BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public Service Commission on its own Motion to Conduct an investigation on intrastate switched access charge policies and regulation codified in Neb. Rev. Stat. § 86-140	)))))	APPLICATION NO. C-4145/ NUSF-74/PI-147

REPLY COMMENTS OF THE RURAL INDEPENDENT COMPANIES

I. INTRODUCTION

The Rural Independent Companies (the "Companies")[1] hereby submit the following Reply Comments in response to the comments filed pursuant to the Nebraska Public Service Commission's (the "Commission") invitation for comments transmitted to the parties by Staff Attorney, Nichole Mulcahy, on January 14, 2010. The Companies' Reply Comments will address issues raised by various parties in filed comments regarding the Commission's Proposed Order released on November 3, 2009 (the "Proposed Order"), and the public hearing on this docket held on January 6, 2010.

II. BACKGROUND

The Companies provided information regarding the background of this docket in the Companies' Comments filed on February 16, 2010. In summary, this docket was opened by the Commission on February 24, 2009 ("Order Opening Docket"), for the Commission to establish a clearly defined set of policies and procedures that will govern access rate changes as well as a minimum standard required by *Neb. Rev. Stat.* § 86-140 to guide the Commission's determination as to whether access rates are fair and reasonable. On January 6, 2010, a public

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

hearing was held regarding this docket and comments were filed by parties on February 16, 2010.

The Order Opening Docket established the purpose for this proceeding in stating that:

> In the February 3, 2009, Order, the Commission indicated its intent to open an investigatory docket to, "examine the issues raised in [the] proceeding regarding the appropriate evidentiary standard and minimum criteria required under Neb. Rev. Stat. §86-140 to prove a proposed access rate is fair and reasonable." [footnote omitted]
>
> * * * *
>
> Therefore, the Commission opens this docket on its own motion to conduct an investigation on access charge policies and to clarify the minimum criteria required under Neb. Rev. Stat. § 86-140 which governs access rate changes. The Commission does not have any intention through this investigation to consider or evaluate current intrastate switched access rates of telecommunications carriers. On the contrary, the purpose of this investigation will be focused on overarching policy objectives and goals rather than specific instances or rates.

Order Opening Docket at 2-3.

As is self-evident from the above quotation from the Commission's Order, this docket was not opened for the purpose of reviewing current access charge rates of any single access provider or of Nebraska access providers as a group. Rather, the Commission seeks to establish clearly defined policies and procedures that will guide the Commission's formulation of an evidentiary standard for the determination as to whether access rates are fair and reasonable under section 86-140. The Companies' Reply Comments will be organized on an issue-by-issue basis discussing the comments submitted.

III. PURPOSE OF THIS DOCKET IS TO SET APPROPRIATE PROCEDURES AND STANDARDS – NOT TO COMPLETE A COMPREHENSIVE REVIEW OF CURRENT ACCESS RATES

The comments that focused on the process and standards that are required pursuant to section 86-140 appropriately address the subject matter of this proceeding. These comments

included CenturyLink, Rural Telecommunications Coalition of Nebraska ("RTCN"), Cox, NT&T/Orbitcom and portions of the Qwest, AT&T and Verizon Comments.

However, the Commission should disregard as nonresponsive to the issues presented in this proceeding the portions of the AT&T, Verizon and Qwest Comments and the testimony advocating that this docket should address access rates in Nebraska. This type of comment is illustrated by Verizon's incorrect assertion that the Commission's thrust in this docket should focus on the need to lower access rates.[2] As stated by the Commission in the Order Opening Docket (*see* Companies' Comments and the above quotation), an evaluation of access rates is not the purpose of this docket and there is no evidence in this record that supports lowering of access rates. Any contrary statements, including Verizon's assertions and proposal,[3] should be rejected by the Commission.

A significant portion of Verizon's Comments provide a one-sided litany of events in other states.[4] If and when the Commission opens a docket to compare Nebraska's intrastate access rates and compensation mechanisms with other states, this information may become relevant; however, such information and the accompanying arguments provided by Verizon are wholly irrelevant to the purpose of this docket.

AT&T also asserts that the Commission should address "access reform" in this docket.[5] Again, these comments and requests do not address the issues that are the subject of this proceeding. The Commission should disregard AT&T's attempts to broaden this proceeding and

---

[2] Verizon Comments at pp. 2-6.

[3] For example, Verizon urges a uniform benchmark that applies to all LECs' access charges. Verizon Comments at p.6. This one-size-fits-all proposal is not responsive to the current Commission inquiry and is not appropriate for the access rate and compensation system in Nebraska.

[4] *Id.* at pp. 8-17.

[5] AT&T Comments at p. 11.

rather, should focus on resolving the important procedural issues and the evidentiary standard relating to section 86-140.

The Companies agree with CenturyLink's concerns about Qwest's testimony that appears to request establishment of an ILEC access rate benchmark for the entire state. Not only would such action be potentially harmful to the sustainability of existing Commission-approved telecommunications policies, but moreover, the discussion of this benchmark proposal is again beyond the scope of this proceeding and is not relevant to the topics to be addressed by the Commission.

The Commission should accord no weight to the proposals and unsupported statements made by Verizon, AT&T and Qwest regarding issues relating to access rates that are outside the scope of this proceeding. The focus of the Commission's efforts should be to determine the "appropriate evidentiary standard and minimum criteria required under Neb. Rev. Stat. § 86-140 to prove a carrier's proposed access rates are fair and reasonable."[6]

IV. NEGOTIATIONS AND APPLICATIONS FOR REVIEW SHOULD ONLY OCCUR WHEN THERE IS AN ACCESS RATE CHANGE

The Commission is correct in its interpretation of the Legislature's directive in the first sentence of section 86-140(1) that requires telecommunications companies to negotiate access rates prior to applying for Commission review of access rates, and that negotiations can only be triggered if a provider of access service seeks to change its existing access rates.[7] The Companies agree with the Comments submitted by the RTCN that support the Proposed Order regarding the negotiation requirement and the ability of individual carriers to request reviews of the access rates.[8] The RTCN is correct in stating that a different policy could "lead to ILECs

[6] Order Opening Docket at p. 2.
[7] Proposed Order at p. 4.
[8] RTCN Comments at pp.3-6.

being forced to defend their rates on a frequent and ongoing basis."[9] Such a result would lead to unnecessary and wasteful use of Commission and telecommunications company resources.

CenturyLink also supports this treatment of existing ILEC access rates in the Proposed Order.[10] CenturyLink is correct that it "makes no sense to open the doors for repeated challenges to a company's access rates if the Commission has already approved those rates."[11]

In opposition, Verizon and AT&T request that the Commission adopt a process that would result in continual review and complaints regarding access rates that have been previously approved by the Commission.[12] Neither AT&T nor Verizon offer any basis on which this negotiation requirement of section 86-140 can be satisfied. Additionally, both AT&T and Verizon ignore the fact that the Commission may open an investigation of a carrier's access rates at any time. The ability of the Commission to undertake such an investigation clearly protects carriers and consumers and, at the same time, prevents interexchange carriers from unnecessarily initiating multiple applications for access rate reviews or access charge complaints.[13]

The Proposed Order reflects the Commission's correct interpretation of the Legislature's directive in the first sentence of section 86-140(1) that requires telecommunications companies to negotiate access rates prior to applying for Commission review of access rates, and that negotiation and applications for review can only be triggered if a provider of access service seeks to change its existing access rates. The Commission should adopt the procedure in the Proposed Order regarding negotiations and applications for review, subject to the revisions proposed by the Companies as set forth in Exhibit 5 placed in the record at the hearing.

---

[9] *Id.* at p. 6.
[10] CenturyLink Comments at pp. 2-5.
[11] *Id.* at p. 4.
[12] Verizon Comments at p.1 and AT&T Comments at pp. 4-7.
[13] As previously stated, the Companies do not take issue with the Commission's position set forth in footnote 9 of the Proposed Order that the Commission may, on its own motion, review access charges of telecommunications companies that are subject to the provisions of section 86-140(1).

V. <u>EVIDENTIARY REQUIREMENTS OPTION 3 - SUPPORTED SERVICES SHOULD BE RETAINED</u>

As previously stated, the Commission's primary purpose in opening this docket was to establish appropriate evidentiary standards for a determination as to whether a telecommunications company's proposed access rates are fair and reasonable. As noted in their Comments,[14] the Companies focused their discussion of the Commission's proposed evidentiary standards on Option 3 because this option is most likely to be used by the Companies to establish that a proposed access charge rate change is fair and reasonable. Option 3 utilizes a supported services analysis to calculate the costs of access.

Qwest has proposed to delete Option 3 because Qwest alleges it is statistically flawed and nonsensical.[15] Qwest states that there is no evidence that Option 3 is accurate.[16] These assertions by Qwest are inaccurate.

Option 3 was supported and explained by testimony at the hearing. Gene Hand, Director of the Commission's Telecommunications Department, testified that Option 3 utilizes NUSF EARN Form data converted to a supported service basis "using a calculation and factors that the staff developed."[17] Additionally, Dan Davis, the Companies expert witness, provided examples of the application of Option 3 to data of two hypothetical carriers.[18]

The Companies have reviewed Option 3 and believe that Option 3 presents valid factors and formulae to establish a carrier's costs of providing intrastate access, thereby allowing the Commission to make a determination as to whether a proposed access charge rate change is fair and reasonable in accordance with the requirements of section 86-140(1). Additionally, Option 3

---

[14] Companies Comments at p. 9.
[15] Qwest Comments at p. 4.
[16] *Id.*
[17] Testimony of Gene Hand (Transcript 5-6).
[18] Testimony of Dan Davis (Transcript 58-60), and see Exhibits 6 and 7.

is important because this option, developed by the Commission Staff, allows for evidence to be provided by a carrier concerning its cost to provide access that is not exclusively developed from an expensive full-blown cost study.

Ironically, the Commission's offering of Option 3 in the Proposed Order comes in response to "the lack of financial evidence Qwest offered at the hearing to show why the increased access rate it proposes is fair and reasonable."[19] The Commission concluded that "[w]e find that some minimal level of financial analysis, including a showing revenues and costs, needs to be provided by any applicant seeking access rate increases under § 86-140."[20] The Commission clarified this conclusion by stating:

> We do not desire a full cost study, nor do we interpret the statute to require such a time-consuming and costly analysis. Yet, as we stated above, we find that some level of financial analysis and cost evidence is contemplated under *Neb. Rev. Stat.* § 86-140.

Based upon the foregoing findings, inclusion of Option 3 in the Proposed Order is not only entirely appropriate, but further, is consistent with the Commission's reasoning in Application No. C-3945. The testimony at the hearing and the explanation contained in the Proposed Order provides sufficient and ample support in the record for the Commission to adopt Option 3. Qwest's proposal to remove Option 3 from the Proposed Order should be rejected.

VI. INTERIM APPLICATION OF REVISED ACCESS RATES

The Companies have requested a modification of the Proposed Order that would provide the local exchange carrier seeking the access rate changes with an option to implement the proposed access changes on an interim basis effective on the date that the local exchange carrier files its response to the application for access charge review. This interim period would be

[19] *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 dated Feb. 3, 2009 at p. 10.
[20] *Id.* at p. 11.

subject to a true-up of the interim access rate charges based upon the final access rate approved by the Commission. The RTCN supports this modification to the Proposed Order to allow for the interim rate implementation.[21]

Verizon also addressed this interim implementation issue.[22] Although Verizon believes the use of an interim rate would occur infrequently, Verizon states that it should be made "clear that any 'interim' rate would be subject to a 'true-up,' and that the LEC would have to promptly refund to its interexchange carrier customers the differences . . ."[23] The Companies' proposal regarding the interim access rate implementation specifically stated that such implementation would be subject to "true-up."[24]

The Companies believe that the adoption by the Commission of this requested modification is prudent and appropriate.

VII. THE COMMISSION SHOULD TAKE ACTION ON THE PROPOSED ORDER

The Companies believe that the issues in this docket relating to the application of section 86-140 to incumbent LEC intrastate access charges have been fully considered, reviewed and developed and are now ripe for the Commission to issue a final order addressing these issues. It should be remembered that in addition to this docket already being opened for one year, the issues in this docket actually relate back to Application No. C-3945/NUSF-60.02/PI-138, which was opened on July 29, 2008. Furthermore, in addition to the work in the previous docket, the Commission has, in this docket, received four rounds of comments (initial comments and reply comments, post hearing comments and reply comments) and has held a public hearing.

---

[21] RTCN Comments at pp. 8-11.
[22] Verizon Comments at pp. 18-19.
[23] *Id.* at p. 19.
[24] *See* Exhibit 5 at pp. 6-7.

Accordingly, the Companies do not support delaying a decision in this proceeding while one or more workshops are held.[25] CenturyLink joins in this position stating that workshop discussions "would be an inefficient use of the parties' and the Commission's resources."[26] Additionally, the Companies do not believe that the Commission should delay issuance of a final order in this proceeding until the Federal Communications Commission ("FCC") takes action regarding intercarrier compensation in light of the continuing uncertainties surrounding the date on which the FCC will ultimately rule on this subject.[27]

In the event that one or more workshops are ordered by the Commission, the Companies suggest that the subject matter of such workshops be limited to issues relating to the application of section 86-140 to CLEC access charges, which issues are addressed on pages 10 and 11 of the Proposed Order under the headings "Access Rate Complaints", "Reasonably Comparable", and "Access Complaint Evidentiary Requirements". Of the parties that filed Post-Hearing Comments, only Qwest and AT&T advocated that one or more workshops be conducted. The primary thrust of Qwest's Comments that take exception to the Proposed Order focus on "Access Rate Complaints" which relate only to CLEC access rates.[28] Thus, it appears that holding one or more workshops focused on CLEC access issues would address Qwest's interests.

While Cox, in its Comments, expresses its willingness to participate in one or more workshops, the principal focus of the Cox Comments relating to further development of the

---

[25] AT&T (AT&T Comments at p. 12) and Qwest (Qwest Comments at p. 1) filed comments requesting a future workshop. Additionally, Cox (Cox Comments at p. 7) and CenturyLink (CenturyLink Comments at p. 7) did not object or oppose the Commission holding a future workshop. It should also be noted that the Commission has entered an Order Staying Proceeding in Application No. FC-1339 stating "that the proceedings in the above-captioned matter be, and it is hereby, stayed pending the outcome in Application No. C-4145/NUSF-74/PI-147." Thus, the Commission anticipated an early resolution of the instant proceeding when it entered the stay order in FC-1339.

[26] CenturyLink Comments at p. 7.

[27] Cox (Cox Comments at p. 2) states that they believe that waiting for intercarrirer compensation reform may be more efficient.

[28] *See* Qwest Comments at pp. 5-8.

record in this proceeding relates to a review of CLEC intrastate access charges and establishment of a transition process.[29] Rather than conducting one or more workshops, the Companies suggest that the Commission proceeds to implement Cox's suggestion to either "open a Progression Order as a part of the present docket, or if it prefers, to open a new docket that specifically reviews CLEC intrastate access charges and to create a statewide CLEC transition and implementation process . . ."[30] Either of these procedural approaches would be preferable to conducting workshops which would lack the procedural and substantive focus that could be provided by a progression order or an order opening a new docket to address CLEC access charge issues.

Based upon the comments and testimony already provided in this docket, the Companies submit that the Commission has established a comprehensive record on which it can resolve any open issues relating to incumbent LEC intrastate access charges. The prompt entry of a final order establishing the procedures and policies governing incumbent LEC intrastate access charge changes will better serve the public interest than a delay of that decision.

VIII. THE LEGISLATIVE HISTORY DOES NOT SUPPORT AT&T'S ASSERTIONS THAT EVERY TELECOMMUNICATION CARRIER CAN INDEPENDENTLY AND RANDOMLY ATTACK A TARIFFED ACCESS RATE

AT&T's review of the "Legislative History of Neb. Rev. Stat. § 86-140" in Exhibit A attached to its Comments, fails to present a complete review of the genesis of section 86-140 and the negotiation requirement set forth therein. In order to "go back to the beginning" with regard to this statute, it is necessary to refer to 1986 Nebraska Laws, Legislative Bill 835 ("LB 835"), and testimony before the Committee on Public Works regarding LB 835.

---

[29] *See* Cox Comments at p. 6.
[30] *Id.*

According to the Legislature's records, AT&T's then 25-year Director of External Affairs for Nebraska, Patrick McHale, presented testimony in support of LB 835. Following is Mr. McHale's testimony relative to that section of LB 835 that is now codified as section 86-140:

> It is our [AT&T's] opinion that LB 835, with one change, would be the bill most beneficial to the general public and the industry. It allows those companies that wish to compete in the marketplace to pursue full competition, yet it allows other companies to stay regulated. As a safeguard, it limits increases in the price of local service. Our proposed amendment is to Section 6. *Briefly stated, the amendment would allow the Public Service Commission to act as an arbitrator* ***when telecommunications companies cannot reach agreement on the price of access*** *or jointly furnished interexchange services.* It is our opinion that the modified final judgment to the consent decree requires this. (emphasis added)[31]

AT&T was the proponent of the amendment to LB 835 that constituted the Commission as the "arbitrator" in an access charge review application "*when telecommunications companies cannot reach agreement on the price of access*." Obviously, Mr. McHale's statement concerning "agreement on price" pre-supposed that the companies have been engaged in ***negotiations***. Thus, in the final version of LB 835, section 14 embodied the requirement of negotiations of access rates which now appears in section 86-140(1). The testimony by AT&T's Director of External Affairs establishes rationale for the negotiation requirement of section 86-140(1), and confirms the Commission's position in the Proposed Order as well as in the Commission's Orbitcom Order[32] that negotiation between affected telecommunications companies is a condition precedent to initiation of an application for access charge review by an interexchange carrier.

Further, Exhibit A to AT&T's Comments mischaracterizes the intent of 1999 Nebraska Laws, Legislative Bill 514 ("LB 514"). Contrary to AT&T's claim, LB 514 does not provide a basis for the conclusion that a telecommunications company may seek Commission review of

[31] Legislative Record, Committee on Public Works, testimony on LB 835, Feb. 5, 1986 at p. 16.
[32] *See* Companies' Comments at pp. 3-4.

access rates absent efforts to negotiate a proposed access rate change have been attempted and failed.

LB 514 removed the sunset date for the Nebraska Universal Service Fund, and clarified the powers of the Commission regarding access rate reviews. LB 514 did not grant authority to individual carriers to randomly challenge these rates. The legislative history clearly shows that the ability to review established rates was granted to the Commission.

In the hearing before the Transportation Committee regarding LB 514, Senator Bromm, one of the sponsors of LB 514, stated that "the bill clarifies the authority of the Public Service Commission with respect to the power to review access charges on its own motion."[33] Further, in the opening round of floor debate regarding LB 514, Senator Bromm stated that "the second primary purpose of the bill . . . is to clarify the powers of the Public Service Commission with respect to regulating access charges . . ."[34]

The legislative history and the plain language of the statute confirm that LB 514 does not create an independent basis for a carrier to randomly attack a filed access tariff. AT&T's inference that an independent process exists is erroneous. Moreover, a process for carriers to attack filed tariffs that are not subject to proposed changes that have been subject to negotiation would not represent prudent policy making because such a process would encourage an unlimited series of challenges by interexchange carriers of local exchange carrier tariffs which would be wasteful of the Commission's as well as the carriers' resources. The Commission has been vested with the authority to conduct this type of review and the procedures outlined in the Proposed Order are proper.

IX. THE COMMISSION SHOULD ADOPT THE PROPOSED ORDER WITH THE ADDITION OF THE MODIFICATIONS REQUESTED BY THE COMPANIES

[33] Committee on Transportation, LB 514, Page 66 (February 1, 1999).
[34] Legislature Debate, LB 514, p. 883 (February 10, 1999).

The Commission's primary purpose in opening this docket was to establish appropriate evidentiary standards for a determination as to whether a telecommunications company's proposed access rates are fair and reasonable. The Commission has studied this matter for over a year, has issued a Proposed Order that has received a public hearing and two rounds of comments, and subject to the modifications set forth in Exhibit 5, is ripe for issuance as a final order. The Commission should enter a final order regarding incumbent LEC intrastate access charges without further delay or the holding of one or more workshops.

As part of the final order, the Companies renew the request in their Comments for incorporation of the modifications presented by the Companies in Exhibit 5. These suggestions to the Proposed Order include:

a. Requiring cooperation between multiple carriers requesting negotiations;

b. The addition making the access rates effective if no application for review is timely filed;

c. Including a provision to allow the interim implementation of access rates with a true-up process;

d. Including various minor language clarifications as set forth in Exhibit 5; and

e. An affirmation that the examples set forth in Exhibits 6 and 7 accurately present the calculation of the cost of access service as a supported service using the factors and formulas set forth on page 9 of the Proposed Order and include these examples in the final order, including the clarification of the meaning of "urban and rural service areas".

X. CONCLUSION

After consideration of the post-hearing comments and reply comments, and without the need for conducting workshop(s), the Companies respectfully request that Commission proceeds to issue its final order in this docket that includes the modifications to the Proposed Order requested by the Companies.

Dated: February 26, 2010.

Respectfully submitted,

Arlington Telephone Company,
The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
Consolidated Telcom, Inc.,
Consolidated Telephone Company,
Curtis Telephone Co.,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Co.,
K & M Telephone Company, Inc.,
The Nebraska Central Telephone Company,
Northeast Nebraska Telephone Company,
Rock County Telephone Company,
Stanton Telecom Inc., and
Three River Telco ("The Rural Independent Companies").

By: Paul M. Schudel

Paul M. Schudel, No. 13723
James A. Overcash, No. 18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
(402) 437-8500
Facsimile: (402) 437-8558
Their Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of February, 2010, an electronic copy of the foregoing Reply Comments was delivered to:

Nichole Underhill
Legal Counsel
Nebraska Public Service Commission
1200 N Street
300 The Atrium
Lincoln, NE 68509-4927

Kevin Saville
Frontier Communications
2378 Wilshire Blvd.
Mound, MN 55364

Loel P. Brooks
Brooks, Pansing Brooks, PC, LLO
1248 "O" Street, Suite 984
Lincoln, NE 68508

Jill Vinjamuri-Gettman
Gettman & Mills, LLP
10250 Regency Circle, Suite 200
Omaha, NE 68114

Timothy J. Goodwin
Qwest Corporation
1801 California, Suite 1000
Denver, CO 80202

William E. Hendricks
United Telephone Company of the West
d/b/a Embarq
902 Wasco Street
Hood River, OR 97031

Melanie N. McIntyre
AT&T
4300 Market Point Drive, Suite 350
Bloomington, MN 55435

Jack L. Shultz
Harding & Shultz, PC, LLC
800 Lincoln Square
121 South 13th Street
P.O. Box 82028
Lincoln, NE 68501-2028

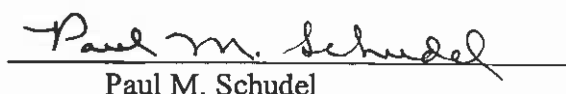
Troy Kirk
Rembolt Ludtke, LLP
1201 Lincoln Mall, Suite 102
Lincoln, NE 68508

Steve Meradith
Windstream Communications
1440 M Street
Lincoln, NE 68508

Steven G. Seglin
Crosby Guenzel, LLP
134 S. 13th Street, Suite 400
Lincoln, NE 68508

Thomas Dixon
MCI Communication Services, Inc.
d/b/a Verizon Business Services
707 17th Street, 40th Floor
Denver, CO 80202

Deonne Bruning, PC, LLO
2901 Bonacum Drive
Lincoln, NE 68502



Paul M. Schudel