

**BEFORE THE
NEBRASKA PUBLIC SERVICE COMMISSION**

In the Matter of the Commission, on its own)
Motion, seeking to amend Title 291, Chapter)
5, Telecommunications Rules and) Rule and Regulation No. 177
Regulations, to adopt rules regarding filing of)
agreements containing terms for provision 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.)

RURAL INDEPENDENT COMPANIES' COMMENTS

The Rural Independent Companies¹ respectfully submit these Comments in response to the Commission's Order Opening Docket and Seeking Comment dated September 8, 2010 (the "Order"). In the Order, the Commission proposes to amend its Telecommunications Rules and Regulations by adopting a requirement that carriers providing regulated telecommunications services in this State shall either file copies of all agreements, or provide the Commission with a description of all agreements for provision of telecommunications services regulated by the Commission if such agreements specify "rates or charges different from the rates and charges for such services contained in the carrier's tariff on file with the Commission." Order at p. 1.

¹ Arlington Telephone Company, Blair Telephone Company, Cambridge Telephone Co., Clarks Telecommunications Co., Consolidated Telephone Company, Consolidated Telco, Inc., Consolidated Telecom, Inc., The Curtis Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hamilton Telephone Company, Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K & M Telephone Company, Inc., The Nebraska Central Telephone Company, Northeast Nebraska Telephone Company, Rock County Telephone Company, Stanton Telephone Co., Inc., and Three River Telco are identified as the "Rural Independent Companies".

I. BACKGROUND OF THE ORDER

Review of a series of events that have occurred over the past year is not only helpful, but is necessary to establish the context in which the Commission opened this rule-making proceeding.

In November 2009, the Commission released its Order in Application Nos. FC-1332 and FC-1335 (the "Orbitcom Order"). These two formal complaint dockets related to access charge payment disputes between Orbitcom, Inc., a competitive local exchange carrier ("Orbitcom") and AT&T Communications of the Midwest, Inc., an interexchange carrier ("AT&T"). During the course of the evidentiary hearing regarding these complaints, significant attention was given to the terms of a "Settlement and Switched Access Service Agreement" (the "SSASA") pursuant to which Orbitcom provided AT&T with switched access rates that were below its intrastate tariffed switched access rates. In its Order the Commission wrote as follows concerning the SSASA:

The Commission has serious concerns *regarding the existence of agreements between carriers* that are not filed with the Commission and contain rates that are not made available to all competitors in the marketplace. . . .

The Commission, therefore, intends to open an investigation to closely *scrutinize unfiled, off-tariff agreements between carriers in Nebraska* and examine the affect of such agreements on regulatory policy, competition, and the telecommunications marketplace. (emphasis added)

On January 20, 2010, the Commission did, in fact, open such an investigative docket in Application No. C-4238. In its Order Opening Docket the Commission stated the purpose of such investigation as follows:

The Commission on its own motion, opens this docket *to investigate agreements and/or contracts between carriers operating in Nebraska*, not filed with the Commission, to provide intrastate access

services at rates, terms and conditions, other than those contained in a carrier's official tariff filed with the Commission. (emphasis added)

As a basis for proceeding with the C-4238 investigation, the Commission referenced its evidentiary hearing in the Orbitcom/AT&T complaint cases and the disclosure therein of the existence of the SSASA observing that “[d]uring the course of the hearing the Commission received further evidence that other such agreements exist and are operational in Nebraska.” (Order Opening Docket, page 1) Following the opening of the C-4238 investigation, the Commission transmitted a data request to all local exchange and interexchange carriers operating in Nebraska and requested information relating to any “off tariff” agreements regarding access charges.

While the Commission did not release the responses to its data request for public review, in its Order closing the C-4238 docket, the following statement was made:

Based on the comments and information received in response to the Commission's February 22, 2010 data request, the Commission finds 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 finds that a rulemaking proceeding addressing tariff filings and agreements/contracts for tariffed services outside of a tariff would be in the public interest. Accordingly, the Commission will initiate a rulemaking *to address the issues raised in the above-captioned investigation*. (emphasis added)

The foregoing statements by the Commission convey the clear intention that the contemplated rulemaking proceeding would address the subject matter of the Orbitcom Order and the C-4238 docket, namely, contracts or agreements *between carriers providing for provision of switched access service* at rates differing from filed tariffs.

The instant proceeding was opened pursuant to the Order Opening Docket and Seeking Comment entered on September 8, 2010. However, rather than reflecting the

scope as described in the Order closing Application No. C-4238 (quoted above), the Commission stated that it “opens this proceeding to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to adopt rules regarding filing of agreements containing terms for provision 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.” (emphasis added) The wording of the proposed revisions to Rule 002.21 in the Appendix attached to the September 8 Order similarly reflect this expanded breadth of the proposed rule-making to include *all services regulated by the Commission* that are provided by a carrier.²

II. DISCUSSION

The scope of proposed Rule 177 should be limited to contracts or agreements between carriers relating to switched access service.

It is the position of the Rural Independent Companies that the scope of proposed Rule 177 should be expressly limited to switched access services rather than applying to “every service that a carrier offers that is regulated by the Commission.” (*See*, proposed section 002.21A) As is demonstrated by the foregoing “Background” section, the entire context from which this proposed rulemaking proceeding arises relates only to switched access service. No record whatsoever has been created, nor has the Commission previously requested comment or evidence relating to off tariff agreements concerning any regulated service other than switched access service.

² An additional occurrence that creates a further context for this Rule 177 proceeding is the informal complaint of Qwest Communications against Cox Nebraska Telecom, LLC set forth in the letter of George Baker Thomson, Jr. to Mike Hybl and Gene Hand (undated) in which “Qwest requests that the Commission informally investigate Cox’s tariff revisions [regarding switched access service filed with the Commission on April 2, 2010 and effective on April 12, 2010] under its Procedural Rule 003.02 and suspend the revisions pending completion of the investigation. Cox responded to the Qwest informal complaint via letter from Robert Logsdon to Gene Hand dated August 12, 2010. Again, the service at issue in this informal complaint was limited to switched access service.

As proposed, Rule 177 would apply not only to switched access service, but also to all other carrier-to-carrier services within the Commission's regulatory authority. Furthermore, and perhaps most importantly, proposed Rule 177 would apply to *all Commission-regulated end user retail services provided by carriers in Nebraska*. While there is no definition of "regulated by the Commission" in proposed Rule 177, it can reasonably be presumed that the proposed Rule's scope of applicability to end user retail services would not be limited to basic local exchange service which is the end user retail service that is rate regulated by the Commission, but would also extend to end user retail services that are subject to quality of service regulation by the Commission.

Although no evidence has been gathered to date, it is certainly reasonable to anticipate that if end user retail services provided by any carrier holding a certification or permit issued by this Commission, and subject to any form of "regulation" by the Commission are within the coverage of Rule 177, literally hundreds of end user retail service contracts or agreements could become subject to the filing requirements of proposed Rule 002.21K. This result would create significant and unwarranted administrative burdens on carriers and the Commission. The costs associated with these administrative burdens are not offset by benefits of applying proposed Rule 177 beyond switched access services. Since there have been neither consumer complaints nor any other evidence of possible issues with end user retail service agreements, extending the reach of proposed Rule 177 to "every service that a carrier offers that is regulated by the Commission" seems to provide an apt context for application of the old adage that this is a "solution looking for a problem."

There is no explanation in the Order Opening Docket and Seeking Comment in Rule 177 to justify expansion of the proposed coverage of the Rule beyond agreements relating to carrier provision of switched access service at prices or terms below those provided in tariffs filed with the Commission. The Rural Independent Companies do not believe that any justification exists for the expanded scope of coverage of Rule 177, and as a consequence, respectfully recommend that Rule 002.21A be revised to read as follows (changes in the text of proposed Rule 177 shown in highlighted text):

002.21A For every switched access service that a carrier offers that is regulated by the Commission, the tariff of the carrier shall set out the rates, charges, regulations, terms, and conditions applicable to the switched access service.

Additionally, the Rural Independent Companies recommend that proposed Rule 002.21K be revised to read as follows:

002.21K Special Contracts: A carrier rendering regulated telecommunication services-switched access service under a contract that charges, demands, collects or receives a greater, lesser, or different compensation than the rates, fares, and charges specified in its switched access service tariff in effect at the time, shall maintain an up-to-date summary list of all such contracts in its tariff schedules. The list shall be designated the list of switched access service contracts with deviations and show at least the following information regarding each contract:

002.21K1 The name and location of each party to the contract other than the carrier filing the tariff;

002.21K2 The execution and expiration dates ~~The type of class or service;~~

002.21K3 State the most comparable provisions of the switched access tariff and summarize the differences between such tariff sections and the contract. ~~The execution and expiration dates;~~

~~002.21K4 State the most comparable regular tariff by schedule number and summarize the differences between the tariff and the contract;~~

The Rural Independent Companies do not propose changes to the remainder of Rule 002.21 as proposed by the Commission.


The Rural Independent Companies believe that the foregoing changes will appropriately accomplish the modification of the scope of proposed Rule 177 so as to limit its application to contracts and agreements relating only to switched access service.

III. CONCLUSION

For the foregoing reasons, the Rural Independent Companies respectfully request that the Commission adopt the revisions to proposed Rule 177 set forth above. In the event that the Commission requests reply comments and when the Commission schedules a public hearing on this proposed Rule 177, the Rural Independent Companies intend to continue their participation in this docket.

Dated: November 5, 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 5th day of November, 2010, counsel for the Rural Independent Companies caused the original and eight (8) paper copies of the foregoing Comments to be filed with the Commission; and caused one electronic copy of the Comments to be served on the Commission Staff persons identified below:

Nebraska Public Service Commission

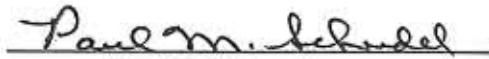
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