BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission, on its own motion, to conduct an investigation on intrastate switched access charge policies and regulation codified in Neb. Rev. Stat. Section 86-140.	) Application No. C-4145/ NUSF-74/ PI-147	
	) ORDER ISSUING PROPOSED ORDER AND NOTICE OF HEARING	
	) Entered: November 3, 2009	

BY THE COMMISSION:

B A C K G R O U N D

On February 24, 2009, the Nebraska Public Service Commission ("Commission"), on its own motion, opened the above-captioned investigation and sought comments from interested parties regarding access charge policies, specifically the appropriate evidentiary standard and minimum criteria required under Neb. Rev. Stat. §86-140 (Reissue of 2008) which governs access rate changes. Notice of the above-captioned docket was published in the Daily Record, Omaha, Nebraska, on February 26, 2009.

The Commission entered an order on February 3, 2009, in Docket C-3945/NUSF-60.02/PI-138 in which Qwest Corporation's proposed access charges were examined by the Commission.[1] In the February 3, 2009, Order, the Commission indicated its intent to open an investigatory docket to "examine the issues raised in [the] proceeding regarding the appropriate evidentiary standard and minimum criteria required under Neb. Rev. Stat. §86-140 to prove a carrier's proposed access rates are fair and reasonable."[2]

In the above-captioned proceeding, the Commission requested that interested parties submit written comments regarding intrastate access rate change proceedings under §86-140 and intrastate access rate policy in general. The Commission provided five proposals and four questions on which comments were requested to be filed on or before April 23, 2009. Written comments were filed by: AT&T Communications of the Midwest, Inc. and TCG of Omaha, Inc. ("AT&T"); Cox Nebraska Telcom, L.L.C. ("Cox"); Citizens Telecommunications Company of Nebraska d/b/a Frontier

[1] *See* Docket C-3945/NUSF-60.02/PI-138, *In the Matter of the Nebraska Public Service Commission to conduct an investigation of Qwest Corporation's Proposed Switched Access Charge Rates* Order (Feb. 3, 2009).
[2] Id. at 13.

Communications of Nebraska ("Frontier"); United Telephone Company of the West d/b/a Embarq ("Embarq"); Qwest Corporation ("Qwest"); Rural Telephone Coalition of Nebraska ("RTCN")[3]; The Rural Independent Companies ("RIC")[4]; Nebraska Telephone Association ("NTA"); Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc. d/b/a Nextel Partners ("Sprint Nextel"); MCI Communications Services, Inc. d/b/a Verizon Business Services ("Verizon"); and Windstream Nebraska, Inc. ("Windstream").

On May 13, 2009, the Hearing Officer entered an order requesting reply comments from interested parties on or before May 27, 2009. This filing date was extended by the Hearing Officer Order to June 10, 2009. Reply comments were filed by AT&T, Cox, Embarq, Qwest, RIC, RTCN, Sprint Nextel and Verizon.

O P I N I O N A N D F I N D I N G S

The Commission has carefully reviewed the Comments and the Reply Comments that have been submitted. In order to focus additional comments to the Commission in the above-captioned proceeding, the Commission is releasing the following Proposed Order for consideration by interested parties.

Proposed Order

The Nebraska Telecommunications Regulation Act[5] grants regulatory authority to the Commission regarding changes to intrastate access charges[6] imposed by telecommunications companies for access to local exchange networks for interexchange service in §86-140. The statute was initially

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[3] RTCN is comprised of: Arapahoe Telephone Company, Benkelman Telephone Co., Inc., Cozad Telephone Company, Diller Telephone Company, Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Company, Mainstay Communications, Plainview Telephone Company, Southeast Nebraska Telephone Co., Wauneta Telephone Company and WesTel Systems f/k/a Hooper Telephone Company.

[4] RIC is comprised of: Arlington Telephone Company, Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco Inc., Consolidated Telcom, Inc., Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc, Hershey Cooperative Telephone Company, K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telecom, Inc., and Three River Telco.

[5] See Neb. Rev. Stat. §86-101 et seq.

[6] For purposes of this order, the terms, "access charges" and "access rates" are synonymous meaning the charges imposed by a local exchange carrier for access by an interexchange carrier to its network.

enacted by the Nebraska Legislature in 1986,[7] and was subsequently amended and recodified.[8] Section 86-140 currently reads:

> (1) Access charges imposed by telecommunications companies for access to a local exchange network for interexchange service shall be negotiated by the telecommunications companies involved. Any affected telecommunications company may apply for review of such charges by the Commission, or the Commission may make a motion to review such charges. Upon such application or motion and unless otherwise agreed to by all parties thereto, the Commission shall, upon proper notice, hold and complete a hearing thereon within ninety days of the filing. The Commission may, within sixty days after the close of the hearing, enter an order setting access charges which are fair and reasonable. The Commission shall set an access charge structure for each local exchange carrier but may order discounts where there is not available access of equal type and quality for all interexchange carriers, except that the Commission shall not order access charges which would cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs, as determined by the Commission based upon evidence received at hearing, incurred or which will be incurred by the local exchange carrier in providing such access services. Any actions taken pursuant to this subsection shall be substantially consistent with the federal act and federal actions taken under its authority.
> (2) Reductions made to access charges pursuant to subsection (1) of this section shall be passed on to the customers of interexchange service carriers in Nebraska whose payment of charges has been reduced. The Commission shall have the power and authority to (a) ensure that any access charge reductions made pursuant to subsection (1) of this section are passed on in a manner that is fair and reasonable and (b) review actions taken by any telecommunications company to ensure that this subsection is carried out.
> (3) For purposes of this section, access charges means the charges paid by telecommunications companies to

[7] Laws 1986, LB 835, §14.
[8] Most notably by Laws 1999, LB 514.

local exchange carriers in order to originate and terminate calls using local exchange facilities.

Negotiation Requirement

The first sentence of §86-140(1) expressly provides that the intrastate access charges imposed by a telecommunications company for access to its local exchange network for interexchange service "shall be negotiated by the telecommunications companies involved." Local exchange carriers operating in Nebraska that provide intrastate access services must file tariffs with this Commission setting forth the rates, terms and conditions under which intrastate access service is provided.

The Commission finds that the inclusion of a negotiation requirement in §86-140 indicates the Legislature's intent that reviews under the provisions of §86-140 be necessarily premised upon submission of a tariff to the Commission whereby a carrier that provides access service implements a change in its existing intrastate access rates. Absent a carrier filing a tariff seeking to change its existing intrastate access rates, there is nothing to be negotiated by the affected carriers and the negotiation requirement would be rendered meaningless.[9]

Upon the Commission's receipt of a tariff filing by a carrier seeking to change its existing intrastate access rates, and to ensure that all potentially affected carriers are made aware of such filing, the tariff provision will be automatically suspended by the Commission.[10] The Commission shall then publish notice of such filing pursuant to the Commission's Rules of Procedure.[11]

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[9] The Commission notes that the provisions of §86-140(1) that allow the Commission on its own motion to review access charges, added to this statute by the Legislature in Laws 1999, LB 514, §2, are not reasonably interpreted to be premised on prior negotiation by affected telecommunications companies regarding the access charges in question. The Commission retains the authority to review access charges of telecommunications companies that are subject to the provisions of §86-140(1) at any time.

[10] The Commission recognizes that Neb. Rev. Stat. §86-144 (Reissue of 2008) provides that telecommunications companies shall file rate lists which, except for basic local exchange rates, "shall be effective after ten days' notice to the commission." Notwithstanding this directive, §86-140 sets forth separate, unique provisions governing establishment of access charges, including a negotiation requirement. Therefore, tariff filings that contain a change in a carrier's intrastate access rates shall be automatically suspended pending compliance with the procedures set forth in this Proposed Order.

[11] *See* Neb. Admin. Code, Title 291, Ch. 1 §011 (1992).

Any interested telecommunications carrier desiring to negotiate the proposed access rates shall notify the carrier proposing the change in writing within thirty days (30) following publication of notice. A copy of the written notification shall also be submitted to the Director of the Communications Department no later than the same day such written notification was sent to the carrier proposing a change to its access rates.

If no requests for negotiations are received and the Commission does not initiate a review of the proposed charges on its own motion, the suspended tariff containing the access rate changes shall become effective and shall be deemed approved by the Commission immediately following the expiration of the thirty (30) days following publication.

In the event the carrier proposing a change in its intrastate access rates receives written notice from an affected carrier evidencing that carrier's desire to negotiate in good faith the proposed access rates, representatives of the carrier proposing to change its access rates shall confer with representatives of each of the affected carriers requesting negotiations. Such negotiations shall continue until (a) such time that the parties reach agreement on the access rates in question or (b) sixty (60) days following Commission publication of notice that such carrier has filed a proposed change to its intrastate access tariff, whichever is earlier.

The carrier that initiated the change in its access rates shall report to the Director of the Communications Department in writing the outcome of the negotiations. In the event the negotiations were successful and resulted in a modification of the proposed access rate tariff, the written notice shall include a proposed amended tariff with the negotiated changes. The carrier shall also send a copy of the notice and amended tariff provisions to those carriers that participated in the negotiations.

Access Rate Change Reviews

Any carrier that participated in the negotiations that remains dissatisfied with the proposed access rates may apply for review of such proposed intrastate access rates by the Commission. Such application shall be in writing, shall describe with reasonable particularity the relief sought by the carrier seeking review and the facts that support granting such relief and shall be filed with the Commission within (a) thirty (30) days from the filing of the written report on the outcome of the negotiations with the Communications Department or (b)

ninety (90) days following publication of notice of the filing of a tariff proposing change in a carrier's access rates by the Commission, whichever is earlier. A copy of the application shall be served upon the carrier proposing to change its access rates and all other carriers that participated in the negotiations of such rates, such service to be in accordance with the Commission's Rules of Procedure.[12]

The carrier seeking to change its intrastate access rates shall file a response to such application within twenty (20) days following service of the application. Such response shall include:

1) Rate of Return information
2) Basic Local Exchange Service Revenues
3) Access Service Revenues
4) Federal Universal Service Fund (FUSF) and Nebraska Universal Service Fund (NUSF) support received
5) Demand by rate element
6) Cost of providing supported services (basic local exchange and access services)

All information provided shall be by year for the immediately preceding three years. Requiring three years worth of data will present a more normalized picture of the carrier's operations and significantly reduce the effect of any irregular or anomalous years affecting demand, costs and/or revenues.

Basic Local Rates

In the Commission's review of changes to access rates, basic local service revenues shall be imputed at current benchmark rates, $17.95 per month in urban areas and $19.95 per month in rural areas.[13] The Commission has indicated that a telecommunications company should first seek additional revenue by increasing local rates in both its urban and rural service areas to benchmark rates prior to increasing its intrastate access rates to generate additional revenue.[14] Imputing basic local service revenues at benchmark rates will allow the Commission to determine whether raising basic local service rates alone would allow a telecommunications company sufficient

[12] Id.
[13] *See* Docket NUSF-50, *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to the universal service fund mechanism established in NUSF-26*, (December 19, 2006).
[14] *See* Docket C-3945/NUSF-60.02/PI-138, *In the Matter of the Nebraska Public Service Commission to conduct an investigation of Qwest Corporation's Proposed Switched Access Charge Rates* Order (Feb. 3, 2009).

cost recovery, or if increases to a carrier's intrastate access rates are fair and reasonable.[15]

Rate of Return

The NUSF-EARN Form uses a 12% rate-of-return (ROR) as the level at which NUSF support is subject to adjustment due to carrier overearnings. However, in Docket NUSF-7, the Commission has declared that no carrier is guaranteed a 12% ROR and a 12% ROR is not a targeted ROR.[16] The Commission instead found that 12% is not a floor for earnings and established a 10% ROR as the cap for any carriers seeking additional NUSF support. The Commission shall utilize a 10% ROR for any carrier seeking an increase in access rates consistent with the rate applied by the Commission in the NUSF-7 proceeding for carriers seeking increased NUSF support. The 10% ROR shall be used in the analysis of a proposed increase in access rates. The results of any such analysis shall be a guideline for the Commission's fair and reasonable determination.

Evidentiary Requirements For a §86-140 Fair and Reasonable Analysis

Any telecommunications company seeking to implement a change in its intrastate access rates shall have three options to establish that its proposed access charges are fair and reasonable as required by Section 86-140(1). The three options are described below.

Option 1: Cost Study

A carrier seeking to change its intrastate access rates for which Commission review has been requested may submit a cost study to establish the fair and reasonable nature of the requested access charges. While potentially cost-prohibitive in some situations, a carrier may have cause to perform a cost study for reasons other than to support its proposed access rates. Further, a carrier might determine the expense of preparing a cost study is reasonable and necessary to support a review of its proposed access rates by the Commission. Cost study data that establishes the carrier's cost of access

[15] The imputation of benchmark rates discussion is premised upon the assumption that a carrier has filed for an increase in its intrastate access rates.

[16] *See Docket* NUSF-7, *In the Matter of the Commission, on its own motion, seeking to review and approve requests for modification of the funding calculation for the Nebraska Universal Service Fund.* Waiver Requests Granted in Part and Denied In Part (September 26, 2000).

consistent with the proposed access rates would be sufficient to satisfy the fair and reasonable requirements of Section 86-140.

Option 2: NUSF-EARN Form Data

A carrier desiring to implement a change in its access rates may utilize data similar to the earnings data reported on a NUSF-EARN Form, on a supported services basis, to accompany such carrier's response to an application for Commission review of the proposed access rates. The earnings data would be used as a tool to assist the Commission in ascertaining the costs incurred by the carrier in providing access services.

Option 2 provides certain criteria for carriers that may consider its use. First, Incumbent Local Exchange Carriers ("ILECs") receiving NUSF support currently file similar information on their annual NUSF-EARN Forms. The cost/earning information has already been gathered or is available with some minor modifications, thereby significantly reducing the financial burden for the carrier seeking a change in access rates.

Second, a telecommunications company's network is used to provide both basic local exchange and access services. On a supported services basis, NUSF-EARN Form data takes into account the primary revenue sources used to fund a telecommunication carrier's network, namely basic local exchange and access services revenue, as well as universal service support, both state and federal, received by the carrier. In accordance with existing Commission policy regarding administration of the NUSF, all sources of network cost recovery will be examined in determining whether the carrier's proposed access rates are fair and reasonable. Using the NUSF-EARN Form will help to maintain consistency between the revenues used to analyze a proposed change in intrastate access rates and the current NUSF high-cost support mechanism. Further, examining all sources of supported services revenue collectively will not require the Commission to allocate joint and common costs between basic local service and access service.

The Commission wishes to clarify that while data similar to that reported on an NUSF-EARN Form could be used by a carrier in the Commission's review of a carrier's proposed access rates, the requirements, format, reporting period, deadlines, and the like for those carriers required to submit an NUSF-EARN Form will not in any way be affected. Proceedings reviewing proposed access rates will be considered separately and distinctly from the filing of a carrier's NUSF-EARN Form. Carriers must continue to file NUSF-EARN Forms as required by the Commission

and the Nebraska Telecommunications Infrastructure and Public Safety ("NTIPS") Department for purposes of receiving NUSF high-cost program support. Further, the analysis of earnings data as described in connection with Option 2 will only occur in the event that a Commission review of proposed access rates is initiated.

Supported Services

In the event that the carrier proposing to change its access rates does not maintain its books and records on a supported services basis, the following formulas and factors shall be applied to derive such company's cost of supported services. The Commission will calculate the carrier's three year average; Net Income Before Taxes, utilizing a Cost of Capital input of 10% (NIBT(10%)); Total Expenses (TotExp); and Total Revenues (TotRev). Once calculated, based on a carrier's reporting basis, the appropriate formulas and factors will be applied to derive a carrier's support services basis proxy results. The established factors applied are based on existing Nebraska data reported on a state or supported services basis. The formulas are as follows:

State Basis:

$$NIBT(10\%)_{SS} = NIBT(10\%)_{NE} * NIBTFactor_{SS}$$
$$TotExp_{SS} = TotExp_{NE} * TotExpFactor_{SS}$$
$$TotRev_{SS} = TotRev_{NE} * TotRevFactor_{SS}$$

Total Company Basis:

$$NIBT(10\%)_{SS} = (NIBT(10\%)_{TC} * NIBTFactor_{NE}) * NIBTFactor_{SS}$$
$$TotExp_{SS} = (TotExp_{TC} * TotExpFactor_{NE}) * TotExpFactor_{SS}$$
$$TotRev_{SS} = (TotRev_{TC} * TotRevFactor_{NE}) * TotRevFactor_{SS}$$

The factor values are listed in the table below:

	NIBT(10%)	TotExp	TotRev
$Factor_{NE}$	0.6569	0.6250	0.5653
$Factor_{SS}$	0.8691	0.7592	0.6927

Option 3 will keep potential costs reasonable for those carriers with limited resources that seek to implement an access rates change. Only those carriers reporting data on a total company or state basis are eligible to utilize the foregoing formula calculation.

Access Rate Complaints

As stated above, the Commission finds that proceedings reviewing access rates initiated pursuant to §86-140 are only contemplated by the statute in the event that a carrier seeks to establish initial intrastate access charges or change its intrastate access rates. Challenges to a carrier's existing intrastate access rates are not properly brought under the provisions of §86-140. The Commission found in Docket C-1628/NUSF that a Competitive Local Exchange Carrier's ("CLEC") access charges, in aggregate, must be reasonably comparable to the underlying ILEC in its service territory, absent a demonstration of costs.[17] Therefore, the correct procedural path for carriers desiring to challenge the existing intrastate access rates of a CLEC is to initiate a Formal Complaint against the CLEC alleging violation of the Commission's order in Docket C-1628. Considerable weight will be given to carriers with intrastate access rates established pursuant to the procedures described herein. A review of existing ILEC access charges may only be initiated upon the Commission's own motion.[18]

Reasonably Comparable

In NUSF-50, the Commission defined "reasonably comparable" in describing the difference between the rural and urban NUSF benchmarks for local rates.[19] The difference between the $17.95 per month in urban areas and $19.95 per month in rural areas is approximately 10%. The Commission concludes that use of up to a 10% differential between the CLEC and underlying ILEC access rates as a benchmark indicator of reasonably comparable for purposes of performing an analysis of intrastate access rates is appropriate. However, the 10% differential is not a bright line rule, but an initial starting point for the Commission's analysis. The Commission may also consider the environment surrounding the challenged access rates and what the ILECs access rates were at the time in which the CLEC's access rates were filed.

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[17] *See* Docket C-1628/NUSF, *In the Matter of the Commission, on its own motion, seeking to conduct an investigation into intrastate switched access reform and intrastate universal service fund.* Progression Order #15 (February 21, 2001), at ¶9.

[18] The Commission makes this distinction for ILEC access charges based on the fact that it has formally reviewed and approved ILEC access charges as part of the Docket C-1628/NUSF transition plan process. Additionally, in the case of Qwest, the Commission approved its current access charges in a formal proceeding.

[19] *See* Docket NUSF-50, *In the Matter of the Nebraska Public Service Commission, on its own motion, to make adjustments to the universal service fund mechanism established in NUSF-26*, (December 19, 2006), at ¶32.

Access Complaint Evidentiary Requirements

When a Formal Complaint is filed by an affected carrier alleging the intrastate access rates of a CLEC are not reasonably comparable to the underlying ILEC rates in violation of the Commission Order, the Complaint shall be in writing and in accordance with the Commission's Rules of Procedure. Upon initiation of the Complaint, the following information for a minimum of three years, by year, shall be submitted by the CLEC in its Answer to the Formal Complaint.

1) Rate elements contained within the carrier's access rate structure
2) Demand by rate element
3) Total access revenue booked by the carrier.

The three years worth of data will present a more normalized picture of the CLEC's demand and access revenues.

Carriers whose access rate structure in the aggregate is less than 110% of the underlying ILEC's access rate structure would be presumed to be fair and reasonable. Carriers whose access rate structure is greater than 110% of the underlying ILEC's access rate structure would have an opportunity to present extenuating circumstances or explanations for Commission consideration in determining whether rates that put the carrier's access rate structure above 110% of the ILEC's is justified and meets the reasonably comparable provisions of Docket C-1628.

A CLEC serving geographic areas with more than one underlying ILEC would use a weighted average of the underlying ILECs' access rates to determine unified intrastate access rates. In this case, demand and revenue information, as required above, may also be required by service area.

Notice of Hearing

A Hearing on the above Proposed Order will be held on Wednesday, **December 9, 2009**, at 9:30 a.m. in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska. The hearing will be conducted in legislative format, allowing input from all interested parties. After the transcript of the hearing is prepared the Commission will seek written post-hearing comments from interested parties, due thirty (30) days following the release of the hearing transcript. Reply comments will be allowed and due fourteen (14) days

following the submission of the initial post-hearing comments. The Commission will then issue a final order at the earliest feasible date.

If auxiliary aids or reasonable accommodations are needed for attendance at the meeting, please call the Commission at (402) 471-3101. For people with hearing/speech impairments, please call the Commission at (402) 471-0213 (TDD) or the Nebraska Relay System at (800) 833-7352 (TDD) or (800) 833-0920 (Voice). Advance notice of at least seven days is needed when requesting an interpreter.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a hearing on the above Proposed Order will be held on **December 9, 2009**, at 9:30 a.m. in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

IT IS FURTHER ORDERED that interested parties shall file post-hearing comments and reply comments as established herein.

MADE AND ENTERED at Lincoln, Nebraska, this 3rd day of November, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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MADE AND ENTERED at Lincoln, Nebraska, this 3rd day of November, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

//s// Frank E. Landis