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December 11, 2018

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REDACTED – FOR PUBLIC INSPECTION

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: South Dakota Network, LLC Tariff F.C.C. No. 1
WC Docket No. 18-100; Transmittal No. 13

Dear Ms. Dortch:

South Dakota Network, LLC (“SDN”), by its attorneys, hereby submits its direct case in response to the Commission’s November 29, 2018 *Order Designating Issues for Investigation* in the above-captioned proceeding. Pursuant to the Protective Order adopted by the Commission in this proceeding,¹ SDN requests confidential treatment for certain information in this filing, which is commercially sensitive information that is not normally released to the public.

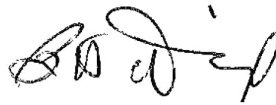
In accordance with the Protective Order and the Commission’s rules, one redacted copy has been filed via ECFS; one confidential, non-redacted copy has been submitted on paper via

¹ *In the Matter of South Dakota Network, LLC Tariff F.C.C. No. 1*, PROTECTIVE ORDER, WC Docket No. 18-100, et al., DA 18-1158, released November 14, 2018.

hand delivery to the Secretary's Office; and two confidential, non-redacted copies have been submitted on paper via hand delivery to Mr. Christopher Koves.

If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "B. H. Dickens, Jr.", with a stylized flourish at the end.

Benjamin H. Dickens, Jr.

Mary J. Sisak

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Counsel to South Dakota Network, LLC

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

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

DIRECT CASE OF SOUTH DAKOTA NETWORK, LLC

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Filed: December 11, 2018

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Executive Summary

In the Designation Order, the Commission designates one issue for investigation concerning "the appropriate benchmark rate for SDN's interstate switched access service." In connection with this issue, the Commission asks whether SDN is using the correct competing incumbent LEC(s) in calculating its benchmark rate and whether its calculated benchmark rate is based on the rate(s) for the appropriate service(s) of the competing incumbent LEC(s). As shown herein, SDN calculated the benchmark rate in compliance with Commission rules, regulations and orders and the Commission should so find.

As to the first question, SDN has used the correct competing ILECs to calculate its benchmark. SDN's interstate access service is comprised of two different elements: tandem switching and equal access, a component of local end office switching. Equal access is still a necessary service for originating traffic from SDN's subtending LECs, and although the Commission has found CenturyLink is the appropriate benchmark for tandem switching service in the *Aureon Tariff Order*, CenturyLink does not offer equal access to non-affiliated LECs in South Dakota. The Commission's rules recognize that access service is comprised of many elements or functions, and nothing in the rules requires a carrier to benchmark all of its services to one competing ILEC. With respect to equal access functionality, SDN's subtending ILECs would be the competing ILECs for the purposes of the Commission's rules, because they would be the ones providing the service were it not for SDN. Because those carriers primarily participate in or mirror NECA rates, those rates are the appropriate benchmark for SDN's equal access.

As to the second question, SDN used the appropriate services to calculate its benchmark. As discussed, tandem switching and equal access are separate functions, and equal access function is a part of local switching. The NECA rates for local switching are divided into premium and non-premium rates, depending on whether equal access is provided. Therefore, the difference between these two rates reflects the rate for equal access service, and forms an appropriate basis to determine the benchmark for SDN's equal access service. Although the Commission found in Aureon that NECA rates were inappropriate, those facts differ considerably from SDN's facts..

The history of the Commission's benchmark rules show that their purpose is to correct a market failure to constrain the rates of CLECs entering into and serving ILEC territories. The competing ILEC analysis is designed to mimic market competition, and in SDN's case the relevant market for equal access functionality is the subtending LECs. This is true even though SDN does not directly serve end users. Nothing in the rules requires the competing ILEC to be in actual direct competition with the CLEC for benchmark purposes, and indeed, if this were the case, then CenturyLink's tandem switching rate would not be an appropriate benchmark for SDN's tandem switching service either because SDN and CenturyLink are not in actual direct competition for that service. Nor do the rules say anything about affiliation between the CLEC and the competing ILEC.

Finally, SDN's use of a single rate for switched access service is justified. Its tariffed switched traffic is generally balanced between originating and terminating minutes. Charging separate originating and terminating rates would impose costs on both SDN and the IXC's that would likely eliminate any theoretical savings to be generated. SDN's rate is within the zone of reasonableness that the Commission and the courts contemplate when it comes to ratemaking.

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DIRECT CASE OF SOUTH DAKOTA NETWORK, LLC

South Dakota Network, LLC (SDN), by its attorneys, hereby files its direct case in response to the Commission’s November 29, 2018 *Order Designating Issues for Investigation* in the above-captioned proceeding.¹ In the *Designation Order*, the Commission designates one issue for investigation concerning "the appropriate benchmark rate for SDN's interstate switched access service."² In connection with this issue, the Commission asks whether SDN is using the correct competing incumbent LEC(s) in calculating its benchmark rate and whether its calculated benchmark rate is based on the rate(s) for the appropriate service(s) of the competing incumbent LEC(s). As shown herein, SDN calculated the benchmark rate in compliance with Commission rules, regulations and orders and the Commission should so find.

I. INTRODUCTION

SDN is a provider of Centralized Equal Access Service (“CEA”) in the State of South Dakota, and provides CEA service pursuant to both the Commission’s Section 214 authorization

¹ “*Designation Order*”

² *Id.* at ¶1.

and the authorization of the State of South Dakota.³ As acknowledged by the Commission in the *Designation Order*, SDN was "formed to implement long distance equal access obligations and aggregate traffic for connection between rural incumbent local exchange carrier (LEC) and interexchange carrier (IXC) networks."⁴ By virtue of the remote, sparsely populated locations served by these companies, IXCs did not seek to serve these areas and, as a result, consumers were denied the benefits of equal access and competition. SDN's provision of the equal access function and the aggregation of low volume traffic in South Dakota solved that problem, and since 1992 a large number of IXCs have been providing competitive long-distance service to a growing number of rural communities through SDN's equal access tandem switch in Sioux Falls.⁵ Equal access was the primary factor that necessitated the creation of SDN.

SDN has traditionally been regulated as a dominant carrier,⁶ and has been treated as a fully subject carrier under Title II for the history of its existence. Accordingly, like an ILEC, SDN's rates are "the product of an extensive regulatory process" which the Commission has held "yielded presumptively just and reasonable access rates..." The Commission sought to mimic this result for CLECs when it first implemented the benchmark rule for CLECs in 2001.⁷ SDN continues to dispute that it is properly classified as a CLEC under the *Transformation Order*.⁸

³ *In re the Application of SDCEA, Inc.*, 5 FCC Rcd 6987 (FCC 1990) ("SDN 214"); *In re Application of South Dakota Network, Inc. and SDCEA, Inc. for Permission to Construct Centralized Equal Access Facilities*, Docket F-3860, Amended Order Granting Construction Permit and Approving Tariff (SDPUC 1991)("PUC Authorization").

⁴ *Designation Order* at ¶2.

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

⁶ Indeed, the Commission has recently reaffirmed CEA providers' dominant status. *See In re: Technology Transitions*, 31 FCC Rcd. 8283 (FCC 2016) at fn. 43.

⁷ *In re: Access Charge Reform*, 16 FCC Rcd 9923, 9939 (2001).

⁸ *Connect America Fund et al.*, 26 FCC Rcd 17663 (2011) ("*Transformation Order*"), pets. for review denied, *In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

Nevertheless, SDN maintains that it has calculated the benchmark rate in compliance with Commission rules, regulations and orders.

II. RESPONSES TO SPECIFIC ISSUE DESIGNATED FOR INVESTIGATION

In this section, SDN provides specific responses to the issue designated for investigation and associated questions and requests for information. The only issue designated for investigation was “the appropriate benchmark rate for SDN's interstate switched access service.”⁹ In connection with this issue, the Commission asks whether SDN is using the correct competing incumbent LEC(s) in calculating its benchmark rate and whether its calculated benchmark rate is based on the rate(s) for the appropriate service(s) of the competing incumbent LEC(s). Each question is discussed in turn below.

A. SDN Used the Correct Competing ILECs in Calculating its Benchmark Rate

As part of its investigation into the correct competing ILECs to which SDN should benchmark, the Commission states that SDN “must justify its use of both CenturyLink and NECA as the carriers to which it should benchmark.”¹⁰ Simply put, SDN is justified in using two different benchmarks because its interstate access service is comprised of two different elements, tandem switching and equal access, a component of local end office switching.

1. SDN is Justified in Using CenturyLink and its Subtending LECs to Determine its Benchmark Rate

Since the Commission has found that centralized equal access (CEA) providers are CLECs for the purposes of intercarrier compensation¹¹ – a finding SDN continues to dispute –

⁹ *Designation Order* at ¶10.

¹⁰ *Id.* Although the Commission states that SDN must justify its use of NECA as a carrier which it should benchmark, SDN contends that it has benchmarked its equal access service to the ILECs subtending its switch, most of whom participate in or mirror the NECA tariff rates.

¹¹ *In re: AT&T Corp v. Iowa Network Services*, 32 FCC Rcd 9677, 9689 (2017).

and since SDN does not serve end users, Section 61.26(f) requires that SDN’s rate for access services “may not exceed the rate charged by the competing ILEC for the same access services...”¹² Section 61.26 (a)(3) defines switched exchange access services as the functional equivalent of ILEC interstate exchange access services including local end office switching and tandem switching.¹³ Thus, equal access – a function of local end office switching – and tandem switching are two separate elements of access services that, under Section 61.26(f), SDN is required to benchmark. As discussed later, equal access is still a necessary service for originating traffic from SDN’s subtending LECs, and although the Commission has found CenturyLink is the appropriate benchmark for tandem switching service in the *Aureon Tariff Order*,¹⁴ CenturyLink does not offer equal access to non-affiliated LECs in South Dakota.¹⁵ Nor is CenturyLink likely to begin offering centralized equal access service for non-affiliated ILECs in South Dakota, and upon information and belief, CenturyLink does not have the IP-based transport connections to the non-affiliated ILECs to facilitate call transfer between itself and the non-affiliated ILECs.

¹² 47 C.F.R. 61.26(f).

¹³ 47 C.F.R. 61.26(a)(3). As the Commission is no doubt aware, it is not uncommon within the local exchange industry to have last mile connections provided by a local exchange company, while tandem functions upstream are provided by a different company. It would hardly make sense to ignore this reality in the context of benchmarking.

¹⁴ *In re: Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, WC Docket No. 18-60, Transmittal No. 36, FCC 18-105, released July 31, 2018 at ¶18 (“*Aureon Tariff Order*”).

¹⁵ See Section II(A)(2), *infra*. The Commission has previously found such tandem-level equal access to be in the public interest, since end office conversion was not likely to produce a competitive IXC presence in South Dakota’s market. See *SDN 214; PUC Authorization* at ¶50 (finding SDN project to be in the public interest because it would foster long distance competition through centralized facility in Sioux Falls, South Dakota). Importantly, the Commission also rejected US West’s attempt to compete for traffic terminating at the subtending LECs exchanges.

Section 61.26(a)(2) of the Commission's rules define competing ILEC 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.” There is no limitation in section 61.26(a)(2) that requires a CLEC to benchmark all of its services to the same competing ILEC. In the *Aureon Tariff Order*, the Commission states that “the question to be answered is whether CenturyLink would provide the portion of the access that Aureon provides if Aureon did not provide it...”¹⁶ The Commission also found the D.C. Circuit decision in *Great Lakes* instructive, where the court found that the “relevant question” was which incumbent LEC would have performed the role played by Great Lakes “had Great Lakes not inserted itself into the traffic path.”¹⁷

With respect to SDN's tandem switching function, if SDN did not perform this function then CenturyLink theoretically would, as it offers a tandem switching service in South Dakota. SDN therefore benchmarked its tandem switching rate to CenturyLink in accordance with the Commission’s findings in the *Aureon Tariff Order*.¹⁸ However, with respect to equal access functionality, the local exchange carriers subtending SDN would have provided equal access functionality if SDN had not “inserted itself” into the process with the filing of its section 214 application. SDN's 214 authority granted by the Commission clearly shows that the Commission

¹⁶ *Aureon Tariff Order* at ¶25.

¹⁷ *Id.* at ¶26.

¹⁸ As the *Aureon Tariff Order* is effective and has not been stayed, SDN used the CenturyLink tandem switching benchmark in its annual tariff filing. SDN does not concede that this benchmark is lawful. Upon information and belief, CenturyLink does not offer equal access at its tandem, but this is a core, if not the central, purpose of SDN’s centralized equal access network. Moreover, even if CenturyLink would theoretically offer CEA service, and invest in sufficient IP-based transport connections it currently lacks to serve SDN’s subtending LECs, it would constitute a heroic assumption to conclude that those functions would be performed for free. SDN was created to cure a market failure in the IXC market. One may not logically assume that CenturyLink would promote centralized equal access where its predecessor argued that “1+” equal access service was unnecessary. *PUC Authorization* at ¶56.

authorized SDN to provide equal access functionality instead of the local exchange carriers that utilize the SDN tandem switch.¹⁹ Further, as discussed below, CenturyLink cannot act as a benchmark for SDN's equal access service.

2. CenturyLink Does Not, Would Not, and Cannot Provide Equal Access if SDN Did Not

In the *Designation Order*, the Commission states that, "SDN effectively concedes that CenturyLink is the competing incumbent LEC..." and "... fails to assert that CenturyLink does not or would not provide the equal access capability that SDN provides if SDN did not provide it."²⁰ SDN does not concede that "CenturyLink is the competing incumbent LEC to which it must benchmark for purposes of provision of its interstate switching services." Rather, SDN stated that to the extent it is required to benchmark at all – which SDN disputes – CenturyLink would be the "competing ILEC" as defined by the Commission in the *Aureon Tariff Order* for SDN's tandem switching function. As discussed in greater detail below, SDN contends that the ILECs subtending its switch are the competing ILECs for the equal access functionality provided by SDN.

To be clear, SDN asserts that CenturyLink does not and would not provide equal access for any of SDN's subtending LECs and their end users. CenturyLink has never provided equal access service as part of its tandem switching service. Moreover, CenturyLink currently could not provide functionally equivalent equal access at its tandem for the LECs subtending SDN even if it theoretically would do so because it does not have sufficient IP-based transport connections. Therefore, CenturyLink would have to invest in sufficient IP-based transport connections, in addition to equal access functionality, to be able to provide equal access at its

¹⁹ *SDN 214* at ¶¶3, 7, and 24.

²⁰ *Designation Order* at ¶12.

tandem. There is no basis to believe CenturyLink would do so, and it would constitute a heroic assumption to conclude that it would provide equal access to the SDN subtending LECs for free.²¹

CenturyLink also does not offer equal access service in the service areas of SDN's subtending ILECs. CenturyLink does not provide local services or maintain local end office switches in the service areas of SDN's subtending ILECs. While CenturyLink may provide equal access through its local end office switches, these switches are not located in the subtending ILECs' service areas and have no current ability to provide equal access there. Therefore, CenturyLink has no ability to provide equal access via local end office switches vis-à-vis SDN's subtending ILECs.

It also is illogical to assume that CenturyLink would promote centralized equal access were SDN not to exist, particularly where SDN's public charter was challenged by CenturyLink's predecessor as unnecessary.²² As previously referenced, CenturyLink's predecessor U.S. West opposed SDN's equal access plans for several years in both regulatory and judicial proceedings in South Dakota. The PUC's findings made clear that U.S. West was opposed to the "+1" equal access that became the hallmark of this Commission's equal access policies, as noted earlier. Any hypothetical supposition that CenturyLink would provide this service to the ILECs now, and for free, would founder against this history and economic reality. Finally, it should be noted that U.S. West was only required to provide equal access for interLATA traffic (i.e., as a practical matter, for calls originating within South Dakota, and

²¹ SDN notes that although CenturyLink's rate to its affiliates for tandem switching is zero, it charges non-affiliated carriers for tandem switching. It is clear that CenturyLink would not provide equal access to non-affiliated carriers for free.

²² *PUC Authorization.*

terminating outside South Dakota, and vice versa) at the end office level, and for U.S. West's own customers.²³

3. SDN Should Be Permitted to Include Equal Access in its Tariffed Rate

Although the Commission acknowledges SDN's assertion that CenturyLink does not offer equal access functionality, the Commission states that "SDN does not explain why the Commission should allow SDN to include equal access functionality in its tariffed rate when it is no longer obligated to provide such a service."²⁴ In support of this statement, the Commission relies upon its December 28, 2015 order granting forbearance from equal access obligations to all LECs, except for existing customers presubscribed to stand-alone long-distance providers as of December 28, 2015. It also relies upon its July 13, 2018 order extending forbearance of the equal access requirement for existing customers presubscribed to a stand-alone long-distance provider as of December 28, 2015. But, these orders do not preclude carriers from offering equal access functionality. Rather, the Commission has forbore from enforcing the section 251(b)(3) dialing parity requirements for competitive LECs and ILECs.

As acknowledged by the Commission in the *Aureon Tariff Order*, the Commission has "[n]ever precluded a competitive LEC from billing for services (or, in this case, mileage) that it actually provides." It also must be noted that IXC's are voluntarily providing stand-alone long distance service in South Dakota and they are choosing to purchase equal access functionality from SDN. In fact, and as noted in the *Aureon Tariff Order*, SDN affirmatively states that approximately three quarters of its originating access traffic is sent to large, national IXC's. Thus, equal access is still a service demanded by ILEC end users and IXC's offering service within SDN's network. Relatedly, SDN submits that its regulated revenues should not be cut in half

²³ *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 232 (D.C. Cir. 1982).

²⁴ *Designation Order* at ¶12.

without a separate examination of the public interest factors which led the Commission to issue SDN's section 214 authorization in the first instance.

It is worth noting that the Commission declined to address SDN's concerns on this subject in the *Aureon Tariff Order*: "[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."²⁵ Further, with respect to the inclusion of equal access in any SDN benchmark rate, the Commission stated:

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.²⁶

In sum, equal access is still a necessary and integral part of SDN's network. IXC's still utilize this access service and SDN still charges for this service. SDN respectfully submits that its obligations under section 214 cannot be discharged or canceled by the reference to forbearance orders.²⁷ SDN further submits that its continued provision of equal access to IXC's pursuant to tariff is consistent with the *Aureon Tariff Order*.

4. SDN's Appropriate Benchmark is Not Limited to the CenturyLink Rate

The Commission further requires SDN to justify its decision to "assert that SDN's appropriate benchmark is not limited to the CenturyLink rate, including its basis for interpreting

²⁵ *Aureon Tariff Order* at fn. 150.

²⁶ *Id.* at fn. 97.

²⁷ 47 U.S.C. § 214 (requiring authorization for the discontinuance, reduction, or impairment of service). *In re: Petition of US Telecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks et al.*, 31 FCC Rcd 6157, 6188-89, (2015). (No mention of centralized equal access or CEA providers, which provide equal access pursuant to their 214 authorizations).

the Commission's rules to allow it to include NECA as a competing incumbent LEC to which it may benchmark its rates," in light of the Commission's findings in the *Aureon Tariff Order*.²⁸ SDN's use of CenturyLink as the competing ILEC for the tandem switching function and the ILECs subtending its switch as the competing ILECs for equal access function is entirely consistent with Section 61.26 of the Commission's rules and the *Aureon Tariff Order*. As previously discussed, there is no limitation in section 61.26(a)(2) of the Commission's rules that requires a CLEC to benchmark all of its services to the same competing ILEC, nor do the Commission's rules require a carrier to provide all of the functions or the exact same functions as the carrier to whom it benchmarks its rate. Accordingly, there is no reason that SDN must benchmark every access service function it provides to CenturyLink's rates, especially where CenturyLink does not offer, and has no rate for, a particular element.

The Commission's finding that NECA tariff rates were inappropriate for Aureon's benchmark turns on facts unique to that case, and which are not present here. For instance, the Commission rejected arguments by Aureon that its subtending LECs would constitute competing incumbent ILECs within the meaning of section 61.26 because ... "[Aureon's] subtending LECs do not currently have the facilities or capabilities to provide the switching and transport services provided by Aureon [fn omitted]."²⁹ Both SDN's benchmarking approach and its network differ from these facts. First, SDN's tandem switching rate is benchmarked to that of CenturyLink. Unlike Aureon, SDN does not argue that the competing ILECs for purposes of tandem switching would be those subtending its network.

Second, CenturyLink does not have the facilities or capability to provide equal access for traffic from LECs subtending SDN's switch in South Dakota. The arguments regarding tandem

²⁸ *Designation Order* at ¶12.

²⁹ *Aureon Tariff Order* at ¶24.

transport also do not apply because, unlike the facts in Aureon, SDN's subtending LECs provide the transport services between SDN's switch and the LECs' end offices.³⁰

Third, the Commission in Aureon questioned whether Aureon's subtending LECs made continued use of Aureon's centralized equal access: "we cannot determine from the record whether Aureon's LECs still use or require the equal access functionality Aureon makes available."³¹ The Commission also stated that it is difficult to imagine a significant demand for equal access capability.³² The Commission also noted that "CenturyLink and its predecessors did provide equal access when it was required, and may still provide it to customers grandfathered by the Commission."³³

As previously discussed, these factors in Aureon's case are not present here. Equal access offered by SDN is still necessary and a used and useful aspect of SDN's network, with approximately 75% of its originating traffic sent to non-affiliated IXC's.³⁴ This statement by SDN in the Aureon record was not challenged. The Commission only found that it was not relevant, given the terminating nature of Aureon's traffic.³⁵

The Commission's discussion of CenturyLink's provision of equal access also is distinguishable. As an initial matter, SDN's 214 authority makes it clear that the SDN subtending LECs would have provided equal access if SDN had not "inserted itself into the traffic path." Further, as shown, although CenturyLink may still provide equal access in its service area, CenturyLink does not have the current capability to provide equal access for traffic originating from the SDN subtending ILECs.

³⁰ *Aureon Tariff Order* at ¶26.

³¹ *Id.* at ¶27.

³² *Id.*

³³ *Id.*

³⁴ *See* Exhibit 1.

³⁵ *Aureon Tariff Order* at ¶27 fn 97.

In the *Aureon Tariff Order*, the Commission also indicated that Aureon’s subtending LECs were not capable of providing centralized equal access service.³⁶ However, as recognized by the Commission, SDN and the subtending LECs jointly provide access service. With respect to equal access, the LECs, for example, notify customers of the availability of equal access and enroll customers in long distance service. Importantly, the NECA tariff contains a rate for local end office switching when equal access is provided, which can be used to determine a benchmark for equal access.³⁷ Because CenturyLink does not provide stand-alone equal access, there is no rate to which SDN may benchmark even though, as shown, CenturyLink would not provide equal access for free. To the extent the Commission found that CenturyLink may have provided equal access to non-affiliated LECs when it was required in Iowa, it has never provided equal access to SDN’s subtending LECs. In fact, its predecessor, US West, fought these ILECs’ attempts to provide equal access collectively through the creation of SDN.

In sum, the Commission’s finding that NECA rates were not appropriate in Aureon’s case does not fit the facts here.

B. SDN Calculated Its Benchmark Rate Based on the Appropriate Services

1. SDN’s Use of a Weighted Average Differential is Appropriate

In the *Designation Order*, the Commission states that SDN must “justify its use of a weighted average differential between premium and non-premium originating local switching rates in the NECA tariff.”³⁸ As discussed above, SDN’s subtending ILECs are the competing ILECs for the purposes of Rule 61.26, at least insofar as SDN’s equal access rates are concerned. All but one of those carriers participate in the NECA tariff. And, while the NECA tariff does not

³⁶ *Aureon Tariff Order* at ¶¶23-24.

³⁷ See Section II(B)(1), *infra*.

³⁸ *Designation Order* at ¶13.

contain a specific rate for equal access 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).³⁹ Thus, SDN was able to determine a benchmark rate for the equal access portion of local end office switching by isolating the differential between the premium and non-premium rate. This follows the Commission's statement that "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."⁴⁰ It is important to note that SDN only used the difference between the two local switching rates in its tariff benchmark, which isolates and removes any non-equal access local switching components from SDN's own rate.

2. **SDN Provides a Function of Local End Office Switching**

The Commission also states that "SDN does not provide local end office switching service so it must explain and justify why NECA rates for that local end office service functionality should be used in SDN's benchmark calculation."⁴¹ SDN contends that the Commission's statement that SDN does not provide local end office switching service⁴² is not entirely correct because SDN provides equal access functionality, which is one of the functional parts of local end office switching.⁴³ For purposes of benchmarking, 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

³⁹ National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, Page 6.32 and 6.32.1.

⁴⁰ *In re: Access Charge Reform*, 19 FCC Rcd 9108 at ¶9 (2004).

⁴¹ *Designation Order* at ¶13.

⁴² *Id.*

⁴³ See Section II(A)(1), *supra*.

provided may not exceed the rate charged by the competing ILEC for the same access service." Here, SDN provides the equal access portion of local end office switching.⁴⁴ As discussed previously, the rate for this portion can be accurately captured in the difference between the premium and non-premium rates for local end office switching. Thus, SDN's benchmark is based on that difference and not the entire local end office switching rate.

3. **Key Facts Render Aureon Distinguishable**

In the *Designation Order*, the Commission states that in Aureon's case it found that "CenturyLink would provide the switched access service that Aureon provided (here SDN) if Aureon did not, and not the NECA carriers."⁴⁵ The Commission further requires SDN to "explain and justify why these same questions, regarding which carrier would provide the switched access service if SDN did not, do or do not apply to it."⁴⁶ As discussed in greater detail above, SDN's factual circumstances differ and, accordingly, the Commission's finding in the *Aureon Tariff Order* do not apply to SDN.⁴⁷

4. **Data on Subtending LECs Use of NECA Tariff Rates**

The Commission states that, "SDN must tell us how many of SDN's subtending LECs participate in the NECA tariff and in which NECA rate(s) they participate."⁴⁸ Of the 35 LECs subtending SDN, 28 are ILECs that provide local end office switching via the NECA tariff. One ILEC does not participate in the NECA tariff. Six are CLECs that do not participate in NECA's tariff. However, four of the CLECs mirror NECA rates. A complete list of the SDN subtending

⁴⁴ See SDN 214.

⁴⁵ *Designation Order* at ¶13.

⁴⁶ *Id.*

⁴⁷ See Section II(A)(3), *supra*.

⁴⁸ *Designation Order* at ¶14.

LECs that participate in the NECA tariff and the NECA rates in which they participate are provided as Exhibit 2.

5. SDN's Subtending LECs Meet the Definition of "Competing ILEC"

The Commission states that SDN also must address "how a subtending LEC that partners with SDN to provide access services to IXC's for the origination and termination of traffic could be considered to be competing with SDN as that term was intended and defined in the Commission's rules, and therefore, might justify SDN benchmarking its rate to the NECA rate."⁴⁹ The Commission further requires SDN to explain "why the Commission should find it appropriate for SDN to benchmark in part to the NECA rates, when the Commission rejected doing so in the case of Aureon."⁵⁰

Section 61.26's history makes clear that the term "competing" refers to the traditional competition between ILECs and CLECs for end-users in the ILEC's service area. If SDN were the type of CLEC that the rule contemplates (i.e., competing for end-user customers in the ILEC's territory), it would compete with the SDN ILECs, and not CenturyLink. CenturyLink lacks ILEC operations within the service areas of SDN's subtending ILECs. Thus, SDN's ILECs provide the appropriate benchmark.

The benchmarking rule was originally adopted in 2001 to address a perceived failure in the market place to constrain CLEC access charges. To correct this perceived market shortcoming, the FCC set the benchmark rate "to mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider."⁵¹ Thus, the Commission adopted the original definition of competing

⁴⁹ *Designation Order* at ¶14.

⁵⁰ *Id.*

⁵¹ *In re Access Charge Reform*, 16 FCC Rcd at 9941.

ILEC: “the incumbent local exchange carrier that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC.”⁵² It is meant to mimic the competitive market place in which a CLEC enters the same market as an ILEC to compete for end-users. The purpose of the rule was to permit CLECs to receive revenues equivalent to those the ILECs receive from IXCs for access to those customers.⁵³

In 2004, the FCC recognized that the then-current iteration of the benchmarking rule did not address situations where the CLEC acted as an intermediate provider - i.e., did not directly serve end-users. To address this shortcoming, it modified the definition of competing ILEC to read “... that would provide interstate exchange access service, in whole or in part, to a particular end user ...”, and further added subparagraph (j), which requires that “if a CLEC provides some portion of the interstate 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.” The FCC’s specific words were: “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.”⁵⁴ In adopting this rule, the Commission expressly concluded that, “regulation of these rates is necessary for the [sic] all the reasons that we identified in the *CLEC Access Reform Order*.”⁵⁵ Accordingly, the competing ILEC is still the ILEC that the CLEC “competes” with to deliver IXC traffic to a given end user. In this case, the given end users are the subtending LEC’s users.

⁵² *Id.* at 9975.

⁵³ *Id.* at 9945.

⁵⁴ *In re Access Charge Reform*, 19 FCC Rcd at ¶17.

⁵⁵ *Id.*

The Commission's rule does not state that the competing ILEC and competitive LEC must be actual direct competitors. Moreover, if actual direct competition is required for the Commission's rule then it would be inapplicable for SDN's tandem switching service as well, as SDN and CenturyLink are not competitors for the provision of tandem services to IXC's routing traffic to and from the ILEC's subtending SDN's switch. Rather, the section 214 authority granted by the Commission and the corresponding South Dakota Commission Order dictate that IXC's route their traffic only to SDN's tandem switch that originates and/or terminates calls associated with SDN's subtending ILEC's. And, both orders contain language intended to foreclose competition for this terminating traffic.⁵⁶ Therefore, if the ILEC local switching rate cannot be a benchmark for SDN's provision of equal access because the ILEC's do not compete with SDN in the traditional sense of the word, then CenturyLink's tandem switching rate cannot be a benchmark for SDN's provision of tandem switching because CenturyLink does not compete with SDN for tandem switching service.

Finally, Commission precedent appears to contemplate the use of an ILEC, wholly owned by a CLEC, as a "competitive ILEC" under rule 61.26. In the *Designation Order*, the Commission cites its decision in *Great Lakes Comnet* on the subject of an intermediate carrier having benchmarked to the incorrect competing ILEC.⁵⁷ There, the Commission ultimately found that Great Lakes ("GLC") should have benchmarked its rates to AT&T Michigan.⁵⁸ It rejected an argument that Westphalia Telephone Company ("WTC"), an ILEC indirectly owned by GLC, was the appropriate competing ILEC under 61.26(f).⁵⁹ Importantly, the sole basis for rejecting WTC's status as a competing ILEC was the provision in WTC's tariff restricting

⁵⁶ SDN 214 at ¶¶21-24, *PUC Authorization* at ¶¶60.

⁵⁷ *In re AT&T Services Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd 2586 (2015).

⁵⁸ *Id.* at 2594.

⁵⁹ *Id.*

interLATA carriage; the affiliation between the carriers was not even considered as a relevant factor.⁶⁰ Since there is no LATA issue in SDN's case,⁶¹ *Great Lakes* supports the use of the equal access service benchmark as filed by SDN.

6. SDN's Use of an Equal Access Component Is Justified

In the *Designation Order*, the Commission directs SDN to "provide a justification for including the equal access service component in the terminating switched access rate when SDN's terminating switched access does not include the provision of that functionality."⁶² As the Commission has recognized, ratemaking under the Communications Act and similar statutes "is not an exact science."⁶³ In the context of agency ratemaking, courts evaluate whether the "end result" of a particular regulatory scheme results in rates that are within a "zone of reasonableness."⁶⁴ SDN's originating and terminating tariffed switched traffic is generally balanced. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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's.

⁶⁰ *Id.*

⁶¹ There is no such restriction at play in SDN's case. All of SDN's subtending LECs provide intraLATA local switching.

⁶² *Designation Order* at ¶15.

⁶³ See, e.g., *In re: Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 4119, 4193 (1994).

⁶⁴ *Id.*

⁶⁵ See Exhibit 1.

⁶⁶ *Id.*

At the same time, charging a separate originating and terminating rate would impose cost on both SDN and IXC. SDN would incur additional cost to calculate and bill separate charges, including the handling of disputes as to whether traffic was properly identified as originating and terminating. IXC also would incur additional cost to identify and track traffic as originating and terminating. SDN notes that no IXC has objected to SDN's unified originating and terminating rate.

Finally, the *Designation Order* requires SDN to “explain and justify including the equal access service component in all originating switched access rates...”⁶⁷ The Commission assumes that equal access functionality “may not be provided for all calls originating from every one of [SDN’s] subtending LECs.”⁶⁸ As explained in its tariff filing, SDN developed its tariffed rate using only minutes of use that are billed under its tariff, apportioned to the costs associated with only those minutes.⁶⁹ Every IXC ordering tariffed access service from SDN has ordered Feature Group D (FGD) access service and all FGD originating minutes are subject to equal access. As previously discussed, in the context of ratemaking, the “end result” of a particular methodology must result in rates within a “zone of reasonableness.” Based on the above facts, SDN’s methodology satisfies this standard.

IV. CONCLUSION

For the forgoing reasons, the Commission should find that SDN is using the correct competing incumbent LECs in calculating its benchmark rate and that its calculated benchmark rate is based on the rates for the appropriate services of the competing incumbent LECs. Equal access is a separate element of access service provided by SDN that would be provided by

⁶⁷ *Designation Order* at ¶15.

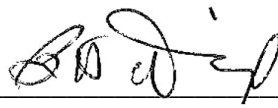
⁶⁸ *Designation Order* at ¶15.

⁶⁹ South Dakota Network, LLC Tariff F.C.C. No. 1, Transmittal No. 13, Description and Justification (filed Sept. 17, 2018).

SDN's subtending LECs if not for SDN. CenturyLink's switching rate does not include equal access and CenturyLink does not provide that service. Accordingly, a separate benchmark using SDN's subtending ILECs is appropriate. Further, SDN's use of a weighted average differential of NECA premium and non-premium local switching rates is appropriate because that differential directly represents the rate for equal access service. Finally, SDN's use of a single rate for switched access service is justified. Its tariffed switched traffic is generally balanced between originating and terminating minutes. Charging separate originating and terminating rates would impose costs on both SDN and the IXC's that would likely eliminate any theoretical savings to be generated. SDN's rate is within the zone of reasonableness that the Commission and the courts contemplate when it comes to ratemaking.

Respectfully submitted,

SOUTH DAKOTA NETWORK, LLC

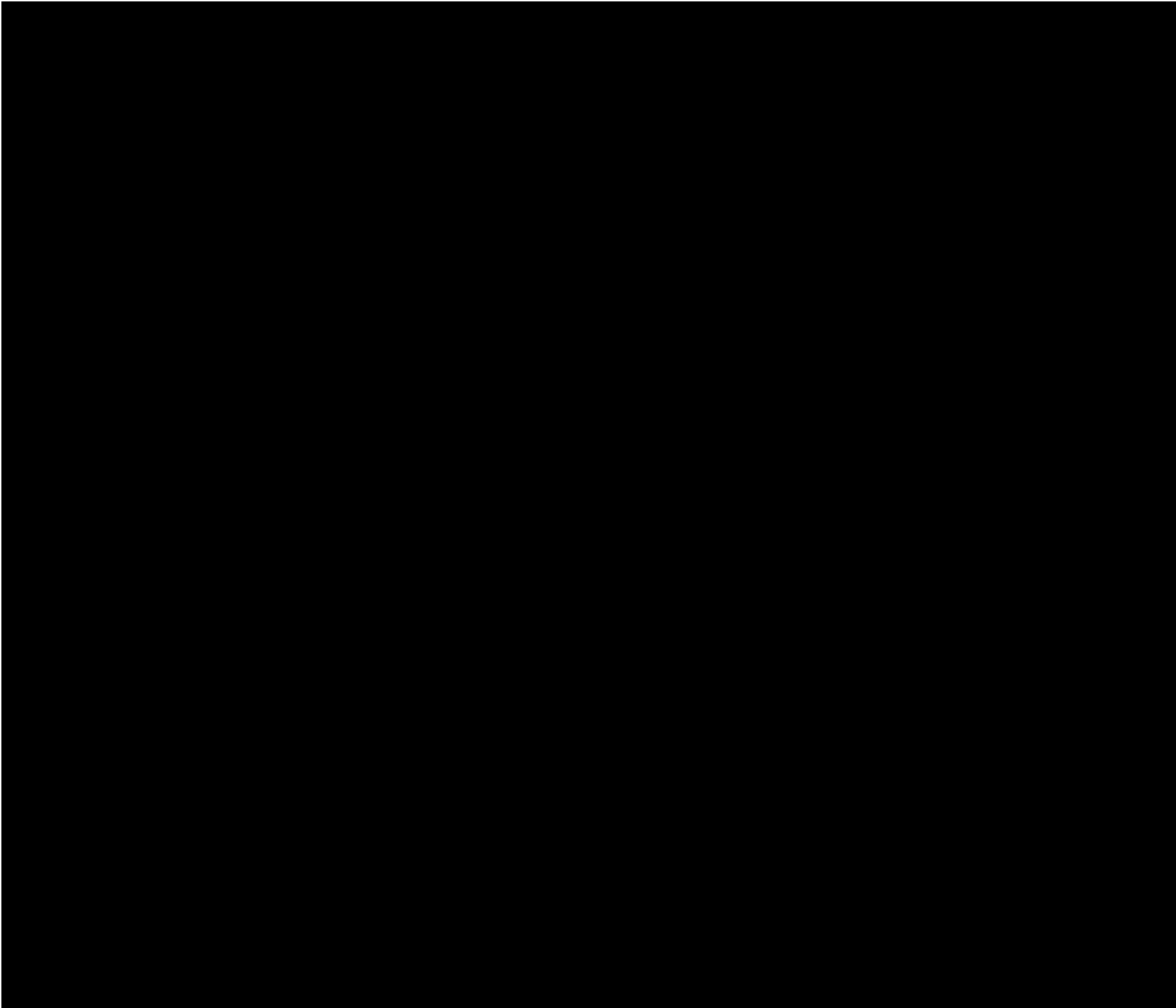
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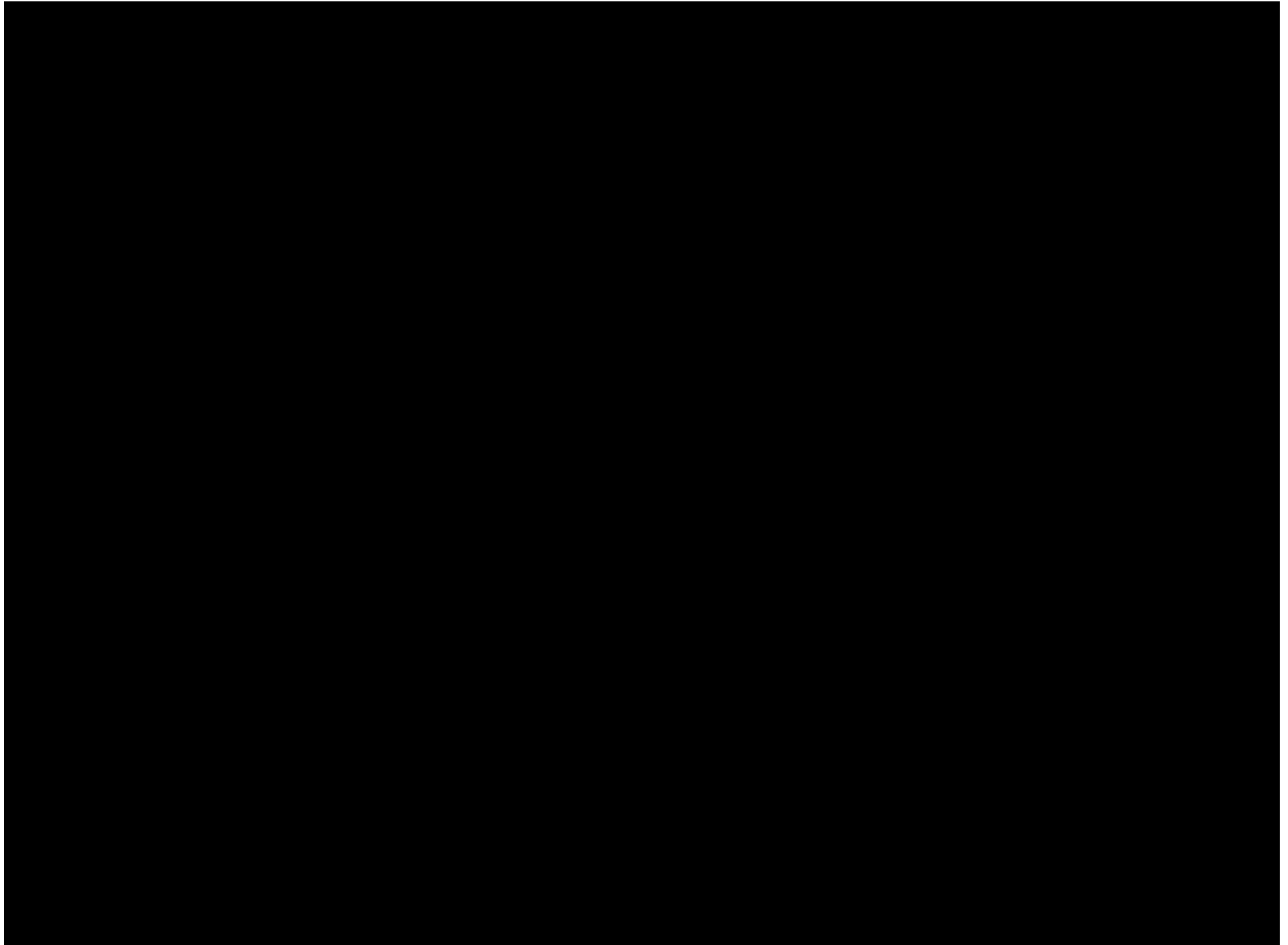
EXHIBIT .1

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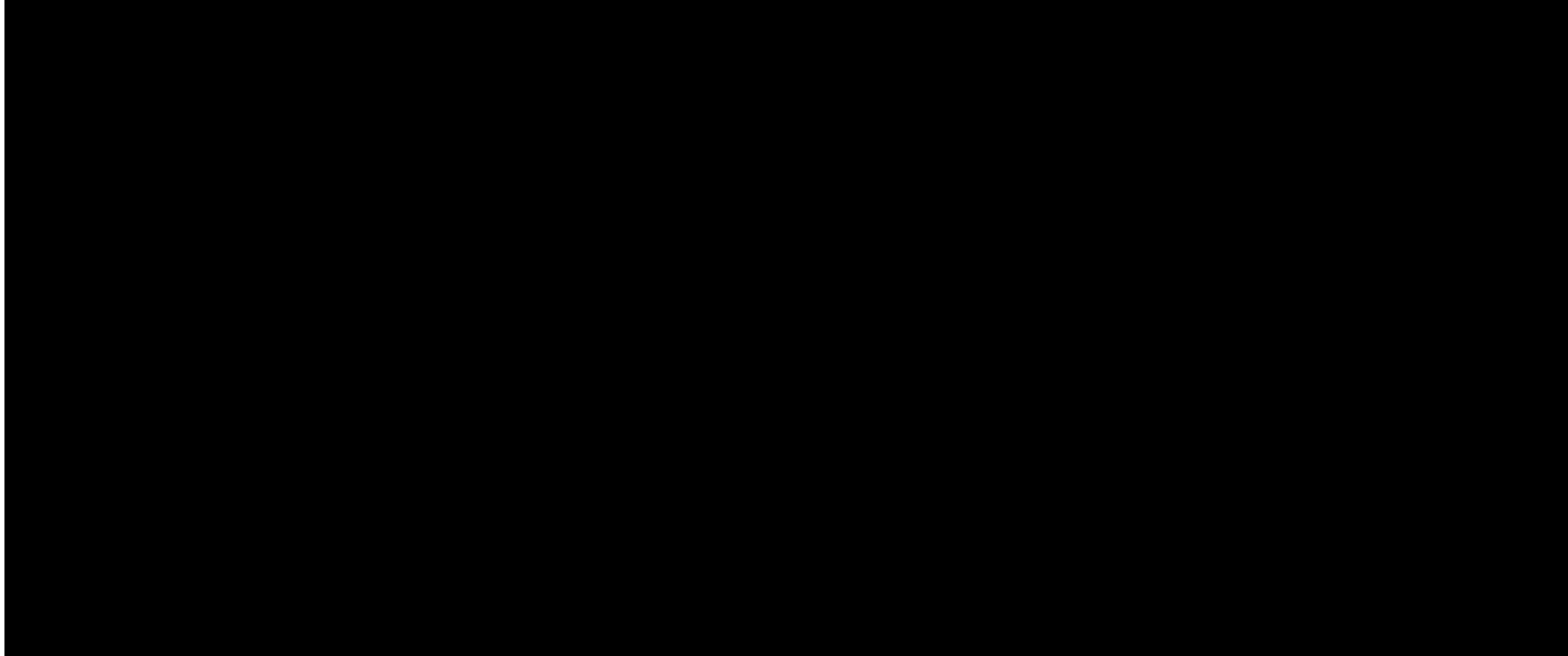
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EXHIBIT .2

Source of Local Switching Rate

OCN	Name	NECA Rate Band	
1405	Alliance Communications Cooperative, Inc.	8	
1640	Golden West Telecommunications Cooperative, Inc. - Armour	8	
1642	Alliance Communications Cooperative, Inc. - Baltic	7	
1647	Cheyenne River Sioux Tribe Telephone Authority	8	
1649	Beresford Municipal Telephone Company	6	
1651	Interstate Telecommunications Cooperative, Inc.	3	
1653	City of Faith Municipal Tel. Co.	8	
1657	Alliance Communications Cooperative, Inc. - Splitrock	2	
1659	Golden West Telecommunications Cooperative, Inc.	3	
1664	James Valley Cooperative Telephone Company	6	
1666	Jefferson Telephone Company	7	
1667	Golden West Telecommunications Cooperative, Inc. - Kadoka	8	
1668	Kennebec Telephone Company	8	
1669	Triotel Communications, Inc. - McCook	8	
1670	Midstate Communications, Inc.	4	
1671	West River Telecommunications Cooperative (Mobridge)	2	
1674	RC Technologies	1	
1676	Santel Communications Cooperative, Inc.	1	
1677	Golden West Telecommunications Cooperative, Inc. - Sioux Valley	5	
1679	Interstate Telecommunications Cooperative, Inc.	3	
1680	Venture Communications Cooperative	1	
1682	Triotel Communications, Inc. - Tri-County	8	
1684	Golden West Telecommunications Cooperative, Inc. - Union	8	
1685	Valley Telecomm Coop. Assn., Inc.	3	
1686	Golden West Telecommunications Cooperative, Inc. - Vivian	4	
1688	Venture Communications Cooperative	8	
1689	West River Cooperative Telephone Company	2	
4413	West River Telecommunications Cooperative	1	
1650	City of Brookings Municipal Telephone Department	*	City of Brookings Municipal Telephone Department FCC No. 2
6125	Northern Valley Communications, LLC	*	Mirrors CenturyLink Operating Companies Tariff F.C.C. No. 11
7010	Long Lines Metro	*	Icore, Inc. Tariff F.C.C. No. 3 Section 17.10 Long Lines
9001	Midstate Telecom, Inc.	*	Mirrors NECA Rate Band 8
682C	Sancom, Inc. DBA Mitchell Telecom	*	Mirrors NECA Rate Band 8
683C	RC Communications, Inc.	*	Mirrors NECA Rate Band 8
907D	SS Telecom, Inc.	*	Mirrors NECA Rate Band 8
ALL OCN's			

* Not participating in NECA Traffic Sensitive Tariff

EXHIBIT .3

DECLARATION UNDER PENALTY OF PERJURY

I, Mark Shlanta, hereby state the following:

1. I am the Chief Executive Officer of South Dakota Network, LLC.
2. I have reviewed the Direct Case of South Dakota Network, LLC, to which this Declaration is attached.
3. I certify under penalty of perjury that I have personal knowledge of the factual statements contained therein, and that said statements are true and correct to the best of my knowledge, information, and belief.

Signed:  _____

Mark Shlanta

Executed this 11th day of December, 2018

Certificate of Service

I hereby certify that a copy of the forgoing **Direct Case of South Dakota Network, LLC**
was sent via electronic mail to the following:

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