

# Nebraska Public Service Commission

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~~NICHOLE MULCAHY~~

STEVE MERADITH January 29, 2013

TO ALL INTERESTED PARTIES:

RE: Rule and Regulation #187: In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to add rules regarding adequacy of service and prohibiting call blocking and choking.

## CERTIFICATION

I, Steve Meradith, Executive Director of the Nebraska Public Service Commission, hereby certify that the enclosed is a true and correct copy of the original order made and entered in the proceeding docketed Rule and Regulation No. 187 on the 29th day of January, 2013. The original order is filed and recorded in the official records of the Commission.

Please direct any questions concerning this order to Nichole Mulcahy, Legal Counsel, 402-471-0234.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Nebraska Public Service Commission, Lincoln, Nebraska, this 29th day of January, 2013.

Sincerely,



Steve Meradith  
Executive Director

cc: Per Attached Distribution List  
Secretary of State, Room 2300, State Capitol, Lincoln, NE 68509  
Governor's Policy Research Office, Room 1319, State Capitol, Lincoln, NE 68509  
Mr. John Wightman, Chairman, Executive Board, District #36, State Capitol, Lincoln,  
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SECRETARY'S RECORD, NEBRASKA PUBLIC SERVICE COMMISSION

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on ) RULE AND REGULATION NO. 187  
its own motion, seeking to amend )  
Title 291, Chapter 5, Telecommuni- ) ORDER RELEASING THIRD SET OF  
cations Rules and Regulations, to ) PROPOSED RULES, SEEKING  
add rules regarding adequacy of ) COMMENT, NOTICE OF HEARING  
service and prohibiting call block- )  
ing and choking. ) Entered: January 29, 2013

BY THE COMMISSION:

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

On July 17, 2012, the Nebraska Public Service Commission (Commission), on its own motion, opened this proceeding to amend Title 291, Chapter 5, Telecommunications Rules and Regulations, to add rules regarding adequacy of service provided by telecommunications carriers and prohibiting call blocking and choking pursuant to the Nebraska Telecommunications Regulation Act, Neb. Rev. Stat. § 86-101 et. seq. Under the provisions of the Act, the Commission is given the authority to promulgate rules and regulations for purposes of administering the Act.

The Commission released a first set of proposed rules and requested comments from interested parties. Comments were timely received from AT&T Communications of the Midwest, Inc. and TCG Omaha (AT&T); Charter Fiberlink-Nebraska LLC (Charter); Cox Nebraska Telcom LLC (Cox); N.E. Colorado Cellular, Inc. d/b/a Viaero Wireless (Viaero); Rural Independent Companies (RIC); Rural Telecommunications Coalition of Nebraska (RTCN); Sprint Nextel (Sprint); Time Warner Cable (TWC); United Telephone Company of the West d/b/a CenturyLink (CenturyLink); and Verizon. Based upon the initial comments the Commission made changes to the first set of proposed rules and released a second set of proposed rules for comment.

Comments on the second set of proposed rules were timely received from AT&T, Charter, Cox, RIC, and CenturyLink. Based upon the second set of comments received, further revisions to the proposed rules have been made and a Third Set of Proposed Rules and Regulations attached hereto as Appendix is released for comment.

The additional changes were made to proposed Rule 002.02I. The changes include replacing the word "certain" with "applicable" as advocated by Charter.

Cox, RIC, and others expressed concern that the language limiting the sections application to unreasonable and unjust choking, blocking, reducing and restricting of traffic did not include *force majeure* events outside the control of the carrier. While the Commission believes that it is clear from the previously included language regarding reasonableness that events outside the control of a carrier would not be included under this section, *force majeure* language has been added to address those concerns.

Some commenters expressed concern over the scope of the agency liability contained in the last sentence proposed Rule 002.02I. Some commenters suggested we remove the language in its entirety, others advocated inclusion of language requiring only that carriers take reasonable steps or commercially reasonable steps to ensure traffic completion. The Commission finds removing the language would defeat the intent of the above-captioned rulemaking proceeding. Further, including terms like "reasonable steps" would add ambiguity to the rule and serve only to potentially limit carrier responsibility to manage their networks and ensure quality of service and call completion regardless of the means they employ to route traffic. Therefore, we decline to remove language or include the suggested language. However, to address concerns about the extent of a carrier's liability, the Commission did add language limiting the liability of carriers to acts performed by agents or employees of the carrier acting within the scope of their employment.

Charter suggested carriers should not be held responsible for the actions of other carriers it utilizes to route its traffic. We find this in direct contradiction of the Commission stated intent of the above-captioned rulemaking and to the Federal Communications Commission's (FCC) declaratory ruling issued in February 2011 in response to the rural call termination issues.<sup>1</sup> In the Declaratory Ruling, the FCC stated that carriers are responsible for the acts, omissions, or failures of their employees and agents, and as such, carriers are liable for the actions of an underlying provider hired to deliver traffic.<sup>2</sup> We also find such suggestion contrary to this Commission's regulatory policy and rules requiring quality service for all customers in Nebraska. Carriers that utilize other carriers to route traffic have a responsibility to ensure the underlying provider is not engaging in blocking, choking, or other unreasonable call restrictions. The rules proposed in this proceeding intend to codify such responsibility to quality of service in Nebraska.

CenturyLink urged us to making certain changes to proposed Rule 002.02B, stating the rule as proposed is unnecessarily restrictive and could prohibit carriers from managing their networks. We disagree with this assessment of the proposed rule and its impact and find prohibiting unreasonable call blocking and choking will not stop a carrier from lawfully and appropriately managing its network.

The RIC advocated replacing the last sentence of proposed Rule 002.02I with different language. We decline to do so. The language contained in the last sentence was suggested by another commenting party in the first round of comments and the Commission finds the language as currently proposed suffices for Commission purposes.

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<sup>1</sup> See Wireline Competition Bureau Declaratory Ruling, CC Docket No. 01-92 and WC Docket No. 07-135 (February 6, 2012).

<sup>2</sup> *Id.* at para. 15.

CenturyLink expressed concern that language in proposed Rule 002.02I alluding to attempts to avoid paying access fees was the Commission attempting to address intercarrier compensation issues. In the proposed rule the Commission is merely including an example of a possible motivation by some carriers to not complete calls to certain areas, the avoidance of certain fees. The language is not an attempt to address or even comment on intercarrier compensation issues.

The RIC also encouraged us to amend Title 291, Chapter 1, Section 027.02A(2), the Commission's Rules of Procedure regarding civil penalty procedures and reference such change in a new section 002.02J to the proposed rule. While this may indeed be an appropriate change to the Commission's Rules of Procedure, such a change would require a separate rulemaking procedure, including notice of the Commission's intent to make changes to a different chapter of Title 291. Such change cannot be made in the current rulemaking proceeding.

Next, we are urged by the RIC to also make an explicit exception for resale interexchange carriers from the provisions of the proposed rule unless evidence established actual knowledge by the reseller carrier of the underlying carrier's violations of the rules. We decline to include an explicit exception at this time. Such a defense or argument of no actual knowledge could be utilized by a reseller in the event action by the Commission was taken under the provisions of the rule against an interexchange reseller carrier.

Charter asserts the proposed rule goes beyond the Commission's jurisdiction. We do not find this argument persuasive and find the rule as proposed clearly within the Commission jurisdiction to regulate quality of service.

Finally, AT&T and Charter again urge us to not act as the FCC is currently investigating similar issues at the national level. As stated previously in this proceeding, we find it appropriate to act for the benefit of Nebraska consumers at this time. AT&T also encouraged us to include a sunset provision in the rule. The Commission finds a sunset provision unnecessary.

As urged by some commenters, the Commission unequivocally states that any changes made to Rule 002.02 regarding quality of service will also apply to interexchange carriers as Rule 002.02 is adopted in the Commission interexchange carrier rules in Rule 003.01C.

Comments on the third set of proposed rules, which are set forth in the Appendix and incorporated herein by this reference, shall be filed by interested parties on or before **3:00 p.m., March 1, 2013**. Parties filing comments should file one (1) original with five (5) paper copies and one (1) electronic copy in Word format emailed to [deena.ackerman@nebraska.gov](mailto:deena.ackerman@nebraska.gov) and [nichole.mulcahy@nebraska.gov](mailto:nichole.mulcahy@nebraska.gov).

The Commission finds that this matter should be set for hearing on **Tuesday, March 19, 2013, at 1:30 p.m.** in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

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If auxiliary aids or reasonable accommodations are needed for attendance at the meeting, please call the Commission at (402) 471-3101. For people with hearing/speech impairments, please call the Commission at (402) 471-0213 (TDD) or the Nebraska Relay System at (800) 833-7352 (TDD) or (800) 833-0920 (Voice). Advance notice of at least seven days is needed when requesting an interpreter.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that interested parties may file comments on or before 3:00 p.m. on **March 1, 2013**. Commenting parties shall file one original and five (5) paper copies along with one (1) electronic copy in Word format. Electronic copies should be emailed to [nichole.mulcahy@nebraska.gov](mailto:nichole.mulcahy@nebraska.gov) and [deena.ackerman@nebraska.gov](mailto:deena.ackerman@nebraska.gov).

IT IS FURTHER ORDERED that this matter be set for hearing on **Tuesday, March 19, 2013, at 1:30 p.m.** in the Commission Hearing Room, 300 The Atrium, 1200 N Street, Lincoln, Nebraska.

MADE AND ENTERED at Lincoln, Nebraska, this 29<sup>th</sup> day of January, 2013.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

  
Chair

ATTEST:

  
Executive Director

//s//Anne C. Boyle  
//s//Frank E. Landis

APPENDIX

Amendments to Nebraska Administrative Code, Title 291, Chapter 5, Telecommunications Rules and Regulations:

002.02 Adequacy of Service:

002.02A Each exchange carrier shall provide adequate access line service. In determining whether the access line service provided by an exchange carrier is adequate, the Commission's consideration will include, but shall not be limited to, the adequacy of the carrier's plant and equipment, the number and nature of service interruptions, trouble reports, customer complaints and held applications, the nature of access line service offered by the carrier and the nature of the access line services desired by the public served.

002.02B Adequate service shall include not subjecting any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage in the provisioning of service by means of blocking, choking, reducing or restricting traffic in any way, or otherwise engaging in unjust or unreasonable conduct with regard to intrastate telecommunications service prohibited by Nebraska law or the rules and regulations of the Commission.

002.02BC In the event of a dispute between a subscriber or subscribers and an exchange carrier regarding the adequacy of the access line service provided, the carrier shall make such investigations as required by the particular case, and report the results to the subscriber. In the event the dispute is not reconciled, the exchange carrier, or the subscriber affected, may make application to the Commission for a determination of the dispute.

002.02GD Each exchange carrier shall employ appropriate engineering and administrative procedures to determine the adequacy of access line service being provided to its customers.

002.02DE Traffic studies shall be made and records thereof maintained to the extent and frequency necessary to determine that sufficient equipment and adequate operating forces are provided.

002.02EF Each exchange carrier shall employ adequate procedures for assignment of facilities. The assignment record shall be kept up-to-date and checked periodically to determine whether adjustments are necessary to maintain proper balance in all trunk and equipment groups.

002.02FG Local access line service furnished by means of line concentrators or subscriber carrier equipment at a given exchange shall be substantially equivalent to that furnished other subscribers at that exchange served by means of normal physical loops.

002.02GH Each exchange carrier shall continually review its operations to assure that the access line service provided is adequate.

002.02I No exchange carrier shall engage in any practice, including blocking, choking, reducing, or otherwise restricting telecommunications traffic to particular locations in an unjust or unreasonable manner, that has the effect of degrading service to a particular location, including for purposes of avoiding any applicable rate, charge, or fee. This shall not apply if traffic restriction is caused by a *force majeure* event that is beyond the reasonable control of the exchange carrier. Each exchange carrier shall be responsible for the acts, omissions, or failures of their officers, agents or other persons acting for or employed by the carrier, acting within the scope of their employment, including but not limited to third parties contracted by carriers to assist in the provision of service.