

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal) Application No. FC-1332
Complaint of Orbitcom, Inc.,)
Sioux Falls, South Dakota,)
seeking a determination that)
AT&T Communications of the) ORDER GRANTING MOTION TO
Midwest, Inc., Denver, Colorado,) COMPEL
failed to pay intrastate access)
charges billed by Orbitcom in)
accordance with Orbitcom's)
intrastate switched access)
tariff.)
In the Matter of the Formal) Application No. FC-1335
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.) Entered: August 21, 2009

BY THE HEARING OFFICER:

On February 27, 2009, a Formal Complaint was filed with the Nebraska Public Service Commission ("Commission") by Orbitcom, Inc., ("Orbitcom") against AT&T Communications of the Midwest, Inc. ("AT&T") and was docketed as Application No. FC-1332. On April 30, 2009, AT&T filed a Formal Complaint against Orbitcom with the Commission, which was docketed as Application No. FC-1335. On May 12, 2009, the Commission granted AT&T's Motion to Consolidate the above-captioned proceedings pursuant to Commission Rules of Procedure.

On August 5, 2009, both Orbitcom and AT&T filed Motions to Compel responses to discovery requests in the above-captioned docket. Both parties also requested a hearing on the motions. Oral arguments on the pending Motions to Compel were held on August 17, 2009, in the Commission hearing room. The parties had subsequently met and reached agreement regarding all of Orbitcom's responses to AT&T's discovery requests, as a result, AT&T informed the Hearing Officer that it's Motion to Compel was no longer at issue. Further, the parties informed the Hearing Officer that only three Orbitcom requests to AT&T remained at issue, the parties having reached agreement on all the other discovery requests. The three remaining data requests at issue are Orbitcom's discovery Request Nos. 11, 12, and 13.

Orbitcom's counsel proposed two alternative requests to the original Orbitcom Request Nos. 11, 12, and 13. A paper copy of the two proposed alternatives to Orbitcom's Request Nos. 11, 12, and 13 was offered by Orbitcom at the Oral Argument proceeding and is attached hereto, and incorporated by reference. AT&T's counsel renewed its objection on the grounds that the information sought by Orbitcom in Request Nos. 11, 12, and 13, notwithstanding Orbitcom's proposed alternatives, remained irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in the above-captioned proceeding.

O P I N I O N

The Nebraska Supreme Court rules and regulations govern discovery in matters before the Commission.¹ Generally, "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" and "appears reasonably calculated to lead to the discovery of admissible evidence."² The Commission is not bound by the strict rules of evidence and therefore the admissibility of evidence is typically liberally interpreted by the Commission.

AT&T objected to Orbitcom's original Request Nos. 11, 12, and 13 on the grounds that the information sought is not relevant to the proceeding, not calculated to lead to admissible evidence, unduly burdensome, overly broad, and will involve third parties not participating in the current proceeding.

The two alternative requests proposed by Orbitcom eliminate some of AT&T's objections as the alternative proposals no longer seek the identity of third parties or specific contractual terms and provisions. The requests have been reduced to general terms and percentages. I find the alternatives proposed by Orbitcom are not unduly burdensome, overly broad, nor will they require the involvement of third parties not participating in the current proceeding. However, AT&T renewed its objection to the Alternative Request Nos. 11, 12, and 13, as proposed by Orbitcom on the grounds of relevancy and not being reasonably calculated to lead to the discovery of admissible evidence in the above-captioned proceeding.

AT&T argues the proceeding before the Commission is limited to whether Orbitcom's intrastate switched access rates are fair and reasonable and Orbitcom's requests seek information about AT&T's access rates and practices, which are not relevant to the

¹ Neb. Admin. Code, Title 291, Ch. 1 § 016.11 (1992).

² Neb. Ct. R. Disc. § 6-326(b)(1). (Emphasis added).

proceeding. AT&T's counsel also argued that the current relevancy issue is similar to a similar issue raised in the recently concluded Qwest access rate increase investigation, Application No. C-3945/NUSF-60.02/PI-138.³

While AT&T has raised the issue of whether Orbitcom's current access rate as contained in its tariff are fair and reasonable and whether Orbitcom complied with statutory provisions regarding the implementation of access rates, an inquiry into Orbitcom's access rates does not encompass the entirety of this proceeding. Both the current docket and the C-3945 proceeding⁴ raised by AT&T deal with access rate issues, however, AT&T raising issues regarding Orbitcom's current access rates does not impose the limit on discovery urged by AT&T in this current proceeding. Orbitcom's complaint and AT&T's answer to Orbitcom's complaint raise issues concerning contractual agreements containing access rates between the parties, negotiations between AT&T and Orbitcom surrounding such contracts, and the procedures of both implementing and terminating such contractual agreements between the parties.

Clearly the discovery requests as revised by Orbitcom seek information that could contain relevant information to the proceeding and could reasonable be viewed as leading to the discovery of admissible evidence.

After a thorough examination of all the filings and motions in the current proceeding, I find that Orbitcom's discovery requests Nos. 11, 12, and 13, as revised, seek information relevant to the above-captioned proceeding and are reasonably calculated to lead to the discovery of admissible evidence. Therefore, Orbitcom's Motions to Compel should be granted for the limited purpose of AT&T answering one of the two alternate Requests Nos. 11, 12, and 13 proposed by Orbitcom. I have no preference regarding which alternative proposed by Orbitcom is answered by AT&T and will leave it to the parties to determine which alternative will be answered by AT&T.

O R D E R

IT IS THEREFORE ORDERED by the Hearing Officer that the Motion to Compel filed by Orbitcom, Inc. be, and is hereby, granted, limited to answering one of the proposed alternatives to the original discovery requests as attached hereto.

³ See Application No. C-3945/NUSF-60.02/PI-138, *In the Matter of the Nebraska Public Service Commission to conduct an investigation of Qwest Corporation's Proposed Switched Access Charge Rates*. (February 3, 2009).

⁴ *Id.*

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Application Nos. FC-1332 & FC-1335

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MADE AND ENTERED in Lincoln, Nebraska, on this 21st day of August, 2009.

BY:

A handwritten signature in cursive script that reads "Tim Schram". The signature is written in black ink and is positioned above a horizontal line.

Tim Schram
HEARING OFFICER

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal Complaint) Application No. FC-1332
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 Orbit-)
Com's Intrastate Switched Access Tariff.)

In the Matter of the Formal Complaint) Application No. FC-1335
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.)

TWO ALTERNATIVES TO ORBITCOM'S REQUESTS NOS. 11, 12, AND 13

ALTERNATIVE 1:

REQUEST: State the total amount of money that AT&T paid for all of the access service that it purchased in Nebraska in 2008; and state what percentage of such total amount was paid pursuant to negotiated agreements and what percentage of such total is paid pursuant to a tariff on file with the Nebraska Public Service Commission.

RESPONSE:

ALTERNATIVE 2:

REQUEST NO. 11: Identify the number of local exchange carriers to which AT&T pays the Nebraska access tariff rate (as opposed to a contract rate) for intrastate access services for such carriers.

RESPONSE:

REQUEST NO. 12: Identify the number of local exchange carriers with which AT&T has a contract that establishes or sets the rates for intrastate access services provided to AT&T in Nebraska.

RESPONSE:

REQUEST NO. 13: State the number of carriers for which the intrastate access rates set forth in AT&T's intrastate access tariff on file with the Commission were negotiated; state the number of carriers in Nebraska which pay AT&T based on AT&T's intrastate access rate in AT&T's Nebraska tariff.

RESPONSE:

DATED August 17, 2009

ORBITCOM, INC., Complainant

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By: _____
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