

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own) RULE AND REGULATION NO. 177
motion, seeking to amend Title 291, Chapter 5,)
Telecommunications Rules and Regulations, to)
adopt rules regarding filing of agreements)
containing terms for provisions of regulated)
telecommunication services at rates or charges)
different from the rates and charges for such)
services contained in a carrier’s tariff on file with)
the Commission.)

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

I. INTRODUCTION

The Rural Telecommunications Coalition of Nebraska (“RTCN”),¹ by and through its attorneys of record, hereby respectfully submits its Comments to the Nebraska Public Service Commission (“Commission”) regarding the Commission’s rule amendments as proposed in its September 8, 2010, Order Opening Docket and Seeking Comment in the above-captioned docket (the “Order”).

II. COMMENTS

A. The scope of the proposed rule amendments is unclear.

The Commission’s proposed rule amendments, particularly Proposed Rules 002.21A, 002.21K, and 002.21L, are somewhat unclear as to the services for which the proposed rules

¹ 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 Communications, Inc., Wauneta Telephone Company, and WesTel Systems f/k/a Hooper Telephone Company.

were intended to apply. Accordingly, RTCN respectfully requests that the Commission explain its intentions with regard to these rule amendments.

More specifically, based on the timing of the release of the Commission's Order opening this rulemaking proceeding, a reasonable presumption can be made that the Commission intended these rule amendments to address the issues raised in the Commission's investigation in Application No. C-4238/PI-157, *In the Matter of the Nebraska Public Service Commission on its Own Motion, Seeking to Investigate Unfiled Agreements for Intrastate Switched Access Services at Rates Other than those Contained in a Carrier's Tariff on File with the Commission* (the "Investigation"). The Commission opened the *Investigation* on January 10, 2010, following its order in a complaint proceeding involving OrbitCom and AT&T.² In its *OrbitCom v. AT&T* order, the Commission expressed its concerns over its discovery that many unfiled switched access service agreements exist in Nebraska which set rates lower than those contained in the local exchange carrier's ("LEC") switched access tariff on file with the Commission.³

In its *Investigation* proceeding, the Commission sent data requests to all LECs and interexchange carriers ("IXC") operating in Nebraska, seeking to gather more information regarding the existence and nature of unfiled switched access agreements. After receiving responses to its data requests, the Commission subsequently closed the *Investigation* on August 31, 2010, explaining that based on the comments and information received in response to the data requests, the Commission found "that there is confusion and disagreement regarding Commission policy and requirements in Nebraska regarding access agreements and contracts for services outside of a carrier's filed tariff." The Commission then declared that it was in the public interest to open a rule-making to address the issues raised in the *Investigation*. Based on

² See *OrbitCom, Inc. v. AT&T Communications of the Midwest, Inc.*, Application Nos. FC-1332/1335, Order (Nov. 10, 2010) ("*OrbitCom v. AT&T*").

³ See *id.* at 12.

this declaration and the subsequent opening of this Rule and Regulation No. 177 less than two weeks later on September 8, 2010, a natural conclusion can be drawn that the Commission intended the proposed rule amendments in this docket to address the unfiled, confidential, “off-tariff” agreements for switched access services that were the subject of the *Investigation* in C-4238.

However, the placement of the proposed rule amendments in the section of the Commission’s Telecommunications Rules designated for basic local exchange services,⁴ coupled with the specific language of the proposed rule amendments⁵ which seems to contemplate a larger scope of application than simply switched access services agreements, has led to confusion as to whether the Commission intends to address only unfiled switched access agreements; all unfiled agreements for regulated telecommunications services; or only those unfiled agreements that fit within the scope of basic local exchange services.

Based on the foregoing and the absence of any explanation in the Order opening this rule-making docket, RTCN is uncertain as to the Commission’s intentions with respect to the intended scope of the proposed rule amendments, and therefore, respectfully requests that the Commission provide additional clarity.

⁴ The Commission’s proposed rule amendments appear in Section 002 of the Commission’s Telecommunications Rules, which section applies to what is commonly referred to as basic local exchange service. Unlike basic local exchange services which are provided to end-user customers, switched access services are intercarrier services provided by a local exchange carrier to an interexchange carrier. Thus, any rules related to switched access services do not seem to fit logically within Section 002 of the Telecommunications Rules. It should be mentioned, however, that there are no sections in the Commission’s Telecommunications Rules which specifically address switched access services or rates.

⁵ The language of the rule amendments appears to extend well-beyond switched access services. More specifically, Proposed Rule 002.21A purports to apply to “every service that a carrier offers that is regulated by the Commission,” and Proposed Rule 002.21K purports to apply to “regulated telecommunications services.” Thus, as proposed, these rule amendments would apply to all regulated telecommunications services and not simply switched access services.

B. Unless a compelling reason can be demonstrated to permit switched access agreements setting different rates than those set forth in the applicable switched access services tariff, such agreements should be prohibited.

The Commission identified its concern regarding confidential unfiled switched access service agreements in *OrbitCom v. AT&T* and further explored this concern in its *Investigation*, but no record has been established, nor any other showing made, that demonstrates a need to permit switched access service agreements at all. Unless and until a case is made that demonstrates a compelling reason to permit switched access service agreements that set different rates than those set forth in the applicable tariff, RTCN does not support a rule amendment to allow them.

RTCN's primary concern with permitting switched access service agreements was illustrated in the *OrbitCom v. AT&T* complaint - the impetus for the Commission's *Investigation* in C-4238. In its Answer to AT&T's Complaint in *OrbitCom v. AT&T*, OrbitCom alleged, among other things, that AT&T had forced OrbitCom to enter an off-tariff agreement by refusing to pay any access charges owed to OrbitCom until AT&T's proposed agreement rates (which were different than the tariff rates) were accepted by OrbitCom. While RTCN is not suggesting one way or the other as to whether OrbitCom's allegation had merit, RTCN is aware that the type of self-help tactic described in OrbitCom's Answer is historically not uncommon in the industry,⁶ and RTCN fears that if switched access agreements are permitted, small LECs, like those making up RTCN, may be vulnerable to these types of anti-competitive pressure tactics from large IXC's.

⁶ *In re Access Charge Reform, Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 9932, para. 23 (rel. April 27, 2001) ("Reacting to what they perceive as excessive rate levels, the major IXC's have begun to try to force CLEC's to reduce their rates. The IXC's primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services.").

In addition to RTCN's above-described concern regarding the potential vulnerability to small LECs, RTCN also urges the Commission to consider whether or not permitting switched access agreements that set different rates than those set forth in the switched access services tariff is consistent with Nebraska law, particularly NEB.REV.STAT. § 75-126, which seems to provide that rates of common carriers must be the same for all similarly situated customers, must not be preferential, and must be the same as those rates filed with or set by the Commission:

(1) Except as otherwise provided in this section, no common carrier shall:

(a) Charge, demand, collect, or receive from any person a greater or lesser compensation for any services rendered than it charges, demands, collects, or receives from any other person for doing a like or contemporaneous service unless required under section 86-465;

(b) Make or give any undue or unreasonable preference or advantage to any particular person; . . .

(e) Demand, charge, or collect, by any device whatsoever, a lesser or greater compensation for any service rendered than that filed with or prescribed by the commission. . . .⁷

While not prohibiting individual case basis contracts in general, this statute seems to indicate that, all other things being equal, there should only be one rate for all similarly situated customers receiving the same service.

Based on the foregoing concerns of RTCN and Nebraska law, RTCN suggests that unless a compelling reason can be demonstrated that switched access agreements setting rates different than those set forth in the applicable switched access services tariff should be permitted, the Commission should prohibit such agreements altogether.

⁷ NEB.REV.STAT. § 75-126.

C. If the Commission adopts a rule amendment that permits switched access service agreements, then the Commission should adopt a rule to specifically prohibit self-help practices.

In the event a strong case is made that switched access service agreements should be permitted, and the Commission's proposed rule amendments are subsequently adopted, the Commission should adopt a rule which prohibits the type of self-help tactics referenced in the *OrbitCom v. AT&T* proceeding and other court and FCC proceedings.⁸ Accordingly, as an alternative to prohibiting switched access service agreements altogether, RTCN proposes that the Commission adopt the following rule:

002.21M A customer receiving switched access services pursuant to a tariff filed with the Commission is prohibited from using self-help measures of withholding payment for services duly performed. In the event of a dispute or negotiation, the switched access service customer must first pay the amount allegedly due under the tariff, and then, if applicable, seek redress if such amount was not proper under the applicable tariffed charges and regulations.

The adoption of this rule would go a long way to help alleviate RTCN's primary concern regarding the allowance of switched access services agreements.

D. If the Commission adopts rule amendments related to switched access services, the Commission should consider (1) creating a new section in the telecommunications rules dedicated to switched access services, and (2) postponing the adoption of the current proposed rule amendments until such time as the Commission implements rules codifying its ruling in Application No. C-4145/NUSF-74/PI-147.

If the Commission determines that it is necessary to adopt rules addressing switched access service tariffs or agreements, then the Commission should create a new section in the Telecommunications Rules dedicated to switched access services. As currently proposed, the rule amendments contemplated in this rule-making proceeding are all contained in Section 002

⁸ See *In re Access Charge Reform, Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd. 9932, para. 23 (rel. April 27, 2001); *MCI Telecommunications Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company*, 62 FCC 2d 703, para. 6 (1976); *National Communications Association, Inc. v. AT&T*, 2001 WL 99856 (S.D.N.Y. Feb. 5, 2001).

of the Commission's Telecommunications Rules. Section 002 of the Commission's Telecommunications Rules relate to basic local exchange services provided to end-user customers, rather than intercarrier services, like switched access services, which are provided by one carrier, a LEC, to another carrier, an IXC. Thus, any proposed rule amendments related to intercarrier services such as switched access services do not fit logically within Section 002 of the Rules. As noted above,⁹ there are currently no Telecommunications Rules specifically related to switched access services, and therefore, to the extent the Commission adopts rules regarding such services, the Commission should create an entirely new rule section dedicated to switched access services.

Moreover, the Commission should consider postponing the adoption of any rules related to switched access services until the finalization of the appeal of the Commission's Order in Application No. C-4145/NUSF-74/PI-147,¹⁰ in which the Commission adopted various policies and filing requirements related to intrastate switched access services. At the conclusion of the appeal process in Application No. C-4145/NUSF-74/PI-147, the Commission may likely need to adopt rules to codify its findings and conclusions in that case. It seems appropriate that all currently anticipated rule amendments related to switched access services, including both those contemplated in this rule-making and those contemplated in Application No. C-4145/NUSF-74/PI-174, should be addressed at the same time.

III. CONCLUSION

In conclusion, RTCN respectfully requests that the Commission provide clarification with regard to the intended scope of the proposed rule amendments in this rule-making

⁹ See footnote 4.

¹⁰ *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 (April 20, 2010).

proceeding, and that the Commission refrain from adopting any rules that permit switched access agreements that set different rates than those set forth in an applicable switched access tariff, unless and until a demonstration is made that a compelling reason exists to permit such agreements. In the event the Commission permits switched access service agreements, RTCN respectfully requests that the Commission adopt a rule prohibiting self-help practices as described above. Finally, to the extent the Commission adopts rule amendments related to switched access services, RTCN urges the Commission to consider (1) creating a new section in the Telecommunications Rules dedicated to switched access services and (2) postponing the adoption of such rule amendments until such time as the Commission implements rules codifying its ruling in Application No. C-4145/NUSF-74/PI-147.

Dated this 5th day of November, 2010.

RURAL TELECOMMUNICATIONS COALITION
OF NEBRASKA (“RTCN”)

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 Communications, Inc.,
Wauneta Telephone Company, and
WesTel Systems f/k/a Hooper Telephone Company.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that an original and eight copies of the foregoing Comments of the Rural Telecommunications Coalition of Nebraska were filed with the Public Service Commission on November 5, 2010, and a copy was served via electronic mail on November 5, 2010 addressed as shown below, to the following:

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