

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE COMPLAINT
OF ORBITCOM, INC. AGAINST MCI
COMMUNICATIONS SERVICES, INC.
D/B/A VERIZON BUSINESS SERVICES
AND TELECONNECT LONG DISTANCE
SERVICES & SYSTEMS COMPANY D/B/A
TELECOM*USA FOR UNPAID ACCESS
CHARGES

TC08-135

**ORBITCOM'S POST-HEARING REPLY
MEMORANDUM OF LAW IN SUPPORT
OF ITS AMENDED COMPLAINT
(PUBLIC)**

COMES NOW OrbitCom, Inc. ("OrbitCom") and respectfully submits this Post-Hearing Reply Memorandum of Law in response to Verizon's Post-Hearing Brief and in further support of its Amended Complaint.

ARGUMENT AND ANALYSIS

Not surprisingly, Verizon's Post-Hearing Brief does little to simplify the matters in this case. In fact, it injects even more unsubstantiated and unabashed misstatements into the mix. Distilled to its essence, Verizon's argument is that OrbitCom failed to comply with the terms of its tariff, failed to provide credible evidence that it billed Verizon appropriately, and thus failed to meet its burden of proof. Despite its lengthy brief, however, it is Verizon's position which remains unsupported. Most significantly, one must remember in analyzing this matter that Verizon has improperly withheld *all* payment from OrbitCom and that OrbitCom is owed money for a lengthy period of time in this proceeding. Clever drafting cannot change that critical fact.

1. OrbitCom Has Met Its Burden of Proof With Regard to the Use of a PIU Factor and the PIU Factors Which It Used to Bill Verizon.

Verizon correctly points out that OrbitCom bears the burden of proving those allegations set forth in its Amended Complaint. However, this is essentially the only statement in Verizon's brief upon which the parties seem to agree. The allegations contained in OrbitCom's Amended

As previously set forth in its initial post-hearing memorandum, OrbitCom's Tariff sets forth the process by which the jurisdiction of MOUs is determined and the rate which is thereafter applied. See OrbitCom's Post-Hearing Memorandum of Law in Support of its Complaint, pp. 5-6. The Tariff explains that the jurisdiction of the traffic at issue will be determined either by actual call detail or through application of a PIU. See OrbitCom Switched Access Tariff, § 3.4 www.puc.sd.gov/commission/tariffs/telecommunications/orbitcom.pdf. Specifically, Section 3.4 of OrbitCom's tariff provides:

When the Company receives sufficient call detail to determine the jurisdiction of some or all originating and terminating access minutes of use (MOU), the Company will use that call detail to render bills for those MOU and will not use PIU factors. When the Company receives insufficient call detail to determine the jurisdiction of some or all originating and terminating access MOU, the Company will apply PIU factor(s) provided by the Customer or developed by the company to those minutes for which the Company does not have sufficient call detail. PIU factor(s) must be provided in whole numbers and will be used by the Company to apportion use and/or charges between interstate and intrastate jurisdictions until Customer provides an update to its PIU factor(s).

Section 3.4.1.4 provides:

If no PIU for originating minutes is submitted as specified herein, then the projected PIU will be set on a default basis of 32 percent interstate traffic and 68 percent intrastate traffic.

In order for OrbitCom to dispense with use of a PIU, it must have available to it sufficient call information to render an *accurate* bill. Id. at § 3.4. While the language of the tariff does not specifically reference the issuance of an accurate bill, it only makes sense. Other than its conclusory statements, Verizon has done nothing to prove that OrbitCom had sufficient call detail to bill jurisdictionally. In its attempts to do so, Verizon went so far as to take completely out of context a statement made by Michael Powers during his hearing testimony. In its brief, Verizon argues that Mr. Powers testified that only one to four percent of traffic lacks the

Even more tellingly, Verizon fails to reference that, in response to Verizon's own Data Requests to OrbitCom, Second Set, OrbitCom informed Verizon of these steps:

Data Request 47(e): When did OrbitCom begin billing other interexchange carriers jurisdictionally?

Response: OrbitCom has been working for some time to test jurisdictional billing. It is a very labor intensive process to switch a carrier to this type of billing requiring the rebuilding of tables within the billing system and then repeating test billings to insure accuracy. It can take up to a year to convert a carrier. Other than test accounts, OrbitCom began billing the process of billing other carriers jurisdictionally at the same time as Verizon.

Data Request 47(e): When OrbitCom began billing Verizon jurisdictionally, what monthly usage period did its bills cover?

Response: April 1 through April 30, 2009.

See OrbitCom's Responses to Verizon's Second Set of Data Requests.

While Verizon can argue that the EMI records which OrbitCom receives from Qwest are sufficient for it to determine the jurisdiction of the calls and the proper intra- or interstate rate, that does not make it so for OrbitCom. See Hearing Exhibit 3, p. 3, lines 18-23; p. 4, lines 1-11. The jurisdictional detail present in the EMI indicator is simply not sufficient to do what Verizon claims it can. See Hearing Exhibit 3, p. 3, lines 18-23; p. 4, lines 12-22. Under these circumstances, OrbitCom properly determined that the use of a PIU, developed by it, was appropriate for use in this context.

Furthermore, the fact that the jurisdictional detail present in the EMI record is insufficient to render an accurate bill is borne out by Verizon's own analysis submitted for the record. Confidential Exhibits LF-32 (an analysis of the actual CDRs underlying the June 2009 billing to Verizon and labeled as OrbitCom Non-EMI call records-June 2009) pulled from OrbitCom's

It is clear at a simple glance that the use of OrbitCom's CDR records produces a PIU factor which is much more favorable to Verizon. According to Verizon's own analysis of the CDR records, the resulting PIU factor is [REDACTED]. Use of the raw EMI records results in a PIU factor of [REDACTED]. See Exhibit B, LF-32 and LF-33. The difference in the factors is easily explainable. OrbitCom's billing system reduced the unknown MOUs from in excess of [REDACTED] MOUs to [REDACTED] MOUs, reclassifying virtually all of [REDACTED] minutes, which number represents the difference in the two categories, from *unknown* to *interstate*.

As set forth above, OrbitCom determined, and rightly so, that the jurisdictional assignment contained in the Category 11-01-01 EMI records furnished to OrbitCom by Qwest for access billing was insufficient to accurately bill by jurisdiction. Accordingly, OrbitCom elected to use a PIU developed by the company (32%) (and which is clearly a permissible option under the terms of the tariff) until it could implement billing software that compared the originating NPA-NXX to the terminating NPA-NXX of each and every call and match them to a current and accurate database to determine jurisdiction. Prior to implementing this billing software, Verizon's own analysis contained in exhibits LF-32 and LF-33 demonstrate that using the 32% PIU instead of the jurisdictional indicator on the EMI records (which Verizon is claiming was sufficient for OrbitCom to bill by jurisdiction) resulted in a much more accurate and favorable result for Verizon.

Verizon also takes issue with the rate that has been applied to the traffic at issue. Specifically, Verizon alleges that OrbitCom's use of the composite rate of \$0.06 is inappropriate. However, this act too, is in compliance with OrbitCom's tariff. Verizon personnel, during the initial contact with OrbitCom, failed to understand that the rates for access contain a mileage component for calls between the tandem switch and the end office. See Hearing Exhibit 2, p. 3,

submit a dispute in response to a bill. Id.³ Verizon further ignores the fact that if it submits a PIU factor to OrbitCom it must provide information supporting the proposed PIU and do so on a quarterly basis. See OrbitCom Switched Access Tariff at 3.4; see also Hearing Exhibit 3, p. 8, lines 11-13; Exhibit Mp 2-21.

OrbitCom's Tariff also does not provide for retroactive application of a PIU factor. In its Post-Hearing Brief, Verizon argued that it never requested the retroactive application of a PIU factor. However, this is an untrue statement. If Verizon did not want the factor to be applied retroactively, it would have simply paid OrbitCom's billing past-due billing statements to that date and then demanded the PIU it supplied be used going forward. However, this was not the only questionable practice undertaken by Verizon. Through its protestations that it never intended for the PIU to be applied retroactively, Verizon further brought into question when it supplied its proposed PIU factor to OrbitCom. The e-mail containing the factor was sent on August 21, 2008, at 10:32 a.m. See Hearing Exhibit B, p. 42, LF-26; see also Hearing Exhibit 2, MP 2-21. After receipt of that e-mail, at 1:29 p.m. on August 21, 2008, OrbitCom representative Penny Peterson replied, requesting any information in Verizon's possession which supported the proposed PIU factors. As evidenced by Mr. Powers' pre-filed testimony, neither he nor Ms.

-
- A. I would agree. I certainly think we need to provide the detail that supports our dispute and always be willing to go over those spreadsheets and explain any questions that a carrier might have. Certainly.

See Hearing Transcript, p. 150, lines 24-25; p. 151, lines 1-6.

³ Section 4.8 of OrbitCom's Switched Access Tariff provides:

The Customer may dispute a bill only by written notice to the Company. Written dispute must be received by the company within 60 days of the payment due date. If a written dispute is not received by the Company within 60 days of the payment date, the bill statement shall be deemed to be correct and considered due and payable in full by Customer.

The Company, upon receiving a written dispute will investigate the merits of the dispute. Upon completion of its investigation, the Company will provide written notice to the customer regarding the disposition of the claim, i.e., resolved in favor of the Customer or resolved in favor of the Company. The Company will resolve the dispute and assess credits or penalties to the customer[.]

how the billing dispute could be resolved, Verizon demanded CDRs. However, Verizon requested call detail records from OrbitCom in a format that did not exist, a fact that was repeatedly explained to Verizon. See Hearing Exhibit 3, p. 4, lines 12-22; p. 5 lines 1-2. Moreover, it did so without providing a detailed dispute so that OrbitCom could determine the validity of that dispute. See Exhibit 2, p. 9, lines 19-23; p. 10, lines 1-5.⁴

Once a complaint process was commenced in this matter, and discovery begun, Verizon served the following request for production:

Verizon 048: For each month that OrbitCom has been billing Verizon jurisdictionally, provide a five-day sample of Call Detail Records or other call detail information that demonstrates that OrbitCom correctly determined the jurisdiction of the calls covered by the invoices and that OrbitCom applied the correct jurisdictional rate (i.e., interstate or intrastate) for all of the calls. This request is limited to Call Detail Records or other call detail associated with switched access traffic that OrbitCom billed Verizon in South Dakota. Provide the information separately for BAN 8080SD0555 and BAN 8080SD0222.

OrbitCom initially objected to this request because of concerns about Verizon's documented violations of the FCC's CPNI rules concerning use and mis-use of customer proprietary information, but offered to work with Verizon to identify documents which would assist Verizon in determining the accuracy of OrbitCom's bills. See Hearing Exhibit 2, MP3-28. After the production of several hundred pages of call detail information, Verizon indicated that the information provided was insufficient, arguing that the information was not provided in a usable format, failed to contain CDRs for a weekend, and that it did not contain the automatic number identifiers ("ANIs"). Verizon thereafter filed a Motion to Compel with this Commission, which the Commission granted⁵, ordering OrbitCom to disclose CDRs with ANIs.

⁴ Verizon stopped paying OrbitCom's bills in August 2007; however, it did not provide any written notice until February 14, 2008. The spreadsheet at that time did little to help with an analysis of Verizon's claimed disputed as it did not contain a breakdown by BAN and billing element. See Hearing Exhibit 2, p. 9, lines 19-23; p. 10, lines 1-5.

⁵ Specifically, the Commission ordered the following:

Exhibits LF 32 -35. In its analysis, Verizon utilized the CDR and EMI records provided by OrbitCom for the 5-day period in June 2009. Using the CDR records, Verizon's own exhibit illustrates that the applicable PIU for the 5-day sample of calls is ██████ for originating calls and 28.99% for terminating calls, for a combined PIU of ██████ for all calls. Id. at LF 32. Using the EMI records, Verizon's exhibit shows a PIU of ██████ for originating calls and ██████ for terminating calls, for a total PIU of ██████. Id. at Exhibit 33; see also p. 6 *infra* for further explanation. Using the EMI records, the PIU calculated by OrbitCom for each of the 5 days in the sample was ██████. Use of the CDRs yielded factors of ██████ ██████. See Hearing Exhibit 3, p. 7, lines 6-10. See Also Exhibits MP3-29 and MP3-30 (detailing the number of calls used in the sample and the breakdown of those calls into 800, interstate, and intrastate MOUs). In looking at the PIU factors generated using the 5-day sample, it is clear that OrbitCom's default PIU factor of 32% was and is more generous and accurate than that which Verizon's own numbers show.⁸

It was not until Verizon injected a significant number of calls, which were not included in OrbitCom's CDR or EMI records that the PIU changed, and changed dramatically – to a 72% factor.⁹ See Hearing Exhibit B, Exhibit LF 34. Verizon's analysis of these records contained in excess of ██████ calls over a 5-day period, which calls were not contained in the records

⁸ OrbitCom also used a PIU factor of 95% intrastate and 5% interstate from July 2007 through August 2008. See Hearing Transcript, p. 18, lines 14-25; p. 19, lines 1-25; see also Hearing Exhibit 1, p. 7, lines 9-18. Verizon takes issue with the use of this factor as well. It specifically attempts to twist Mr. Powers' testimony regarding Verizon's designation as both a PIC and an LPIC. See Verizon's Post Hearing Brief, p. 12. Just because Verizon has always been *considered* a PIC does not mean it *is* one. As has been referenced on numerous occasions, OrbitCom has offered to Verizon a credit for the error it made in regard to the billing of all types of traffic using that PIU factor. See Hearing Transcript, p. 20, lines 11-17; see also Hearing Transcript, p. 158, lines 14-23; see also Hearing Exhibit 3, Exhibit MP3-31. Despite such offers, Verizon never responded, thereby leaving this an open issue for the Commission to resolve.

⁹ It should also be noted that during the parties' discussions prior to the initiation of the current action, Verizon demanded that OrbitCom utilize a PIU of 91%. See Hearing Exhibit 2, p. 20, line 13; Exhibit MP2-21. Even Verizon's fictional PIU analysis outlined above and in Exhibits LF 32-25 does not support a PIU of 91%. No where in Verizon's own records is a factual basis provided for a 91% PIU factor.

show [REDACTED] MOU for the unknown minutes in LF-34, resulting in a difference of [REDACTED] additional unknown minutes on LF-34. For the interstate minutes category, Ms. Freet's exhibit shows [REDACTED] on LF-32 and [REDACTED] on LF-34, resulting in a difference of [REDACTED] additional interstate minutes on LF-34. For the intrastate minutes category, Ms. Freet's calculations show [REDACTED] minutes on LF-32 and [REDACTED] on LF 34, resulting in a difference of [REDACTED] additional intrastate minutes on LF-34.

The bottom line is compelling: LF-32 shows a total PIU of [REDACTED] and LF-34 shows a PIU [REDACTED]. Through the addition of the phantom calls, Verizon created a PIU factor which is far more favorable to it than what the actual records do and should show.

Verizon's attempts to obtain a far more favorable PIU factor do not stop here. Using the numbers in LF-34, OrbitCom would be entitled to bill an additional [REDACTED] interstate minutes at .6 cents per minute for a total of [REDACTED] in additional billing for the same five days covered in LF-32. OrbitCom would also be entitled to bill [REDACTED] additional intrastate minutes at approximately six cents per minute for the additional amount of [REDACTED]. Using those same exhibits, there are still an additional [REDACTED] minutes for which jurisdiction remains unknown. Through application of Verizon's newly created [REDACTED] PIU, [REDACTED] of the formerly unknown minutes become interstate in nature, and therefore billable at \$0.006 cents per minute for a total of [REDACTED] in additional billing to Verizon, plus an additional [REDACTED] intrastate minutes at six cents per minute for another [REDACTED] in billings to Verizon. The addition of the phantom traffic results in a total of [REDACTED] in new charges to Verizon for the five-day sample at issue. Through extrapolation of these numbers, Verizon would owe OrbitCom [REDACTED] in additional charges over a 30-day period.

appropriate identification of traffic: the OCN and the CIC. Ms. Freet explained in her testimony, that the absence of such identifying information is easily explainable and, in this case, insignificant.

Broken down further, when one views the information provided by Ms. Freet, LF 37, which represents Verizon's PIU calculation, it clearly contains records which are Category 11-01-20 records. Category 11 EMI records contain many different types of records designated by the last four digits. Category 11-01-01 records are Carrier Access Usage for North American Originating and Terminating call records. See Exhibit LF-31. Category 11-01-25 records are Toll Free Carrier Access Records. These Category 11-01-01 and 11-01-25 records are the only records OrbitCom receives from Qwest to bill access and represent the industry standard for billing Carrier Access charges. Verizon offers no explanation why its 11-01-20 records should be used to compute a PIU (and not used for billing) and offers no explanation as to what comprises Category 11-01-20 records. Significantly, Category 11 records contain an OCN and a CIC according to page 5 of LF-31. A simple review and comparison of OrbitCom's EMI and CDR records shows as such. If an EMI record does not identify a CIC, it cannot be billed.

The specific numbers associated with the records most commonly used to bill are 11-01-01 and 11-01-25 records. Verizon's own Exhibit LF 32 explains that Category 11-01-01 records consist of records for are originating and terminating calls. See Hearing Exhibit B, LF 32, p. 5. Qwest provides this category of records to OrbitCom so that OrbitCom can bill access charges. Category 11-01-25 records consist of records for toll free calls. This is the only other category of record provided to OrbitCom by Qwest for access billing as per industry standards. A review of the records used by OrbitCom to bill Verizon shows that the categories of records used to bill Verizon were and still are 11-01-01 and 11-01-25. See Hearing Exhibit 5. Interestingly and

examination of the first part of LF 37 reveals a total of 5,925 Category 11-01-20 records. Of these, 3,999 records have no CIC code whatsoever, 220 have the CIC of 0555, and the balance of these records are spread over 28 different CICs. Had OrbitCom received these records, it could not have billed any records lacking a CIC code. It would have billed the remainder to Verizon and the 28 other IXC whose CIC codes are actually identified. Under these circumstances, Verizon cannot state with any justifiable certainty that it can discern OrbitCom's traffic from that of any other carriers whose traffic traverses Verizon's network.

Verizon also attempts to negate the argument that an OCN is a necessary component of any call detail record. As set out in its Post Hearing Brief, Verizon argues that OrbitCom's OCN would likely not be contained on anyone's network record anywhere. See Verizon's Post Hearing Brief, p. 29-30. Again, Verizon's argument is contrary to the record evidence. In fact, according to Verizon's own exhibits, which are industry standard records, an OCN will appear on every record that leaves the Qwest switch. See Hearing Exhibit B, Exhibit LF 32, p. 5. LF 32 explains that a ULEC's OCN (such as OrbitCom's) should appear on Category 11-01-01 records. Verizon's analysis simply does not work. In his pre-filed testimony, Mr. Powers explained why this is the case:

The less fields a switch has to look at, the more efficiently it operates. According to the instructions issued by ATIS Alliance for Telecommunications Industry Solutions) and detailed out on page 5 of Exhibit LF-32, the appropriate Qwest switch puts the OCN of the ULEC (OrbitCom) on the Category 11-01-01 EMI record in the originating or terminating field. Examination of the EMI records sent to OrbitCom by Qwest shows that OrbitCom's OCN of 8080 is always included in the record in the proper place. The records sent with Ms. Freet's supplemental testimony show mostly the Qwest OCN of 9631 as the terminating

(OCN 7421), and Qwest (OCN 9631). Most of these non-matched records are not tied to OrbitCom by OCN or ANI. Again, none of these non-matched records were provided to OrbitCom by Qwest on the EMI/DUF files. For the most part, why should they be? They are not OrbitCom's records.

See Hearing Exhibit 3, p. 11, lines 10-18.

testimony of the Verizon employee who actually pulled the records from Verizon's switch. See Hearing Transcript, p. 155, lines 13-19. Verizon offered no direct evidence of OrbitCom calls contained within its Exhibit LF 37, but merely relied and continues to rely upon a broad statement from Ms. Freet that the exhibit does in fact contain OrbitCom calls, but without pointing to any reference or supporting documentation for those calls. Again, Verizon must be careful of that for which it wishes.

Ultimately, Verizon is attempting to hold OrbitCom accountable for records it never received and never billed. To require OrbitCom to use calls it never received, had no knowledge of, and for which it cannot bill, in its PIU calculation is patently unfair and contrary to industry standard. The introduction of new phantom calls into evidence only illustrates the desperation of Verizon's attempts to exonerate itself from what it knows to be illegal self-help.

c. The alleged non-disclosure of CDRs by OrbitCom is a red herring.

If Verizon seeks nothing but strict application of OrbitCom's tariff, then it cannot escape the fact that it failed to provide a proper dispute of OrbitCom's bills within the 60 day dispute period outlined in the tariff. See OrbitCom Switched Access Tariff, § 4.8. Rather than admit to its failure to comply with the tariff, Verizon attempts to cast blame upon OrbitCom by devoting significant argument to OrbitCom's alleged failure to provide CDRs to Verizon after Verizon ceased paying OrbitCom's bills in August 2007. Verizon seemingly suggests that it is entitled to a presumption that OrbitCom never could prove its case because it did not provide Verizon with the CDRs which it requested. While it does not come right out and say so, Verizon's argument is tantamount to a spoliation argument. Verizon did not make a direct accusation, but rather alludes to it because it knows that its argument misses the mark.

simply stopped paying all together and demanded CDRs from OrbitCom. Again, as explained from the inception of the parties' discussions, both prior to and during this litigation, OrbitCom could not produce the documents as requested. There was no intent to deceive, sandbag or engage in other nefarious purposes.

Moreover, Verizon has done much to make it seem as if it had unassailable right to CDRs. This is not a process described in OrbitCom's Tariff. Following the denial of its dispute, it was Verizon's obligation to provide CDRs or other call detail information. See OrbitCom Switched Access Tariff, ¶ 4.8. OrbitCom's Tariff, not Verizon personnel, dictates the process to be followed in the event of a dispute. OrbitCom's Tariff is in no way unique. Qwest's tariff provides for a similar process. See http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_sda.t.htm, SD QC Access Tariff, p. 38, Section 2, 2.4.1(c). It is abundantly evident that Verizon seeks to distract this Commission's focus from its own self-help by accusing OrbitCom of destroying evidence. Accordingly, Verizon's complaints regarding the production of CDRs should be given no weight.

2. OrbitCom Has Met Its Burden of Proof with Regard to Its Right to Bill Verizon for Tandem Switching.

As with the PIU dispute, the dispute regarding the validity of OrbitCom's tandem switching charges is far simpler than what Verizon made of it. OrbitCom has a contract with Qwest, through which it has paid for the rights to bill for that service. The issue of the validity of OrbitCom's charges for tandem switching remains a contract issue. The existence of this contract, absent a direct challenge to it, which challenge Verizon has not undertaken, ends the inquiry.

tandem and cannot avoid the charge for its traffic traversing the same. See Hearing Transcript, p. 38, lines 2-9.¹²

b. Verizon's argument defies common logic.

Even if one were to give some credence to the language cited by Verizon, it in no way negates the plain language and plain meaning of the contract, which clearly specifies that Qwest will not bill for access on any lines converted to QLSP service by OrbitCom. Id. at p. 39, lines 5-12; see also Exhibit 6, Paragraph 3.7.¹³ Regardless of whether one draws a distinction between networks, there is clearly a distinction between which party has the contractual *right* to bill for that traffic and that right clearly belongs to OrbitCom. This point was also recognized and made by Mr. Rislov in his questioning of Ms. Freet. See Hearing Transcript, p. 189-190, lines 17-25 and 1-7. Verizon's own exhibits also prove this point. An examination of Verizon's Exhibit LF-42, which represents bills for the alleged DEOTs which Verizon claims it has with Qwest, evidences bills for Colorado, Oregon, Hill City, South Dakota, and Sioux Falls, South Dakota. A review of the Sioux Falls bills establishes that Qwest is billing Verizon for Local Switching, Data Base Inquiry, and Transport charges, all of which are components of access charges. This confirms that OrbitCom traffic cannot possibly be traversing these alleged DEOTs, as this bill would represent a clear violation of the QLSP Agreement by Qwest.

¹² Mr. Powers testified:

Verizon's calls have to get to and from OrbitCom's end users somehow. And if they don't have a DEOT to us, it has to go through the tandem. And I don't think there's any complaints here that they aren't getting their calls originated or terminated.

See Hearing Transcript, p. 38, lines 5-9.

¹³ Paragraph 3.7 provides, "If an End User Customer is served by CLEC through a QLSP service, Qwest will not charge, assess, or collect Switched Access charges for InterLATA or IntraLATA calls originating or terminating from that End Users phone.

Services LLC d/b/a Verizon Access Transmission Services for Approval of its Access Services Tariff, ¶9. In its pleading, Verizon referred to OrbitCom as a carrier similarly situated to it.¹⁴ *Id.* This otherwise innocuous reference proves two points: (1) Verizon's initial claims that it did not know OrbitCom had a tariff are wholly disingenuous and (2) Verizon operates in a similar, if not identical, manner to OrbitCom, thereby making it quite curious as to why Verizon now voices objections to OrbitCom's tariff and the billing and dispute processes outlined therein.

3. Verizon's Request for Further Delay of This Proceeding so That it Can Obtain Thirty Days of CDR Records from Verizon Should be Denied.

At the time of the hearing and in its Post-Hearing Brief, Verizon requested a delay in this proceeding so that it might obtain 30 days of CDRs from OrbitCom in order to better analyze whether OrbitCom determined the proper jurisdiction for the traffic at issue. This request is purely a delay tactic and one which benefits only Verizon. One must also question the need for such a request. For the first time since it received OrbitCom's records in September 2009, Verizon now challenges whether the 5-day sample provided by OrbitCom was in fact a representative sample. At no time following production of these CDRs did Verizon object to these requests or request further records. Verizon did not seek a continuance in order to obtain additional records. Instead, Verizon used the 5-day sample provided by OrbitCom in its analysis never raising the need for additional records until the time of the hearing.

¹⁴ In its Petition, Verizon made the following statement:

In addition, OrbitCom, Inc., a CLEC, was granted a waiver of the requirement to prepare cost studies by agreeing to set its intrastate switched access rates at the rates set by Qwest. The Commission granted OrbitCom's waiver request on almost identical grounds set forth here: namely, OrbitCom obtained all of its switched access elements from Qwest, and thus asserted that its costs for switched access service elements were at least as much as Qwest's costs for those elements. The Commission also accepted OrbitCom's argument, similar to that made here by MCImetro, that applying ARSD 20: 10: 27: 12 should not be required, particularly since it would result in much higher switched access rates than were being proposed.

See TC 08-42, *In the Matter of the Filing by MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for Approval of its Access Services Tariff*, ¶9.

interstate and avoiding the imposition of the tandem switching charge, thereby lowering the applicable access rate and achieving lower costs than that of its competitors. By way of example, an examination of LF-42 (Verizon's alleged DEOT and facilities bills) shows that the 94% PIU filed by Verizon in this case is being applied to all [REDACTED] minutes of 800 traffic. If Verizon is successful in claiming any CLEC or RLEC bound traffic travels over its DEOTs to Qwest, it will effectively rejurisdictionalize that carriers traffic to its liking – a ruling that would be a dangerous and extremely damaging precedent.

The effect of Verizon's argument is violative of nearly every established tariff, contract and industry practice in not only South Dakota, but in all jurisdictions. Its argument changes generally accepted billing practices, modifies rates, and nullifies established contractual relationships. Through its argument and request for relief, Verizon seeks relief that is detrimental to almost every CLEC and RLEC in South Dakota.¹⁵

¹⁵ By way of example, one need look no further than the Qwest tariff which has been filed in other states in order to see the harm inflicted by the necessary result of Verizon's position. Qwest's tariff, specifically the jurisdictional reporting requirement provisions, provides as follows:

For EF and DTT facilities, the customer has the following jurisdiction options; 1) allow the Company [Qwest] to develop the projected LATA-level PIU factor using a mechanized program as set forth in a., following or 2) provide the Company with a projected LATA-level PIU favor via a quarterly jurisdictional report as set forth in b., following[.]

The options set forth in the respective Qwest tariffs effectively allow the *Customer, which in this case would be Verizon*, not Qwest, to dictate in advance the jurisdiction of the traffic at issue. No matter what the actual traffic, Verizon could dictate a 90% PIU on its DEOT. Even if 100% of the traffic on that DEOT were intrastate, Qwest would be required under its tariff to use the Customer provided PIU which, in this hypothetical, would be 90% interstate, thus rejurisdictionalizing calls without once challenging any LECs tariffs before the Commission. A simple review of Verizon's Exhibit LF-26 (Hearing Exhibit B) will show Verizon dictating a PIU of 83% to 96% on any DEOTs ordered.

See Qwest Intrastate Switched Access Tariff for Minnesota, MN QC Access Service Tariff, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_mn_a_t.htm; ND QC Access Service Price Schedule, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_nd_a_ps.htm; WY QC Access Service Price Schedule No. 2, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_wy_a_ps_no_2.htm.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 8th day of January, 2010, upon the following:

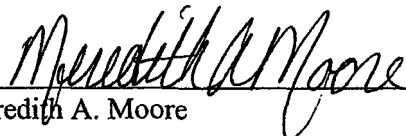
Ms. Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
patty.vangerpen@state.sd.us
Telephone: 605-773-3201

Ms. Karen Cremer
Staff Attorney
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
karen.cremer@state.sd.us
Telephone: 605-773-3201

Ms. Terri LaBrie Baker
Staff Analyst
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
terri.labriebaker@state.sd.us
Telephone: 605-773-3201

David A. Gerdes
May, Adam, Gerdes & Thompson, LLP
503 South Pierre Street
PO Box 160
Pierre, SD 57501
dag@magt.com
Telephone: 605-224-8803

Thomas F. Dixon
Assistant General Counsel
Verizon
707 - 17th Street, #4000
Denver, CO 80202
thomas.f.dixon@verizon.com
Telephone: 303-390-6206


Meredith A. Moore