

**Before the
PUBLIC UTILITIES COMMISSION
of the
STATE OF SOUTH DAKOTA**

**In the Matter of Complaint of)
Orbitcom, Inc. against Global) Docket No. TC08-005
Crossing Telecommunications, Inc.)**

Global Crossing Supplement to Answer and Motion to Take Judicial Notice

Global Crossing Telecommunications, Inc., (Global Crossing), through its undersigned attorney, respectfully submits this supplement to its Answer to Orbitcom’s Complaint dated February 4, 2008.

As was stated in Global Crossing’s Answer filed on July 28, 2008, Orbitcom is not allowed pursuant to FCC Rule to charge an access rate for interstate switched service in excess of the incumbent LEC unless it enters into an agreement with an individual interexchange carrier to do so. As stated in the Answer, Global Crossing has refused to enter into such an agreement with Orbitcom.

As a part of its Answer, Global Crossing asserts that Orbitcom is unable to charge at this point for interstate access rates as it does not have a federal tariff. Since its filing against Global Crossing in TC07-079, Orbitcom has requested of the FCC the ability to charge interstate switched access rates equal to its intrastate rates. On August 27, 2008, the FCC in Docket No. TC08-162, declined Orbitcom’s request to allow such practice. A copy of the FCC’s Memorandum of Opinion and Order is attached hereto as Exhibit A. Global Crossing requests the Commission take judicial notice of this opinion and order pursuant to SDCL 1-26-19.

Denial of Orbitcom requests by the FCC is significant in that it shows Orbitcom’s intent and coincides with the alleged practice claimed by Global Crossing. It is the contention of Global Crossing that Orbitcom does now in fact attempt to charge IXCs such as Global Crossing its intrastate switched access charge for interstate access services and as has further been alleged by Global Crossing, certain reclassification or adjustments to recover interstate charges at an intrastate rate where done after the dismissal of TC07-079 by Orbitcom. According to the attached FCC Order, they have no authority to do so.

Dated this 30th day of August, 2008.

Olinger, Lovald, McCahren & Reimers, P.C.
117 E. Capitol – PO Box 66
Pierre, SD 57501

/s/ William M. Van Camp
William M. Van Camp
Attorney for Global Crossing Telecommunications, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of August, 2008, he filed electronically with the Commission and served the same by email a true and correct copy of the Global Crossing Supplement to Answer and Motion to Take Judicial Notice to:

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/s/ William M. Van Camp

Before the
Federal Communications Commission
Washington, D.C. 20554

Exhibit

A

| | | |
|---|---|----------------------|
| In the Matter of |) | |
| |) | |
| Petition of OrbitCom, Inc. for Forbearance from |) | |
| CLEC Access Charge Rules |) | WC Docket No. 08-162 |
| |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 2008

Released: August 27, 2008

By the Commission: Commissioners Copps and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. In this Order, we deny a petition filed by OrbitCom, Inc. (OrbitCom) requesting that the Commission forbear from tariff regulations set forth in sections 61.26(b) and (c) of the Commission's rules.¹ OrbitCom's petition fails to address in any manner the statutory criteria for a grant of forbearance or to provide any showing that those criteria are met by its request.² Accordingly, we deny the petition.

II. BACKGROUND

2. On August 27, 2007, OrbitCom filed its one page petition seeking forbearance from tariff regulations set forth in sections 61.26(b) and (c) of the Commission's rules.³ These rules generally provide that a competitive LEC may not tariff rates for interstate access services that are higher than the rates charged for such services by the competing incumbent LEC.⁴ Specifically, OrbitCom requests that the Commission permit OrbitCom to tariff rates for interstate switched access that would mirror its intrastate tariff rates. Although OrbitCom does not provide any information about any of its rates, we assume that it is requesting forbearance from these rules because its intrastate rates are higher than its interstate rates, and thus the rules would preclude OrbitCom from filing an interstate rate at the level of its intrastate rate.

¹ Petition of OrbitCom, Inc. for Forbearance from Tariffing Regulation of Competitive Interstate Switched Exchange Access Services Pursuant to 47 C.F.R. § 61.26(b) and 47 C.F.R. § 61.26(c) (filed Aug. 27, 2007) (OrbitCom Forbearance Petition).

² See 47 U.S.C. §§ 160(a) and (b). Likewise, OrbitCom's petition ignores section 1.53 of the Commission's rules, which requires that petitions for forbearance under section 10 of the Act "shall be identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. § 160(c)." 47 C.F.R. § 1.53.

³ OrbitCom Forbearance Petition.

⁴ See 47 C.F.R. §§ 61.26(b) and (c).

3. The Commission adopted the rules in sections 61.26(b) and (c) in 2001 as part of its access charge reform proceeding.⁵ In the *CLEC Access Reform Order*, the Commission concluded that the access services market structure prevented competition from effectively disciplining prices.⁶ The Commission found further that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation, which could ensure the reasonableness of those rates. Those competitive LECs would then rely on their tariffs to demand payment from long distance carriers for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.⁷ To address this market failure, the Commission revised its tariff rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.⁸

4. For the Commission to grant the forbearance requested by OrbitCom, the Commission must determine that the three elements of section 10 of the Act are satisfied. In particular, section 10(a) provides that:

The Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that –

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
- (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
- (3) forbearance from applying such provision or regulation is consistent with the public interest.⁹

⁵ See *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*). In order to ensure that competitive LEC access rates are just and reasonable, the Commission sought to eliminate regulatory arbitrage opportunities that previously existed with respect to tariffed competitive LEC access services. See *id.* at 9924-25, paras. 2-3. The Commission limited its application of the tariff rules to competitive LEC interstate access services (defined only as interstate switched access services unless otherwise specified to the contrary). *Id.* at 9924, para. 2 & n.2.

⁶ *Id.* at 9936, para. 32. The Commission explained that an interexchange carrier (IXC) has no competitive alternative for access to a particular end-user, and, because the IXC pays access charges and recovers those costs through averaged rates, the end-user has no incentive to avoid high-priced providers for access services. *CLEC Access Reform Order*, 16 FCC Rcd at 9935, para. 31.

⁷ *Id.* at 9925, para. 2.

⁸ See 47 C.F.R. § 61.26. The Commission set a benchmark rate for competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable. *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

⁹ 47 U.S.C. § 160(a). With regard to the public interest determination required by section 10(a)(3), section 10(b) requires the Commission to “consider whether forbearance from enforcing the provision or regulation will promote

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III. DISCUSSION

5. The OrbitCom Forbearance Petition does not meet any of the statutory criteria necessary for forbearance under section 10(a) of the Act.¹⁰ We first consider whether OrbitCom's request for forbearance from tariff regulations established in sections 61.26(b) and (c) of the Commission's rules meets the statutory criteria contained in section 10(a)(1). That section states that the Commission shall forbear if it determines that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory."¹¹ In its petition, apart from an unsupported claim that the requested relief would allow it to "recover some costs" and "remain competitive,"¹² OrbitCom provides no evidence from which the Commission could determine that the requirement of section 10(a)(1) has been met. OrbitCom provides no evidence about its costs, or any state rate that it would use to establish its interstate rate. For example, how many different intrastate rates does OrbitCom have, and what are they? Nor does OrbitCom explain how its interstate rates would remain just and reasonable if it were allowed to charge higher rates for interstate services. Because OrbitCom provided no evidence or analysis to demonstrate that enforcement of the tariff regulations established by sections 61.26(b) and (c) is not necessary to ensure that intercarrier charges and practices are just and reasonable, and are not unjustly or unreasonably discriminatory, we find that the OrbitCom Forbearance Petition fails to meet the statutory criteria necessary for forbearance contained in section 10(a)(1).

6. The second and third prongs of section 10(a) require that the Commission shall forbear if "enforcement of such regulation or provision is not necessary for the protection of consumers,"¹³ and if "forbearance from applying such provision or regulation is consistent with the public interest."¹⁴ OrbitCom does not address the issue of consumer benefit or protection, or how the requested forbearance would be consistent with the public interest.¹⁵ Significantly, OrbitCom does not address the extensive competitive concerns that gave rise to the implementation of rules 61.26(b) and (c), much less show how its requested relief, and the increased access charges that would result from its grant, would benefit consumers.¹⁶ Because OrbitCom has presented no evidence or analysis to demonstrate that enforcement

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competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b). Further, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." *Id.*

¹⁰ See 47 U.S.C. § 160(a). See also *Cellular Telecommunications & Internet Assoc. v. Federal Communications Commission*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong).

¹¹ 47 U.S.C. § 160(a)(1).

¹² See OrbitCom Forbearance Petition.

¹³ 47 U.S.C. § 160(a)(2).

¹⁴ 47 U.S.C. § 160(a)(3).

¹⁵ See OrbitCom Forbearance Petition.

¹⁶ See generally *CLEC Access Reform Order*. The Commission noted, for example, that implicit in terminating access is the fact that neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider, thus potentially giving CLECs the incentive to charge excessive rates for

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of sections 61.26(b) and (c) is not necessary for the protection of consumers and is consistent with the public interest, we find that its petition fails to meet the statutory criteria necessary for forbearance contained in sections 10(a)(2) or (3).

IV. EFFECTIVE DATE

7. Consistent with section 10 of the Act and the Commission's rules, this Order shall be effective on August 27, 2008.¹⁷

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to section 10(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 160(c), that the petition for forbearance of OrbitCom, Inc. IS DENIED as set forth herein.

9. IT IS FURTHER ORDERED, pursuant to section 10 of the Communications Act of 1934, as amended, 47 U.S.C. § 160, and section 1.103(a) of the Commission's rules, 47 C.F.R. § 1.103(a), that this decision SHALL BE EFFECTIVE on August 27, 2008. Pursuant to sections 1.4 and 1.13 of the Commission's rules, 47 C.F.R. §§ 1.4, 1.13, the time for appeal SHALL RUN from the release date of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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terminating access service. *Id.* at 9927, para. 10. The Commission acknowledged that the market for access services does not appear to be structured in a manner that allows competition to discipline rates. *Id.* at 9936, para. 32. The Commission also found that its previous decision not to regulate CLEC access rates and its reliance on the section 208 complaint process had failed to keep CLEC access rates within a zone of reasonableness. *Id.* at 9933, para. 25.

¹⁷ 47 U.S.C. § 160(c) (deeming the petition granted as of the forbearance deadline if the Commission does not deny the petition within the time period specified in the statute); 47 C.F.R. § 1.103(a).

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS
CONCURRING**

Re:*Petition of OrbitCom, Inc. for Forbearance from the CLEC Access Charge Rules, WC Docket No. 08-162*

The forbearance petition before the Commission does not meet the minimum statutory criteria necessary to grant relief from the Commission's tariff rules and therefore should be denied. The fact is that the Commission lacks the information necessary to determine whether granting forbearance could possibly be justified in this case. The petition is only a single page with no documentation filed to support the relief being sought. Rather than expend the Commission's limited resources on such a thinly-supported petition, perhaps the Commission should have dismissed the petition as deficient when it was first filed. Or, perhaps, the Commission should have remedied the petition's deficiencies by seeking to develop the information necessary to make a fully-informed decision. The Commission took neither of those tacks. As a result, the Commission is now in the unfortunate position of having to either grant or deny the forbearance petition despite the lack of information – to take no action would result in the petition being “deemed granted.”

The Commission has now seen the two ends of the spectrum when it comes to the forbearance process. On one end is the case where forbearance is deemed granted because after due consideration the decision lacks a majority of support. On the other end we now have a forbearance petition that could have been deemed granted without sufficient consideration due to a lack of information. Neither outcome is a good one and both demonstrate the clear need for better procedural rules and an end to the deemed granted scenario. To ensure that the petition before the Commission is not granted without adequate evidence, I concur in the decision.

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING**

Re: *Petitions of OrbitCom, Inc. for Forbearance from CLEC Access Charges, WC Docket No. 08-162*

In today's decision, the Commission denies a petition seeking forbearance from the Commission's tariff rules for interstate access services. I agree with the Order's finding that the petitioner has fallen far short of meeting the standard for forbearance set by Congress. I have consistently encouraged the Commission to base its decisions on a careful and sound examination of specific geographic and product markets, and it is clear that this petition provided no such evidence.

While the Commission reaches the right result here, this case reinforces the need for procedural rules to govern the forbearance process. The appearance of this item on the public circulate list before the Commission sought public comment predictably evoked questions from interested parties and raises questions about the Commission's approach to facially deficient petitions. Wielding our Section 10 authority carefully is particularly important given the nature of the forbearance statute and its "deemed grant" provision, in particular.¹ Congress alone has the power to modify the statute, but we are again reminded of the need to develop meaningful procedural rules to govern the forbearance process. For these reasons, I concur in this decision.

¹ I share the concerns of the many Members of Congress who have expressed unease about the "deemed grant" provision of section 10, which allows private parties to exempt themselves from the law without consideration of the very standard for forbearance articulated by Congress.