

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal ) Application No. FC-1332  
Complaint of Orbitcom, Inc., )  
Sioux Falls, South Dakota, )  
seeking a determination that )  
AT&T Communications of the ) ORDER ISSUING FINDINGS ON  
Midwest, Inc., Denver, Colorado, ) ORAL ARGUMENT ISSUES  
failed to pay intrastate access )  
charges billed by Orbitcom in )  
accordance with Orbitcom's )  
intrastate switched access )  
tariff. )

In the Matter of the Formal ) Application No. FC-1335  
Complaint of AT&T Communications )  
of the Midwest, Inc., Denver, )  
Colorado, seeking a )  
determination that OrbitCom, )  
Inc., Sioux Falls, South Dakota, )  
failed to negotiate Intrastate )  
Access Charges and that )  
OrbitCom's tariffed Intrastate )  
Switched Access Rates are unfair )  
and unreasonable. ) Entered: September 20, 2011

BY THE COMMISSION:

On February 27, 2009, a Formal Complaint was filed with the Nebraska Public Service Commission ("Commission") by OrbitCom, Inc., ("OrbitCom") of Sioux Falls, South Dakota, seeking a determination that AT&T Communications of the Midwest, Inc., ("AT&T") Denver, Colorado, failed to pay for intrastate access services provided by OrbitCom and billed to AT&T in accordance with OrbitCom's Nebraska Switched Access Services Tariff ("Nebraska Tariff"). The Formal Complaint was docketed by the Commission as Application No. FC-1332.

On April 30, 2009, AT&T filed the above-captioned Formal Complaint against OrbitCom with the Commission, which was docketed as Application No. FC-1335, alleging OrbitCom's intrastate access rates contained in its Nebraska Tariff were not negotiated and are not fair and reasonable pursuant to Neb. Rev. Stat. § 86-140.<sup>1</sup> AT&T further requested a Commission review of OrbitCom's intrastate access rates under § 86-140.

On May 1, 2009, AT&T filed a Motion to Consolidate the above-captioned proceedings pursuant to Commission Rules of

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<sup>1</sup> Neb. Rev. Stat. § 86-140 (Reissue of 2008).

Procedure. The motion was granted by the Commission in an order issued on May 12, 2009.

A Hearing was held on September 16, 2009. The Commission issued an order with its findings and conclusions on November 10, 2009. In the order the Commission found AT&T's attempt to initiate a review of OrbitCom's intrastate access rates pursuant to *Neb. Rev. Stat. § 86-140* six plus years after the tariff was filed and the rate effective in Nebraska, untimely and dismissed AT&T's application for an Commission review pursuant to *Neb. Rev. Stat. § 86-140* of OrbitCom's intrastate access rate in its Nebraska Tariff.<sup>2</sup>

On December 10, 2010, AT&T filed an appeal of the Commission's decision with the District Court of Lancaster County. On February 24, 2011, the District Court issued an order on the appeal, reversing the Commission's findings in the above-captioned docket and remanding the proceeding back to the Commission to conduct a review of OrbitCom's access rates under *Neb. Rev. Stat. § 86-140*.

On March 25, 2011, OrbitCom filed an appeal of the District Court's decisions with the Nebraska Court of Appeals. Subsequently, on May 25, 2011, OrbitCom filed a motion to withdraw its appeal with the Court of Appeals. The Court of Appeals granted OrbitCom's motion and dismissed the appeal on June 13, 2011.

Therefore, pursuant to the District Court's February 24, 2011 order, the above-captioned matter was remanded to the Commission for further proceedings.

Parties had an initial planning conference on August 25, 2011, at 10:00 a.m. in the Commission Niobrara Conference Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska. At the conference the following legal questions were raised:

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<sup>2</sup> See Application No. FC-1332 & FC-1335, *In the Matter of the Formal Complaint of Orbitcom, Inc., Sioux Falls, South Dakota, seeking a determination that AT&T Communications of the Midwest, Inc., Denver, Colorado, failed to pay intrastate access charges billed by Orbitcom in accordance with Orbitcom's intrastate switched access tariff, and, In the Matter of the Formal Complaint of AT&T Communications of the Midwest, Inc., Denver, Colorado, seeking a determination that OrbitCom, Inc., Sioux Falls, South Dakota, failed to negotiate Intrastate Access Charges and that OrbitCom's tariffed Intrastate Switched Access Rates are unfair and unreasonable*, Order (November 10, 2009) at P. 9.

- 1) The scope of AT&T's appeal to the District Court filed on December 10, 2010, including whether the Commission prior to any further proceedings should direct AT&T to pay OrbitCom the outstanding balance for access services billed pursuant to OrbitCom's intrastate switched access tariff;
- 2) The scope of the remand ordered by the District Court in its order of February 24, 2011, including whether an evidentiary proceeding before the Commission is necessary or desirable; and
- 3) In the event the Commission determines an evidentiary proceeding is required pursuant to the February 24, 2011 remand order from the District Court, the structure for such review within the procedural framework established by the Commission's order in Docket C-4145/NUSF-74/PI-147.

The Hearing Officer determined that briefs on these issues would be necessary and full Commission participation required in making a determination on the issues. AT&T requested an opportunity to present oral argument to the Commission on the issues to be briefed.

The Hearing Officer issued an order on August 29, 2011, setting a deadline to submit briefs on the issues outlined above of September 7, 2011. Oral arguments were held before the Commission on September 14, 2011, in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

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

### Scope of AT&T Appeal

The Formal Complaints, Docket FC-1332 and FC-1335 were consolidated by the Hearing Officer in an order issued on May 12, 2009. In that order, the Hearing Officer found the two dockets substantially similar both legally and factually to grant consolidation of the two complaints.<sup>3</sup>

On November 10, 2009, the Commission issued an order on the consolidated Docket FC-1332 and FC-1335. Only one order was entered by the Commission addressing all matters raised in the consolidated proceeding.

On December 10, 2009, AT&T filed a Petition for Review of the Commission's order entered on November 10, 2009, which was

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<sup>3</sup> *Id.* Order Granting Motion to Consolidate, (May 12, 2009).

entered in the consolidated proceeding of Docket FC-1332 and FC-1335.

OrbitCom argues AT&T did not appeal the FC-1332 portion of the proceeding, seeking to make a distinction between the two complaints that were procedurally consolidated. OrbitCom argues AT&T failed to specifically assign or argue as error the portion of the Commission's order in which we ordered AT&T to pay OrbitCom for access charges billed as of April 2008. OrbitCom requests the Commission immediately enter an order directing AT&T to pay the outstanding balance to OrbitCom.

AT&T responds that the defenses it offered to the payment OrbitCom sought under its complaint, Docket FC-1332, which the Commission ultimately did not adopt, were assigned as error in its Petition for Review to the District Court. Thus, AT&T did appeal the portion of the Commission's order directing payment by AT&T to OrbitCom.

We find AT&T's appeal included the entire consolidated docket. AT&T's Petition for Review clearly stated it sought District Court review of both FC-1332 and FC-1335.<sup>4</sup> Additionally, the District Court's order reversed and remanded the Commission's November 10, 2009 order in its entirety. The District Court did not reverse in part or modify in part. Neither did the District Court order payment by AT&T if indeed the order did not reverse the Commission's finding in regard to the payment by AT&T to OrbitCom. We find AT&T appealed both FC-1332 and FC-1335 and the entire order of the Commission was reversed and remanded, including the portion of the order directing payment by AT&T to OrbitCom for outstanding access charges. Finally, OrbitCom's request we issue an interim order directing immediate payment by AT&T to OrbitCom for access services is denied.

#### Scope of District Court Remand Order

Next the parties disagree over the scope of the District Court's Order reversing and remanding the proceeding back to the Commission. OrbitCom argues no further evidentiary proceeding is necessary as the Commission has already reviewed OrbitCom's access rates pursuant to §86-140. And even if an §86-140 review wasn't conducted in the first proceeding, sufficient evidence is contained on the record for the Commission to make a

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<sup>4</sup> Petition For Review of Contested Case Decision by the Nebraska Public Service Commission, Docket C109-4787, (December 10, 2009).

reasonableness determination as required by §86-140. AT&T argues the Commission must conduct a hearing.

The Commission is bound by the specific directions mandated to it by an appellate court and can do nothing but obey the mandate.<sup>5</sup> The District Court stated in the February 24, 2011 order, "the decision of the Commission dated November 10, 2009, is reversed and the matter remanded to the Commission for a review of OrbitCom's charges for interexchange service pursuant to §86-140."<sup>6</sup> The Commission finds the District Court order clear and unambiguous.

*Neb. Rev. Stat. § 86-140, states,*

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.<sup>7</sup>

Clearly, the statute contemplates an evidentiary hearing at which the Commission will receive revenue and cost information regarding a carrier's provisioning of access services. The District Court ordered the Commission to conduct a review pursuant to §86-140. Such reviews under §86-140 are evidentiary hearings.

OrbitCom argues the first hearing is sufficient and no further evidentiary proceeding is necessary. OrbitCom points to the caption assigned by the Commission in FC-1335 and argues the Commission has already conducted an §86-140 review in the first proceeding. We disagree. In our November 10, 2009 order, the Commission declined to conduct an §86-140 review as sought by AT&T and found instead,

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<sup>5</sup> *Anderson By and Through Anderson/Couvillion v. Nebraska Dept. of Social Services*, 253 Neb. 813 (1998).

<sup>6</sup> *AT&T of the Midwest v Nebraska Public Service Commission, et al*, Docket C109-4787, Order (February 24, 2011) at P.5.

<sup>7</sup> *Neb. Rev. Stat. § 86-140(1)*(Reissue of 2008) emphasis added.

Therefore, the Commission finds that AT&T's complaint alleging violations of § 86-140 and its request for the Commission to review OrbitCom's access charges and find them unfair and unreasonable under § 86-140 are untimely and not properly brought under §86-140 and should therefore be dismissed.<sup>8</sup>

Next OrbitCom argues a second evidentiary proceeding is nonetheless unnecessary as the record contains sufficient evidence for the Commission to conduct the ordered review. OrbitCom specifically refers us to AT&T's witness Lawrence Bax's testimony and financial information submitted by OrbitCom consisting of the company's 2008 Profit and Loss Statement and its 2008 Nebraska Income Tax Return.<sup>9</sup>

Regarding Mr. Bax's testimony, he noted in his testimony at the hearing that he did not have access to OrbitCom's revenues and demands to develop his analysis and therefore his testimony regarding OrbitCom's access rates were derived from assumptions.<sup>10</sup>

Additionally, in the November 10, 2009 Order we found even if the Commission had wanted to conduct an analysis of OrbitCom's access rates we had insufficient evidence upon which to do so.<sup>11</sup> That finding was made with the tax return and profit and loss statement from 2008 in the record.

The Commission finds it has not previously conducted an §86-140 review in this proceeding. Further, we find, as before, there is insufficient evidence currently in the record for the Commission to conduct a review of OrbitCom's access rates as directed pursuant to §86-140. Evidence regarding the revenues and costs of OrbitCom in provisioning access services will need to be added to the record before the Commission can conduct a review and make a finding regarding reasonableness. We were directed by the District Court's Order to conduct such a review, therefore, we find an evidentiary hearing is required.

Finally, regarding OrbitCom's argument the remand order of the District Court was only for a review of what OrbitCom billed AT&T. We see nothing in the District Court's order limiting our

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<sup>8</sup> *Supra* Application Nos. FC-1332/FC-1335, Order (November 10, 2009) at P.9.

<sup>9</sup> *Supra* Application Nos. FC-1332/FC-1335, OrbitCom's Brief on Remand Issues, (September 7, 2011) at P.8, footnotes 19 and 20.

<sup>10</sup> *Id.* Hearing Transcript, at P. 123:12-20.

<sup>11</sup> *Supra* Application No. FC-1332/FC-1335, Order (November 10, 2009) at P.10.

review to the charges billed to AT&T. We are instead ordered to conduct a review of "OrbitCom's charges for interexchange services pursuant to §86-140."<sup>12</sup> We find the §86-140 review ordered by the District Court is not limited to what OrbitCom billed AT&T, but is to review OrbitCom's access rates, which are contained in its Nebraska access tariff.

#### Structure of § 86-140 Review Proceeding

OrbitCom argues the Commission's findings in Docket C-4145/NUSF-74/PI-147 has no bearing on any remand proceeding.<sup>13</sup> OrbitCom points out the Commission's order in Docket C-4145 was entered after the Commission's November 10, 2009 order in this matter and therefore is not applicable. Additionally, OrbitCom argues the current docket is a formal complaint proceeding in which the complainant has the burden to prove its allegations. Therefore, the burden is on AT&T to provide evidence to prove OrbitCom's access rates are unreasonable.

AT&T urges the Commission to utilize its procedures outlined in Docket C-4145 for an §86-140 review and to allow interested access customers of OrbitCom to have meaningful participation in the proceeding.<sup>14</sup> AT&T argues OrbitCom bears the burden to prove its access rates and charges are fair and reasonable.

While it is true our order in Docket C-4145 was entered subsequent to our findings in the above-captioned docket, the investigation encompassed in the C-4145 proceeding was a direct result of the Commission findings in another docket in which a §86-140 review was sought. In Docket C-3945/NUSF-60.02/PI-138, MCI Communications Services Inc. d/b/a Verizon Business Services filed a protest and a request for review by the Commission of Qwest Corporation's<sup>15</sup> proposed access rate increase pursuant to §86-140.<sup>16</sup> Significant time was devoted during that proceeding to arguing and interpreting §86-140. Ultimately the Commission denied Qwest's proposed access rate increase stating,

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<sup>12</sup> *Id.*

<sup>13</sup> Docket C-4145/NUSF-74/PI-147, *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*, Order, (April 20, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> Qwest Corporation was subsequently acquired by CenturyLink, and is now CenturyLink QC d/b/a Qwest Communications.

<sup>16</sup> See Application No. 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*, (filed July 16, 2008).

We therefore find that Qwest failed to comply with the requirements of Neb. Rev. Stat. §86-140(1)(Cum. Supp. 2006), by not including any form of a cost analysis in this proceeding. Consequently, we have insufficient evidence upon which to make a finding as to whether or not Qwest's proposed access rate is fair and reasonable.<sup>17</sup>

The Commission in the same order also stated, "We find that some minimal level of financial analysis, including a showing [of] revenues and costs, needs to be provided by any applicant seeking access rate increases under §86-140."<sup>18</sup> The Commission then called for an investigation into what those minimum levels of evidence required to be provided under an §86-140 review should look like. That investigation called for by the Commission became Docket C-4145/NUSF-74/PI-147.<sup>19</sup>

Even though the current proceedings were filed as formal complaints that have clear rules regarding the burdens of evidence on the complainant and respondent, the District Court ordered the Commission to do a review of OrbitCom's access rates pursuant to §86-140. In order for the Commission to conduct such a review as contemplated under that statute, certain financial information is necessary from OrbitCom. Any analysis conducted by the Commission without such information would be speculation and assumption. We therefore find OrbitCom must provide financial evidence as to its costs and revenues for providing access services at an evidentiary hearing to enable the Commission to conduct a review pursuant to § 86-140.

In Docket C-4145 the Commission provided a road map to carriers in Nebraska as to the type of evidence and information minimally necessary to be provided to the Commission to conduct a fair and reasonable analysis in a §86-140 review.<sup>20</sup> We urge OrbitCom to avail itself of the Commission's guidance and findings in that docket and file financial evidence in compliance with Docket C-4145 to avoid wasting time and resources in a review proceeding with insufficient evidence.

The Commission does agree with OrbitCom that this current proceeding is unique. AT&T urges us to expand the review

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<sup>17</sup> *Id.* Order (February 3, 2009) at P.13.

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

<sup>19</sup> *Id.* at 13.

<sup>20</sup> *Supra* Docket C-4145/NUSF-74/PI-147, Order (April 20, 2010) at P.9.



proceeding ordered by the District Court to include the participation of other interested parties. We find adding additional parties at this stage in the proceeding is inappropriate. The opportunity for interested parties to be involved in the above-captioned proceeding was when AT&T and OrbitCom initially filed their complaints. No parties requested formal or informal intervention in the proceeding at that time. Now, after an order from the District Court on an appeal remanding the docket for further proceedings at the Commission, we find no new parties will be allowed to intervene and participate in the proceeding.

Regarding the use of discovery in this matter, we find that it should be allowed if sought by a party, but in a limited fashion due to the abbreviated timeframe for review proceedings dictated under §86-140.<sup>21</sup> We leave the determination of the details of a procedural schedule to the Hearing Officer's discretion and direction.

### Conclusion

The Commission finds AT&T's appeal of our November 10, 2009 order in the above-captioned docket included our findings in both the FC-1332 and FC-1335 matters and the entire order was reversed by the District Court in its February 24, 2011 order. Therefore, we will not issue an interim order directing immediate payment by AT&T to OrbitCom for access services. We further find the February 24, 2011 Order of the District Court reversing and remanding the Commission's order directs the Commission to conduct a review of OrbitCom's access rates pursuant to §86-140. We find the Commission has not previously conducted an §86-140 review in this matter and the evidence currently on the record is insufficient for such a review necessitating a second evidentiary proceeding. Additionally, we find such review as ordered by the District Court shall be of OrbitCom's access rates as contained in its Nebraska tariff, not limited to the charges billed to AT&T for such services. Next, we find OrbitCom shall file appropriate cost and revenue information as to enable the Commission to conduct an §86-140 review. We urge OrbitCom to use the Commission's guidance as found in our C-4145/NUSF-74/PI-174 Order, issued on April 20, 2010, to submit its financial evidence for our review. Finally, no additional parties will be allowed to intervene in the

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<sup>21</sup> See Neb. Rev. Stat. § 86-140(1)(Reissue of 2008), requiring a hearing before the Commission within 90 days of filing an application and an order to be issued by the Commission within 60 days of the hearing, unless all parties to the proceeding agree to an extension.

proceeding and discovery in some limited fashion shall be allowed as directed and determined by the Hearing Officer.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that AT&T's appeal of the Commission's November 10, 2009 order included our findings in both the FC-1332 and FC-1335 matters in their entirety.

IT IS FURTHER ORDERED that OrbitCom's request the Commission enter an interim order, prior to further proceedings, directing immediate payment by AT&T to OrbitCom of the outstanding amount sought by OrbitCom for access services be, and is hereby, denied.

IT IS FURTHER ORDERED that the February 24, 2011 Order of the District Court reversing and remanding the Commission's order directs the Commission to conduct a review of OrbitCom's access rates pursuant to §86-140 and such review will require a second evidentiary proceeding.

IT IS FURTHER ORDERED that OrbitCom shall file cost and revenue information to enable the Commission to conduct an §86-140 review, a schedule for such filing shall be determined by the Hearing Officer.

IT IS FINALLY ORDERED that no new parties shall be allowed to intervene in the above-captioned proceeding and discovery in some limited fashion shall be allowed if desired by the parties as directed and determined by the Hearing Officer.

MADE AND ENTERED at Lincoln, Nebraska, this 20<sup>th</sup> day of September, 2011.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman:

ATTEST:

Deputy Director

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MADE AND ENTERED at Lincoln, Nebraska, this 20<sup>th</sup> day of September, 2011.

COMMISSIONERS CONCURRING:

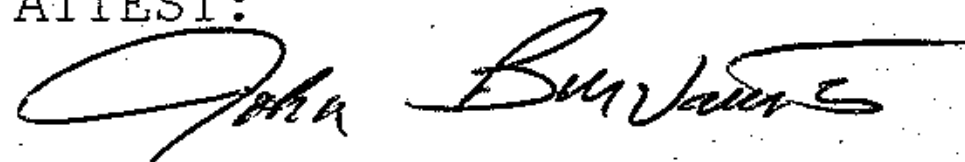
//s// Frank Landis  
//s// Tim Schram

NEBRASKA PUBLIC SERVICE COMMISSION

Chairman:



ATTEST:



Deputy Director