

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, Inc., Denver, Colorado, ) ORDER ON REMAND  
failed to pay intrastate access )  
charges billed by Orbitcom in )  
accordance with OrbitCom's )  
intrastate switched access )  
tariff. )

) Application No. FC-1335  
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 ) Entered: February 28, 2012  
and unreasonable. )

BY THE COMMISSION:

B A C K G R O U N D

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.

AT&T filed an Answer to FC-1332 and a Counterclaim on March 31, 2009. On April 7, 2009, OrbitCom filed a Motion to Dismiss the Counterclaim filed by AT&T. On April 14, 2009, the Commission entered an order dismissing AT&T's Counterclaim on procedural grounds.

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 the Commission's Rules of Procedure. On May 5, 2009, OrbitCom filed an Opposition to AT&T's Motion to Consolidate and AT&T filed a Response to the Opposition to the Motion to Consolidate on May 9, 2009. The Commission granted the Motion to Consolidate in an order issued on May 12, 2009. OrbitCom filed its Answer and Affirmative Defenses in Application No. FC-1335 on May 15, 2009.

A planning conference was held in the above-captioned dockets on June 11, 2009, with representatives of the parties and the Commission. During the planning conference the parties agreed to a procedural schedule including a hearing date of September 16, 2009, to be continued to September 17, 2009, as needed. The Hearing Officer issued an order on June 15, 2009, memorializing the agreements and establishing the procedural schedule for the docket.

On August 5, 2009, both OrbitCom and AT&T filed Motions to Compel responses to discovery requests in the above-captioned docket. Both parties also requested oral argument on the motions. Oral arguments on the pending Motions to Compel were held on August 17, 2009.

The parties had subsequently met and reached agreement regarding all of OrbitCom's responses to AT&T's discovery requests, as a result, AT&T informed the Hearing Officer at the Oral Argument proceeding that its Motion to Compel was no longer at issue. Further, the parties informed the Hearing Officer that only three OrbitCom requests to AT&T remained at issue, the parties having reached agreement on all the other discovery requests. A Hearing Officer Order issued on August 21, 2009, granted OrbitCom's Motion to Compel on the remaining issues with AT&T's answers limited to two alternative proposals offered by OrbitCom.<sup>2</sup>

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

<sup>2</sup> See Application No. FC-1332, *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* & Application No. FC-1335, *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*, Hearing Officer Order Granting Motion to Compel (August 21, 2009).

An initial hearing in this matter 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 sustained OrbitCom's complaint against AT&T and 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 a Commission review.<sup>3</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 pursuant to *Neb. Rev. Stat. § 86-140*.<sup>4</sup>

On March 25, 2011, OrbitCom filed an appeal of the District Court Order 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 Order, the above-captioned matter was remanded to the Commission for further proceedings.

An initial conference was held on the remanded review on August 25, 2011. At that conference certain legal questions on the scope of the original appeal, the scope of the District Court Order remand and procedure for the ordered §86-140 review were raised. The Hearing Officer entered an order on August 29, 2011, setting deadlines for brief submission on the raised issues and scheduling oral arguments. Oral arguments were held before the Commission on September 14, 2011.

On September 20, 2011, the Commission entered an order with its findings and conclusions on the legal and procedural issues raised by the parties. The Commission found AT&T had appealed both Docket No. FC-1332 and FC-1335 and that a second evidentiary proceeding was necessary to comply with the District

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<sup>3</sup> See Application No. FC-1332 & FC-1335, Order (November 10, 2009)(hereinafter "Original FC-1332/1335 Order").

<sup>4</sup> *AT&T of the Midwest v Nebraska Public Service Commission, et al*, Docket No. C109-4787, Order (February 24, 2011)( hereinafter "District Court Order").

Court Order directing the Commission to conduct an §86-140 review.<sup>5</sup>

A second planning conference on the remanded review was held in the above-captioned dockets on September 21, 2011. During the planning conference the parties agreed to a procedural schedule for the § 86-140 review proceeding including a hearing date of December 20, 2011. The Hearing Officer issued an order on September 23, 2011, memorializing the agreements and establishing the procedural schedule for the § 86-140 review.

On November 3, 2011, AT&T filed a Motion to Compel responses to discovery requests. Oral arguments on the pending Motion to Compel were held on November 4, 2011. A Hearing Officer Order issued on November 8, 2011, granted in part and denied in part AT&T's Motion to Compel.<sup>6</sup>

A hearing on the remand order was held on December 20, 2011.<sup>7</sup>

Post-hearing briefs and proposed orders were due to the Commission on January 27, 2012. On February 2, 2012, AT&T filed a Motion to Strike portions of OrbitCom's post-hearing brief. OrbitCom filed a response to AT&T's Motion on February 3, 2012. The Hearing Officer issued an order on February 10, 2012, denying AT&T's Motion to Strike.

## E V I D E N C E

### **Motion to Dismiss**

At the outset of the Remand Hearing, the Commission heard argument on a Motion to Dismiss the FC-1335 portion of the proceeding filed by OrbitCom. OrbitCom argued that the Connect America Fund ("CAF") Order entered by the Federal Communications Commission ("FCC") in November of 2011,<sup>8</sup> preempts the Commission's authority to provide the relief sought by AT&T

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<sup>5</sup> *Supra* Application No. FC-1332 & FC-1335, Order Issuing Findings on Oral Argument Issues (September 20, 2011).

<sup>6</sup> *Supra* Application No. FC-1332 & FC-1335, Hearing Officer Order Granting In Part, Denying In Part, Motion to Compel (November 8, 2011).

<sup>7</sup> Hereinafter "Remand Hearing".

<sup>8</sup> Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform - Mobility Fund, 76 Fed. Reg. 73830 (2011)(to be codified at 47 C.F.R. pts. 0,1,20,36,51,54,61,64 and 69)(hereinafter, "CAF Order").

in Application No. FC-1335, and therefore, the complaint should be dismissed.

AT&T responded to OrbitCom's Motion stating it disagreed with OrbitCom's characterization of the FCC's CAF Order and added the FCC's reform of access rates was premised on the current rates being lawful, which AT&T maintains in Application FC-1335, OrbitCom's rates are not. Further, AT&T argued nothing in the FCC's November 29, 2011 CAF Order precludes the Commission from conducting a § 86-140 review.

The Hearing Officer reserved on ruling on OrbitCom's Motion to Dismiss, and therefore the Commission will make a determination on the pending motion. The Commission is mindful that the FCC in its CAF Order has ordered significant reforms in the intercarrier compensation system currently in place. However, the CAF Order, while laying out a transition period to lower intrastate access rates does not preclude the Commission from reducing rates in a more abbreviated time period.<sup>9</sup> Therefore, we find the Commission is not precluded by the CAF Order from conducting the § 86-140 review as ordered by the District Court. OrbitCom's Motion to Dismiss is denied.

At the Remand Hearing, the Commission took administrative notice of the record and all filings in the entire proceeding in this docket. Both AT&T and OrbitCom offered the testimony of two witnesses. OrbitCom presented testimony from Mr. Brad VanLeur and Mr. Michael Powers. AT&T presented testimony from Mr. Lawrence J. Bax and Mr. Daniel Rhinehart.

OrbitCom's witness Mr. Michael Powers, the Vice President and Chief Financial Officer of OrbitCom, filed direct and rebuttal testimony in the Remand Hearing. Mr. Power's testimony was accepted into the record as Exhibits 4 and 5, respectively. Mr. Powers sponsored several exhibits containing financial information of OrbitCom. Mr. Powers submitted various financial information, including supporting documents and spreadsheets for the years, 2008, 2009, and 2010 for OrbitCom including: overall rate of return, basic local exchange revenue in Nebraska, profit and loss statements, access service revenues in Nebraska, the Federal and State Universal Service support received, demand information, OrbitCom's costs for providing basic local and access service in Nebraska, and spreadsheets showing monthly local service costs.<sup>10</sup> Mr. Powers also submitted a copy of the

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<sup>9</sup> FCC CAF Order, para. 816, fn. 1542.

<sup>10</sup> See Application No. FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Exhibit No. 4, Attachments MP2-1 - MP2-6.

Qwest Local Services Platform ("QLSP") Agreement OrbitCom has with Qwest Corporation<sup>11</sup> ("Qwest") for the applicable period.<sup>12</sup>

Mr. Powers testified as to how he calculated OrbitCom's rate of return based on OrbitCom's books and records.<sup>13</sup> Mr. Powers stated that it was his belief that OrbitCom's intrastate switched access rates are fair and reasonable.<sup>14</sup> He also testified that OrbitCom's current access rates result in its annual revenue to be realized from interexchange carriers to be less than the annual costs incurred to provide access services, and thus a reduction in its rates would be in violation of Nebraska statutes.<sup>15</sup> Mr. Powers further testified that OrbitCom's access rates are reasonably comparable to the rates of the underling ILEC.<sup>16</sup> He also testified that the removal of any particular rate elements from OrbitCom's access rates is not required.<sup>17</sup>

Mr. Powers testified that OrbitCom ceased receiving any NUSF distributions as of September of 2011,<sup>18</sup> and he further explained that based on the FCC's recent CAF Order, OrbitCom will experience a significant reduction in its intrastate switched access rates beginning in July of 2012.<sup>19</sup>

Mr. Powers testified that AT&T has not paid OrbitCom for access service based on OrbitCom's access tariff since April of 2008, and he provided the amount due and owing from AT&T as of the date of the hearing and as of January 11, 2012.<sup>20</sup>

Mr. Brad Vanleur, President of OrbitCom, Inc., filed rebuttal testimony in the Remand Hearing. Mr. Vanleur's testimony was accepted into the record as Exhibit 6. Mr. Vanleur testified to the lack of a business relationship between OrbitCom and VP Vending, stating the two companies are completely separate and no expenses are blended or shared by VP

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<sup>11</sup> Qwest Corporation was subsequently acquired by CenturyLink, and is now CenturyLink QC d/b/a Qwest Communications.

<sup>12</sup> Application No. FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Exhibit No. 4, Attachment MP2-6.

<sup>13</sup> Application No. FC-1332/FC-1335 Remand Hearing Transcript, 23:2 - 27:15 (Hereinafter "TR page number:line number").

<sup>14</sup> TR 30:12-14.

<sup>15</sup> Application No. FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Ex. 4, p. 7.

<sup>16</sup> Application No. FC-1332/FC-1335, Remand Hearing Rebuttal Testimony of Michael Powers, Ex. 5, p.8.

<sup>17</sup> *Id.* at p. 7.

<sup>18</sup> TR 23:23-24.

<sup>19</sup> TR 143:16-22.

<sup>20</sup> TR 20:12-14.

Vending and OrbitCom.<sup>21</sup> Mr. Vanleur also testified that he has never been an officer, director, or employee of Sioux Valley Television contrary to certain assumptions made in the testimony of Mr. Rhinehart on behalf of AT&T.<sup>22</sup>

AT&T's witness, Mr. Daniel Rhinehart, a Financial Analyst for AT&T, filed direct testimony in the Remand Hearing. Mr. Rhinehart's testimony was accepted into the record as Exhibits 3C and 3R. Mr. Rhinehart testified that it is AT&T's position that OrbitCom failed to meet the evidentiary requirements to support its tariffed switched access rates. Mr. Rhinehart testified that OrbitCom failed to provide its costs on a supported service basis and as such OrbitCom's evidence should be given no weight.<sup>23</sup> Mr. Rhinehart testified to an analysis he conducted of OrbitCom's financial information. Mr. Rhinehart stated according to his analysis OrbitCom assigned excessive costs to its Nebraska operations, including the costs of non-supported services and those attributable to OrbitCom's interstate operations.<sup>24</sup> Mr. Rhinehart testified that in his view, OrbitCom is highly profitable with respect to its supported services. In addition, Mr. Rhinehart presented a cost study he developed and concluded that OrbitCom's intrastate switched access rate should be set at \$.0037 per minute of use.<sup>25</sup>

AT&T next called Lawrence J. Bax, an Operations Access Manager for AT&T. Mr. Bax's Remand Hearing testimony was accepted into the record as Exhibits 2C and 2R. Mr. Bax testified regarding AT&T's position on what was required to be filed pursuant to the procedure outlined by the Commission in its order in Docket C-4145/NUSF-74/PI-147.<sup>26 27</sup> He testified that it was AT&T's position that OrbitCom had failed to meet the evidentiary requirements contained in the C-4145 Order in this proceeding. Mr. Bax testified that based on prior Commission order, the standard for reviewing a CLEC's access rates, absent a cost showing, is that such rates must, in the aggregate, be

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<sup>21</sup> Application No. FC-1332/1335, Remand Hearing Rebuttal Testimony of Brad Vanleur, Ex. 6, p. 3.

<sup>22</sup> *Id.*

<sup>23</sup> Application No. FC-1332/1335, Remand Hearing Direct Testimony of Daniel Rhinehart, Ex. 3R, pp.4-5.

<sup>24</sup> *Id.* at p. 5.

<sup>25</sup> *Id.*

<sup>26</sup> Application No. FC-1332/1335, Remand Hearing Direct Testimony of Lawrence Bax, Ex. 2R, pp. 5-6.

<sup>27</sup> See 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) (hereinafter "C-4145 Order").

reasonably comparable to the ILEC with whom they compete.<sup>28</sup> Mr. Bax opined that OrbitCom's switched access rate should be reduced at least to the level reasonably comparable to that of the ILEC with whom OrbitCom competes, which is Qwest.<sup>29</sup> Mr. Bax also testified that the Carrier Common Line charge ("CCL") rate element in OrbitCom's tariff should be removed.<sup>30</sup>

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

The Nebraska Telecommunications Regulation Act<sup>31</sup> grants regulatory authority to the Commission regarding intrastate access charges imposed by telecommunications companies for access to local exchange networks for interexchange service. The District Court Order directed the Commission to conduct a review of OrbitCom's intrastate access rates pursuant to the provisions of the Nebraska Act codified in § 86-140. Section 86-140(1) 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,

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<sup>28</sup> Application No. FC-1332/1335, Remand Hearing Direct Testimony of Lawrence Bax, Ex. 2R, p. 6, citing Docket C-1628/NUSF, *In the Matter of the Commission, on its own motion, seeking to conduct an investigation into intrastate access charge reform and intrastate universal service fund*, Progression Order #15 at para. 9.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at p. 9.

<sup>31</sup> See Neb. Rev. Stat. § 86-101 et seq. (hereinafter, "Nebraska Act")



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.<sup>32</sup>

The statute directs the Commission to consider a carrier's revenues and costs in the provisioning of intrastate access services in determining whether a carrier's access rates are fair and reasonable. To assist carrier's in determining what evidence is needed for the Commission to conduct a review under § 86-140, the Commission opened an investigation, took comments, conducted a hearing, and ultimately entered an order. The order in Docket C-4145/NUSF-74/PI-147, established the minimum evidentiary requirements necessary for the Commission to conduct a fair and reasonableness review of any carrier's intrastate access rates pursuant to § 86-140.<sup>33</sup>

In our C-4145 Order, we offered carriers two options to provide the necessary financial data for the Commission's review, a cost study and data similar to what is reported on an NUSF-EARN Form.<sup>34</sup> We recognized the substantial cost to companies to conduct cost studies; therefore, we allowed a second option as a more cost effective and less burdensome way to meet the evidentiary requirements.

Also in the C-4145 Order we recognized that many carriers do not keep books on a state specific basis nor a supported services basis. Therefore, we adopted conversion factors to make the required adjustments from a total company basis, to a state specific basis and finally to a supported services basis for our analysis. However, we said, "No carrier is required to utilize the supported services conversion factors. Any carrier may conduct its own conversion of its books and records to a supported services basis and submit such data to the Commission."<sup>35</sup>

OrbitCom did not submit a cost study but instead utilized Option 2 of the C-4145 Order by submitting into evidence data similar to what is reported on an NUSF-EARN Form. OrbitCom is not required to submit NUSF-EARN Forms, therefore it used financial information from its books and records to compile

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<sup>32</sup> Neb. Rev. Stat. § 86-140(1) (Reissue of 2008).

<sup>33</sup> See 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.*

<sup>34</sup> C-4145 Order at p. 11.

<sup>35</sup> *Id.* at p. 12.

similar data to that included on NUSF-EARN Forms. OrbitCom also elected to convert its financial information to what it termed a supported services basis instead of utilizing the factors adopted by the Commission in the C-4145 Order.<sup>36</sup>

To accomplish its conversion to supported services, OrbitCom allocated revenues and costs to its Nebraska jurisdiction using a ratio derived from dividing the total company revenue of OrbitCom's 14 state operations by the revenue generated by its Nebraska operations.<sup>37</sup> OrbitCom then divided the revenue generated by local exchange and access services in Nebraska by the total revenue generated in Nebraska to determine a ratio to convert Nebraska numbers to a supported services level (hereinafter "SS Factor").<sup>38</sup> The SS Factor was then used to convert OrbitCom's Nebraska revenues to a supported services level. The SS Factor was then applied to its Nebraska General and Administrative ("G & A") expenses and Other Expenses line item and summed to determine a supported services basis for its G & A and Other expenses. OrbitCom also added to its expenses what it is billed by Qwest for resale of its lines in Nebraska to arrive at its total expenses at a supported services level.<sup>39</sup> Finally, OrbitCom used its self-determined, annual, Nebraska Percentage of Equity factors to convert its total equity numbers to a Nebraska basis. No further adjustment was made to convert equity amounts to a supported services level, but such adjustments were performed and submitted by the Company after the hearing.<sup>40</sup> OrbitCom then used these numbers to calculate a rate of return for each of the three year periods, 2008, 2009, and 2010.<sup>41</sup>

AT&T expressed many concerns regarding the allocation methods utilized by OrbitCom and the method by which it adjusted its books and records to a supported services basis. AT&T also expressed concern regarding adjustments that were not made by OrbitCom to remove revenues and expenses attributable to interstate and non-regulated services, as well as, other expenses allocated to Nebraska associated with OrbitCom's multistate operations.

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<sup>36</sup> FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Exhibit No. 4, Attachments MP2-1 - MP2-6.

<sup>37</sup> *Id.* Exhibit No. 4 at p. 6.

<sup>38</sup> *Id.* at p. 7.

<sup>39</sup> TR 25:7 - 26:7.

<sup>40</sup> This calculation was omitted from Exhibit MP2-1, p. 2, attached to the Remand Hearing Direct Testimony of Michael Powers, Ex. 4. The company discussed the omission, see TR 85:2-18 and TR 142:13-24, and submitted corrected numbers in its Remand Hearing post-hearing brief, see FC-1332/FC-1335, OrbitCom, Inc.'s Post-Hearing Brief on Remand, p. 15, fn. 69 and 73.

<sup>41</sup> All calculations can be seen on Exhibit MP2-1, p. 2, attached to the Remand Hearing Direct Testimony of Michael Powers, Ex. 4.

Upon cross examination Mr. Powers stated that OrbitCom's conversion of its data to a supported services level contained both interstate and intrastate costs and revenues. Mr. Powers testified that OrbitCom did not remove interstate and non-regulated costs and expenses in converting its data to a supported services basis.<sup>42</sup> Upon questioning by Commissioner Landis, Mr. Powers further testified that OrbitCom understood the Commission C-4145 Order to not require removal of interstate revenues and costs.<sup>43</sup>

We share many of AT&T's concerns regarding OrbitCom's adjustments and lack of adjustments to convert its data to a supported services basis for our analysis. OrbitCom is mistaken in its understanding of the requirements of our C-4145 Order. The Nebraska Act gives authority to the Commission regarding *intrastate* access rates. Interstate rates and matters are under the purview of the FCC and not within the state's jurisdiction. Section 86-140 of the Nebraska Act is the statutory provisions whereby we conduct the review in this proceeding. Section 86-140 deals with intrastate costs, revenues, rates, and charges. Further, services that are not regulated by the Commission would clearly need to be excluded from the Commission's review of regulated intrastate service costs and revenues.

Therefore, as OrbitCom's conversion of its financial data included interstate and non-regulated revenues and costs, the Commission shall make the following adjustments to the financial data provided by OrbitCom.

### **Revenues**

#### **Basic Local Exchange Revenues**

The Commission makes no adjustment to the Basic Local Exchange Revenues included by OrbitCom.

#### **State Access Revenue**

As stated above, OrbitCom did not exclude interstate access revenues from its revenue calculations.<sup>44</sup> Therefore, the Commission shall remove the interstate access revenues included in the revenue figure. In Exhibit MP2-2, attached to the direct testimony of Michael Powers, on the sheet marked "NE Profit and Loss, 2008 - 2010" the Commission finds the lines marked "CABS-

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<sup>42</sup> TR 80:6-14.

<sup>43</sup> TR 81:7-23.

<sup>44</sup> *Id.*

NE Orig Inter" and "CABS-NE Term Inter," denoting originating and terminating interstate access revenues should be removed from the Access Service Revenue figure.<sup>45</sup>

### Federal Universal Service

The amount of Federal Universal Service ("FUSF") support received by OrbitCom in 2008, 2009, and 2010 is available on the Universal Service Administrative Company ("USAC") website and is a matter of public record.<sup>46</sup> The numbers included by OrbitCom for FUSF support received differ slightly from the numbers on the USAC website. We attribute this minor inconsistency to how the FUSF figures were booked by OrbitCom in its financial records for each year. For the sake of consistency, we find that the FUSF amounts shall be adjusted to reflect numbers on the USAC website.

### Nebraska Universal Service

OrbitCom testified that as of September 2011, OrbitCom no longer receives Nebraska Universal Service ("NUSF") support.<sup>47 48</sup> While OrbitCom included the NUSF it received in 2008 through 2010, this support will no longer be received. To include NUSF support in our analysis of the fairness and reasonableness of OrbitCom's intrastate rates on a prospective basis from the date of this review would not accurately reflect the revenue received by the company. Therefore, we find a pro forma adjustment should be made to reflect a known and measureable change in the revenue figure, and the NUSF support received by OrbitCom shall be adjusted to zero for our analysis.

### Expenses

AT&T claims OrbitCom inflated its Nebraska expenses by including expenses from its other states in the Nebraska jurisdiction. We find it is reasonable to allocate multistate operation expenses to Nebraska, as Nebraska utilizes the services and benefits of the entire OrbitCom operation and

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<sup>45</sup> FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Exhibit No. 4, Attachments MP2-2, p. 2.

<sup>46</sup> See [www.usac.org](http://www.usac.org).

<sup>47</sup> TR 23:23-24.

<sup>48</sup> This is due to the Commission's adjustments to the NUSF mechanism and zones in Docket C-3554/NUSF-50/PI-112, *In the Matter of the Commission, on its own motion, seeking to investigate whether the zones established in Docket C-2516 are appropriate in light of NUSF-26 findings and conclusions and 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.*

should therefore have a portion of the expenses allocated to the Nebraska jurisdiction.

As stated above OrbitCom used a ratio determined by dividing its Nebraska local exchange and access services revenues by its total Nebraska revenues to arrive at its SS Factor. However, with the Commission's adjustments to revenues discussed above, the SS Factor used by OrbitCom is no longer accurate. Therefore, the Commission will instead utilize the supported services expense factor adopted in our C-4145 Order (hereinafter "4145 SS Factor") to adjust OrbitCom's expenses from a Nebraska level to a supported services level for our analysis.

#### Local General and Administrative Expenses

As stated above OrbitCom's total G & A expenses for Nebraska shall be converted to a supported services basis using the 4145 SS Factor to arrive at a new figure for local G & A expenses.

#### Local Services Cost of Goods Sold

Mr. Powers testified that he included the amount OrbitCom paid to Qwest for the network elements it uses to provide service in Nebraska pursuant to the QLSP agreement OrbitCom has with Qwest.<sup>49</sup> This figure was labeled Local Service Cost of Goods Sold ("COGS") on the documents provided by OrbitCom.<sup>50</sup> Mr. Powers testified under cross-examination that the facilities purchased from Qwest are also used by OrbitCom to provide interstate services, including long distance and internet services.<sup>51</sup> OrbitCom's calculations, however, included 100% of those costs; no adjustments were made to reflect the cost of providing non-supported services over the facilities.<sup>52</sup>

Therefore, we find the expenses included in the COGS category should be adjusted to remove a portion of costs reflecting the provisioning of non-regulated services over those facilities. Therefore, the Commission will apply the C-4145 SS Factor to the COGS figure to adjust it to a supported services level.

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<sup>49</sup> TR 25:12-20.

<sup>50</sup> FC-1332/FC-1335, Remand Hearing Direct Testimony of Michael Powers, Exhibit No. 4, Attachments MP2-2, p. 2.

<sup>51</sup> TR 75:18 - 76:15.

<sup>52</sup> *Id.* Ex. 4, Attachment MP2-6.

### Other Expenses

In its analysis, OrbitCom included a category of expenses it termed "Other Expense."<sup>53</sup> Mr. Powers testified at the hearing that "Other Expense" reflected interest expense from outstanding debt of OrbitCom.<sup>54</sup> AT&T's witness Mr. Rhinehart testified that including interest as a separate expense in the calculation of net revenues would effectively allow OrbitCom to double count interest expense.<sup>55</sup>

In telecommunications regulatory accounting, interest expense is a below the line expense and not included in the calculation of a company's net operating revenues to determine an overall rate of return. Interest expense is instead included in the debt element of a company's capital structure. We agree with AT&T that interest expense is implicitly recognized as a portion of the company's rate of return and including it as an itemized expense, as OrbitCom has done here, would double count the interest expense. Therefore, we find the interest expense included in the "Other Expense" category shall be removed from the Commission's calculations.

### Equity

The Commission will utilize OrbitCom's Nebraska Percentage of Equity factors to convert total company equity figures to a Nebraska basis. The Commission shall apply the C-4145 supported services revenue factor to the Nebraska percent of equity figure to adjust OrbitCom's equity numbers to a supported services basis. The Commission has chosen to use the revenue factor as we deem it a more appropriate factor to convert OrbitCom's equity numbers to a supported services basis than an investment factor.

### Average Rate of Return

Finally, after conducting the calculations with all the adjustments discussed above, the resulting average rate of return proxy for OrbitCom for the years 2008, 2009, and 2010, falls below the 10% figure adopted by the Commission in the C-4145 Order.<sup>56</sup> Therefore, while a 10% rate of return is not a bright line for determining reasonableness, the Commission finds

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<sup>53</sup> *Id.*

<sup>54</sup> TR 25:21-23.

<sup>55</sup> Application No. FC-1332/1335, Remand Hearing Direct Testimony of Daniel Rhinehart, Ex. 3C, pp.19-20.

<sup>56</sup> C-4145 Order at p. 13.

the rate of return proxy for OrbitCom on supported services in Nebraska is reasonable. Therefore, we find OrbitCom's intrastate access rate, contained in OrbitCom's Nebraska Tariff is fair and reasonable and requires no adjustment.

As the Commission's analysis has resulted in a conclusion that OrbitCom's current intrastate access rate is fair and reasonable, the Commission will not establish a different rate. Therefore, our analysis need go no further to consider demand elements such as minutes of use and demand by rate element. Demand data would only be considered by the Commission in the event the Commission sought to establish a different access rate. We further decline to comment on the sufficiency of the evidence provided by OrbitCom regarding its demand levels and minutes of use in this proceeding and its compliance with our C-4145 Order.

### **Reasonably Comparable**

Mr. Bax's testimony for AT&T discusses the reasonably comparable concept contained in Commission order.<sup>57</sup> The Commission has previously stated that Competitive Local Exchange Carrier's ("CLEC") access charges, in aggregate, must be reasonably comparable to the underlying incumbent in its service territory, absent a demonstration of costs.<sup>58</sup> Mr. Bax urges us to reject the demonstration of costs offered by OrbitCom and instead compare OrbitCom's access rates to Qwest's, the incumbent with whom OrbitCom competes. As the Commission did not reject OrbitCom's financial information and has conducted an analysis of the cost data provided by OrbitCom, we find a comparison of Qwest's intrastate access rate to OrbitCom's is unnecessary in this proceeding.

### **CCL Charge Rate Element**

Mr. Bax also discusses the CCL charge element included in OrbitCom's access rates and urges the Commission to remove the CCL charge.<sup>59</sup> However, as stated above, the Commission found CLEC access rates must be reasonably comparable in the aggregate to the underlying ILEC rate.<sup>60</sup> We instead considered OrbitCom's

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<sup>57</sup> Application No. FC-1332/1335, Remand Hearing Direct Testimony of Lawrence Bax, Ex. 2R, p. 6.

<sup>58</sup> 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.

<sup>59</sup> TR 113:17-25.

<sup>60</sup> *Supra.* Docket C-1628/NUSF, Progression Order #15 (February 21, 2001), at ¶9.

rate in the aggregate, not any one specific rate element, when conducting our analysis of OrbitCom's costs and revenues in making our reasonableness determination. We therefore find it is not necessary to consider or adjust any one rate element of OrbitCom's access rate structure in the current proceeding.

### **Access Rate Billing Dispute**

In April of 2008, OrbitCom began billing AT&T for access services pursuant to the rate contained in its Nebraska Tariff. Prior to that date, OrbitCom had billed AT&T pursuant to an agreement between OrbitCom and AT&T for access services. Upon the expiration of that agreement, the parties were unsuccessful in negotiating a new contract.<sup>61</sup> Therefore, OrbitCom began billing AT&T at the rate in its Nebraska Tariff. AT&T refused to pay OrbitCom for access services at the rate contained in its Nebraska Tariff and instead initiated the above-captioned proceeding. AT&T has claimed throughout this proceeding that OrbitCom's access rate is unreasonable and, therefore, unlawful.

The Commission has conducted a § 86-140 review of OrbitCom's access rate contained in its Nebraska Tariff and has made a finding that the current rate is fair and reasonable. Therefore, OrbitCom's rate is also lawful. During the entire proceeding AT&T did not dispute that access services were rendered by OrbitCom, nor that AT&T owes payment to OrbitCom for services rendered, but has only disputed the rate at which those services have been billed.

The Commission finds that OrbitCom's Nebraska tariffed intrastate switched access rate is fair, reasonable and lawful. Therefore, the Commission finds that AT&T should pay the outstanding balance owed to OrbitCom based on the rate in its Nebraska Switched Access Tariff as of April of 2008, to the date of this Order.

### **Conclusion**

After conducting a review of OrbitCom's revenues and costs of providing intrastate access services, we find that OrbitCom's current intrastate access rate is fair and reasonable. We further find OrbitCom has been billing AT&T for access services rendered by OrbitCom to AT&T pursuant to the lawful rate in its Nebraska Tariff since April of 2008. AT&T has received access services from OrbitCom and should therefore pay the outstanding

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<sup>61</sup> See Application No. FC-1332/FC-1335 Transcript of September 16, 2009 Hearing, Direct Testimony of Brad VanLuer, Exhibit No. 2, pp. 5-6 and attached exhibit BV-3.



balance due OrbitCom for such services rendered from April 2008 to the date of this order, unless and until OrbitCom no longer has a valid and effective access tariff on file in Nebraska.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission, after conducting a review pursuant to *Neb. Rev. Stat. § 86-140* of OrbitCom, Inc.'s intrastate access rate as contained in its Nebraska Switched Access Services Tariff, OrbitCom, Inc.'s intrastate access rate is fair and reasonable at its current rate.

IT IS FURTHER ORDERED that the petition for review of OrbitCom, Inc.'s intrastate access rate pursuant to *Neb. Rev. Stat. § 86-140* filed by AT&T Communications of the Midwest, Inc., docketed as Application No. FC-1335, is hereby completed, and Application No. FC-1335 be, and it is hereby, closed.

IT IS FURTHER ORDERED that OrbitCom, Inc.'s complaint against AT&T Communications of the Midwest, Inc., docketed as Application No. FC-1332 be, and it is hereby, sustained.

IT IS FURTHER ORDERED that AT&T Communications of the Midwest, Inc. shall pay the outstanding balance due to OrbitCom, Inc. for access services as of the April 2008 billing statement through the date of this order.

IT IS FURTHER ORDERED that subsequent to this order, any intrastate access services rendered by OrbitCom, Inc. to AT&T Communications of the Midwest, Inc. or any of its affiliates or subsidiaries shall be provided pursuant to OrbitCom, Inc.'s Nebraska Switched Access Services Tariff.

MADE AND ENTERED at Lincoln, Nebraska, this 28<sup>th</sup> day of February, 2012.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director

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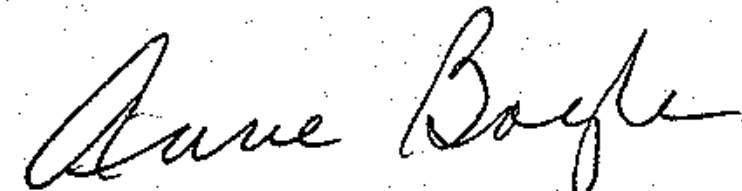
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NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:



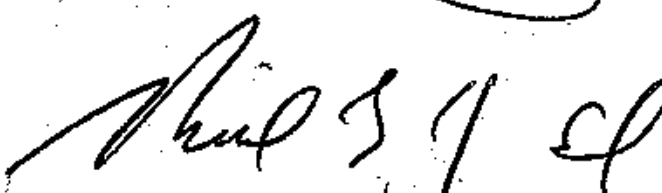




//s// Rod Johnson  
//s// Frank Landis

Chairman

ATTEST:



Executive Director