

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 Midwest,	)	ORDER GRANTING IN PART,
Inc., Denver, Colorado, failed to	)	DENYING IN PART, MOTION TO
pay intrastate access charges	)	COMPEL
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: November 8, 2011

BY THE HEARING OFFICER:

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 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

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

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.

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

On November 3, 2011, AT&T filed a Motion to Compel responses to discovery requests in the above-captioned docket.

Oral arguments on the pending Motion to Compel were held on November 4, 2011, at the Commission. The data requests at issue are Data Request Nos. 1-2, 1-4, 1-6, 1-8, 1-9, 1-11, 1-13, 1-14, 1-15, 1-20, 1-23, 1-24, 1-25, and 1-28. Some of the data requests are related in subject matter and were discussed together; therefore, those same data requests will be discussed together in this order.

#### O P I N I O N

The Nebraska Supreme Court rules and regulations govern discovery in matters before the Commission.<sup>3</sup> Generally, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" and "appears reasonably calculated to lead to the discovery of admissible evidence."<sup>4</sup> The Commission is not bound by the strict rules of evidence and therefore the admissibility of evidence is typically liberally applied by the Commission.

To expedite matters due to the shortened timeframe contained within the statute for Commission review pursuant to *Neb. Rev. Stat.* § 86-140, in the order I issued on September 23, 2011 ("Planning Conference Order"),<sup>5</sup> I specifically limited discovery to written

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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.

<sup>3</sup> *Neb. Admin. Code*, Title 291, Ch. 1 § 016.11 (1992).

<sup>4</sup> *Neb. Ct. R. Disc.* § 6-326(b)(1).

<sup>5</sup> *Supra*, Remand Planning Conference Order and Notice of Hearing, (September 23, 2011).

discovery and limited the number of written discovery to thirty-five (35) requests, including subquestions and subparts each being considered a separate request. I also limited the scope of discovery in the above-captioned proceeding to costs and revenues of OrbitCom's provisioning of intrastate access service in Nebraska.

Total Company v. Nebraska Specific Information Data Requests

AT&T seeks financial information, minutes of use, access line counts, and property assets, for OrbitCom's entire fourteen (14) state operation. OrbitCom has provided and has not objected to AT&T's requests seeking Nebraska specific information. OrbitCom objects to providing information on the entire company as outside the scope of the proceeding as limited in the Planning Conference Order.

AT&T states in its motion, the information on the entire company is necessary to verify the validity of OrbitCom's allocations of costs and revenues to its Nebraska operations. AT&T claimed at the oral arguments that the information filed by OrbitCom in its direct testimony is totally inadequate to this proceeding.

In general I find that AT&T's questions are beyond the scope of this proceeding and would be overly burdensome to OrbitCom. Regarding specific requests I find the following:

Data Request Nos. 1-2, 1-4, and 1-6

AT&T seeks audit reports, financial statements, and the Trial Balance for OrbitCom as a whole. I find these are outside the scope of this proceeding and more detailed than necessary for this proceeding. However, I find some total company information in a more limited fashion is appropriate.

OrbitCom in compliance with the Commission's annual report requirement,<sup>6</sup> files certain financial statements on a total company basis with the Commission. Balance sheets similar to those filed with OrbitCom's annual report were provided with the pre-filed direct testimony of Michael Powers on behalf of OrbitCom, filed on October 19, 2011 ("OrbitCom Direct"). The Company also files a profit and loss statement for the entire OrbitCom entity with its annual report to the Commission. Further, evidence filed by OrbitCom previously in this proceeding included a 2008 profit and loss statement for OrbitCom as a whole.<sup>7</sup>

Therefore, I find a less burdensome method to obtain whole company information is for OrbitCom to provide profit and loss statements for OrbitCom as a whole for 2008, 2009, and 2010, similar to what it files annually with its annual report to the Commission. OrbitCom shall update the profit and loss statements to reflect the

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<sup>6</sup> Neb. Rev. Stat. § 75-116 (Reissue of 2009).

<sup>7</sup> Supra, Application Nos. FC-1332/FC-1335, September 16, 2009, Hearing Transcript, Exhibit 12.

year end tax copy or audited report numbers. OrbitCom and AT&T shall coordinate together to determine whether the documents submitted regarding 2008 need to be resubmitted or are sufficient as previously filed.

The profit and loss statements will suffice for this proceeding in lieu of the data sought by AT&T in these requests. Therefore, the requests as modified, OrbitCom filing profit and loss statements for 2008, 2009, and 2010, is granted, the remaining information sought in the requests is denied.

Data Request No. 1-8

AT&T seeks the differences in cost between OrbitCom's intrastate access services and interstate access services. I find OrbitCom's interstate access rates and the costs associated with the provision of interstate access services are irrelevant to this proceeding and the request is not calculated to lead to admissible evidence. Therefore, Data Request No. 1-8 is denied.

Data Request No. 1-9

Here AT&T seeks aggregate company-wide totals similar to those provided by OrbitCom in the Nebraska Access Line Report filed by OrbitCom. I find to require OrbitCom to create 36 monthly reports for the entire company similar to what OrbitCom provided for Nebraska would be burdensome and beyond the scope of this proceeding as limited in the Procedural Order. AT&T stated only providing information from the total line would be sufficient. While that may be less data actually submitted by OrbitCom, to compile the totals would still require OrbitCom to compile all the data for all 36 months for the other 13 states in which it does business. Therefore, Data Request No. 1-9 is denied.

Data Requests Nos. 1-11, 1-13, and 1-14

In these requests AT&T is seeking to explore the figures provided by OrbitCom in the attachments with the OrbitCom Direct testimony. AT&T seeks the numbers used by OrbitCom to make its calculations. In Docket No. C-4145 the Commission offered options to any company being reviewed by the Commission pursuant to § 86-140 to meet the Commission's minimum evidentiary requirement to enable a fair and reasonable analysis of its intrastate access rates. One method was using NUSF-EARN Form data or, "data similar to what is reported on an NUSF-EARN Form if the carrier is not required to submit an EARN Form to the Commission."<sup>8</sup> OrbitCom does not submit NUSF-EARN Forms, but did submit similar data, in summary form as submitted by companies on NUSF-EARN Forms. The Commission relies on information submitted on NUSF-EARN Forms, similar in format as that provided by OrbitCom in

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<sup>8</sup> Application No. 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)*, at p. 10.

this proceeding, for conducting different analysis, not unlike the analysis contemplated in the current §86-140 review proceeding. I find the information provided by OrbitCom comports with the Commission's order in C-4145 and the further data to verify these figures sought by AT&T is outside the scope of these proceedings. To find otherwise would hold companies that do not file NUSF-EARN Forms to a higher evidentiary standard than those that do. Therefore, Data Requests Nos. 1-11, 1-13, and 1-14 are denied.

#### Data Request No. 1-15

In this request AT&T seeks copies of OrbitCom's federal income tax returns for the previous three years. As stated before, this is to verify the accuracy of figures provided in OrbitCom Direct. For the reasons stated above in my findings on Data Requests Nos. 1-11, 1-13, and 1-14, I find the federal income tax returns of the entire OrbitCom entity are outside the scope of this proceeding. However, OrbitCom has already provided a copy of its 2008 Nebraska income tax return in this proceeding.<sup>9</sup> Its Nebraska specific tax returns would be relevant to this proceeding. I find OrbitCom shall instead provide its 2008, 2009 and 2010 Nebraska income tax returns. Therefore, the request as modified, OrbitCom filing Nebraska income tax returns for 2008, 2009, and 2010, is granted, the remaining information sought in the requests is denied. As before, AT&T and OrbitCom can coordinate as to whether OrbitCom needs to resubmit the previously submitted 2008 return.

#### Data Requests Nos. 1-20, 1-23, 1-24, 1-25, and 1-28

AT&T again seeks information for the whole of OrbitCom's fourteen (14) state operation, including property records, long-term liabilities on OrbitCom's books, the depreciation and amortization rates for each asset, the top five most highly compensated employees, and the rate pages for OrbitCom's agreements with CenturyLink in the other thirteen (13) states in which it operates. As before, I find the assets, debts, amortization/depreciation tables, high earners, and contracts in other states for services in other states are irrelevant to the inquiry into OrbitCom's Nebraska intrastate switched access revenue. OrbitCom's offer to provide its entire payroll figures was rejected by AT&T. I fail to see how the salary of any specific OrbitCom employee is at all relevant to this proceeding. Further, copies of interconnection agreements between OrbitCom and CenturyLink are a matter of public record and filed with the utility commission in the corresponding states, and therefore, readily available to AT&T. Therefore, I find Data Requests Nos. 1-20, 1-23, 1-24, 1-25, and 1-28 are denied.

#### Counting

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<sup>9</sup> *Supra*, Application Nos. FC-1332/FC-1335, September 16, 2009, Hearing Transcript, Exhibit 12.

AT&T submitted twenty-eight (28) numbered data requests to OrbitCom. OrbitCom objected to the number, saying by its count, including the subparts of each question, AT&T's discovery requests well exceeded the thirty-five (35) allowed under the Planning Conference Order. At the oral arguments, counsel for AT&T agreed to remove definitional sections requiring multiple parts to each answer by OrbitCom, reducing the number of subparts in each data request. With the definitional sections removed and my decision regarding the disputed requests above, the number of data requests is significantly reduced, but still exceeds the limit. However, I find the subject matter sought is relevant to this proceeding and therefore, good cause exists to exceed the limit. Thus, I find OrbitCom shall respond to the non-disputed Data Requests of AT&T and provide the information as ordered above.

### Conclusion

After a thorough examination of all the filings, motions, and arguments in the current proceeding, I find that Data Requests Nos. 1-2, 1-4, 1-6, and 1-15, shall be granted only as limited and modified above. I further find Data Requests Nos. 1-9, 1-11, 1-13, 1-14, 1-20, 1-23, and 1-24, are beyond the scope of the above-captioned proceeding and should therefore be denied. Additionally, I find Data Requests Nos. 1-8 and 1-25 are irrelevant to this proceeding and not calculated to lead to admissible evidence. Next, I find Data Request No. 1-28 is a matter of public record and available to AT&T. Lastly, the non-disputed data requests and the limited response as ordered above shall be provided by OrbitCom.

### O R D E R

IT IS THEREFORE ORDERED by the Hearing Officer that the Motion to Compel regarding Data Requests Nos. 1-2, 1-4, 1-6, and 1-15, be, and is hereby, granted as modified in this order.

IT IS FURTHER ORDERED that the Motion to Compel regarding Data Requests Nos. 1-8, 1-9, 1-11, 1-13, 1-14, 1-20, 1-23, 1-24, 1-25, and 1-28 be, and are hereby, denied.

IT IS FURTHER ORDERED that the non-disputed data requests and the limited responses to 1-2, 1-4, 1-6, and 1-15 as ordered above shall be provided by OrbitCom even though the number of responses exceeds the contained in the September 23, 2011 Planning Conference Order.

MADE AND ENTERED at Lincoln, Nebraska, this 8<sup>th</sup> day of November, 2011.

BY:

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Tim Schram  
HEARING OFFICER

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

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MADE AND ENTERED at Lincoln, Nebraska this 8<sup>th</sup> day of November,  
2011.

BY:

A handwritten signature in black ink, appearing to read "Tim Schram", with a long horizontal flourish extending to the right.

Tim Schram  
HEARING OFFICER