decision significantly intrudes into the FCC’s jurisdiction here.

A key element of NVC’s claims, and particularly its attempt at the judicial dissolution of SDN, is its contention that SDN’s agreement with AT&T was unlawful. However, the *Transformation Order’s* pronounced 2011 policy change favoring negotiated agreements for

access traffic supports a declaration that SDN may lawfully negotiate commercial agreements.

There are no carve-outs or exceptions to the negotiated agreement doctrine which would apply to CEA providers or dominant carriers generally.

NVC's claims are largely predicated upon the assumption that it enjoys an exclusive right to transport stimulated traffic between Sioux Falls and Groton, South Dakota. Such an assumption violates more than two decades of Commission policy governing the access market. There are two key Commission access policies implicated by the SDN/NVC dispute. The first is the Commission's long-standing goal to promote competition for interstate transport services; the second is the Commission's recognition that there are certain market failures in the terminating access market that require regulatory correction. In light of the Commission's policies aimed directly at increasing competition in the access market and curbing CLEC monopoly power, it is clear that NVC's assertion of a monopoly entitlement for interstate access transport is flatly inconsistent with the Act and Commission rules and policies.

Each count of NVC's complaint invokes the federal questions SDN has described above: SDN's ability to enter into a contract for competitive service, and NVC's right to provide transport. Accordingly, these Counts are within the exclusive province of the Commission.

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South Dakota Network, LLC, a South Dakota limited liability company (“SDN”), requests pursuant to Section 1.2 of the Commission’s Rules<sup>1</sup> that this Commission issue an expedited Declaratory Ruling on federal issues in a matter set for trial in South Dakota state court beginning on March 19, 2018. Substantively, SDN’s Petition asks that the Commission confirm (a) that the Commission has jurisdiction over interstate traffic and associated facilities at issue in the South Dakota case; (b) that a contract between SDN and an interexchange carrier (“IXC”), entered into for the purpose of terminating large volumes of traffic bound to a competitive local exchange carrier (“CLEC”) engaged in access stimulation or “traffic pumping,” is lawful under the Communications Act of 1934, as amended (the “Act”),<sup>2</sup> and (c) that CLECs enjoy no exclusive right to transport terminating traffic to their end offices (or elsewhere), including the related matter that the filing of a CLEC federal tariff does not confer a right to compel other carriers to use the tariffed services. Commission action is necessary to avoid regulatory uncertainty associated with the court action.

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<sup>1</sup> 47 C.F.R §1.2

<sup>2</sup> 47 U.S.C. §§151 *et seq.*

SDN requests that a Public Notice issue as soon as reasonably possible setting comment dates. SDN appreciates the requirements of the Commission's processes and does not expect a ruling by the trial date, but submits that circumstances warrant a speedy comment cycle. The matters before the trial court are almost entirely subject to the Commission's jurisdiction, including rates, terms, and conditions, and points of interconnection for interstate traffic. Indeed, among other claims, the plaintiffs seek the judicial dissolution of SDN. The trial court has sought an amicus curiae brief from the Commission's Office of General Counsel ("OGC") on only two of the many important issues that are within the Commission's jurisdiction. Rather than filing an amicus brief, SDN is suggesting to the OGC that it request a stay of proceedings to the state court pending the Commission's determination of this Petition. The Commission is respectfully requested to issue its Public Notice seeking comment on the Petition as soon as reasonably possible.

## **I. BACKGROUND**

This matter arises from the latest dispute between an IXC and a CLEC long engaged in access stimulation. Despite all efforts by SDN to avoid an improper intrusion on the Commission's plenary jurisdiction, a constantly changing attack on SDN in the litigation makes it inevitable that the state court will not be able to avoid such intrusion and entanglement. The most recent change in claims by the CLEC reveals its true aim, which is to establish an exclusive or monopoly right to access transport or otherwise enforce rights to collect amounts for transport services not ordered by the IXC. SDN provided and continues to provide transport services in what it believed to have been a proper utilization of available authority to resolve the dispute, but that competition is being attacked as unlawful and contrary to the Commission's policies. SDN had attempted to obtain a pronouncement from the Commission on these issues in the context of

an order issuing on the Petition for Forbearance filed by AT&T in WC Docket No. 16-363,<sup>3</sup> which would have been issued well before the trial date. In the litigation between SDN and the CLEC, an amicus curiae brief has been requested, but would not sufficiently address the important federal issues that are within the Commission's jurisdiction. Thus under the present state of the litigation, with all claims against SDN crystalized and other avenues unavailable, SDN now comes before the Commission to address the issues in the proper forum and jurisdiction.

As the Commission is aware, SDN is a centralized equal access ("CEA") network provider operating under this Commission's Section 214 authority, issued in 1990.<sup>4</sup> SDN's network was originally authorized and constructed for the purpose of providing equal access and related services for rural incumbent telephone companies in the state of South Dakota. By virtue of the extremely remote, sparsely populated locations served by such companies, IXC's did not seek to serve these low volume traffic areas. SDN's aggregation of low volume traffic in Sioux Falls, South Dakota solved that problem, and since 1992 a large number of IXC's have been providing competitive long-distance service to a growing number of rural communities (approximately 300 as of today) through SDN's equal access tandem switch in Sioux Falls.<sup>5</sup> Over time, efficiencies of this centralization and aggregation resulted in further service offerings to these rural communities.<sup>6</sup>

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<sup>3</sup> Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363 (filed Sept. 30, 2016).

<sup>4</sup> *In Re: Application of SDCEA, Inc.*, 5 FCC Rcd 6978 (FCC 1990).

<sup>5</sup> *Id* at ¶24 (noting benefits of traffic demand through centralized equal access).

<sup>6</sup> These services include SS7, CNAM, video transport from a centralized headend, Internet (now with DDoS mitigation), Home/Farm automation support, and Network Marketing support for regional network RFPs that support rural telehealth, regional banking, State Circuit Courts, schools and Governmental facilities from the smallest communities up through an including services for the Federal Government.

In addition to carrying the traffic of its rural *incumbent* local exchange carrier owners, rural *competitive* local exchange carriers affiliated with SDN's owners have designated the SDN switch in the LERG for interstate and intrastate transport services. One of SDN's member-ILECs, James Valley Cooperative Telephone Company ("James Valley"), is affiliated with Northern Valley Communications, Inc. ("NVC"), a CLEC. NVC is a well-known access stimulator and has been involved in a number of court and Commission proceedings regarding its practices.<sup>7</sup> NVC's access stimulation scheme has had a material, negative impact upon SDN's business. In April of 2013, AT&T stopped paying SDN's tandem switching (CEA) charges for stimulated traffic associated with NVC. These withheld access charges include significant amounts for interstate traffic. Although SDN has acted diligently to ameliorate the corrosive effect of NVC's traffic stimulation scheme upon SDN's business, other major interexchange carriers in addition to AT&T have also failed to pay for the same reason.

Numerous efforts were made to resolve the non-payment disputes between SDN and AT&T and NVC and AT&T. These included efforts by SDN to explore alternative transport options for AT&T on a prospective basis, including economic alternatives similar to direct transport that would address the problems created by the high volume, stimulated traffic. After discussions with Commission staff, SDN filed revisions to its interstate tariff to address these high volume concerns. Ultimately, these tariff revisions were withdrawn in light of discussions with FCC staff. In lieu of tariff revisions, SDN developed a contract option for transport of AT&T traffic between SDN and NVC. SDN and AT&T entered into such a contract in

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<sup>7</sup> See *Qwest Communications Corp. v. Northern Valley Communications*, 26 FCC Rcd 8332 (FCC 2011), *reconsideration denied*, 26 FCC Rcd 14520 (FCC 2011) and *Sprint Communs. Co. L.P. v. Northern Valley Communs.*, 26 FCC Rcd 10780 (FCC 2011), *petitions for review consolidated and denied*, *N. Valley Communs., LLC v. FCC*, 717 F.3d 1017, 1019 (D.C. Cir. 2013) (cataloging NVC tariff filings, which were rejected, seeking to evade FCC rule for "end users" to be charged a fee by CLECs in order to assess interstate access charges against IXCs).



September 2014, after which NVC and its corporate affiliates filed suit against SDN, its CEO and Managers in a circuit court in South Dakota.<sup>8</sup>

Although cloaked in South Dakota statutory and common law claims as discussed below, NVC's complaint asks the state court to make findings contrary to the Act, the Commission's precedent, and its pro-competitive policies. These matters were brought before the court in a motion to dismiss and/or refer issues to this Commission upon grounds of preemption and/or primary jurisdiction, which the court largely denied;<sup>9</sup> Count V of NVC's complaint, claiming that SDN had violated South Dakota statutory provisions concerning unfair treatment of a "regular established dealer," was the only Count dismissed as preempted.<sup>10</sup> Aside from the preempted Count V, the only area in which the judge showed any deference concerning NVC's claims relates to the judicial dissolution of SDN in Count VIII (regarding the alleged unlawful access tariff cost study and the allegation that SDN had violated the Act by its Agreement with AT&T). Rather than refer the matter to the Commission, however, the Court only invited an amicus curiae brief if the Commission "is so inclined."<sup>11</sup>

## **II. THE COMMISSION HAS JURISDICTION OVER THIS DISPUTE**

NVC's circuit court complaint concerns a physically intrastate trunk facility carrying almost entirely interstate traffic. Furthermore, NVC's complaint and other papers filed in the state proceeding are replete with references to SDN's interstate tariff filings, the Act, the

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<sup>8</sup> *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5<sup>th</sup> Cir.).

<sup>9</sup> See, Attachment A: Memorandum Decision on Defendant's Motion to Dismiss and Alternative Motion to Stay and Refer Issues to the Federal Communications Commission and Motion to Strike or Exclude the Opinions of Warren Fischer, Michael Starkey, and Barry Bell, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5th Cir. July 17, 2017) ("Memorandum Decision").

<sup>10</sup> *Id.* at pp. 12-13.

<sup>11</sup> *Id.* at p. 18.

Commission's rules, as well as arguments that SDN has violated NVC's rights under the Act.<sup>12</sup> For instance, factual allegations in the complaint include reference to NVC's "federal tariff,"<sup>13</sup> the payment for which SDN allegedly interfered,<sup>14</sup> Commission meetings and tariff filings which were the result of an SDN "scheme,"<sup>15</sup> and that a Transport Agreement struck between SDN and AT&T was discriminatory because it replaced SDN's withdrawn Commission tariff amendment.<sup>16</sup> The Agreement is alleged to have caused a breach of an operating agreement between SDN and its members and their affiliates (i.e., James Valley and NVC),<sup>17</sup> specifically an implied contract term evidently believed by NVC to award it an interstate transport monopoly,<sup>18</sup> and resulted in an alleged intentional interference with a business relationship.<sup>19</sup> Each claim has a core issue of conformity with the Commission's regulations or rights arising therefrom.

Against this background, there can be no factual dispute that NVC's complaint is primarily driven by interstate traffic and, therefore, is subject to the Commission's jurisdiction. It is well established that it is the nature of the traffic, and not the physical location of the facility, that determines whether the Commission has jurisdiction. The dividing line between the regulatory jurisdiction of the FCC and states depends on "the nature of the communications which pass through the facilities [and not on] the physical location of the lines."<sup>20</sup> Interstate and

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<sup>12</sup> See Attachment B: Second Amended Complaint, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5th Cir. May 2016) ("Complaint").

<sup>13</sup> *Id.* at ¶45.

<sup>14</sup> *Id.* at ¶¶52, 53.

<sup>15</sup> *Id.* at ¶¶56 – 59.

<sup>16</sup> See Complaint at ¶¶65-71.

<sup>17</sup> *Id.* at ¶¶74-83.

<sup>18</sup> *Id.* at ¶86.

<sup>19</sup> *Id.* at ¶¶94-99.

<sup>20</sup> *National Ass'n of Regulatory Util. Com'rs v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

foreign communications are “totally entrusted to the FCC.”<sup>21</sup> The Commission has “plenary and comprehensive regulatory jurisdiction over interstate and foreign communications.”<sup>22</sup> “Congress vested in [the FCC] plenary jurisdiction to regulate the instrumentalities and facilities used in the transmission and reception of interstate communications.”<sup>23</sup> Indeed, the Commission’s jurisdiction has been upheld over physically intrastate terminal equipment even against evidence that “[a]pproximately 97% of telephone calls” were **intrastate**.<sup>24</sup> There can be no serious debate then that the interstate traffic here and associated facilities are squarely within the Commission’s jurisdiction. In addition, the issues before the state court are inextricably intertwined with federal issues in the areas of competition policy, interconnection, and statutory responsibility over its licensees. Thus, the state court’s decision significantly intrudes upon the FCC’s jurisdiction here.

To be sure, this Petition may not anticipate all of the outcomes by which NVC’s complaint could inhibit Commission policies. As discussed in greater detail below, NVC has only recently developed a new damage theory which posits that NVC has been denied access revenue from the failure of a wholesale IXC market. This failure is laid at the feet of the SDN/AT&T Agreement. Moreover, SDN has learned that it may now face damages at trial up to, and possibly exceeding, \$25 million. These developments, and other theories at trial (e.g. breach of the operating agreement), if reduced to a judgment, may inhibit SDN’s ability to compete, if not function altogether. If such matters come to pass, the South Dakota proceeding could become ripe for preemption, and SDN may seek such an outcome.

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<sup>21</sup> *Id.* at 1501.

<sup>22</sup> *Telerent Leasing Corp. et al.*, 45 FCC 2d 204, 217 (1974), *aff’d sub nom. North Carolina Utilities Commission v. FCC*, 537 F.2d 787 (4<sup>th</sup> Cir.), *cert. denied*, 429 U.S. 1027 (1976).

<sup>23</sup> *Ortho-O-Vision, Inc. Petition for Declaratory*, 69 FCC 2d 657, 666 (1978).

<sup>24</sup> *See North Carolina Utilities Commission, et al. v. FCC*, 552 F.2d 1036, 1044 fn. 7 (4<sup>th</sup> Cir. 1977).

### **III. THE COMMISSION SHOULD DECLARE THAT SDN CAN CONTRACT FOR TRANSPORT AND SWITCHING**

A key element of NVC's claims, and particularly its attempt at the judicial dissolution of SDN, is its contention that SDN's agreement with AT&T was unlawful. Indeed, NVC has recently lodged a letter with the Commission's Office of General Counsel ("OGC")<sup>25</sup> seeking an amicus curiae filing to such effect with the court. Relatedly, the U.S. District Court for South Dakota's Northern District has noted that the existence of a valid agreement between SDN and AT&T is significant to its decision in a judicial dispute covering the same pumped traffic and SDN transport facilities.<sup>26</sup> In addition to the legal disputes covering past periods, a ruling upon SDN's legal authority to contract under Commission precedent and rules is necessary as a matter of prospective business relationships (thereby removing this issue from determination by a state court jury in South Dakota). As the Commission knows, access stimulation/traffic pumping is not a benign practice.<sup>27</sup> SDN's network was designed to connect and aggregate low volumes of access traffic from rural communities for the purpose of presenting an economic case for IXC's to offer presubscribed service there. That SDN has had IXC non-payment issues with respect to stimulated traffic thus is no surprise. State court judges and a Brown County, South Dakota jury do not have the Commission's expertise in this area. As is discussed in the next sections of this Petition, important Commission policies are at risk without a ruling as requested here. SDN's

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<sup>25</sup> See Attachment C: Letter from G. David Carter to Jennifer Tatel, Esq., et al., Office of General Counsel, dated September 2, 2017 at p. 2.

<sup>26</sup> See Attachment D: Opinion and Order on Pending Motions, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC*, No. 17-1022 (D.S.D. November 13, 2017).

<sup>27</sup> See, e.g., *Sprint Communications Company, L.P. v. Crow Creek Sioux Tribal Court, Native American Telecom, LLC and B.J. Jones*, 121 F.Supp.3d 905, 923 (S.D. 2015) ("To the contrary, the Commission noted that one of the purposes of the CAF Order was to "curtail wasteful arbitrage practices." Of those wasteful practices, access stimulation was singled out as "one of the most prevalent arbitrage activities today[.]").

ability to enter into agreements with willing IXC buyers is a key business tool to maintain the viability of obtaining payment for service in the face of access stimulation.<sup>28</sup>

Thus, SDN's decision to enter into the AT&T agreement was driven by a compelling business imperative to resolve IXC customer disputes caused by NVC's traffic pumping. As previously discussed, NVC's complaint challenges SDN's ability to enter into a contract with AT&T for stimulated traffic transport and switching service,<sup>29</sup> and seeks judicial dissolution of SDN, notwithstanding SDN's section 214 authorization. NVC also argues in its state court complaint that the AT&T agreement violates "requirements as a rate of return carrier."<sup>30</sup> However, the *Transformation Order's* pronounced 2011 policy change favoring negotiated agreements for access traffic supports a declaration that SDN may lawfully negotiate commercial agreements, as in the case of transporting AT&T's stimulated terminating access traffic to NVC's Groton, South Dakota switch.

Two of the *Transformation Order's* principal objectives were to implement comprehensive intercarrier compensation reform that leaves "... carriers free to enter into negotiated agreements that allow for different terms"<sup>31</sup> and to "...curtail two of the most

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<sup>28</sup> As noted, the Commission has extended the 251(b)(5) regime to the transport and termination of all access traffic, not just stimulated access traffic. Given that *all* LECs are entitled to establish contracts with willing negotiating partners under the *Transformation Order*, it is certainly the case that whether SDN is considered to have been a dominant CEA provider or a non-dominant CLEC (or something in between) at the time of its AT&T agreement, it certainly had the right to have provided a competitive transport service.

<sup>29</sup> Although NVC alleges that SDN's contract with AT&T is for the provision of switching and transport services, SDN contends that it only provided terminating transport service pursuant to the contract. SDN contends that the factual question of whether SDN has provided transport and switching service should be decided by the Commission via the complaint process. However, for purposes of this Declaratory Ruling, SDN asks the Commission to decide the legal question assuming switching service was provided.

<sup>30</sup> Complaint at ¶123.

<sup>31</sup> *Transformation Order* at ¶¶648, 739.

prevalent arbitrage activities today, access stimulation and phantom traffic ...”<sup>32</sup> A close review of this *Order* shows that this language is hardly gratuitous. After requiring a “default” tariff-based mechanism, the Commission stated many times that “carriers should be free to negotiate commercial agreements.”<sup>33</sup> Commission rule section 51.905(a) states that, “[t]he rates set forth in this section are default rates. Notwithstanding any other provision of the Commission's rules, telecommunications carriers may agree to rates different from the default rates.”<sup>34</sup> The Commission has affirmed this policy in its recent *2016 Technology Transitions Order*, where it described the *Transformation Order*, in pertinent part, as follows: “The rate caps these rules prescribe are “default rates” from which the rules permit carriers to deviate by private agreement [citing fn. 60].”<sup>35</sup> In the next paragraph, the Commission noted: “... private agreements require a willing negotiating partner[.]”<sup>36</sup>

These *Orders* leave little doubt as to SDN’s ability to provide terminating access switching and transport service pursuant to contract or pursuant to SDN's default tariffed rate. There are no carve-outs or exceptions to the negotiated agreement doctrine which would apply to CEA providers or dominant carriers generally. Against this background, the Commission is respectfully requested to reaffirm that SDN may arrange to provide terminating access transport and switching through consensual agreement.

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<sup>32</sup> *Id.* at ¶649.

<sup>33</sup> *Id.* at fn. 1290; see also, ¶812 (“At the same time, carriers remain free to enter into negotiate agreements that differ from the default rates established above.”); ¶828 (carriers permitted to negotiate alternative intercarrier compensation arrangements to the tariff based default rates); ¶1322-1323 (carriers allowed to negotiate agreements during transition to bill and keep).

<sup>34</sup> 47 CFR §51.905.

<sup>35</sup> *In re: Technology Transitions*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, FCC 16-90 at ¶25 (released July 15, 2016)(“*Technology Transitions Order*”).

<sup>36</sup> *Id.* at ¶26.

#### **IV. THE COMMISSION SHOULD DECLARE THAT CLECS HAVE NO EXCLUSIVE RIGHT TO INTERSTATE TRANSPORT SERVICE**

NVC's claims are largely premised upon the assumption that it enjoys an exclusive right to transport stimulated traffic between Sioux Falls and Groton, South Dakota.<sup>37</sup> SDN submits that such an assertion is flatly contrary to the Commission's policies and regulations regarding transport competition, and respectfully requests that the Commission rule that no such CLEC-exclusive or monopoly right is permissible.

A review of the complaint itself shows NVC's mistaken assumption in this respect. For instance, the complaint asserts that NVC and its two affiliates refused to relinquish NVC's "right" to transport AT&T's traffic;<sup>38</sup> that SDN "attempted to force NVC to relinquish its existing rights to collect tariffed access charges;"<sup>39</sup> and that SDN interfered with NVC's "expectancy of future business with AT&T pursuant to NVC's tariffs."<sup>40</sup> NVC has argued variously, that its "right" to transport arises because its tariff was "deemed lawful," that SDN promised to accord NVC "the same terms and conditions" which apply to NVC's ILEC owner and SDN's other owners (and thus implicitly agreed that NVC has an exclusive transport arrangement),<sup>41</sup> and that the *Transformation Order* cemented, in an unspecified way, such exclusive transport rights.<sup>42</sup>

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<sup>37</sup> Groton is the headquarters of NVC's parent ILEC, James Valley. NVC is headquartered in Aberdeen, SD. James Valley supposedly operates a tandem switch connecting and terminating traffic to the town of Redfield, SD, which is in NVC's service area and in which the traffic stimulating entities are apparently located.

<sup>38</sup> See Complaint at ¶6.

<sup>39</sup> *Id.* at ¶92.

<sup>40</sup> *Id.* at ¶95.

<sup>41</sup> See Complaint at ¶¶37-39. See, also, Attachment E: Letter from James Cremer, counsel to NVC, to William Heaston, SDN of November 17, 2014 ("SDN is not entitled to provide transport services to AT&T because services are provided by NVC pursuant to its deemed lawful tariff.")

<sup>42</sup> Attachment F: Letter from James Cremer to William Heaston of March 31, 2014.

NVC's argument that its federal tariff was "deemed lawful," and that the *Transformation Order* gave it transport monopoly rights, are questions of law running to the central issue whether NVC has exclusive transport rights for interstate traffic. These assertions are patently wrong, as there are no provisions in the Commission's orders or rules which stand for this proposition. Indeed, none are cited by NVC.

The claim that SDN is in a position to grant NVC an exclusive or monopoly transport right also is absurd on its face – SDN enjoys no such power or authority. NVC's claim is based on a letter in which NVC asked SDN to provide service on the "same terms and conditions" provided to its ILEC members.<sup>43</sup> SDN, however, cannot confer any interstate rights upon carriers choosing to designate SDN's tandem as a POI in the LERG. Through the 214 process, the Commission conferred special privileges on SDN and its members. However, because NVC is not a member of SDN, it is not included in SDN's 214 authority.

In fact, NVC's complaint violates more than two decades of Commission policy governing the access market. There are two key Commission access policies implicated by the SDN/NVC dispute. The first is the Commission's long-standing goal to promote competition for interstate transport services; the second is the Commission's recognition that there are certain market failures in the terminating access market that require regulatory correction. This dispute involves both policies because NVC is effectively attempting to extend its market power over end-user customers to IXC's seeking competitive transport alternatives.

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<sup>43</sup> This argument is based upon the misquotation of NVC's letter which, in fact, recognizes that its CLEC status may require different treatment. *See* Complaint at Exhibit A: Letter from Doug Eidahl of NVC to Rich Scott of SDN, September 8, 1999. Moreover, there is no evidence that SDN agreed to any of these terms. In any event, SDN cannot confer a transport monopoly on NVC.



Beginning in 1992, the Commission adopted a series of Orders intended to promote competition for interstate access services, including transport services in particular. In one such Order, the Commission required the larger local telephone companies to allow competitors to construct transmission facilities into their offices so as to compete for dedicated services in local markets.<sup>44</sup> In another, the Commission began to restructure its Part 69 Rules governing access in order “to promote competition for interstate switched transport.”<sup>45</sup> As part of this proceeding, the Commission explicitly adopted a structure where dedicated circuits were priced as though they were shared circuits (i.e., they were priced based on usage, not on a flat-rate basis) for a variety of competitive and policy reasons, with the expectation that competition in this market would develop.<sup>46</sup> In a companion proceeding, the Commission took a series of steps to increase competition in the long-distance access market through expanding interconnection including for switched access transport,<sup>47</sup> particularly given the emergence of the competitive access provider (“CAP”) industry, and tandem switching.<sup>48</sup> Later, the Telecommunications Act of 1996 was adopted (“the ’96 Act”) to address, among other things, the market power of incumbents by requiring them to make components of their networks available to entrants at cost-based rates.<sup>49</sup>

Though access competition did develop as intended by the Commission’s Orders and the ’96 Act, it also emerged that competitive LECs retained market power over terminating traffic that required Commission intervention in order to discipline anticompetitive behavior.

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<sup>44</sup> *In Re: Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369 (FCC 1992).

<sup>45</sup> *See In Re: Transport Rate Structure and Pricing*, 7 FCC Rcd 7006 at ¶¶1-6 (FCC 1992).

<sup>46</sup> *Id.* at ¶¶27-30.

<sup>47</sup> *In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase I*, 8 FCC Rcd 7374 (FCC 1993) at ¶¶1-4.

<sup>48</sup> *In Re: Expanded Interconnection with Local Telephone Company Facilities, Transport Phase II*, 9 FCC Rcd 2718 (FCC 1994) at ¶¶2-4.

<sup>49</sup> PL 104-104, 110 Stat. 56.

Specifically, in imposing access charge benchmarks upon the CLEC industry, the Commission noted the market power enjoyed by CLECs over their end users:

[T]here is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXC's, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates. Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.<sup>50</sup>

The *Seventh R&O* went on to find that "IXCs are subject to the monopoly power that CLECs wield over access to their end users," and established benchmark pricing rules, described as a "...restriction on the CLEC's exercise of their monopoly power..."<sup>51</sup>

After plugging that hole in the regulatory paradigm, principally caused by the CLEC manipulation of internet service provider ("ISP") bound traffic, the Commission was shortly faced with new access stimulation schemes like those of NVC. In the *Transformation Order*, the Commission indicated that "[t]he record confirms the need for prompt Commission action to address the adverse effects of access stimulation," which adverse effects include "unjust and unreasonable" interstate switch access rates and harm to competition by giving companies that pump traffic a competitive advantage over companies that do not.<sup>52</sup> Recalling that the terminating access markets essentially consist of a series of bottleneck monopolies over access to individual end users,<sup>53</sup> the Commission recognized that access stimulation was yet another

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<sup>50</sup> *In Re: Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (FCC 2001) at ¶¶34 ("Seventh R&O").

<sup>51</sup> *Id.* at ¶¶38-40. See also, *In Re: ACS Anchorage, Inc.* 22 FCC Rcd 16304 (FCC 2007) at ¶59 (... "interexchange carriers are subject to the monopoly power that all competitive LECs wield over access to their end users, and that carriers' carrier charges cannot be fully deregulated.").

<sup>52</sup> *Transformation Order* at ¶¶661-665.

<sup>53</sup> *Transformation Order* at ¶674, citing *In Re: Access Charge Reform*, 16 FCC Rcd 9923, 9935 (CLEC Access Reform Order).

instance of CLECs exploiting a *de facto* monopoly in this market.<sup>54</sup> Accordingly, the Commission stepped in with new benchmarking rules aimed at breaking up this market power wielded by CLECs.<sup>55</sup>

In light of the Commission's policies aimed directly at increasing competition in the access market and curbing CLEC monopoly power, it is clear that the assertion of a monopoly entitlement for interstate access transport is flatly inconsistent with the Act and Commission rules and policies.

## **V. EACH CLAIM IMPLICATES THIS COMMISSION'S JURISDICTION**

As discussed below, each count of NVC's complaint triggers Commission jurisdiction and policy issues, as previously discussed: SDN's ability to enter into a contract for competitive service, and NVC's alleged exclusive right to provide transport. Counts I (Breach of Operating Agreement), II (Breach of Contracts), III (Breach of Fiduciary Duty and Duty of Good Faith and Fair Dealing), IV (Intentional Interference with Business Relationship), and VII (Conversion) all implicate NVC's claim to enjoy exclusive transport rights. Counts VI (Unjust Enrichment) and VIII (Dissolution) raise questions about SDN's ability to contract for competitive transport service. Count IX (Declaratory Judgment) and the Prayer for Relief closely follow the claims in the other Counts, including fixing the POI, specifying terms, and dissolving SDN. Accordingly, these Counts are the exclusive province of the Commission.

### **A. Counts Implicating Exclusive Transport Claims**

In Count I, NVC alleges that SDN has wrongfully changed its point of interconnection ("POI") with the SDN network.<sup>56</sup> However, the Commission retains jurisdiction over the

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<sup>54</sup> *CLEC Access Reform Order* at 9936.

<sup>55</sup> *Transformation Order* at ¶679-701.

interconnection of intrastate communications facilities used in interstate communications,<sup>57</sup> as here, and has never granted CLECs the right to demand a point of interconnection outside its service area with other (particularly, non-ILEC) carriers. The court rejected arguments that the movement of the POI implicated this Commission's jurisdiction on this score when it concluded that Count I "...does not challenge the rate, terms and conditions of telecommunications service."<sup>58</sup> This conclusion is simply unsustainable, as the base dispute in NVC's complaint concerns transport mileage, and AT&T's payments therefor. These in turn are directly determined by the POI at issue.<sup>59</sup> It is clear that this claim thus does affect the rates, terms and conditions of interstate service provided to AT&T and AT&T's prerogatives to arrange competitive alternatives to NVC's transport, as previously demonstrated. The state law claim is at once at odds with SDN's role as a competitor, and AT&T's right to a competitive choice for interstate transport.

In Count II, NVC alleges that SDN has interfered with "NVC's ability to collect tariffed transport charges from long-distance carriers for transporting said access traffic from Sioux Falls to Brown County."<sup>60</sup> The Commission has exclusive jurisdiction over interstate tariffs and their terms, including any right to collect tariff charges in a competitive market. SDN briefed this claim in detail, demonstrating for the court how NVC relies upon an alleged "right" to carry traffic between Sioux Falls and Brown County, South Dakota (NVC's geographic location)

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<sup>56</sup> Complaint at ¶80.

<sup>57</sup> *National Ass'n of Regulatory Util. Com'rs* at 1498-1501.

<sup>58</sup> *Memorandum Decision* at pp. 8-9.

<sup>59</sup> As the Commission is aware, the POI defines the starting point of a particular service, and typically becomes an important determinant of any mileage calculation regarding transport services. For instance, under NECA #5, the tariff generally indicates (6.4.6) that "The mileage to be used to determine the monthly rate for Local Transport is calculated on airline distances between the end office switch ... and the customer's serving wire center ...," which itself is influenced by the location of the POI.

<sup>60</sup> Complaint at ¶86.

without competitive ‘interference’ from SDN,<sup>61</sup> and accordingly raises a substantial federal question regarding Commission policy and precedent on transport competition. Notably, SDN’s expert report by Mr. Joseph Gillan included citation to Commission precedent supporting the proposition that CLECs have no right to determine IXC traffic routing in the first instance.<sup>62</sup> The court, as before, refused to acknowledge that enforcement of this “right” would have any economic effect: “under either theory, Plaintiffs do not challenge the rate, terms and conditions of a telecommunications service agreement.”<sup>63</sup> The court’s ruling is notable for its failure to grasp the operations of the interstate access market (and understandably so). The presence of competitive service does not interfere with a carrier’s ability to collect tariff charges unless, of course, such carrier has not been selected by the customer.

In Count III, NVC alleges that SDN and its managers have violated a state-law statutory obligation imposed upon members of a limited liability company by, among other things, “attempting to force NVC to relinquish its existing rights to collect tariffed access charges.”<sup>64</sup> This count raises matters falling within the Commission’s exclusive jurisdiction, such as the interpretation of a CLEC’s access tariff and the “rights” thereby conferred, including how such “rights,” if they exist at all, intersect with the Commission’s competition policy. As previously discussed, the Commission has exclusive jurisdiction over this issue. Quite simply, the filing of a tariff hardly confers upon NVC any right to traffic, which goes to the heart of the Commission’s competition policy for the last four decades, at least.

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<sup>61</sup> Attachment G: Defendant’s Reply to Plaintiffs’ Sur-Reply in Support of All Defendants’ Motion to Dismiss and Alternative Motion to Stay Proceedings and Refer Issues to the Federal Communications Commission at p. 13, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134 (S.D. 5th Cir. July 17, 2017).

<sup>62</sup> *CLEC Access Reform Order* at 9960, ¶92 (FCC 2001).

<sup>63</sup> *Memorandum Decision* at p 10.

<sup>64</sup> Complaint at ¶92.

In Count IV, NVC alleges intentional interference with NVC's relationship with AT&T pursuant to NVC's interstate tariffs, specifically with its ability to collect for its transport services.<sup>65</sup> Again, the validity of NVC's tariff and of NVC's claim to competition-free transport service are issues squarely within the Commission's jurisdiction.<sup>66</sup> The court, though, rejected SDN's argument that this claim implicated the Act, concluding that, "... the alleged wrongful acts are not predicated on duties or obligations imposed by the FCA."<sup>67</sup> SDN respectfully submits that the Commission will have a different view of transport competition, as discussed above.

In Count VII, NVC alleges SDN has converted circuit capacity leased "exclusively" to NVC.<sup>68</sup> NVC claims it has been "harmed" by SDN's "unlawful" use of NVC's property,<sup>69</sup> and NVC seeks recovery of lost tariff charges to other IXC's who may have used AT&T to deliver access traffic to NVC through the SDN agreement with AT&T. It is clear that this Count is predicated on NVC's claim that it has a transport monopoly, and accordingly raises a question as to whether any such right exists. If NVC has no right to the underlying traffic on the facilities, then NVC's claimed "harm" is conjectural at best. Even if SDN improperly used NVC's leased

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<sup>65</sup> Complaint at ¶99.

<sup>66</sup> Critically, the most recent filing in state court by NVC now seeks to recover, under this tort claim, alleged lost profits due to AT&T utilizing the transport agreement with SDN to provide wholesale service to other carriers rather than pay NVC's tariffed rates. That filing was made in response to SDN's dispositive motion under state law, which the Court denied. *See* Attachment H: Excerpt from January 26, 2018 Motions Hearing Transcript at p. 31:6-23; pp. 54-57, South Dakota Network, LLC's Motion for Partial Summary Judgment, *James Valley Cooperative Telephone Company, et al., v. South Dakota Network, LLC, et al.*, No. 15-134. This amply demonstrates that the state court proceeding will be rife with arguments and decisions about the lawfulness of the SDN agreement with AT&T, all of which center on applicable Commission regulations, the Act and regulation of rates for interstate access traffic.

<sup>67</sup> *Memorandum Decision* at 12.

<sup>68</sup> Complaint at ¶116.

<sup>69</sup> Complaint at ¶120.

facility, this would not mean that NVC is entitled to its tariffed rate. NVC can only obtain its tariffed rate when it provides the tariffed service to the IXC, in this case AT&T. Here, it did not. SDN provided the transport service in question.

**B. Counts Implicating the Lawfulness of the SDN-AT&T Agreement**

In Count VI, NVC alleges unjust enrichment predicated upon its assertion that SDN's provision of transport service to AT&T is unlawful because SDN may not contract for transport and switching.<sup>70</sup> The lawfulness of SDN's provision of interstate transport service to AT&T is squarely within the Commission's exclusive jurisdiction. The court ruled against SDN's argument that NVC's unjust enrichment claim was improper, despite NVC's allegations that SDN "is not lawfully permitted to provide ..." the AT&T transport service<sup>71</sup> and that SDN cannot lawfully provide the transport service to AT&T.<sup>72</sup> As previously noted, this is the same agreement which the court now agrees should be subject to an OGC amicus brief – precisely because it is within the Commission's jurisdiction. At bottom, this count turns upon SDN's ability to contract for access services and, as such, intrudes upon the Commission's jurisdiction.

Count VIII seeks the dissolution of SDN, predicated upon the alleged illegality of the AT&T/SDN agreement and alleged improper cost study filings in support of SDN's federal tariff.<sup>73</sup> In a nutshell, then, this claim represents an attempt to dissolve an entity of federal creation, subject to prior Commission approval for discontinuance of service, based upon alleged violations of the Act itself, the Commission's rules regarding SDN's ability to contract for transport service, and an alleged violation of the Commission's tariffing rules. The state court denied SDN's request to refer this Count to the FCC, content only to hear from OGC in an

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<sup>70</sup> Complaint at ¶106.

<sup>71</sup> Compare Complaint at ¶106 with *Memorandum Decision* at p 14.

<sup>72</sup> Complaint at ¶¶1, 106, 123, and 124.

<sup>73</sup> Complaint at ¶123.

amicus filing.<sup>74</sup> This Count again implicates the Commission's jurisdiction. The Commission should find that SDN may lawfully contract for transport and switching access services; that SDN's federal access tariff was filed as deemed lawful and, therefore, there is no valid dispute regarding SDN's cost study. Further, even if SDN is not allowed to provide access service pursuant to contract, or if SDN's cost study and tariffed access rate did not comply with Commission rules, such conduct would not result in the revocation of SDN's authority to operate. Indeed, the unilateral dissolution of SDN is outside the court's jurisdiction.<sup>75</sup>

## **VI. CONCLUSION**

Based on the forgoing, SDN respectfully requests the following action from the Commission:

1. A ruling that the Commission has plenary jurisdiction over the traffic and facilities at issue in NVC's complaint, and a related ruling that if NVC has facts purporting to show a violation of the Act in this matter, that it exercise its remedies under the Act.
2. A ruling that NVC's complaint treads upon the Commission's policies and precedent favoring competition in the access service market, including for switching and high-volume transport.
3. A ruling that SDN is authorized to contract for access services, as it has with AT&T, or a related ruling that if not, SDN may not be dissolved by the South Dakota court based upon any lack of SDN's ability to have contracted for access service, and/or claims concerning its 2014 Annual Access Filing cost support.

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<sup>74</sup> *Memorandum Decision* at p 18.

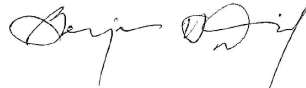
<sup>75</sup> See 47 U.S.C. 214(e) (requiring Commission consent prior to the reduction, impairment, or discontinuance of service).



4. Through its Office of General Counsel, to notify the South Dakota court that its proceeding should be stayed pending Commission action on this Petition.

Respectfully submitted,

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Filed: February 7, 2018

**Certificate of Service**

I hereby certify that a copy of the forgoing **Petition for Declaratory Ruling of South Dakota Network, LLC** was sent via United States mail to the following:

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