

SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Formal )  
Complaint of Orbitcom, Inc., ) Application No. FC-1332  
Sioux Falls, South Dakota, )  
seeking a determination that )  
AT&T Communications of the )  
Midwest, Inc., Denver, Colorado, ) ORDER  
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: November 10, 2009

BY THE COMMISSION:

B A C K G R O U N D

On February 27, 2009, a Formal Complaint was filed with the Nebraska Public Service Commission ("Commission") by OrbitCom, Inc., ("OrbitCom") of Sioux Falls, South Dakota, seeking a determination that AT&T Communications of the Midwest, Inc., ("AT&T") Denver, Colorado, failed to pay for intrastate access services provided by OrbitCom and billed to AT&T in accordance with OrbitCom's Nebraska Switched Access Services Tariff ("Nebraska Tariff"). The Formal Complaint was docketed by the Commission as Application No. FC-1332.

AT&T filed an Answer to FC-1332 and a Counterclaim on March 31, 2009. On April 7, 2009, OrbitCom filed a Motion to Dismiss the Counterclaim filed by AT&T. On April 14, 2009, the Commission entered an order dismissing AT&T's Counterclaim on procedural grounds.

On April 30, 2009, AT&T filed the above-captioned Formal Complaint against OrbitCom with the Commission, which was docketed as Application No. FC-1335, alleging OrbitCom's intrastate access rates contained in its Nebraska Tariff were not negotiated and are not fair and reasonable pursuant to Neb.

Rev. Stat. §86-140.<sup>1</sup> AT&T further requested a Commission review of OrbitCom's intrastate access rates under §86-140. On May 1, 2009, AT&T filed a Motion to Consolidate the above-captioned proceedings pursuant to the Commission's Rules of Procedure. On May 5, 2009, OrbitCom filed an Opposition to AT&T's Motion to Consolidate and AT&T filed a Response to the Opposition to the Motion to Consolidate on May 9, 2009. The Commission granted the Motion to Consolidate in an order issued on May 12, 2009. OrbitCom filed its Answer and Affirmative Defenses in Application No. FC-1335 on May 15, 2009.

A planning conference was held in the above-captioned dockets on June 11, 2009, with representatives of the parties and the Commission. During the planning conference the parties agreed to a procedural schedule including a hearing date of September 16, 2009, to be continued to September 17, 2009, as needed. The Hearing Officer issued an order on June 15, 2009, memorializing the agreements and establishing the procedural schedule for the docket.

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 oral argument on the motions. Oral arguments on the pending Motions to Compel were held on August 17, 2009.

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 at the Oral Argument proceeding 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. A Hearing Officer Order issued on August 21, 2009, granted OrbitCom's Motion to Compel on the remaining issues with AT&T's answers limited to two alternative proposals offered by OrbitCom.<sup>2</sup>

A Hearing in this matter was held on September 16, 2009.

#### E V I D E N C E

<sup>1</sup> Neb. Rev. Stat. §86-140 (Reissue of 2008).

<sup>2</sup> See Application No. FC-1332, *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-1335, 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*, Hearing Officer Order Granting Motion to Compel (August 21, 2009).

At the outset of the Hearing, OrbitCom made a Motion to Dismiss the provisions of the Complaint filed by AT&T against OrbitCom. OrbitCom argued the provisions of Neb. Rev. Stat. §86-140(1) require the Commission to hold a hearing in §86-140 proceedings within ninety (90) days of receiving a filing initiating such a proceeding unless agreed to by all parties in the proceeding.<sup>3</sup> The September 16, 2009, hearing in the above-captioned proceeding occurred later than ninety (90) days from the filing of the Complaint by AT&T against OrbitCom. OrbitCom argued it had never expressly agreed to an extension of the ninety (90) days allowed under the statute.

AT&T responded that OrbitCom's Motion was without merit due to counsel for OrbitCom's participation in the Planning Conference conducted by the Hearing Officer on June 11, 2009, and agreeing to the September 16, 2009, hearing date. OrbitCom's Motion to Dismiss was denied by the Hearing Officer.

At the hearing in the above-captioned docket, both AT&T and OrbitCom offered the testimony of two witnesses. OrbitCom presented testimony from Mr. Brad VanLeur and Mr. Michael Powers. AT&T presented testimony from Mr. Lawrence J. Bax and Mr. Victor J. Liss.

Mr. VanLeur, the President of OrbitCom, filed direct and rebuttal testimony in this matter. Mr. VanLeur's testimony was accepted into the record as Exhibits 2 and 3, respectively. Mr. VanLeur testified to the efforts of OrbitCom to obtain payment from AT&T for intrastate access services provided by OrbitCom to AT&T pursuant to its Nebraska Tariff. Further, Mr. VanLeur testified regarding the Settlement and Switched Access Service Agreement ("SSASA") between OrbitCom and AT&T, the origins of the SSASA, the terms and conditions of the SSASA, and the circumstances surrounding the eventual, in Mr. VanLeur's opinion, termination of the SSASA between AT&T and OrbitCom.

Mr. VanLeur stated that OrbitCom had entered into a SSASA with AT&T in 2004 and under the terms of the SSASA billed AT&T an intrastate access rate that was lower than the intrastate access rate contained in OrbitCom's Nebraska Tariff. Also, pursuant to the SSASA, the terms and conditions of the SSASA were kept confidential. The SSASA between OrbitCom and AT&T executed in January of 2004 was not filed with the Commission. Mr. VanLeur further stated that OrbitCom had sent a letter to AT&T on August 2, 2009, terminating the SSASA as per the terms

<sup>3</sup> See Neb. Rev. Stat. §86-140(1) (Reissue of 2008).

of the SSASA.<sup>4</sup> OrbitCom began billing AT&T at its Nebraska Tariff rate for intrastate access services in April of 2008.<sup>5</sup> Mr. VanLuer also testified regarding certain conversations and written correspondence between OrbitCom and AT&T regarding the SSASA and its terms and conditions.<sup>6</sup>

OrbitCom next called Mr. Michael Powers, the Vice President and Chief Financial Officer of OrbitCom. Mr. Powers filed direct and rebuttal testimony in this matter. Mr. Power's testimony was accepted into the record as Exhibits 4 and 5, respectively. Mr. Powers testified that the access rates contained in the SSASA between OrbitCom and AT&T are lower than OrbitCom's access rates contained in its Nebraska Tariff. Since OrbitCom began billing AT&T at its Nebraska Tariff rates and not under the terms of the SSASA, AT&T has continued to pay the lower SSASA rates, only remitting a part of the amount billed by OrbitCom pursuant to its Nebraska Tariff.<sup>7</sup>

Mr. Powers testified regarding the amount, according to OrbitCom's billing records, as of September 14, 2009, AT&T had not remitted of the total amount billed by OrbitCom for intrastate access services.<sup>8</sup> Mr. Powers further testified that OrbitCom has no other "off tariff" agreements, or agreements to provide intrastate access service for a different rate other than that contained in Orbitcom's Nebraska Tariff, with any other carrier in Nebraska. AT&T is the only carrier with whom OrbitCom does business in Nebraska that does not pay OrbitCom Nebraska Tariff intrastate access rates.<sup>9</sup>

AT&T called Lawrence J. Bax, an Operations Access Manager for AT&T. Mr. Bax filed direct and rebuttal testimony in this matter. Mr. Bax's testimony was accepted into the record as Exhibits 7 and 8, respectively. Mr. Bax testified concerning the billing and payment of intrastate access charges between OrbitCom and AT&T. Mr. Bax's testimony specifically addressed AT&T's allegations that OrbitCom did not negotiate its Nebraska intrastate access rates contained in its Nebraska Tariff pursuant to §86-140. Further Mr. Bax raised the allegation that OrbitCom's intrastate access rates contained in its Nebraska Tariff are not reasonably comparable to the intrastate access rates of the Incumbent Local Exchange Carrier ("ILEC")

<sup>4</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Brad VanLuer, Exhibit No. 2, pp. 5-6.

<sup>5</sup> *Id.* at pp. 7-8 and Transcript, 17:23 – 18:4 (Hereinafter "Tr page number:line number").

<sup>6</sup> *Id.* at pp. 8-10.

<sup>7</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Michael Powers, Exhibit No. 4, p. 3.

<sup>8</sup> Tr 69:13-19.

<sup>9</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Michael Powers, Exhibit No. 4, pp. 4-5 and TR 75:14-76:4.

underlying the service areas served by OrbitCom, namely Qwest Corporation ("Qwest"), as required by Commission Order.<sup>10</sup>

Mr. Bax testified as to his analysis of OrbitCom's intrastate access rates contained in its Nebraska Tariff, including the rate elements and did a comparison of OrbitCom's access rates to Qwest's access rates. Mr. Bax concluded OrbitCom's Nebraska access rates contained in its Nebraska Tariff are 494% higher than Qwest's access rates in the same area.<sup>11</sup> Therefore, based on his analysis, Mr. Bax testified that in his opinion, OrbitCom's access rates contained in its tariff are not fair and reasonable.

AT&T next called Mr. Victor J. Liss, the Lead Carrier Relations Manager for AT&T. Mr. Liss filed direct and rebuttal testimony in this matter. Mr. Liss's testimony was accepted into the record as Exhibits 9 and 10, respectively. Mr. Liss testified concerning the issues surround the history of the SSASA between AT&T and OrbitCom and concerning the events surrounding the termination and attempted negotiations of a new SSASA.

Mr. Liss addressed OrbitCom's claims that they had submitted a letter on August 2, 2007, giving AT&T notice of termination of the SSASA. Mr. Liss testified that the letter was never received and the only copy he had received of the letter was emailed to him by OrbitCom and was unsigned.<sup>12</sup> Mr. Liss testified that AT&T had no notice from OrbitCom of its intent to terminate the SSASA until OrbitCom billed AT&T in April of 2008 at its Nebraska Tariff intrastate switched access rate. Mr. Liss stated that he contacted Mr. Brad VanLeur with OrbitCom and informed him that AT&T desired to negotiate a new SSASA with OrbitCom. Further, Mr. Liss stated that AT&T continued to pay the lower SSASA rate for access services provided by OrbitCom in Nebraska while negotiations were ongoing.<sup>13</sup>

Mr. Liss further detailed correspondence and communications between himself and representatives of OrbitCom regarding the SSASA and attempts to negotiate a new SSASA. Mr. Liss testified that OrbitCom unilaterally terminated negotiations for a new SSASA between AT&T and OrbitCom in October of 2008.<sup>14</sup>

<sup>10</sup> See Docket C-1628/NUSF, *In the Matter of the Commission, on its own motion, seeking to conduct a investigation into intrastate access charge reform and intrastate universal service fund*, Progression Order #15, (February 21, 2001).

<sup>11</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Lawrence J. Bax, Exhibit No. 7, pp. 5-6.

<sup>12</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Victor J. Liss, Exhibit No. 9, pp. 4-5.

<sup>13</sup> Id. at pp. 5-6.

<sup>14</sup> Id. at 7.

## O P I N I O N   A N D   F I N D I N G S

OrbitCom filed its initial complaint, docketed by the Commission as Application No. FC-1332, seeking to collect for intrastate access services billed to AT&T at the rates contained in OrbitCom's Nebraska Tariff. AT&T brought the above-captioned Application No. FC-1335 complaint, pursuant to §86-140 alleging OrbitCom's intrastate access rates contained in its Nebraska Tariff are unfair and unreasonable and that OrbitCom failed to negotiate its access rates contained in its Nebraska Tariff.

**Section 86-140 Proceedings**

The Nebraska Telecommunications Regulation Act<sup>15</sup> grants regulatory authority to the Commission regarding intrastate access charges imposed by telecommunications companies for access to local exchange networks for interexchange service pursuant to Neb. Rev. Stat. § 86-140. The pertinent provisions of §86-140 currently reads:

- (1) Access charges imposed by telecommunications companies for access to a local exchange network for interexchange service shall be negotiated by the telecommunications companies involved. Any affected telecommunications company may apply for review of such charges by the Commission, or the Commission may make a motion to review such charges. Upon such application or motion and unless otherwise agreed to by all parties thereto, the Commission shall, upon proper notice, hold and complete a hearing thereon within ninety days of the filing. The Commission may, within sixty days after the close of the hearing, enter an order setting access charges which are fair and reasonable. The Commission shall set an access charge structure for each local exchange carrier but may order discounts where there is not available access of equal type and quality for all interexchange carriers, except that the Commission shall not order access charges which would cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs, as determined by the Commission based upon evidence received at hearing, incurred or which will be incurred by the local exchange carrier in providing such access services. Any actions taken pursuant to this subsection shall

<sup>15</sup> See Neb. Rev. Stat. §86-101 et seq.

be substantially consistent with the federal act and federal actions taken under its authority.<sup>16</sup>

Local exchange carriers operating in Nebraska that provide intrastate access services file tariffs with the Commission setting forth the rates, terms and conditions under which intrastate access services are provided. Unless challenged by an affected carrier or the Commission within ten (10) days of filing, a tariff is considered approved and becomes effective pursuant to Neb. Rev. Stat. §86-144.<sup>17</sup> OrbitCom's current Nebraska Tariff was filed with the Commission and became effective on February 5, 2003, pursuant to §86-144. No affected carrier, including AT&T, challenged or filed for a review of OrbitCom's intrastate access rates contained in its Nebraska Tariff in 2003. OrbitCom's intrastate access rates have remained unchanged in Nebraska for the past six (6) plus years.<sup>18</sup>

AT&T seeks Commission review of OrbitCom's intrastate access rates filed in 2003, six (6) plus years after OrbitCom's Nebraska Tariff was filed and became effective. AT&T's complaint, Application No. FC-1335 attempts to initiate such review pursuant to §86-140. Further, AT&T requests the Commission order OrbitCom to lower its intrastate access rates to the same level as OrbitCom's interstate access rates.

The Commission does not interpret the language and intent of §86-140 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. Instead, in our analysis, the provisions of §86-140 only apply in the event a carrier files a tariff with new or revised access charges.

The first sentence of §86-140(1) expressly provides that access charges imposed by a telecommunications company for access to its local exchange network for interexchange service, "shall be negotiated by the telecommunications companies involved." The inclusion of a negotiation requirement in § 86-140 indicates the Legislature's intent that reviews under the provisions of § 86-140 be necessarily premised upon submission of a tariff to the Commission 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

<sup>16</sup> Neb. Rev. Stat. §86-140 (Reissue of 2008).

<sup>17</sup> Neb. Rev. Stat. §86-144(1)(Reissue of 2008).

<sup>18</sup> TR 75:21-76:1.

establishing a new rate or revising current access rates is filed by a carrier. Absent a carrier filing such a tariff containing its initial rates or changing its existing intrastate access rates, there is nothing to be negotiated by the affected carriers. To interpret the provisions of §86-140 any differently would effectively render the negotiation requirement under the statute meaningless.

The provisions of §86-140(1) also place time restrictions upon the Commission to conduct access rate review proceedings. The statute allows ninety (90) days for the Commission to conduct a hearing in such proceedings.<sup>19</sup> The inclusion of an express provision limiting the timeframe for Commission access charge review proceedings also supports the conclusion that the Legislature was only contemplating proceedings under §86-140 in the event a carrier seeks to establish initial access rates or revise its existing access rates. The obvious concern regarding timeliness in §86-140 review proceedings is rendered meaningless and unnecessary if carrier initiated reviews of other carrier's existing access rates can be done at will. The Legislature's inclusion of a statutorily imposed short timeframe for §86-140 proceedings shows clear intent to avoid long delays when carriers seek to implement new or revised access rates.

AT&T did not object to OrbitCom's access rates as being unfair and unreasonable or petition for a review pursuant to §86-140 in 2003. In response to questioning regarding the inaction of AT&T in 2003, AT&T's witness Mr. Bax testified, "looking back at it, [it] is simply AT&T didn't feel as if the tariff applied to them since they were... able to negotiate successfully with OrbitCom and reach agreement on a rate that both parties found acceptable and a rate that was other than the one that was in the tariff."<sup>20</sup> AT&T mistakenly believed that it could negotiate an alternate access rate with OrbitCom, and in the event the agreement terminated, initiate a Commission review of OrbitCom's access rates contained in its Nebraska Tariff if OrbitCom began billing AT&T at the Tariff rate.

Clearly, it was only when AT&T was unable to negotiate different intrastate access rates with OrbitCom that AT&T became concerned with the intrastate access rates contained in OrbitCom's Nebraska Tariff. As Mr. Bax stated, "AT&T is challenging the increase that it will realize resulting from ceasing the contracted rate and imposing the excessive tariff rate."<sup>21</sup> However, AT&T does not get another opportunity to

<sup>19</sup> Neb. Rev. Stat. §86-140(1)(Reissue of 2008).

<sup>20</sup> TR 144:8-14.

<sup>21</sup> TR 141:10-12 (emphasis added).

challenge OrbitCom's current tariffed rates, simply because this is the first time AT&T will pay the rate.

AT&T's opportunity to request negotiations with OrbitCom regarding OrbitCom's intrastate access rates or to apply to the Commission for a review of those rates was in 2003, when OrbitCom filed its Nebraska Tariff establishing its access rates. AT&T failed to do so and chose instead to try and negotiate a better deal for itself. To bring an application for review of OrbitCom's Nebraska Tariff six (6) plus years after it was filed with the Commission is untimely and not proper under §86-140. Therefore, the Commission finds that AT&T's complaint alleging violations of §86-140 and its request for the Commission to review OrbitCom's access charges and find them unfair and unreasonable under §86-140 are untimely and not properly brought under §86-140 and should therefore be dismissed.

The Commission notes that the provisions of §86-140(1) that allow the Commission on its own motion to review access charge rate changes, added to this statute by the Legislature in 1999,<sup>22</sup> are not premised on prior negotiation by affected telecommunications companies regarding the access charges in question. The Commission retains the authority to review access charges of telecommunications companies that are subject to the provisions of §86-140(1) at any time.

### Reasonably Comparable

AT&T's complaint in the above-captioned proceeding does not contain allegations that OrbitCom is in violation of the Commission's order in Docket C-1628/NUSF. In that Order we found that a Competitive Local Exchange Carrier's ("CLEC") access charges, in aggregate, must be reasonably comparable to the underlying ILEC in its service territory, absent a demonstration of costs.<sup>23</sup> However, a significant portion of Mr. Bax's testimony for AT&T is dedicated to discussing the reasonably comparable concept contained in the Commission's order and comparing Qwest intrastate access rates to OrbitCom's.<sup>24</sup> Further, in its Post-Hearing Brief, AT&T asks the Commission to either, set OrbitCom's intrastate access rates to the level of OrbitCom's interstate access rates or in the

<sup>22</sup> Laws 1999, LB 514, § 2.

<sup>23</sup> See Docket C-1628/NUSF, *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*. Progression Order #15 (February 21, 2001), at ¶9.

<sup>24</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Lawrence J. Bax, Exhibit No. 7, pp. 5-6 and TR 121:18-129:9.

alternative at the level of Qwest's access rates.<sup>25</sup> Therefore, while the Commission does not need to address these allegations since AT&T's Complaint did not allege OrbitCom was in violation of a Commission Order, the Commission will briefly address AT&T's allegation that OrbitCom's access rates are not reasonably comparable to Qwest's.

The Commission has not previously defined or interpreted reasonably comparably as it pertains to access rates. AT&T interprets "reasonably comparable" to mean "essentially equivalent". However, far from requiring equivalency between the rates of the CLEC and ILEC, the Commission added the words "in the aggregate", recognizing that access rates are made up of different rate elements and charges that differ from carrier to carrier.<sup>26</sup>

Even AT&T's own witness testified to the difficulties of comparing access rates between carriers. Mr. Bax testified that the access rate AT&T urges us to adopt for OrbitCom is based on assumptions. Mr. Bax stated, "I don't have Qwest's proprietary and confidential data, so I am not sure how [Qwest] developed their numbers."<sup>27</sup> Mr. Bax further explained,

Similarly, I didn't have access to revenues and demands from OrbitCom to develop market number. So, I used the publically available tariffs for the two entities [Qwest and OrbitCom]. But, if you were to lay those tariffs next to one another, even if you had it in tabular form, you are not going to see the rate elements line up. The only way to affect an apples to apples comparison is to derive assumptions.<sup>28</sup>

The Commission finds that even if it desired to analyze how OrbitCom's access rate compares to the underlying ILEC's access rates in its service territory, there is insufficient evidence on which to conduct such an analysis. Even if we determined Qwest's access rates were the appropriate rate for OrbitCom's access rates, we have nothing but assumptions offered by AT&T to determine Qwest's current rates. As Mr. Bax points out, Qwest was not a party to the above-captioned proceeding. While Mr. Bax's assumptions may be valid, they remain assumptions. We

<sup>25</sup> See Application FC-1332/FC-1335, AT&T's Post Hearing Brief, at p. 4.

<sup>26</sup> See Docket C-1628/NUSF, *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*. Progression Order #15 (February 21, 2001), at ¶9.

<sup>27</sup> TR 123:9-12.

<sup>28</sup> TR 123:12-20.

therefore, decline to adopt AT&T's assumptions and order OrbitCom to change its access rate structure to mirror Qwest's and charge the same as Qwest for intrastate access services.

The Commission also notes that we have initiated a proceeding to consider intrastate access rate policy and procedures specifically under §86-140 and access policy in general in Nebraska, Docket C-4145/NUSF-74/PI-147.<sup>29</sup> The Commission intends to address many of the issues raised by the parties in the above-captioned proceeding in that investigation. The Commission feels it is premature to adopt findings regarding access charge policies as urged by AT&T in this proceeding in light of the ongoing investigation. The investigatory docket provides a forum for all interested and affected parties to comment and be a part of the regulatory process. Therefore, the better procedural path for the Commission to establish important policy regarding intrastate access rates is through the investigatory docket currently pending before the Commission. AT&T filed comments and reply comments in the C-4145 investigation and we urge both AT&T and OrbitCom to fully participate in that proceeding.

#### The SSASA

Significant time in the above-captioned proceeding was spent discussing and debating the provisions of the Settlement and Switched Access Service Agreement ("SSASA") between OrbitCom and AT&T. The SSASA, which became effective January 1, 2004, contained provisions whereby AT&T received intrastate access services from OrbitCom at lower rates than the intrastate access rates contained in OrbitCom's Nebraska Tariff.<sup>30</sup> The SSASA was kept confidential between the parties and not filed with the Commission. The Commission was only made aware of the existence of such an agreement when AT&T disclosed that information in its Answer to OrbitCom's complaint, Application No. FC-1332.

Now AT&T and OrbitCom are asking the Commission to interpret the terms and conditions of the SSASA and make determinations in this proceeding regarding specific contractual obligations and requirements. As the SSASA was not filed with the Commission and the terms and conditions of the contract were not reviewed or approved by the Commission, we decline to interpret those provisions. Commission approval and

<sup>29</sup> See Docket C-4145/NUSF-74/PI-147, *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*. Order Opening Docket and Seeking Comment, (February 24, 2009).

<sup>30</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Brad VanLuer, Exhibit No. 2, pp. 5-6 and attached exhibit BV-3.

participation were not sought when the SSASA was originally entered into by the parties, therefore, the Commission will not now consider such agreement after it has terminated and disputes have arisen regarding its provisions. The correct course for the parties to settle disputes arising out of a contractual agreement is in the appropriate court of jurisdiction.

### Unfiled Agreements

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. AT&T revealed in this proceeding it currently has such agreements with other Nebraska carriers to receive intrastate access services at lower rates than the rates contained in the carrier's filed tariff.<sup>31</sup> Both OrbitCom and AT&T have been involved in proceedings in front of other state regulatory commissions regarding these unfiled agreements as we are not alone in our concerns regarding these agreements.<sup>32</sup>

In the current instance, neither the Commission nor other competing interexchange carriers ("IXCs") were aware of the terms and conditions of the SSASA, including the intrastate access rates charged by OrbitCom to AT&T for access services. The Commission is concerned such agreements are discriminatory and anti-competitive and contrary to both Federal and State regulatory policy. 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.

### OrbitCom's Nebraska Tariff

OrbitCom currently has a valid Switched Access Tariff in Nebraska and that has been in effect since February 2003. In April of 2008, OrbitCom began billing AT&T for access services pursuant to the rates contained in its Nebraska Tariff. AT&T refused to pay OrbitCom the Nebraska Tariff rates and instead initiated the above-captioned proceeding challenging OrbitCom's access rates contained in its Nebraska Tariff. However, AT&T did not dispute the access services were rendered by OrbitCom,

<sup>31</sup> TR 163:14-164:4 and Exhibit No. 5 attached exhibit MP-4.

<sup>32</sup> See Application FC-1332/FC-1335 Transcript, Direct Testimony of Brad VanLuer, Exhibit No. 2, pp. 6-7 and TR 145:24-147:18.

nor that it owes payment to OrbitCom for services rendered, but has only disputed the rates at which those services have been billed.

The Commission finds that OrbitCom's Nebraska Switched Access Tariff is valid and effective and the correct rate to be charged by OrbitCom to any IXC to which it provides access services on its network, including AT&T. The Commission further finds that AT&T should pay the outstanding balance owed to OrbitCom based on the rates in its Nebraska Switched Access Tariff as of April of 2008 and going forward.

### Conclusion

We therefore find that AT&T's complaint and request for a review of OrbitCom's intrastate access rates as contained in its Nebraska Tariff is not properly brought under the provisions of Neb. Rev. Stat. §86-140(1) (Reissue of 2008) and should be dismissed. OrbitCom has a valid and effective Switched Access Services Tariff in Nebraska and has been billing AT&T for access services rendered by OrbitCom to AT&T pursuant to its Nebraska Tariff since April of 2008. AT&T has received access services from OrbitCom and should therefore pay the outstanding balance due OrbitCom for such services rendered from April 2008 and into the future, unless and until OrbitCom no longer has a valid and effective access tariff on file in Nebraska. We further find an investigation into unfiled, off-tariff, agreements between carriers to provide access services at other than tariffed rates should be initiated as outlined above.

### O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that AT&T Communications of the Midwest, Inc.'s complaint against OrbitCom, Inc., docketed as Application No. FC-1335, be, and it is hereby, dismissed.

IT IS FURTHER ORDERED that OrbitCom, Inc.'s complaint against AT&T Communications of the Midwest, Inc., docketed as Application No. FC-1332 be, and it is hereby, sustained.

IT IS FURTHER ORDERED that AT&T Communications of the Midwest, Inc. shall pay the outstanding balance due to OrbitCom, Inc. for access services as of the April 2008 billing statement through the date of this order.

IT IS FURTHER ORDERED that subsequent to this order, any intrastate access services rendered by OrbitCom, Inc. to AT&T

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Communications of the Midwest, Inc. or any of its affiliates or subsidiaries, shall be provided pursuant to OrbitCom, Inc.'s Nebraska Switched Access Services Tariff.

MADE AND ENTERED at Lincoln, Nebraska, this 10<sup>th</sup> day of November, 2009.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

*David Kay* *Frank Landis*  
Chairman

*Aune C. Boyle*

ATTEST:

*Frank E. Landis*

*Shelley H.*

//s//Frank E. Landis

Executive Director