

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. section 86-140.)

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

**POST-HEARING
REPLY COMMENTS OF VERIZON**



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MCI Communications; Services, Inc. d/b/a Verizon Business Services

("Verizon") hereby submits its reply to other parties' post-hearing comments in this proceeding.

I. The Commission Should Move Forward to Implement Needed Access Reform Now.

Nearly all of the parties urged the Commission to move ahead and establish, as the Rural Independent Companies ("RIC") noted, "a clearly defined set of policies and procedures" (RIC at 2), and as Qwest described, "a competitively neutral method for reviewing and establishing intrastate switched access rates." While the parties have different interests and priorities, nearly all acknowledged the importance of this proceeding and asked the Commission to complete its deliberations promptly. Only two companies asked the Commission not to "rush" action but to stay the proceeding instead. CenturyLink at 2; Cox Nebraska Telcom, LLC ("Cox") at 2. However, neither offered a compelling reason for delaying the Commission's access reform efforts.

As AT&T, Qwest and Verizon testified at the hearing in January, there is an urgent need for the Commission to accelerate its efforts to ensure that the intrastate switched access rates of all local exchange carriers ("LECs") in Nebraska are set at levels

that are fair, just and reasonable. Moreover, in response to Commissioner Boyle's request, Verizon and AT&T provided evidence that many other states around the country are moving ahead to reform the intrastate switched access regime in their respective jurisdictions. Verizon Comments at 8-17, AT&T at 12 and Exhibits C, D and E. Thus, the Commission can be confident that, as it takes the necessary steps to reform access charges in Nebraska, its efforts will be aligned with those of regulators in many other states.

II. The Commission Should Enforce Its Existing Cap on CLEC Switched Access Rates By Prohibiting CLECs From Charging Rates That Are Higher Than Qwest's Intrastate Access Rates.

Nine years ago, the Commission ruled that a Competitive Local Exchange Carrier's ("CLEC's") intrastate switched access charges, in the aggregate, must be "reasonably comparable" to the intrastate access rates of the ILEC with which it competes. Application No. C-1628, Progression Order #15 (Feb. 21, 2001) at ¶ 9. In its more recent Proposed Order, the Commission stated that it might be appropriate to use "up to a 10% differential between the CLEC and underlying ILEC access rates as a benchmark indicator" of what constitutes "reasonably comparable." The Commission added that this is not intended to be a "bright line rule," but "a starting point for the Commission's analysis" of whether a particular rate is "reasonably comparable."

A. Permitting CLECs to Charge 10% More than an ILEC is Not Justified

AT&T and Qwest provided compelling reasons why the proposal to permit CLECs to charge 10% more than an ILEC is not appropriate. AT&T explained that the proposal runs contrary to the thrust of Neb. Rev. Stat. § 75-123, which requires the Commission to consider the *lowest* rates being charged by other carriers when setting

rates. Given this mandate to use the lowest rates as a guide, this provision cannot be read to indicate that a rate should be presumed reasonable or “reasonably comparable” if it is set 10% *higher* than such other rates. AT&T at 10. Qwest also demonstrated that the use of a 10% additive “is not competitively neutral” and that allowing some carriers to charge more for the “monopoly [access] service” than their competitors “can significantly distort the marketplace.” Qwest pointed out that, in practice, such a standard could lead to an upward spiraling of access prices, which is an undesirable outcome. Qwest at 6-7. Qwest’s proposed solution is straightforward, and is consistent with many of the rules in other states that were referenced in Verizon’s comments: it proposed that the Commission establish Qwest’s intrastate switch access rates as the appropriate benchmark to which “all carriers” must comply. Qwest at 4. Verizon agrees with this recommendation.¹ AT&T’s recommendation is basically consistent with this approach, as it proposed that CLECs should be required to mirror the intrastate access rates of the LEC(s) with whom they compete. AT&T at 10.

Establishing a benchmark applicable to all CLECs would be a simple and effective means to quickly move the most excessive CLEC switched access rates in Nebraska to more efficient levels. A uniform benchmark would also assure that no CLEC receives an undeserved and unfair advantage in competing for retail customers. A benchmark will promote equity and competitive parity and reduce market distortions by prompting CLECs with the highest access rates to recover more of their network costs from their own customers, rather than from other carriers and their customers through

¹ While Verizon agrees that CLEC rates should be capped at Qwest’s intrastate access rates, it is not necessary to require CLECs to establish the same rate structure and rate elements as Qwest; rather, it is only important that, on an average price per minute basis, the rates are comparable. At the same time, a CLEC should only be able to charge for those switched access functions that it actually performs. For example, a CLEC may not charge for “tandem switching” if it does not provide a tandem switching service.

access rates. Failure to establish such a benchmark would allow CLECs to shift an excessive portion of their costs to the purchasers of switched access, thereby placing a disproportionate burden on other carriers in the state—and ultimately, their customers—to subsidize those CLECs' operations.

B. Capping CLEC Rates at the ILEC Level is Consistent With Federal Law

Referring to language in Neb. Rev. Stat. 86-140(1), Cox observed that actions taken by the Commission to modify access charges must be “substantially consistent with the federal act and federal actions.” Cox at 3. What Cox did not acknowledge is that the FCC established a rule nine years ago that caps a CLEC's interstate switched access rates at the level of the ILEC with which the CLEC competes.² Thus, adopting the explicit price cap rule recommended by Qwest and Verizon would be entirely consistent with long-standing federal policy and also comply with the intent of the Nebraska statute. In addition, capping CLEC access rates at the Qwest level is an appropriate and straightforward means of implementing the “reasonably comparable” standard that this Commission first established in 2001.

Consistency with federal law should be achieved in two other ways, as well. AT&T pointed out that the FCC has required CLECs to eliminate any carrier common line rate element from their interstate access rates. Accordingly, CLECs in Nebraska should also be required to remove any such rate element from their intrastate access tariffs. AT&T at 9-10, Hearing Transcript at 28-29. As part of its regulatory program for CLEC access rates, the FCC also ruled that a CLEC may charge only for those access

² *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (April 27, 2001) (“CLEC Price Cap Order”).

services that it actually provides.³ To be consistent with this federal requirement, CLECs in Nebraska should only be permitted to charge IXCs for those switched access functions that they actually perform.

C. Capping CLEC Rates at the ILEC Level Is Reasonable and Appropriate

Only two other CLECs addressed the issue of a price cap on CLEC access rates. In particular, they asked the Commission “to reevaluate and revise the proposed standard for reviewing CLEC intrastate access rates.” Joint Comments of NT&T and OrbitCom (“NT&T/OrbitCom”) at 1. These parties contended that the Commission’s nine-year old “reasonably comparable” standard is “inadequate,” but their argument is unpersuasive. NT&T and OrbitCom did not explain how the Commission’s current standard is an inadequate measure of whether a CLEC’s rates are “fair and reasonable,” nor did they indicate that any CLEC has had any difficulty in understanding or applying the concept in the years since the requirement was adopted.

These companies also asserted that a “rate-to-rate” analysis of CLEC and ILEC rates is “simplistic,” but they ignored the fact that that is the method currently used to determine compliance with the FCC’s CLEC price cap rule and other price cap regulations in those states that have adopted them. In fact, using an ILEC’s rates as a benchmark for determining whether another carrier’s access rates are just and reasonable is a reasonable and administratively efficient approach. There is nothing inherently wrong with such a methodology, and these parties did not show otherwise. While NT&T and OrbitCom alleged (at 4) that the Commission’s existing policy “inappropriately

³ *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108 (May 18, 2004) at ¶ 21; *In the Matter of Access Charge Reform, PrairieWave Telecommunications, Inc. Petition for Waiver of Sections 61.26(b) and (c), et al*, Order, FCC 08-49 (Feb. 14, 2008) at ¶ 26.

assumes” that ILECs’ intrastate access rate are fair and reasonable, the reality is that ILEC rates in general, and Qwest’s Nebraska rates in particular, have been subject to the greatest regulatory scrutiny and strictest discipline; accordingly, there is a more rational basis for relying on those rates as a benchmark for determining whether competing carriers’ rates are fair and reasonable.

D. Cost Data Is Not Needed or Appropriate to Determine Whether a CLEC’s Access Rates Are “Reasonably Comparable” to ILEC Rates

Another point raised by NT&T and OrbitCom relates to the use of cost data in an evaluation of CLEC access rates. NT&T and OrbitCom argued that, based on their interpretation of Neb. Rev. Stat. § 86-140, the Commission must consider a “CLEC’s access-related costs” as part of its evaluation of whether the carrier’s rates are “reasonably comparable.” *Id.* at 3, 5. They took this one step further and suggested that, under the Commission’s proposed rule, a CLEC would be required to produce data about the *ILEC’s* costs and revenues that support the ILEC’s rate in order to prove that the CLEC’s rate is reasonably comparable to the ILEC’s rate. *Id.* at 3.

This is not a reasonable interpretation of the statute, nor does it comport with the Commission’s general approach to CLEC rates for more than a decade. In making their argument, NT&T and OrbitCom relied upon language in Neb. Rev. Stat. § 86-140(1) which states that the Commission may not set LEC access rates at a level that would produce annual revenue for the LEC that is “less than the annual costs” of providing such service. However, these parties overlooked the next section of the statute, which carves out an important exception for CLECs. Neb. Rev. Stat. § 86-141(1) states: “Telecommunications companies which serve less than five percent of the state’s subscriber lines in the aggregate statewide shall not be subject to rate regulation by the

commission pursuant to section[] 86-140 ...” It is not apparent that either of the two commenting CLECs has more than five percent of the access lines in Nebraska. In short, if the CLECs’ retail rates are not regulated, their argument based on the rate-setting provision of § 86-140(1) is moot.

In addition, as Qwest pointed out, “to its knowledge, the Commission has never set switched access rates with reference to any cost study.” Qwest at 3. This is especially true with respect to CLEC access rates, as well as rates for CLECs’ retail services. Because the Commission has not conducted “cost” reviews of CLECs in the past, it is not at all clear how such a review would be conducted now, even if it were appropriate to begin examining CLEC costs at this stage of the industry’s development. CLECs generally do not keep their financial records according to the Uniform System of Accounts that has historically served as the foundation for regulatory decisions regarding ILECs’ costs. The Commission does not have experience reviewing the cost of any CLEC services, it is not knowledgeable about the financial situation of any CLECs or their “costs,” and has no way of comparing the purported costs of a CLEC’s intrastate access services with the costs of providing its other services. If the Commission were to reverse course and, for the first time, begin conducting “cost versus revenue” analyses of individual CLECs, as suggested by NT&T and OrbitCom, this would impose an unmanageable, costly and time-consuming burden on the Commission and carriers alike. NT&T and OrbitCom do not explain how such an effort would serve any useful purpose. Indeed, it would not. The Commission can apply the statute in a way that is meaningful and consistent with its traditional hands-off approach towards CLEC costs.

As other regulatory agencies have found, establishing a clear benchmark for CLEC access rates is a more efficient and administratively simple approach, and avoids the delay, controversy and confusion that would surely arise were the Commission to undertake a series of new cost cases. The FCC explained the rationale for its benchmark policy as follows:

[A] benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs. This process has yielded presumptively just and reasonable access rates for ILECs.

We conclude that the benchmark we adopt will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets. In structuring the benchmark mechanism, we have taken into account a broad variety of competing factors, including: (1) the need to constrain access rates with an eye toward continuing the downward trend in long distance prices, (2) the importance of having new entrants' rates move toward and ultimately meet those of market incumbents, (3) the need to avoid too severe of a disruption in the CLEC sector of the industry, and (4) the extreme difficulty of establishing a "reasonable" CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking. We conclude that our benchmark system, with its conclusive presumption of reasonableness, provides the best solution to the difficult problems associated with how CLECs set their access charges.⁴

⁴ CLEC Price Cap Order at ¶¶ 41, 44.

E. Imposing a Price Cap on CLEC Access Rates Will Not Harm Carriers

NT&T and OrbitCom suggested that setting the rate cap at the ILEC's rate would "subject[] CLEC's [sic] to the whims of the underlying ILEC," which would have "the power to essentially run its competitors out of business by unilaterally lowering its intrastate rates to unreasonable levels." NT&T/OrbitCom at 4. This hypothesis has been demonstrated to be false. Rate caps for switched access service have been in place in many jurisdictions for years, as well as at the federal level, and these parties identified no instance in which the scenario they posited has actually occurred.

The Commission should also reject these carriers' claim that if CLECs are required to lower their access rates to the ILEC's level, "the likely result will be higher local rates and/or less competition," and carriers will be forced to exit the market. *Id.* at 11. The interstate access rates of CLECs in Nebraska have been capped at the ILEC's level since at least 2004, and none of the dire consequences about which NT&T and OrbitCom speculate have occurred. Moreover, a key purpose for access charge reform is to require carriers to recover more of their costs from their own end users, because this sends the appropriate pricing signals. According to the FCC:

When a CLEC attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.⁵

⁵ CLEC Price Cap Order at ¶ 39.

F. A “Transition” to a Price Cap Regime Is Not Warranted

Cox argued that *if* the Commission decides to review CLEC access charges and require any rate reductions, it should provide for a “transition” process. Cox at 6. The Commission should reject this proposal. For the past nine years, CLECs have been subject to a requirement that their access rates in Nebraska must be “reasonably comparable” to those of the ILECs. They have also been subject to an interstate access rate cap, and have been well aware of efforts across the country to cap CLEC access rates. Thus, carriers with excessive rates have had more than ample time to prepare to “transition” those rates downward to comply with the existing standard. The Commission should insist upon immediate compliance with the existing rule, rather than prolong the ability of carriers to charge excessive rates that harm competition and consumers.

III. The Commission Should Confirm the Right of Carriers to File Complaints

Several parties objected to the prospect that carriers in Nebraska might have the right to file complaints alleging that a LEC’s existing access rates are not just and reasonable or violate the requirement that they be “reasonably comparable” to an ILEC’s rate. Their arguments fell into two categories. First, some parties argued that carriers should be prohibited from filing a complaint against a LEC’s access charges. RTCN at 6. Second, they raised the specter of “serial litigation” and “frequent and ongoing challenges” to LEC rates should the right to file complaints be upheld. Neither contention has merit.

There has been some debate about whether an affected carrier's opportunity to challenge another carrier's access rates is limited by section 86-140(1). Regardless, AT&T and Verizon explained that Nebraska law contains several other provisions that clearly establish a carrier's right to file a complaint alleging that a local exchange carrier's switched access tariff violates Nebraska statute or Commission rules and policies. AT&T at 6-7; Hearing Transcript at 25-26, 66-69. The rural LECs acknowledged that Verizon had raised the issue and identified the pertinent authority, but they did not attempt to rebut Verizon's showing. RIC merely observed: "Whether and to what extent the statutes cited by [AT&T's and Verizon's witnesses] are relevant to access charges are matters that the Commission and the telecommunications companies providing access services will undoubtedly address on a case specific basis if and when circumstances warrant." RIC at Section IX. RTCN simply "support[ed] the Commission's declaration ... that '[a] review of existing access ILEC access charges may only be initiated upon the Commission's own motion' (RTCN at 4), but it did not address any of the statutory provisions cited by Verizon and AT&T. Likewise, CenturyLink expressed its "belie[f] that the Commission has sufficient statutory authority to prohibit complaints against previously approved access charges," [CenturyLink at 4] but it offered nothing to support this "belie[f]." In short, these parties completely ignored the issue and presented no information to show that the statutory authority presented by Verizon and AT&T was wrong or inapplicable. Consequently, there is nothing in the record rebutting Verizon's and AT&T's contention that a carrier has a legal right in Nebraska to file a complaint regarding a local exchange carrier's access charges. Accordingly, the Commission should reaffirm that that right exists.

Having failed to prevail on the law, a few parties argued that confirming a carrier's legal right to file a complaint will "encourage[] litigation" (NT&T/OrbitCom at 11), thereby subjecting LECs to "multiple," "long-running" and "unending" formal complaints (Cox at 5, 6), and "forcing [LECs] to defend their rates on a frequent and ongoing basis" (RTCN at 6) through "expensive serial litigation" (Cox at 5). These claims are speculative and ill-founded. They should not be relied upon as a rationale for denying a carrier's due process rights to seek redress of a violation of state law or Commission rules.

There is also no basis for assuming that the affirmation of a carrier's right to file a complaint will open up the floodgates of litigation. Telecommunications carriers have the right to file complaints in most, if not all states, and there is no evidence of a rampant and careless abuse of process. Fears of "unending" complaints and "serial" litigation are unfounded for another reason, as well. If the Commission determines that a complaint against a specific LEC is valid and, as a result, requires the carrier to modify its access rates, and the company complies, then it is not plausible that a different carrier would file another complaint raising allegations about the lawfulness of the new rate. Nothing would be gained by complaining about a new rate that the Commission had just approved.

Finally, these parties' comments actually confirm one of the reasons why the filing of a complaint might be warranted – that is, even if a LEC's rates were, at one time, considered fair and reasonable, changing circumstances and the passage of time may render any earlier presumption of reasonableness obsolete.

Cox contended that a CLEC's "longstanding and stable access rates" should be protected from complaints. Cox at 5-6. Similarly, NT&T and OrbitCom acknowledged that the rates of many CLECs have been "effective for many, many years," and proposed that such rates be "grandfathered." NT&T/OrbitCom at 12. RTCN argued that a contemporary challenge of ILEC access rates that were set in proceedings dating back to 1999 and 2002 "would greatly undermine the Commission's and industry's extensive efforts" a decade ago. RTCN at 5-6.

The fact that an access rate has been in effect for "many years" is not a sufficient reason to insulate that rate from contemporary review via a complaint process. In fact, the opposite is true, as other states have found.⁶ During the hearing, AT&T and Qwest testified that the communications market has changed dramatically over the past decade as competition has expanded, new technologies have been introduced and new firms have entered the market. Transcript at 12-13, 39. Qwest also explained that these market changes have called into question "the original paradigm" that access charges should be treated as a source of "subsidies." *Id.* at 29; *see also* Qwest at 8. For these reasons, Qwest maintained, it is not appropriate to presume that LEC access rates – especially those that were put in place "many years" ago – are fair and reasonable today. Qwest at 8. Verizon agrees. Even CenturyLink acknowledged that a complaint against a carrier's rates should be allowed if "there is a material change of circumstances," which could occur over the passage of time. CenturyLink at 4.

⁶ *See, e.g., In re: Iowa Telecomm. Ass'n*, Final Order, Docket Nos. TF-07-125, TF-01-139, at 11 (Iowa Util. Bd. May 30, 2008) (finding no evidence that pre-1998 subsidy levels in rural local exchange carriers' rates are "just and reasonable in the intrastate jurisdiction in 2008"); *Verizon v. Windstream*, Order, Case No. 2007-00503 (Ky. P.S.C. March 11, 2009) (denying Windstream's motion to dismiss Verizon's complaint that Windstream's access charges established in the 1990s decade are not just and reasonable today).

Thus, the vintage of a LEC's rates may be one reason why the existing rates are no longer just and reasonable, and may provide a legitimate basis for challenging those rates through a formal complaint. Rather than "grandfather" existing rates, as NT&T/OrbitCom suggested (at 11), the Commission should appreciate that rates filed "many years" ago may warrant greater scrutiny, not less. Accordingly, the complaint process should be available to permit an examination of such rates.

IV. Conclusion

The Commission should adopt an order consistent with Verizon's recommendations stated herein and previously. In particular, the Commission should adopt a rule requiring all local exchange carriers in Nebraska to set their intrastate switched access rates at a level no higher than Qwest's.

Dated February 26, 2010

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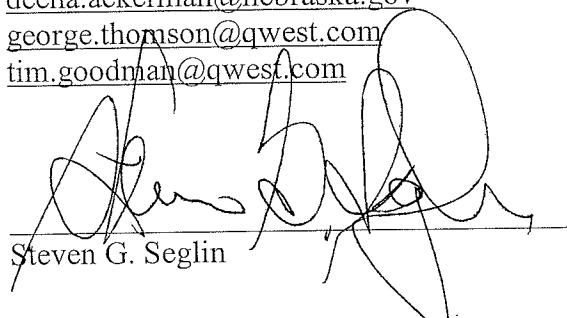
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact courtesy copy of the within POST-HEARING REPLY COMMENTS OF VERIZON was sent on February 26, 2010, by e-mail addressed to:

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