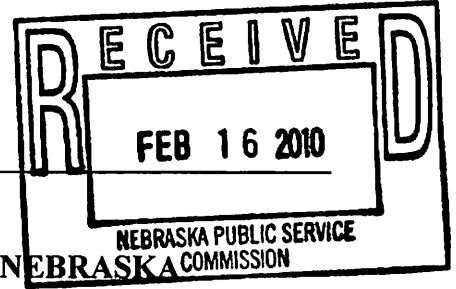


**BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Nebraska Public Service )  
Commission on its own motion to conduct an )  
investigation on intrastate switched access charge )  
policies and regulations codified in Neb. Rev. Stat. )  
Section 86-140. )

Application No. C-4145/NUSF-  
74/PI-147



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**COMMENTS OF THE  
RURAL TELECOMMUNICATIONS COALITION OF NEBRASKA**

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**I. INTRODUCTION**

The Rural Telecommunications Coalition of Nebraska (“RTCN”),<sup>1</sup> by and through its attorneys of record, hereby respectfully submits the following comments in response to the Nebraska Public Service Commission’s (“Commission”) November 3, 2009, Order Issuing Proposed Order and Notice of Hearing in the above-captioned proceeding (“Order”).<sup>2</sup>

As noted in the *Order*, the opening of the above-captioned docket arose out of an investigation into Qwest’s proposed switched access rates in Commission Application No. C-3945/NUSF-60.02/PI-138.<sup>3</sup> In its final order in the aforementioned Qwest proceeding, the Commission determined that it was necessary to establish an appropriate evidentiary standard and minimum criteria for applications seeking changes to intrastate switched access rates under NEB.REV.STAT. § 86-140(1).<sup>4</sup> In the current docket, the Commission first sought and received

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<sup>1</sup> For purposes of this docket, RTCN is made up of the following carriers: Arapahoe Telephone Company d/b/a ATC Communications, Benkelman Telephone Company, Inc., Cozad Telephone Company, Diller Telephone Company, Glenwood Telephone Membership Corporation, Hartman Telephone Exchanges, Inc., Hemingford Cooperative Telephone Co., Mainstay Communications, Plainview Telephone Company, Southeast Nebraska Telephone Co., Wauneta Telephone Company, and WesTel Systems f/k/a Hooper Telephone Company.

<sup>2</sup> *In the Matter of the Nebraska Public Service Commission on its own motion to conduct an investigation on intrastate switched access charge policies and regulations codified in Neb. Rev. Stat. Section 86-140*, Application No. C-4145/NUSF-74/PI-147, Order (November 3, 2009) (“Order”).

<sup>3</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 (February 3, 2009).

<sup>4</sup> See *id.* at 13.

initial and reply comments from interested parties related to (1) the establishment of minimum objective evidentiary criteria to be considered by the Commission in intrastate switched access dockets under § 86-140(1), and (2) certain policy-related questions regarding access rates. RTCN filed both initial and reply comments in response to the Commission's inquiries.

In its November 3, 2009, *Order*, the Commission set forth a "Proposed Order" for which it seeks comments and reply comments from interested parties. Thereafter, on January 6, 2010, a legislatively formatted hearing was held, and various parties presented testimony regarding the Proposed Order. RTCN hereby respectfully submits the following comments in response to the Commission's Proposed Order and the testimony provided at the hearing.

## II. COMMENTS

### A. RTCN Supports the Direction of the Commission's Proposed Order

RTCN commends the Commission for its efforts in creating a workable framework for future intrastate switched access rate applications. RTCN supports the general direction the Commission set forth in its Proposed Order and by these Comments recommends only subtle changes to help clarify and enhance the process and rationale set forth therein by the Commission.

In light of the current environment of elevated local service benchmark rates in Nebraska, a comparably high NUSF surcharge, a depleting state universal service fund, and ongoing investment in fiber projects in rural areas of the State, there appears to be an increasing likelihood that rural ILECs will need to seek increases in their intrastate switched access rates in the coming years in order to meet the ongoing obligations placed on them as carriers of last resort.

All of the RTCN companies have carrier of last resort obligations, and if state universal

service funds are or become insufficient to provide the opportunity for such carriers to earn a reasonable rate of return on their investments to meet these obligations and local rates are raised to benchmark levels, then state access rates should provide for appropriate cost recovery. Such has been the long-standing policy of the Commission, as demonstrated in its NUSF-28 Findings and Conclusions, in which it held: “In the event that the NUSF is not able to meet its funding commitments, companies would in that instance, be permitted to seek approval to increase intrastate access to a reasonable level.”<sup>5</sup> With this in view and in light of the procedural and evidentiary uncertainties that have surfaced in prior applications for access rate increases,<sup>6</sup> it is important that the Commission establish a well-defined access rate application review process and clear evidentiary standards that are consistent with the statutory directives established by the Legislature. Through its Proposed Order in this docket, the Commission is well on its way to accomplishing those objectives.

**B. Interpretation of § 86-140**

In its Proposed Order and its recent order in Application Nos. FC-1332/FC-1335,<sup>7</sup> the Commission has promulgated an accurate and consistent interpretation of NEB.REV.STAT. § 86-140(1). RTCN agrees with the Commission that the “Nebraska Telecommunications Act grants regulatory authority to the Commission regarding changes to intrastate access charges imposed by telecommunications companies for access to local exchange networks for interexchange

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<sup>5</sup> *In the Matter of the Nebraska Public Service Commission, on its Own Motion, Seeking to Conduct an Investigation of Intrastate Access Charges for Rural ILECS*, Application No. NUSF-28, Findings and Conclusions, page 12 (November 26, 2002).

<sup>6</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 (February 3, 2009).

<sup>7</sup> *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) (“Application Nos. FC-1332/FC-1335”).

service in § 86-140.”<sup>8</sup> RTCN also supports the Commission’s understanding and application of the following fair and reasonable standard set forth in the statute: “The Commission may, within sixty days after the close of the hearing, enter an order setting access charges which are fair and reasonable.”<sup>9</sup> As explained more fully below, RTCN further agrees that § 86-140 was not intended “to allow an affected telecommunications company to challenge the intrastate access rates of another carrier at any time by applying for a review of such rates by the Commission,”<sup>10</sup> but that instead, “the provisions of § 86-140 only apply in the event a carrier files a tariff with new or revised access charges.”<sup>11</sup> The Commission’s aforementioned interpretations of §86-140 are well-supported by the language of the statute and the Commission’s understanding of its practical applications.

### C. Challenges to Existing ILEC Rates

Based on the above-reading of § 86-140 and in light of the rigorous process by which current ILEC intrastate switched access rates were established, RTCN strongly supports the Commission’s declaration in the Proposed Order that “[a] review of existing ILEC access charges may only be initiated upon the Commission’s own motion.”<sup>12</sup>

As noted above, by way of its Proposed Order and its conclusions in Application Nos. FC-1332/FC-1335, the Commission clearly understands § 86-140 to only apply in the context of a carrier seeking to implement new or revised intrastate switched access rates and does not apply in the context of a challenge to existing rates under effective tariffs.<sup>13</sup> In reaching this

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<sup>8</sup> *In the Matter of the Nebraska Public Service Commission on its own motion to conduct an investigation on intrastate switched access charge policies and regulations codified in Neb. Rev. Stat. Section 86-140*, Application No. C-4145/NUSF-74/PI-147, Order, page 2 (November 3, 2009).

<sup>9</sup> NEB.REV.STAT. § 86-140(1).

<sup>10</sup> Application Nos. FC-1332/FC-1335, Order at page 7.

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

<sup>12</sup> Application No. C-4145/NUSF-74/PI-147, Order, page 10 (November 3, 2009).

<sup>13</sup> *See id.* at pages 4 and 10; *see also* Application Nos. FC-1332/FC-1335, Order at page 7-8 (explaining “that reviews under the provisions of § 86-140 be necessarily premised upon submission of a tariff to the Commission

conclusion, the Commission looked to the plain language of the statute and found that the negotiation provisions and the time restrictions in § 86-140 helped reveal the legislative intent of the statute.<sup>14</sup>

In addition, the language of § 86-141 also supports the conclusion that § 86-140 was only intended to apply in applications where a carrier is seeking changes to its intrastate access rates. Section 86-141(1) addresses Commission rate regulation as it relates to Section 86-140.<sup>15</sup> With reference to rate regulation under § 86-140, § 86-141(1)(b) provides one of the exceptions to subsection (1) as being when “*the proposed rate increase exceeds thirty percent in one year.*”<sup>16</sup> The language “the proposed rate increase” made with reference to § 86-140 supports a conclusion that rate regulation under § 86-140 was intended by the legislature to apply only in circumstances in which there exists a proposed rate change by a telecommunications company related to its own rates. In addition, §86-141(4) and (5) reference rate regulation under 86-140 as being in the context of a telecommunications company’s “proposed rate change”. Thus, it appears that § 86-141 also lends support to the Commission’s conclusion that § 86-140 is intended to apply only in the context of a carrier seeking new or revised access rates.

Moreover, as it relates to ILECs in particular, the Commission oversaw the restructuring and reduction of all ILECs’ intrastate switched access rates in its various orders in Application No. C-1628<sup>17</sup> and subsequent related proceedings.<sup>18</sup> In those proceedings, the ILECs’ access

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whereby a carrier seeks to implement initial access rates or change its existing intrastate access rates. An affected carrier may initiate a review by the Commission pursuant to § 86-140 only in the event of a tariff establishing a new rate or revising current access rates is filed by a carrier.”)

<sup>14</sup> See *id.*

<sup>15</sup> While §86-141 provides that rate regulation under §86-140 does not apply to telecommunications companies which serve less than five percent of the state’s subscriber lines in the aggregate statewide unless certain circumstances exist,<sup>15</sup> subsection (5) also specifically provides that § 86-141 “shall not be construed to exempt any local exchange carrier from regulation of its access charges pursuant to § 86-140.”

<sup>16</sup> NEB.REV.STAT. § 86-141.

<sup>17</sup> See *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*, Application No. C-1628.

rates were examined and ordered to be reduced, and new rates were subsequently approved by the Commission and implemented during a transition period. To now allow challenges to existing ILEC access rates would greatly undermine the Commission's and industry's extensive efforts in those prior proceedings. It could also lead to ILECs being forced to defend their rates on a frequent and ongoing basis. Such a result would be unnecessary and would place an extremely burdensome strain on such carriers (and the Commission) who previously subjected their rates to scrutiny by the Commission and cooperated with the Commission to reduce such rates.

Based on all the foregoing, RTCN agrees with the Commission's conclusion that challenges to the lawfulness of ILECs' existing access rates under effective tariffs should be prohibited.

**D. Two Statutory Parameters for Determining Lawfulness of ILEC Access Rates**

As it relates to the standard under which the Commission is to review carriers' intrastate switched access rate applications, the Proposed Order is thorough in its proposed application of the fair and reasonable standard, going so far as to provide multiple options to demonstrate a carrier meets the standard and to establish an overall 10% rate of return as a guideline for determining fairness and reasonableness. In addition to the fair and reasonableness standard and an *overall* rate of return guideline, RTCN suggests that the Commission briefly but explicitly address the other access rate parameter set forth in § 86-140, namely that a carrier's access-related annual revenues must not be less than its access-related annual costs.

Section 86-140 provides that "the Commission shall not order access charges which

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<sup>18</sup> See *In the Matter of the Nebraska Public Service Commission, on its own Motion, Seeking to Conduct an Investigation of Intrastate Access Charges for Rural ILECs*, Application No. NUSF-28, Findings and Conclusions (November 26, 2002); *In the Matter of the Nebraska Public Service Commission, on its own Motion, seeking to Determine Access Costs for US West*, Application No. NUSF-17, Findings and Conclusions (September 24, 2002).

would cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs.”<sup>19</sup> Thus, in addition to the requirement that access charges set by the Commission must be fair and reasonable, § 86-140(1) also requires that access charges set by the Commission must not cause a carrier’s annual access-related revenue to be less than its annual access-related costs. The Commission recently confirmed this two-part interpretation of § 86-140(1) by explaining: “Section 86-140 directs the Commission to conduct an analysis of the evidence presented at hearing and set an access rate that is fair and reasonable. The statute then outlines the minimum rate that can be set by the Commission, the cost to the carrier of providing the access service.”<sup>20</sup> Therefore, based on the foregoing interpretation of § 86-140(1), upon a review of a carrier’s application for new or revised access rates, the Commission’s parameters for determining the lawfulness of rates are first, that the rates must be fair and reasonable, and second, that the rates must not cause a carrier’s annual access-related revenue to be less than its annual access-related costs. Accordingly, RTCN recommends that in addition to the Commission’s analysis and application of the fair and reasonable standard and establishment of a guideline *overall* rate of return, the Commission should also explain that it is also bound by the statutory mandate that intrastate access rates cannot be such that they cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs.

#### **E. Procedural Process**

In addition to RTCN’s general support of the Commission’s interpretation of § 86-140 and RTCN’s strong support for a prohibition against challenges to the current access rates of

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<sup>19</sup> NEB.REV.STAT. § 86-140(1).

<sup>20</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, page 10 (February 3, 2009).

ILECs by affected parties other than the Commission, RTCN also offers the following comments related to the procedural process for reviewing applications for new or revised intrastate access rates.

### **1. Time Constraints and Interim Rates**

In light of the statutory mandate that a hearing be held and completed within ninety (90) days following an application for review, RTCN recommends that the Commission explicitly acknowledge the binding nature of such provision and clarify that because of its statutory nature, such time period cannot be extended without the consent of all parties involved.

In addition and in light of the potential length of the process proposed by the Commission to complete an application from the filing of a tariff to the final order from the Commission, RTCN recommends that the Commission amend its Proposed Order to allow for an option to implement interim rates by the carrier seeking a change to its rates. If a carrier reaches a point where it is forced to seek an increase in access rates in order to have an opportunity to earn a reasonable rate of return, it is likely that the timing of the implementation of new access rates may be critical to the financial health of the carrier. Thus, the sooner such carrier can begin to implement new rates the better for the long-term viability of the requesting carrier. Moreover, the approximate 270 days for the entire proceeding to run its course represents significant regulatory lag and warrants the option of implementing interim rates, similar to the option provided under the State Natural Gas Regulation Act.<sup>21</sup> Unlike the natural gas context, however, one of the primary policy shortcomings associated with interim rates (true-up end user customer billing accounts following a final order) would be much less burdensome in the intrastate access rate context because the parties involved in the true-up would not involve end user consumers of telecommunications services but would rather be limited to a true-up between

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<sup>21</sup> See NEB.REV.STAT. § 66-1838(10).

the telecommunications providers involved. For these reasons RTCN recommends that the Commission add the option for carriers to implement interim rates.

## **2. Suspension of Access Tariffs**

As part of its proposed procedure for applications for changes in access rates, the Commission proffers that intrastate switched access tariffs that are filed with the Commission would be automatically suspended. While RTCN does not necessarily oppose the Commission suspending access tariffs following their filing, RTCN is concerned that an automatic suspension without any Commission action is contrary to state statutes and therefore may not be a lawful option. Section 86-144 provides that tariffs of this nature shall be effective after ten days' notice to the Commission, and thus, RTCN recommends that if the Commission is intent on suspending tariffs as they are filed, it should do so through official Commission action rather than through an automatic means as might be declared in a Commission order in this docket.

## **3. Negotiations**

RTCN suggests that the Commission limit negotiations and applications for Commission review under §86-140(1) to "affected" telecommunications companies rather than "interested" telecommunications carriers as described on page 5 of the *Order*. Although subtle, this change in designation is important in light of the specific language of the statute at issue, which provides that "[a]ny *affected* telecommunications company may apply for review of such charges by the Commission."<sup>22</sup> Moreover, by definition, the pool of "affected" carriers is likely narrower than "interested" carriers, and RTCN supports the narrowing of the pool of potential challengers to only include those directly affected by the particular rates being sought.

In addition, RTCN requests the Commission clarify that, to the extent multiple affected telecommunications carriers seek negotiations, the negotiations are to be conducted as a group,

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<sup>22</sup> NEB.REV.STAT. § 86-140(1).

rather than through one-by-one negotiations with each requesting carrier.

Finally, RTCN seeks a clarification from the Commission that, in the event there are multiple carriers who are dissatisfied with the outcome of negotiations and subsequently apply for a review from the Commission, the carrier seeking a change to its rates should only be required to file with the Commission a total of one response to such applications, rather than being required to file a separate response to each application for review.

#### **4. Response to Application for Review**

As described in the Commission's Proposed Order, upon the filing of an application for review of proposed access rates by an affected carrier that is dissatisfied with the outcome of negotiations, the carrier seeking to change its intrastate access rates must file a response to the application for review within twenty (20) days following service of the application. The Commission then described the necessary contents of the response, which include several pieces of evidence supporting the carriers proposed rates. Although RTCN does not object to this proposed process in light of its expediency, RTCN recommends that the Commission clarify the next step in the procedural process, including whether the next step would simply be a review by the Commission followed by the issuance of a final order by the Commission, or whether the Commission intends to hold a hearing and provide further opportunity for parties to submit additional evidence.

#### **5. Endorsement of RIC's Proposals**

During the January 6, 2010, hearing in this docket, the Rural Independent Companies ("RIC"), through its designated representatives, submitted a redline copy of the Commission's Proposed Order, setting forth RIC's recommended changes to the Proposed Order. The document submitted by RIC was received into evidence as Exhibit 5. RTCN has reviewed the

proposed changes set forth by RIC in Exhibit 5 and generally agrees with and endorses the changes set forth therein.

### III. CONCLUSION

In conclusion, as more fully described above, RTCN generally supports the Commission's Proposed Order and at this time recommends only those refinements suggested herein. RTCN again appreciates this opportunity to submit comments and looks forward to its continued participation in this docket.

Dated this 16th day of February, 2010.

RURAL TELECOMMUNICATIONS COALITION  
OF NEBRASKA ("RTCN")

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Hemingford Cooperative Telephone Co.,  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an original and a copy of the foregoing Comments of RTCN 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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