

**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

IN THE MATTER OF THE PUBLIC ) APPLICATION NO. C-4145/NUSF-74/PI-147  
SERVICE COMMISSION, ON ITS OWN )  
MOTION, SEEKING TO CONDUCT AN )  
INVESTIGATION ON INTRASTATE )  
SWITCHED ACCESS CHARGE POLICIES )  
AND REGULATIONS, CODIFIED IN )  
NEB.REV.STAT. SECTION 86-140. )

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**JOINT COMMENTS OF NT&T AND ORBITCOM**

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**I. Introduction**

Nebraska Technology & Telecommunications, Inc. (“NT&T”) and OrbitCom, Inc. (“OrbitCom”), by and through their counsel, hereby respectfully submit these Joint Comments in the above-captioned matter. The Nebraska Public Service Commission initiated this docket on February 24, 2009, to conduct an investigation into access charge policies and to clarify the minimum criteria under NEB.REV.STAT. § 86-140.<sup>1</sup> The Commission subsequently received written comments and reply comments related to its investigation, and then on November 3, 2009, the Commission entered its Order Issuing Proposed Order and Notice of Hearing.<sup>2</sup> The Commission’s November 3, 2009, Order was the first time the Commission addressed the procedural process and evidentiary requirements related to legal challenges to the existing intrastate access rates of competitive local exchange carriers (“CLECs”), and it did so in the form of a proposed order. As more fully addressed below, NT&T and OrbitCom strongly encourage the Commission to reevaluate and revise the proposed standard for reviewing CLEC intrastate access rates. In addition, NT&T and OrbitCom urge the Commission to make certain critical modifications to its proposed complaint process as suggested herein below.

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<sup>1</sup> See *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 Opening Docket and Seeking Comment (February 24, 2009).

<sup>2</sup> See *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 (November 3, 2009).

## **II. Applicable Standard for CLEC Intrastate Access Rates**

Prior to the Commission's recent order in Application Nos. FC-1332/FC-1335,<sup>3</sup> the last time the Commission formally addressed the review standard for CLEC access rates was approximately nine years ago when the Commission found that "absent a demonstration of costs, a CLEC's access charges, in aggregate, must be reasonabl[y] comparable to the ILEC with whom they compete."<sup>4</sup> Both during and since that time, the Commission's review of intrastate switched access charges has been focused primarily on ILECs. NT&T and OrbitCom urge the Commission, whether in this docket or in a separate docket dedicated to CLEC access rate issues,<sup>5</sup> to thoroughly reevaluate the appropriate standard for reviewing the intrastate access rates of CLECs in a manner that accounts not only for the interest of fair competition and Commission precedent, but that is also consistent with Nebraska statutes.

### **A. Inadequacies of the Proposed Application of the "Reasonably Comparable" Standard**

There are several problems with the "reasonably comparable" standard for evaluating CLEC intrastate access rates if such standard is to be applied in the manner set forth in the Commission's proposed order. First, the Commission appears to have completely ignored any applicability of § 86-140(1) to CLECs. Section 86-140(1), by its terms, applies to all "local exchange carriers"<sup>6</sup> (both ILECs and CLECs), and while the Commission may have contemplated the inclusion of CLECs in its proposed process for reviewing applications for new or revised access rates, the Commission failed to account for the applicability of § 86-140 to CLECs in its analysis of the standard for evaluating the lawfulness of a CLEC's intrastate access rates in the Formal Complaint context. The Commission has attempted to cling closely to its precedent of establishing the "reasonably comparable" standard, but in applying such standard, it

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<sup>3</sup> See *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-1332; *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*, Application No. FC-1335, Order (November 10, 2009)

<sup>4</sup> *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*, Application Nos. C-1628/NUSF, Progression Order # 15, Para. 9 (February 21, 2001)

<sup>5</sup> See Hearing Testimony of Garrett, T74:25-76:11.

<sup>6</sup> NEB.REV.STAT. § 86-140(1).

appears the Commission has failed to account for the statutory mandate that local exchange carrier (including CLECs) intrastate access rates must be fair and reasonable and must not result in the carrier's access-related costs being higher than its access-related revenues.<sup>7</sup>

This failure to account for the applicability of § 86-140 results in a troubling inconsistency in the standard for reviewing CLEC access rates, depending on whether such review is in the context of a Formal Complaint proceeding or in the context of an application for new or revised rates. If the proposed order is adopted, it appears that a CLEC's intrastate access rates will be subject to a simplistic rate-to-rate "reasonably comparable" analysis if an affected carrier files a Formal Complaint to lower such rates. However, if the same CLEC was to file new or revised rates through the application process proposed by the Commission, the standard for determining the appropriateness of such rates would be strikingly different because it would have to include the "fair and reasonable"<sup>8</sup> standard and the "cost versus revenue"<sup>9</sup> standard in light of the applicability of § 86-140(1) to all "local exchange carriers."

The next significant problem with the "reasonably comparable" standard as applied in the proposed order is that it inherently requires the production of evidence regarding the intrastate access rates and supporting data (costs, revenues, composite rate, etc.) of the underlying ILEC.<sup>10</sup> In light of Qwest's own failure to produce evidence supporting its intrastate access rate during its most recent application to increase its rates,<sup>11</sup> it would be a seemingly impossible task for a third party (or the Commission) to produce supporting evidence of the underlying ILEC's rate in order to prove whether or not the CLEC's rate is reasonably comparable to the ILEC's rate.

Next, the "reasonably comparable" standard as proposed by the Commission is severely

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<sup>7</sup> *See id.*

<sup>8</sup> "The Commission may, within sixty days after the close of the hearing, enter an order setting access charges which are fair and reasonable." NEB.REV.STAT. § 86-140(1).

<sup>9</sup> "[T]he 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." NEB.REV.STAT. § 86-140(1).

<sup>10</sup> In the Commission's Order in Application No. FC-1332/FC-1335, the Commission explained: "Even AT&T's own witness testified to the difficulties of comparing access rates between carriers. Mr. Bax testified that the access rate AT&T urges us to adopt is based on assumptions. Mr. Bax state, 'I don't have Qwest's proprietary and confidential data, so I am not sure how [Qwest] developed their numbers.'" The Commission further found: "Even if we determined Qwest's access rates were the appropriate rate for OrbitCom's access rates, we have nothing but assumptions offered by AT&T to determine Qwest's current rates. As Mr. Bax points out, Qwest was not a party to the above-captioned proceeding. While Mr. Bax's assumptions may be valid, they remain assumptions." *Id.* at 10.

<sup>11</sup> *See In the Matter of the Nebraska Public Service Commission to conduct an investigation of Qwest Corporation's Proposed Switched Access Charge Rates*, Application No. C-3945/NUSF-60.02/PI-138, Order, p. 12 (February 3, 2009).

flawed in that it inappropriately assumes that the underlying ILEC's intrastate access rate is fair and reasonable. Qwest recently sought an increase in its intrastate access rates from approximately 2.1 cents/minute to 4.8 cents/minute,<sup>12</sup> claiming that its proposed rate was fair and reasonable. In its final order, the Commission never concluded that Qwest's proposed rate of 4.8 cents/minute was unfair or unreasonable. In fact, the Commission explained: "Qwest's proposed access rates *could potentially be fair and reasonable in light of its revenues and expenses*; however, we were presented with no evidence on which to make such a finding."<sup>13</sup> Accordingly, basing a CLEC's rate on an underlying ILEC's rate that may or may not be fair and reasonable is problematic to say the least. A CLEC's fate should not be tied to whether or not the underlying ILEC presents an adequate case to establish that its proposed rates intrastate access rate was fair and reasonable.

Finally, the "reasonably comparable" standard as proposed by the Commission is undesirable because it subjects CLEC's to the whims of the underlying ILEC. Under the facile rate-to-rate approach to determining reasonable comparability proposed by the Commission, particularly the establishment of a 10% differential as a benchmark indicator,<sup>14</sup> the underlying carrier has the power to essentially run its competitors out of business by unilaterally lowering its intrastate access rates to unreasonable levels. For example, Qwest could simply lower its rates at anytime to an unreasonably low level, and then, under the rate-to-rate "reasonably comparable" standard proposed by the Commission, all Nebraska CLEC competitors of Qwest would theoretically be forced to do the same, regardless of whether such rates resulted in CLECs not having an opportunity to earn a reasonable overall rate of return in Nebraska and regardless of whether such rates caused the CLECs to have access-related costs higher than access-related revenues in Nebraska. Such an outcome provides further support for OrbitCom's and NT&T's proposition that the Commission revise its standard.

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<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 12.

<sup>14</sup> See Application No. C-4145/NUSF-74/PI-147, Order, page 10 (November 3, 2009). In addition to all of the reasons described in this section for reevaluating the proposed standard for CLEC access rates, the 10% differential as benchmark indicator, is inapplicable in light of its source. The context of the NUSF-50 analysis was local rates to end user consumers, rather than intrastate access rates to interexchange carriers. Moreover, the NUSF-50 order did not conclude that 10% was the magical differential for determining reasonable comparability, rather, it simply concluded that it was close enough to be considered reasonably comparable. In other words, the Commission did not preclude itself from late concluding that \$27.95 (or some other amount) is not also reasonably comparable to \$17.95.

## **B. The Commission Should Revise the Standard**

In light of all of the foregoing problems associated with the Commission's proposed application of the "reasonably comparable" standard, the Commission should either eliminate such standard altogether and simply adopt the identical standard used to evaluate ILEC access rates, or the Commission should combine the "reasonably comparable" standard with the statutory standards set forth in § 86-140(1) to create a consistent and fair evaluation of the intrastate switched access rates of CLECs to be applied regardless of whether the review takes place in the context of a complaint or an application for new or revised rates.

To the extent the Commission chooses to utilize the "reasonably comparable" standard, NT&T and OrbitCom propose that the Commission revise the application of such standard so that it is not based on a simple rate-to-rate comparison of a CLEC rate to a competing ILEC rate, but that it is rather based on a case-by-case review that takes into account all the factors related to (1) the reasonable comparability analysis, (2) the fair and reasonable analysis and (3) the analysis of whether the final rate results in the CLEC's access-related costs are not higher than its access-related revenues in Nebraska.

Accordingly, the Commission should avoid any evaluation of CLEC access rates that involves only a rate-to-rate comparison with the underlying ILEC without taking into account all other important factors.<sup>15</sup> The Commission should incorporate the evaluation factors that it proposes to apply in applications for new or revised access rates, including the overall 10% rate of return criteria and an assurance that the final rate cannot cause the carrier's access-related costs to be higher than its access-related revenues. It should also consider other carrier-specific factors when determining whether rates are reasonably comparable to the underlying ILEC's rates, including, but not limited to, the type and location of the customers served by the carrier, the size of the carrier, the number of customers, and the carrier's overall revenues and expenses. In fact, the Commission recently found in the Qwest proceeding that "[e]ach carrier's revenues and expenses could potentially be different, allowing for many different intrastate access rates, all of which could be fair and reasonable in relation to that individual carrier."<sup>16</sup>

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<sup>15</sup> To some extent the Commission's standard for CLECs set in C-1628 accounted for additional factors other than a simplistic rate-to-rate comparison by including the exception language, "absent a demonstration of costs."

<sup>16</sup>Qwest Application No. C-3945/NUSF-60.02/PI-138, Order, p. 12 (Feb. 3, 2009).

### C. Transition and Prospective Effectiveness

Regardless of whether the Commission revises its standard for reviewing CLEC access charges, NT&T and OrbitCom strongly recommend that any access rate changes that are ordered by the Commission should be implemented during a transition period, similar to the transition periods provided to ILECs during and following the Commission's rulings in Application No. C-1628. Reductions in intrastate access charges may have a crippling affect on some CLECs, and thus it is appropriate to allow access rate changes to be gradually made over an extended period in order to allow CLECs to search for adequate sources of replacement revenue or change their business model altogether. Moreover, to the extent the Commission should order the reduction of access rates of any local exchange carrier, the effectiveness of such order must be prospective and not retroactive.

### III. Burden of Proof

Once a proper standard is established for evaluating the appropriateness of a CLEC's intrastate switched access rates, the logical next question is who has the burden of proving that the CLEC's rates either meet the standard or fail to meet the standard. Is the complainant required to prove that a CLEC's rates are improper, or is the defendant CLEC burdened with proving its rates are proper? Determining who has the burden of proof in an access rate Formal Complaint will have a significant impact on the outcome of future complaint proceedings and will affect how eager affected parties might be to begin or resume filing multiple Formal Complaints.

In the Commission's proposed order, it appears that the Commission proposes that the burden of proving the validity of a CLEC's rates in the context of a complaint proceeding is on the defendant CLEC, rather than the complaining party.<sup>17</sup> If such is the intention of the Commission, the Commission will be alone in its conclusion when compared to utility regulators in nearly every industry that has some level of rate regulation. While neither the Commission

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<sup>17</sup> In its proposed Order, the Commission does not require the complaining party to present any evidence but requires the Defendant CLEC to provide evidence *in its Answer* justifying its current rates. This is contrary to the Commission's approach in Application Nos. FC-1332/1335, in which the Commission concluded that, even if AT&T would have properly brought its complaint, the complaint would have failed because AT&T failed to present evidence (other than its own assumptions) on which the Commission could base its analysis. *See* Application Nos. FC-1332/FC-1335, Order, page 10 (November 10, 2009).

nor any Nebraska court has yet to address the issue, there exists a wealth of well-established utility regulation precedent that the complaining party in a complaint proceeding before a public service commission bears the burden to prove that the defendant's rates are unlawful.<sup>18</sup>

In *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781 (D.C. Cir. 2000), the D.C. Circuit of the United States Court of Appeals directly addressed whose burden of proof it is when a complaint is brought challenging a currently effective tariff rate or charge as opposed to challenging an application for new or revised tariff rates or charges. The Court held that well-established FCC precedent, along with a wealth of analogous utility regulation precedent, ***clearly imposes the burden of proof on the complainant in a proceeding in which the complainant is challenging a tariff rate that is already in effect.***<sup>19</sup>

In *Hi-Tech v. FCC*, Hi-Tech filed a complaint with the FCC against Sprint Communications regarding revisions to a long distance calling program, which revisions *went into effect two years prior to the filing of Hi-Tech's complaint.*<sup>20</sup> Under federal law, 47 U.S.C. § 204 grants the FCC “quasi-legislative authority to evaluate a carrier’s proposals for new or revised rates,”<sup>21</sup> whereas, 47 U.S.C. § 208 by contrast grants the FCC “authority, upon complaint by an injured party, to adjudicate the lawfulness of a carrier’s past and present rates and practices.”<sup>22</sup> This is analogous to Nebraska law where § 86-140(1) applies to applications for new or revised rates and more general complaint regulations<sup>23</sup> apply to challenges to existing rates.

In the underlying action before the FCC, the FCC held that “[i]t is well established that, in a formal complaint proceeding brought under section 208 of the Act, the complainant has the burden of proof to demonstrate that the carrier has violated the Act or Commission orders.”<sup>24</sup> On appeal, the D.C. Circuit found that the complaint was a complaint by an affected party seeking to adjudicate the lawfulness of a carrier’s past or present rates, rather than as a complaint to

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<sup>18</sup> See *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781 (D.C. Cir. 2000); *Public Serv. Comm'n v. FERC*, 866 F.2d 487, 488 (D.C.Cir. 1989); *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n. 34 (D.C. Cir. 1980); *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S.444, 446, 450, 454, 99 S.Ct. 2388 (1979); 5 U.S.C. § 556(d).

<sup>19</sup> See *Hi-Tech v. FCC*, 224 F.3d 781.

<sup>20</sup> See *id.* at 787.

<sup>21</sup> *Id.* at 786.

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

<sup>23</sup> See NEB.ADMIN.CODE, Title 291, Chapter 1, Rules of Commission Procedure; see also NEB.REV.STAT. § 75-119 (if applicable).

<sup>24</sup> *Hi-Tech Furnace Sys. v. Sprint Communications Co.*, 14 F.C.C.R. 8040, 8044 (1999).

evaluate new or revised rates.<sup>25</sup> The Court agreed with the FCC’s understanding and distinction and noted that it “is similar to that which courts have made with respect to analogous provisions in both the Interstate Commerce Act (ICA) and the Natural Gas Act (NGA).”<sup>26</sup>

In concluding that Hi-Tech—the party challenging a rate revision that had already been in place for two years—bore the burden of proof, the Court explained its analysis as follows:

*Hi-Tech did not file a complaint with the Commission before the Fridays Free revisions went into effect. Instead, it challenged them two years after they had been in place. Accordingly, under the foregoing interpretation of the two statutory provisions, Hi-Tech’s complaint falls within section 208.*

Unlike section 204, section 208 is silent as to which party bears the burden of proof. . . .

Well-established FCC precedent imposes the burden of proof on the complainant in section 208 proceedings. So does our own. Such an allocation is consistent with the Administrative Procedure Act (APA), which takes into account the distinction between statutory provisions that do and do not mention the burden of proof, and which directs that: **“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”** 5 U.S.C. § 556(d). It is likewise consistent with the Supreme Court’s allocation of the burden of proof under the analogous provisions of the ICA, and with our own allocation of the burden under the analogous provisions in the NGA. Accordingly, we find nothing unlawful about the FCC’s decision to impose upon Hi-Tech the burden of proof regarding the reasonableness of the tariff revisions.<sup>27</sup>

As noted by the D.C. Circuit, the nearly identical burden of proof issue has been addressed in the context of the Interstate Commerce Act (ICA),<sup>28</sup> the Natural Gas Act (NGA) and the Administrative Procedures Act (APA). As it relates to the NGA, the D.C. Circuit in *Public Serv. Comm’n v. FERC*,<sup>29</sup> held: “[u]nder § 4 [of the NGA] the company has the burden of showing that [its] proposed rates are just and reasonable, while under § 5 the Commission must show that the [filed] rates it would alter are not just and reasonable. . . . **The unifying principle**

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<sup>25</sup> See *id.*

<sup>26</sup> *Id.* at 786.

<sup>27</sup> (Emphasis added) *Id.* at 787. See also, *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n. 34 (D.C. Cir. 1980)(noting that the complaint procedure of §§ 206-209 “shifts the burden of proof onto the aggrieved party”).

<sup>28</sup> See *Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S.444, 446, 450, 454, 99 S.Ct. 2388 (1979)(noting that burden of proof is on shipper (customer) in § 13(1) proceeding).

<sup>29</sup> 866 F.2d 487 (D.C.Cir. 1989).

*is that the proponent of change bears the burden.*”<sup>30</sup> Consistent with that unifying principle, Section 556 of the federal APA provides: “Except as otherwise provided by statute, *the proponent of a rule or order has the burden of proof.*”<sup>31</sup>

In summary, the overwhelming authority in analogous and nearly identical circumstances establishes that the burden of proof is clearly on the complainant. Thus, as it relates to an affected carrier’s Formal Complaint regarding a CLEC’s existing and effective access rates, the burden must be placed on the complaining party to prove such rates are unlawful. Therefore, the Commission’s proposed order should be revised to place the burden of proving the unlawfulness of such rates on the complainant.

#### **IV. Inconsistencies with Rules of Commission Procedure for Formal Complaints**

In addition to the aforementioned concerns regarding the evaluation standard and burden of proof related to a review of a CLEC’s access rates, NT&T and OrbitCom urge the Commission to modify its proposed Formal Complaint process to match the established Rules of Commission Procedure. The Commission’s proposed order provides that “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.”<sup>32</sup> However, the Commission’s proposed procedural path for challenging existing CLEC access rates veers far from the requirements of the Commission’s Rules of Procedure regarding Formal Complaints. For this reason, NT&T and OrbitCom request the Commission revise its proposed review process to be consistent with the Commission’s Rules of Procedure.

First, the Commission’s proposed order requires that a CLEC provide “the following information for a minimum of three years, by year . . . *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.”<sup>33</sup> This requirement is directly contrary to the Commission’s Rules of Procedure Rule 005.08, which provides: “Answer to Formal Complaint: An answer to a formal complaint shall be filed and shall admit or deny each material allegation of the formal complaint. The answer shall set forth any affirmative defense

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<sup>30</sup> *Id.* at 488.

<sup>31</sup> 5 U.S.C. § 556(d).

<sup>32</sup> Application No. C-4145/NUSF-74/PI-147, Order, page 10 (November 3, 2009).

<sup>33</sup> *Id.* at 11.

which the defense may assert. The Commission shall have the discretion, upon proper showing, to dismiss the formal complaint or require further action.”<sup>34</sup> It is inconsistent with the Commission rules and therefore improper to require the Defendant to produce evidence in its Answer to a Formal Complaint. Rather, the Defendant’s Answer must admit or deny the allegations of the formal complaint and must set forth any affirmative defenses the Defendant might have. The production of evidence should be reserved for the discovery process and hearing.

Next, the Commission’s proposed order appears to imply that the Commission will simply rule upon the Formal Complaint after receiving it and evaluating the information provided in the Defendant’s Answer along with any information related to extenuating circumstances or explanations for why the CLEC’s rate is not within 110% of the underlying ILEC’s rate. Again, this is inconsistent with the Commission’s Rules of Procedure, which first set forth a process by which the Complainant and Defendant may attempt to work toward resolving the issues in the complaint,<sup>35</sup> and then provide that a hearing be held at which time the parties may present evidence to be made part of the record before the Commission.<sup>36</sup> In light of the inconsistencies between the Commission’s proposed process and the Rules of Commission Procedure, OrbitCom and NT&T suggest that the Commission modify its proposed complaint process to conform to the Commission’s rules.

#### V. Unintended Consequences of the Proposed Complaint Process

Based on the Commission’s proposed standard and its apparent placing of the burden of proof on the Defendant CLEC, the overall posture of the Commission’s complaint process appears to strongly favor the potential complainant. NT&T and OrbitCom are concerned that the complainant-friendly nature of Commission’s proposed process may have certain unintended consequences that must be avoided. Despite the rhetoric of the large interexchange carriers looking to lower intrastate access rates of both ILECs and CLECs in Nebraska, such carriers have provided no commitments that the lowering of Nebraska CLEC intrastate access rates will result in lower long distance rates for Nebraska consumers. In fact, if CLECs (or ILECs) are

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<sup>34</sup> NEB.ADMIN.CODE, Title 291, Chapter 1, Rules of Commission Procedure, Rule 005.08.

<sup>35</sup> *See id.*

<sup>36</sup> *See id.* at Rules 005.08, 016, 018; *see also* NEB.REV.STAT. §§ 75-131, 75-132.

forced to lower their intrastate access rates in Nebraska, the likely result will be higher local rates and/or less competition in Nebraska.<sup>37</sup> In order to have an opportunity to earn a profit in Nebraska, CLECs will either be forced to (1) raise their local rates to the extent permitted under prior Commission orders in order to make up for lost revenue from lowered access rates, or (2) exit the Nebraska market. Either scenario will likely have an adverse impact on both local rates and competition in this state.

In addition to the likely adverse impact on local rates and competition in Nebraska, NT&T and OrbitCom are also concerned that the nature of the Commission's proposed process for challenging CLEC access rates encourages unnecessary litigation. The encouragement of litigation in this context, whether intended or not, is contrary to the best interests of Nebraska consumers and leaves Nebraska's best hopes for legitimate competition for local and advanced service severely exposed. As was apparent in the transcript from the hearing held on January 6, 2010, the large, national industry participants are champing at the bit to get this portion of the Commission's proposed order adopted and effective in order to begin or resume litigation over CLEC rates.<sup>38</sup> Subjecting an important group of industry participants to most certain attack by what may likely be multiple parties is not good policy, particularly when there are alternative solutions, including a revision of the review standard, a proper shifting of the burden of proof to the complainant, and/or the grandfathering of current CLEC rates in a similar fashion as the Commission proposed for ILECs.

## **VI. Grandfathering Existing CLEC Access Rates**

The Commission's proposed order provides that a "review of existing ILEC access charges may only be initiated upon the Commission's own motion."<sup>39</sup> Although the Commission explained that it made this distinction for ILEC access charges based on the fact that it has formally reviewed and approved ILEC access charges as part of the Application No. C-1628 transition plan process, OrbitCom and NT&T suggest that CLEC rates that are in effect as of the date of the Commission's final order in this proceeding should also be grandfathered in a similar manner as ILECs rates, subject to a review by the Commission on its own motion.

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<sup>37</sup> See T78:9-19.

<sup>38</sup> See T25:2-21; T62:22-63:9; T65:24-70:19; T75:7-10

<sup>39</sup> Application No. C-4145/NUSF-74/PI-147, Order, page 10 (November 3, 2009).

The intrastate switched access tariffs of many CLECs, including NT&T and OrbitCom, have been on file and effective for many, many years. The statutorily allotted time for challenging the initial tariff filings lapsed long ago, and therefore, parties should not be able to now bring a complaint to challenge these long-standing rates several years after they become effective. Moreover, if the Commission chooses not to grandfather the existing and effective rates of CLECs, multiple CLECs, many of whom are relatively small carriers in Nebraska, will be exposed to the likelihood of defending multiple formal complaints. If the Commission chooses to grandfather current CLEC rates and if the Commission or other carriers have concerns about the rates of certain CLECs, the Commission (on its own accord or at the prompting of concerned parties) would still be able to open an investigation into a CLEC's rates, rather than subjecting CLECs to a potential onslaught of litigation.

## **VII. Conclusion**

In conclusion, NT&T and OrbitCom recommend that, in light of the numerous shortcomings related to the proposed application of the "reasonably comparable" standard, the Commission should reevaluate and revise the standard for reviewing the legality of CLEC intrastate switched access rates. They also recommend that the Commission determine that the complaining party shall have the burden of proof in a Formal Complaint that challenges CLEC access rates. In addition, the Commission should modify its proposed complaint process to be consistent with the Commission Rules of Procedure for Formal Complaints and should grandfather current CLEC rates, similar to the Commission's proposal for CLECs.

DATED: February 16, 2010

NEBRASKA TECHNOLOGY &  
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ORBITCOM, INC.

A large, stylized handwritten signature in black ink, appearing to read 'M. Fahleson', is written over a horizontal line.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an original and a copy of the foregoing Joint Comments of NT&T and OrbitCom were served by hand delivery to the Public Service Commission and a copy was served via U.S. mail or hand-delivery on February 16, 2010 addressed as shown below, to the following:

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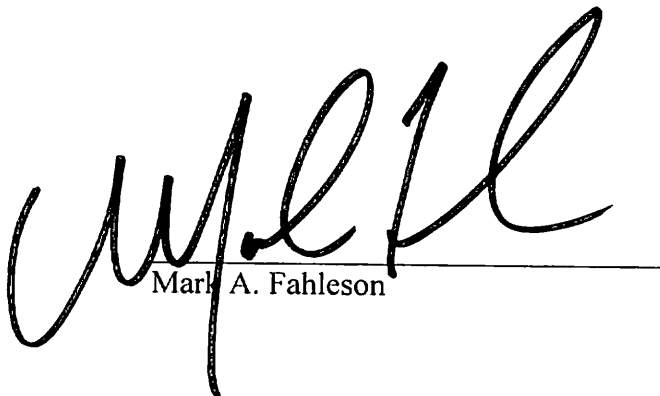
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