

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

RECEIPT

In the Matter of)	
)	
Annual Access Charge Tariff Filing)	Tariff F.C.C. No. 1
South Dakota Network, LLC)	Transmittal No. 13
)	Accepted / Filed
To: The Commission)	
)	SEP 28 2018

Federal Communications Commission
Office of the Secretary

**REPLY TO PETITION TO REJECT OR TO SUSPEND AND INVESTIGATE
SOUTH DAKOTA NETWORK, LLC'S TARIFF**

Pursuant to Section 1.773(b) of the Commission's Rules,¹ South Dakota Network, LLC (SDN), by its attorneys, hereby replies to the petition filed by James Valley Cooperative Telephone Company and Northern Valley Communications, LLC (jointly referred to as Petitioners) asking the Commission to reject or suspend and investigate SDN's 2018 annual access tariff filing.² As shown herein, the issues raised by Petitioners are without merit and should be rejected.

Petitioners argue that SDN's tariff should be rejected or suspended and investigated for three reasons. First, Petitioners argue that the language in Section 5.1 of the tariff violates Sections 251(a) and 202(a) of the Act and describes a service SDN is not providing. Second, Petitioners question the way SDN calculated the applicable CLEC benchmark rate. Third, Petitioners question SDN's projected traffic volumes and allege that they are underestimated based on Petitioner's records.

¹ 47 CFR 1.773(b).

² 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 September 24, 2018)("Petition").

As an initial matter, on September 27, 2018, SDN filed to remove the language in section 5.1 about which Petitioners complain.³ Therefore, this objection is moot. Further, as demonstrated below, Petitioners' remaining complaints are not correct and they are without merit. Accordingly, Petitioners' request that the Commission reject or suspend and investigate SDN's 2018 annual access tariff filing should be denied and SDN's tariff should be allowed to go into effect.

Petitioners Have Suffered No Injury

Petitioners are not customers of SDN and are not injured by SDN's tariff revisions filed September 17, 2018, bearing Transmittal No. 13 ("Revised Tariff"); accordingly, their Petition should be denied. Petitioners refer to rejection, suspension, and investigation standards as a predicate to arguments concerning alleged unlawfulness of SDN's Revised Tariff. Notwithstanding the lack of merit as to these arguments, the Commission should carefully consider that the Petitioners have suffered no cognizable injury as a result of SDN's Revised Tariff. Despite shrill language, one may review in vain the Petitioners' arguments as to SDN's rate calculation⁴ for any allegation that they are negatively impacted by the rate itself. Neither of the Petitioners is a "customer" as defined by SDN's tariff.⁵

It is further worth noting that no IXC – the parties who are customers of SDN and pay SDN's tariffed rates – has filed a petition regarding SDN's Revised Tariff. At best, then, the Petitioners are acting as an unsolicited, private attorney general for other parties with a cognizable interest in this proceeding, having failed to allege, much less prove, any injury to

³ South Dakota Network, LLC F.C.C. Tariff No. 1 Transmittal 14, filed September 27, 2018.

⁴ Petition at pp. 13-18.

⁵ South Dakota Network, LLC F.C.C. Tariff No. 1 at Page 49.

themselves. The U.S. Supreme Court has held that injury is an intrinsic element in the lack of standing doctrine.⁶ The Commission has recognized such precedent in Commission cases.⁷ Therefore, SDN respectfully submits that the Petitioners have no cognizable claim of injury and thus no standing in this matter. And, whether or not the Commission elects to apply the law of standing here, the lack of injury still compels the rejection of the Petitioners' petition.

SDN's Calculation of the Benchmark Rate Is Reasonable and Complies with the Rules

Petitioners argue that SDN's use of NECA rates to calculate its CLEC benchmark rate is in direct defiance of the Commission's conclusions in the *Aureon Rate Order*.⁸ In support of this position, Petitioners argue that the (1) Commission has never recognized equal access service as being properly included in a CLEC benchmark rate; (2) SDN has ignored Commission precedent in which the Commission found CenturyLink to be the appropriate CLEC for Aureon to

⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (standing requires a showing that “the plaintiff . . . suffered an ‘injury in fact’—an invasion of a legally protected interest”); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant’s raising another person’s legal rights”); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (“At an irreducible minimum, Art. III requires the party who invokes the court's authority to ‘show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant’”); see also *Stoops v. Wells Fargo Bank, N.A.*, No. 3:15-83, 2016 WL 3566266 (W.D. Pa. June 24, 2016).

⁷ See, e.g., *In re Maritime Communications/Land Mobile, LLC*, 32 FCC Rcd 3907 (FCC 2017) (dismissing petition because of lack of injury); *In re AT&T Mobility Spectrum LLC*, 27 FCC Rcd 16459 (FCC 2012) (dismissing petition to deny transfer of control due to lack of injury); *In re Improving Pub. Safety Communs.*, 23 FCC Rcd 9558 (FCC 2008) (waiver opposition dismissed due to lack of injury); *In re AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 21750 (FCC 2001) (personal injury “in fact” cited as element in standing test); *In re AmericaTel Corporation*, 9 FCC Rcd 3993 (FCC 1994) (following Supreme Court precedent in examining standing); *In re Application of G&S Television Network, Inc.*, 7 FCC Rcd 4509 (FCC 1992) (applying law requiring direct and personal injury to establish standing).

⁸ Petition at p. 13, citing *In re Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 2018 WL 3641034, at *5, ¶ 18 (2018). (*Aureon Rate Order*)

benchmark to; and (3) if the first two allegations fail, SDN has not demonstrated that it has appropriately calculated the rate that should apply for the service provided.⁹

According to Petitioners, section 61.26 of the rules defines the elements that a CLEC can typically include in its composite rate. However, as acknowledged by Petitioners, those elements include local end office switching, which includes equal access functionality. The NECA tariff identifies the difference between premium local end office switching and non-premium local end office switching based on whether or not the end office switch provides equal access¹⁰ and contains a different rate for local end office switching when equal access is provided and when equal access is not provided.¹¹ The different rates demonstrate not only that equal access is a function of local end office switching but also that there is a real and identifiable cost associated with this function.

Further, the Commission's rules do not require a carrier to provide all of the functions or the exact same functions as the carrier to whom it benchmarks its rate. Rather, section 61.26(f) of the rules states that "[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 service." According to the Commission, "the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions."¹² As stated by the Commission in the *Aureon Rate Order* in connection with transport provided by Aureon, the Commission has

⁹ Petition at pp. 13-16.

¹⁰ National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, Page 6.32 and 6.32.1.

¹¹ *Id.* at Page 17-11 and 17-11.1.

¹² *In re Access Charge Reform*, 19 FCC Rcd 9108 at ¶17 (FCC 2004) (emphasis added).

"[n]ever precluded a competitive LEC from billing for services (or, in this case, mileage) that it actually provides."¹³ SDN's 214 authority granted by the Commission also clearly shows that the Commission authorized SDN to provide equal access functionality instead of the local exchange carriers that utilize the SDN tandem switch.¹⁴ Therefore, it is clear that SDN provides equal access service and the Commission cannot preclude SDN's ability to bill for this service.

Petitioners are wrong to suggest that the *Aureon Rate Order* dictates that SDN is required to benchmark its equal access function to CenturyLink's rate. The Commission specifically did not address SDN's provision of equal access service in that order:

With respect to its own subtending LECs, SDN alleges that "equal access functionality is still necessary as approximately three quarters of its originating traffic is sent to interexchange carriers." SDN *Ex Parte* at 1. However, as the majority of traffic handled by Aureon is terminating, SDN's continuing provision of equal access is not relevant to how Aureon's traffic is handled.¹⁵

The Commission also states that "[w]e note that SDN raises concerns regarding how the CLEC benchmark requirement might be applied to it. SDN July 23 *Ex Parte* at 4. Any concerns SDN might have in this regard are not relevant to our investigation of Aureon's tariff and thus we do not address them."¹⁶ Petitioners' argument, therefore, must be rejected. Further, CenturyLink's tandem switching service does not include equal access functionality and CenturyLink does not offer equal access service in the state of South Dakota in connection with non-affiliated local exchange carriers. CenturyLink also does not offer equal access functionality pursuant to its local end office switching rate for the vast majority of areas served by SDN. Accordingly,

¹³ *Aureon Rate Order* at ¶42.

¹⁴ *In re the Application of SDCEA, Inc.*, 5 FCC Rcd 6978, at ¶¶3, 7, and 24 (FCC 1990).

¹⁵ *Id.* at fn. 97.

¹⁶ *Id.* at fn. 150.

CenturyLink's tandem switching rate or local end office switching rate cannot be the benchmark for SDN's equal access function.

Petitioners also argue that SDN has not demonstrated that it has appropriately calculated the benchmark rate for equal access service; on the contrary, if anything, SDN under-calculated the benchmark for equal access. As shown in the Description and Justification filed with its tariff, SDN determined a benchmark rate for its Centralized Equal Access Service based on a benchmark of \$.002288 for tandem switching service from CenturyLink Tariff FCC No. 11 and a benchmark of \$.01195 for equal access service for a combined unified benchmark rate of \$.014203.

The majority of SDN's CEA minutes are associated with Routing Exchange Carriers participating in the NECA tariff. As stated above, pursuant to its 214 authorization, SDN provides the equal access function instead of the LEC utilizing SDN's tandem. Local exchange carriers participating in NECA's tariff and not providing equal access bill the non-premium originating local switching rates. The access services that the competing ILEC would provide to replace the equal access service provided by SDN is included in premium local end office switching. Thus, the differential between the premium local end office switching rate of the local exchange carriers utilizing SDN's tandem switch and the non-premium local end office switching rate (which does not include equal access functionality) is the correct benchmark for the equal access function provided by SDN.

When calculating its Revised Tariff rate, SDN utilized the difference between the originating NECA local end office switching rate for premium and non-premium local end office switching service to determine the equal access benchmark because the NECA tariff describes the difference in these rates as based on the availability of equal access, among other things.

SDN identified the originating interstate access minutes routed through the SDN tandem from January 2018 through July 2018 for each Routing Exchange Carrier. SDN also identified the respective rate by Routing Exchange Carrier for premium and non-premium local end office switching. The SDN Routing Exchange Carriers represent all eight of the NECA rate bands. The NECA premium local end office switching rate difference ranges from \$.008073 to \$.026911. For ease of calculation, a rate of zero was used for Routing Exchange Carriers not participating in the NECA tariff. SDN multiplied the minutes of use by the respective rates to identify the revenue by premium and non-premium rate. The non-premium revenue was subtracted from premium revenue and divided by the interstate access minutes for all of the Routing Exchange Carriers to arrive at the equal access benchmark. The difference between the weighted average rates for premium and non-premium service provides the benchmark for equal access.

By including a zero rate change for the Routing Exchange Carriers not in NECA's tariff and dividing the differential between premium and non-premium revenue by the interstate access minutes for all of the Routing Exchange Carriers to arrive at the equal access benchmark, the benchmark is lower than it could be. Accordingly, there is no merit to Petitioners' allegation and it should be rejected.

SDN's Projected Traffic Volumes Are Reasonable and Comply with Commission Rules

Finally, Petitioners question the projected traffic volumes used to determine SDN's cost-based rate. Petitioners claim that SDN's traffic projections "do not appear to accurately reflect the traffic volumes that SDN continues to switch at its tandem switch" and, specifically, that "SDN's projections do not even include all of the traffic that it has switched for termination to NVC." Petitioners further allege that they believe that "the reason for this anomaly is SDN's decision to enter into off-tariff contracts with certain long-distance carriers, whereby those

carriers continue to receive tandem switching service from SDN but do not pay the same tariffed rate that other IXC's must pay."¹⁷

Petitioners' claim is without merit. As an initial matter, in the *Transformation Order* and resulting rules,¹⁸ the Commission states that all carriers can enter into contracts for their access services and that the tariffed rate is a default rate only. Moreover, in determining its cost-based rate, SDN excluded from its rate development not only the minutes of use associated with non-access services and access services provided pursuant to contract, but also the investment and expenses that were allocated to those minutes. This is illustrated by the following chart that shows the reduction in minutes of use and the corresponding reduction in revenue requirement that form the basis of SDN's past three tariff filings:¹⁹

<u>Filing Year</u>	<u>Projection Year</u>	<u>CEA Revenue Requirement</u>	<u>MOU</u>	<u>% RevReq Decreased</u>	<u>% MOU Decreased</u>
2018	2018-19	\$680,855	139,770,574	34%	31%
2016	2016-17	\$1,031,140	201,300,000	52%	46%
2014	2014-15	\$2,148,404	370,269,443		

If SDN were to include some or all of the excluded minutes of use, it would also need to add back in the investment and expenses following those minutes, increasing the revenue requirement. Accordingly, even if certain minutes of use should not have been excluded as alleged by Petitioners, it has no effect on SDN's cost-based rate.

¹⁷ Petition at p. 17.

¹⁸ *In re Connect America Fund et al.*, 26 FCC Rcd 17663 at ¶739 (FCC 2011). Section §51.905(a) of the Commission's rules clearly states: "the 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." 47 CFR 15.905.

¹⁹ The CEA Revenue Requirements and the MOUs listed in the table are on the Interstate Access Rate Development page of the Tariff Review Plans filed with SDN's 2014 (page 5), 2016 (page 7), and 2018 (page 7) tariff filings.


Conclusion

As shown herein, SDN's tariff filing is not prima facie unlawful, it does not demonstrably conflict with the Communications Act or a Commission rule, regulation or order and it does not raise substantial questions of lawfulness. Further, SDN's tariffed rate was calculated in accordance with Commission rules and regulations. Accordingly, the petition should be rejected and SDN's tariff should be allowed to take effect.

Respectfully submitted,

SOUTH DAKOTA NETWORK, LLC.

By



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Filed: September 28, 2018

DECLARATION UNDER PENALTY OF PERJURY


I, Marlene Bennett, hereby state the following:

1. I am manager of the Mitchell, South Dakota office of Consortia Consulting, where I have been employed since 2011.

2. Consortia Consulting is primarily responsible for the development and cost support for rates contained in South Dakota Network, LLC's 2018 annual access tariff filing, made on September 17, 2018, bearing Transmittal No. 13. I also have been responsible for this work in a number of previous annual access tariff filings, extending back at least to SDN's 2012 filing.

3. The calculations on pages 8-10 of the accompanying Reply to Petition to Reject or to Suspend and Investigate South Dakota Network, LLC's Tariff, concerning local switching benchmarks and the allocation of investment and expenses to follow minutes allocated away from regulated cost factors, were performed by my team at Consortia Consulting.

4. I certify under penalty of perjury that I have personal knowledge of the factual statements and calculations contained therein, and that said statements are true and correct to the best of my knowledge, information, and belief.

Signed: 

Marlene Bennett

Executed this 28 day of September, 2018.

DECLARATION UNDER PENALTY OF PERJURY

I, Mark Shlanta, hereby state the following:

1. I am the Chief Executive Officer of South Dakota Network, LLC (SDN).

2. I have read the statement on page 2 of the forgoing Reply to Petition to Reject or to Suspend and Investigate South Dakota Network, LLC's Tariff that James Valley Cooperative Telephone Company and Northern Valley Communications, LLC are not customers of SDN's interstate access tariff.

3. I certify under penalty of perjury that I have personal knowledge of this factual statement, and that said statement is true and correct to the best of my knowledge, information, and belief.

Signed:  _____

Mark Shlanta

Executed this 28 day of September, 2018

Certificate of Service

I hereby certify that a copy of the forgoing **Reply to Petition to Reject or to Suspend and Investigate South Dakota Network, LLC's Tariff** was sent via hand delivery, facsimile, and/or electronic mail, as indicated, to the following:

Via Hand Delivery (original + 3 copies):

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By:

A handwritten signature in blue ink, appearing to read "Salvatore Taillefer, Jr.", written over a horizontal line.

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