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UTILITIES COMMISSION

THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED BY ORBITCOM, INC. AGAINST VERIZON BUSINESS NETWORK SERVICES, INC. REGARDING UNPAID ACCESS CHARGES — TC08-135

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Transcript of Proceedings
February 23, 2010

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
DUSTIN JOHNSON, CHAIRMAN
STEVE KOLBECK, VICE CHAIRMAN
GARY HANSON, COMMISSIONER (by telephone)

COMMISSION STAFF
Rolayne Ailts Wiest
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Kara Semmler
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Jon Thurber
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Deb Gregg
Demaris Axthelm

APPEARANCES

Meredith Moore
Thomas Dixon

Reported By Cheri McComsey Wittler, RPR, CRR

TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter, at the South Dakota State Capitol Building, 500 East Capitol Avenue, Pierre, South Dakota, on the 23rd day of February, 2010.

CHAIRMAN JOHNSON: With that, we are done with our short break, and we are back to the regular Commission meeting of February 23.

Our final item for consideration on today's agenda is Telecommunications Item No. 1. It is the OrbitCom/Verizon case. The question before the Commission today is what is the Commission's decision. We've had a number of different rounds of briefing, and today we will have oral argument.

I'll throw out a suggestion. We haven't talked about it beforehand, but I was thinking 10 to 12 minutes for oral argument. If the parties find that unacceptable, please holler, and we can see if we've got some flexibility.

MS. MOORE: I certainly don't have any objection to that time frame.

MR. DIXON: I'll try and make that happen and not talk too quickly.

CHAIRMAN JOHNSON: Great. Let's go ahead and start. It's OrbitCom's case.

OrbitCom, begin.

MS. MOORE: Thank you, Mr. Chairman. Meredith Moore appearing on behalf of OrbitCom today. Also present in the hearing room are OrbitCom's president, Mr. Brad VanLeur, and its General Counsel,

Mr. Pat Mastel.

In the Complaint that OrbitCom filed with this Commission and its Amended Complaint, OrbitCom alleges that Verizon improperly withheld payment of validly billed intrastate access charges. In its Answer and Counterclaim Verizon denied OrbitCom's claims and argued that OrbitCom is essentially entitled to no compensation whatsoever.

From those two Pleadings we have the two issues on which you've heard a significant amount of testimony and seen a significant number of Briefs to date, the first of which is whether the percentage of interstate use that OrbitCom used to bill Verizon was determined accurately and consistent with OrbitCom's tariff.

The second issue is whether OrbitCom properly billed Verizon for tandem switching or the issue has been discussed in the testimony and the Briefs would be the direct office trunk or DEOT issue, D-E-O-T.

To date the amounts which Verizon owes OrbitCom for intrastate traffic total approximately $950,000, inclusive of interest. With the exception of sporadic, excuse me, payment between February of 2008 and August of 2008, Verizon has not made any payment to OrbitCom of disputed or undisputed amounts. So that's approximately two years.

And OrbitCom would submit that consistent with its Complaint in this particular Docket that Verizon has engaged in improper and illegal self-help. And we believe the testimony presented by not only OrbitCom but also by Verizon supports that conclusion.

With regard to the issues raised by the Pleadings, I'll turn to the percentage of interstate use or PIU issue first. And at the heart of this issue really is OrbitCom's tariff and whether OrbitCom properly complied with the terms of the tariff. The PIU factor, and this Commission is very familiar with those, is obviously used in the instances where the particular jurisdiction of a call cannot accurately be determined. In that case the PIU factor is ultimately applied.

And OrbitCom's tariff provides several different scenarios as to how that PIU factor will be calculated and how -- or in what instance that PIU factor should be utilized. And it's Section 3.4 of OrbitCom's tariff that we believe is particularly relevant.

That language permits OrbitCom to bill in one of the following ways: It can use the actual jurisdiction of the traffic or the call detail records, if such information is available and if an accurate bill can be rendered. It can apply a PIU which it or the company as the tariff defines it develops. Or it can apply a PIU

supplied by the customer.

In this particular case there are several different time periods involved. During this OrbitCom, in fact, applied a PIU factor, and one PIU factor that was applied for the greatest length in time is that of a 32 percent interstate factor. And that's essentially what has been defined in the testimony at the time of the hearing as the default factor, and that can also be found in OrbitCom's tariff.

What Verizon has argued is that OrbitCom never should have been able to utilize a PIU in the first place because its tariff mandates or demands that OrbitCom bill jurisdictionally. And I would submit to the Commission that that's a jump in the language or an interpretation. That's a jump that simply doesn't fit under the circumstances of this particular case.

When you look at the tariff and parse the language it's clear that what the tariff does is indicate that if the company has sufficient information available to it to render an accurate bill, it should bill by jurisdiction.

In this particular instance I would submit to you that the testimony presented both in prefiled form as well as the hearing was that on the one hand OrbitCom didn't have the billing system in place to render that

accurate bill. At the same time, the information that it was getting from Qwest wasn't exactly what it needed to render that. So, therefore, that tariff then allows OrbitCom to apply a PIU, which it developed, and that's exactly what it did in this particular case.

And we would submit to you that the testimony and the briefing demonstrates why OrbitCom can support that 32 percent default PIU factor.

I think the other significant thing to remember here is that Verizon's other argument is that when you look at the PIU factor, assuming that one can even be applied, it's asking you to calculate a PIU factor for the time period at issue using records which OrbitCom never received.

This was a bone of contention that was raised in connection with Verizon's recent Motion to Strike. And if you'll recall, there was a discussion at that time and as well as in Verizon's recent Surreply Brief as to different categories of records, specifically category 110120, 0125, records as to what the parties had available to them and whether those could be used.

And I think what's important for this Commission to remember is that the -- and, admittedly so, what Verizon has said is that they have used calls to calculate a PIU factor, which OrbitCom never had any data

to support in the supporting information or the EMI records that it routinely gets from Qwest. And there's been significant amounts of discussion as to whether OrbitCom raised a new issue in regard to its discussion of these 110120 or 110125 records, and I would submit to you that that wasn't a new issue.

And, in fact, Verizon's own records would support that it's using information here that OrbitCom never had access to.

And you need only look to the first page of Ms. Freet's Confidential Exhibit No. 37, page 1 and then it would be part 1 because I know that document came in a number of subparts. But it specifically talks about Category 11, Group 1, Record 20 documents. Those are there.

Those are not records that can be used for access billing. Those are not records that Qwest sends to OrbitCom. So, therefore, Verizon's inclusion of those records in the PIU which it calculated and which it submits to this Commission is appropriate or at least more appropriate than that of OrbitCom's, it simply shouldn't be included. And it sets a very dangerous industry standard and, frankly, makes the CAPS billing process likely even more cumbersome for these companies than it already is because it's placing an expectation on

a company like OrbitCom that it somehow must acquire information, which it doesn't get from Qwest, which it's never gotten from Qwest, which it can't use in the first place to bill.

So I would submit to you that at that level Verizon's argument that its analysis of the PIU factors is incorrect because it references information which was never intended to be included in that PIU factor.

Verizon has also suggested that OrbitCom, or more specifically myself as I defined the legal issues in the Brief, that I have tried to improperly shift the burden of proof for improperly define the burden of proof as it relates to the parties in this particular case. I would submit to you that I haven't done that.

Obviously, as the Complainant, OrbitCom bears the burden of proof to show that it has complied with the terms of the tariff and that it billed Verizon appropriately. However, Verizon has asserted a counterclaim in which it has said that OrbitCom is due no traffic because it did not comply with the terms of its tariff. And it says rather loosely in its filings that OrbitCom must have had sufficient information because it admittedly gets these records from Qwest.

And so to that end, that's not proof. And that is a burden of proof which Verizon bears in the event

that OrbitCom has properly shown you that it has complied with the terms of its tariff. So, therefore, what we would ask is on the PIU issue is that the Commission accept for the time period at issue that Verizon -- or, excuse me, that OrbitCom properly billed Verizon using the 32 percent interstate -- intra -- inter. Excuse me. Interstate use factor.

There was a time period during which OrbitCom billed using a 95/5 or a 5 percent interstate use factor. OrbitCom at the time of hearing and in its prefiled testimony admitted that that was not correct, that was done in error. It has offered to correct that, and it would submit to the Commission that for the time period at issue there that that traffic be rebilled using the 32 percent interstate factor.

With regard to the second issue presented to this Commission, that of the direct end office trunk or OrbitCom's ability to bill the tandem switching element, I would submit to you that this is actually a very simple issue.

Verizon argues essentially that because it has paid for direct trunks into Qwest and because OrbitCom essentially leases Qwest's facilities in order to provide the services that it does, that it needn't pay the tandem switching element, that essentially a direct trunk to

Qwest is the equivalent of a direct trunk to OrbitCom.

That's not correct. And the reason that's not correct is because of the existence of a contract between OrbitCom and Qwest. The Qwest Local Services Platform Agreement, or the QLSP as I think it was most commonly referred to in the testimony at the time of the hearing.

In that particular instance what OrbitCom has done is lease a bundle of rights from Qwest. It has paid for those rights. And specifically that contract indicates that OrbitCom has the ability to charge a party such as Verizon for all switching functions.

Even more importantly, the other thing that that contract says is that Qwest will not bill for those functions.

At the time of hearing Verizon admitted that it does not have a direct trunk to OrbitCom. It admitted that it has not challenged the validity of OrbitCom's contract with Qwest. It certainly has avenues to do so. And if Verizon believes it's been improperly billed by Qwest, that's Verizon's issue with Qwest to address in a different forum, and it certainly has that opportunity.

But the issue in front of the Commission is essentially a contract issue, and that is whether OrbitCom can bill for tandem switching. The contract at issue says so. The FCC has said so in its Decision on

this same issue. And to that end, if this Commission were to essentially allow Verizon to prevail on this argument, it would effectively be as the legal term is "blue pencilling" that contract or essentially rewriting the terms of OrbitCom's contract with Qwest. And I would submit that that's beyond the scope of this particular proceeding here.

And, in addition, that would send really I think the wrong message to a number of carriers in the state who likely have similar types of agreements that OrbitCom does with Qwest. And if one pays for the right, is specifically given the right, whether it be by common law or by formal contract, that right is theirs. Excuse me. So, therefore, we would submit that on the issue of the direct end office trunk OrbitCom was able to bill Verizon for that issue, and it did so in this particular case.

I think the most important thing to take either independently from the two issues that have been presented to you or collectively from the issues that have been presented to you is that Verizon is essentially attempting to not pay OrbitCom for the services which OrbitCom has rendered. That has a significant impact not only from the self-help aspect of this case but also from the -- from the aspect that it really licenses a carrier to take justice into its own hands and to say I'm not

going to pay because I don't believe this is an appropriate rate here or there. It puts the onus on a corporation like OrbitCom to bring suit, to continue to provide services to its customers in the absence of payment, which becomes a significant burden to bear.

And I think the other issue, and I'll be brief on this because I know that you've heard a great deal about this, but in Verizon's Surreply Brief I think that Verizon was given an opportunity by this Commission to provide a fairly straightforward recitation of any of the new issues which we don't believe were raised but which Verizon does as to properly respond to those issues.

And I think that Verizon abused that particular privilege in this case because it not only submitted testimony in regard to certain issues which it claims were raised for the first time but it also injected even more issues into this particular case that had been raised earlier, whether it be in testimony or at the time of the hearing.

It also submitted an Affidavit from one of its employees and from its witness in this particular case, Ms. Freet. I don't believe that was an appropriate use of this Commission's opportunity that was granted to file that Surreply Brief. I don't believe it was appropriate. And the problem that that presents is that there's now to

a certain extent additional testimony in the record that we haven't had the ability to respond to.

I don't want to belabor that point because I believe the most important thing is for this Commission to reach a decision based on the evidence in the record. But I just wanted to mention that I don't believe the inclusion of that Affidavit or a number of the other issues raised by Verizon is appropriate.

The dispute before this Commission is essentially finite in time. And by that I mean that OrbitCom was able to begin billing jurisdictionally in May of 2009. And when I say May of 2009 I mean that that billing would have been for the April traffic. They're currently billing jurisdictionally.

And I think one of the other important things to note is that Verizon from the inception of this proceeding has placed a very significant emphasis on whether OrbitCom could or could not bill jurisdictionally. Despite the fact that OrbitCom has begun to do that, they still have not been paid. And so, therefore, what I would ask from this Commission is that if it rules in OrbitCom's favor, that it not only ask that -- or order Verizon, excuse me, to pay those past amounts due but also to pay those amounts going forward so that we don't end up in front of this Commission again

as it relates to whether the jurisdiction billing is being done appropriately.

I believe the testimony and the evidence in this case establishes whether it be through our own testimony, whether it be through our own records, or whether it be through our analysis of Verizon's records that that PIU factor was billed appropriately, that it, in fact, in some instances was more generous than what it actually needed to be, and that it is certainly supportable, that we have complied with the terms of our tariff, and that we should be compensated -- or that OrbitCom should be compensated in the amounts that have been outlined in the briefs. And to date again that number is approximately $950,000 plus interest.

Thank you.

CHAIRMAN JOHNSON: Thank you, Ms. Moore. Mr. Dixon, we gave Ms. Moore a couple more minutes there so --

COMMISSIONER HANSON: Excuse me. Commissioner, I thought Ms. Moore at the very beginning said 950 including interest, and now the statement was 950 plus interest.

Did I mishear at the beginning?

MS. MOORE: No. I misspoke. It should be 900 and -- and I can give you the exact amount, Commissioner

Hanson. It would be $836,031.22 plus interest of $114,769.14. And I apologize for my error.

COMMISSIONER HANSON: Thank you. Thank you, Commissioner.

CHAIRMAN JOHNSON: Mr. Dixon, you had a question?

MR. DIXON: Yes. Mr. Chairman, with your permission, I apologize. My ears are plugged up, and I had a difficult time hearing Ms. Moore on a couple of points. And I'd like to ask if I could have her repeat them so I don't inadvertently respond to them incorrectly.

Would that be appropriate?

CHAIRMAN JOHNSON: Any objection, Ms. Moore?

MS. MOORE: Depends on the question.

CHAIRMAN JOHNSON: We'll take them as we go.

MR. DIXON: I only have two, I think, and my point is only to be sure I heard them right.

You indicated in the beginning that OrbitCom did not have a billing system in place to address -- you started saying something about Qwest's data. And I apologize. I couldn't hear you.

MS. MOORE: I think you may have heard two concepts as one. I think what I indicated was that the testimony would establish and was admitted in testimony

that OrbitCom's billing system to bill jurisdictionally wasn't up and running immediately, and in addition to that it wasn't receiving the sufficient information from Qwest. So I think you heard correctly. It was just the concepts got commingled for you.

MR. DIXON: Thank you. And my second question, again, I may have misheard it. You made a statement that OrbitCom agrees that it inappropriately applied the 5 percent PIU for a period of time.

Are you referring to the 13 months or the 5 percent PIU was applied? Again, I'm just trying to understand what you were saying you agreed to credit OrbitCom.

MS. MOORE: And that would actually -- I can give you the -- the exact amount would have been included in a footnote in the Brief. But for the purposes of today, there was a time period wherein OrbitCom admits, and that would be found in the Pleadings, that the application of that 5 percent PIU was, in fact, in error. And I would have to go back to the Brief and look at -- I think it was from July of 2007 through August of 2008.

MR. DIXON: Right. I think I could represent to you that that is in Mr. Powers' testimony on page 18, lines 15 to 18 of the transcript. Just to confirm, his indication there was that it was from July of '07

including through July of '08.

MS. MOORE: And that's consistent with our Briefs. So I don't take issue with that statement.

MR. DIXON: I just wanted to be sure I understood it. That's what I was trying to be certain of.

Thank you.

CHAIRMAN JOHNSON: Absolutely. Go ahead and begin your argument.

MR. DIXON: And thank you again. My name is Thomas Dixon. I'm the attorney on behalf of MCI Communications Services, Incorporated and Teleconnect Long Distance Services and Systems Company, doing business as Telecom USA, the Defendants or Respondents. Hereafter I'll refer to us as Verizon to make it less of a mouthful.

As was stated by Ms. Moore, the burden of proof in this case clearly rests on OrbitCom to demonstrate that it accurately billed the jurisdiction of the access traffic for which it billed Verizon and that it properly applied the correct jurisdictional split and rates associated with that jurisdiction.

OrbitCom alleged in its Complaint that it has indeed billed in accordance with the applicable rates and terms set forth in its tariffs. Therefore, it's

important to understand that OrbitCom has that burden of proof as we cited in our Surreply Brief the one time special underground assessment case.

The fact that Verizon filed an Answer to that and stated affirmative defenses does not somehow relieve OrbitCom of its initial burden. If it meets its burden of proof or burden of persuasion at that point, that may shift to Verizon an obligation to present evidence to respond with.

OrbitCom failed to prove that it complied with this tariff, pure and simply. In March of 2000 OrbitCom changed its tariff to allow for jurisdictional billing. However, after March 7 of -- I'm sorry. March of 2007 OrbitCom repeatedly did not use call detail information that was made available by Qwest at the file transfer protocol site to create the access bills that it sent to Verizon until April of 2009.

Ms. Moore relies upon the -- Qwest's agreement between OrbitCom and Qwest which she referred to as the QLSP. And I do note that the QLSP in addition to the statements Ms. Moore has related also requires Qwest in that contract to provide adequate call detail in order for OrbitCom to be able to do its access billing. And that actually is found in Ms. Freet's Exhibit LF 30 to her Exhibit B, the supplemental testimony.

But as Ms. Moore indicated, Section 3.4 of the OrbitCom tariff clearly states that when the company receives sufficient call detail, it must use that to determine the jurisdiction of originating and terminating access in order to render a bill. That language is not optional. And in this instance it's incumbent upon OrbitCom in its burden of proof to demonstrate that for whatever reason the call detail information it received from Qwest was not sufficient.

Rather than using the call detail information as Ms. Moore indicated, OrbitCom used the PIU that it determined was appropriate.

Prior to filing its Reply Brief on January 8, OrbitCom had consistently, and incorrectly I might add, argued that it had a right to choose from any one of the three options to determine the jurisdiction of the traffic. That was both in the -- Mr. Powers' Exhibit No. 2, and it was also stated on cross-examination during examination of Mr. Powers about the language in his Exhibit 2.

But in its Reply Brief OrbitCom raised for the first time, at least in the opinion of Verizon, it had insufficient call detail to determine the jurisdiction of access traffic. And if that were the case, indeed under OrbitCom's tariff it would be entitled then to use a PIU,

be it it's own, be it Verizon's or, in fact, as Mr. Powers noted in his testimony, was actually a fourth option, which he calls the default option, the 32 number that was referenced by Ms. Moore.

Again, the burden of proof is on OrbitCom to demonstrate it had insufficient call detail. What we hear now and what we heard today for the first time is it's not the issue of whether the call detail information was sufficient. It's an issue of whether the OrbitCom billing system as sufficient. And that indeed is consistent with what's been in the testimony throughout this proceeding.

For example, Mr. Powers would relate to the fact that the reason we couldn't do jurisdictional billing in March of 2007 when they inserted that language in their tariff was because the tariff writer had gotten a little bit ahead of the curve. Those were his words in his testimony.

In another place in his testimony he said, Our billing agent couldn't get the jurisdictional billing right to -- billing to our satisfaction. And third, he talked about in one circumstance, He lacked the appropriate software.

It appears that what we're really hearing about is not insufficient call detail but rather the fact that

OrbitCom had not designed its systems in spite of what was contained in its tariff to indeed do billing on a jurisdictional basis.

Now it's obvious that Verizon when it received these bills and determined back -- remember back in July of 2007 it was getting billed at a 5 percent PIU, which meant 5 percent of the traffic was deemed by OrbitCom to be interstate. Qwest -- or Verizon at that point challenged what was going on and began to investigate what was happening.

And so in 2008, February precisely, it sent out messages to ask for the call detail information, the call detail records. And as you know, that was never provided to us until we filed a Motion to Compel here. And in retrospect we now find out it really was not available. It had been purged from the system. And again that was stated by OrbitCom employee, Penny Peterson, in Exhibit LF 9 that was attached to the testimony of Ms. Freet.

So I guess if we're -- if OrbitCom is conceding that it's no longer going to bill us for the 5 percent PIU factor it applied for 13 months, we certainly appreciate that. We were not aware that they were taking the entire 13-month period and removing that 5 percent PIU factor and going to the proposed 32 percent PIU

factor to default factor.

In fact, my understanding of that, and the reason I asked about it, is it related to some 800 total-free traffic that OrbitCom agreed that it had improperly billed. And that was referenced by Mr. Powers in the transcript, as I said, on page 18, lines 15 to 18. So I'm a little confused as to whether OrbitCom's saying the 5 percent was wrong for 13 months or it was only wrong with respect to 800 traffic, which I have both in testimony.

And I would like the former, obviously. And we believe that's appropriate, that we should not have billed 5 percent. We believe OrbitCom provided no evidence whatsoever to demonstrate a 5 percent interstate factor was appropriate and particularly when it's obvious it never used any call detail record to, in fact, determine the actual jurisdiction of the traffic in the first place. It failed to comply with its tariff. It had no right under its own tariff to even use PIU factors.

And then to add insult to injury, alleging we have the burden of demonstrating insufficiency after it knows it has denied us access to the very records -- if we did have such a burden, the very records we would use to address that burden have been purged at the hands of

OrbitCom. The testimony reflected that it did nothing to retain the records even after Verizon raised its disputes.

So the records clearly were an issue. We asked for them on three occasions prior to the Motion to Compel and never received them. Ultimately we received them through the Motion to Compel, and that was only after the alleged jurisdictional billing began in April of 2009.

But I think the key thing to remember here is the price we're paying. Interstate rates are one-tenth of the rate of intrastate rates. So if we're charged for a minute, the interstate rate -- if we are supposed to be getting charged the interstate rate, we are being charged 5.4 cents every minute more on a 6 cent rate. That's effectively what happens. So it is an issue. It's ten times the higher amount.

I also would point out OrbitCom cited the Qwest tariffs in its Reply Brief. And we went and looked at those tariffs. We were familiar with them for other reasons. I would point out that Qwest defaults PIU, which is found on page 20 of the Qwest tariff that was actually cited by OrbitCom in its Reply Brief for the first time in which we attached to our Surreply Brief points out that it's default PIU is 50, not 32.

And that's also consistent with the testimony

provided by Ms. Freet who said she personally was unaware of any other CLECS or any other provider having a PIU of less than 50, and that is consistent with the Qwest tariff.

Turning to the tandem switching function, pure and simply there is no evidence that OrbitCom ever provided tandem switching to Verizon with the sole exception of the EMI records that we obtained from Verizon and -- or from OrbitCom that reflected approximately 3 percent of the traffic had been tandem switched. And that was based on a field within the EMI records, field number I think it's 51, if my memory is right. It indicates with either a 1 or 0 whether or not tandem switching has occurred.

Again the EMI records are generated by Qwest. They're not our records, and they're not OrbitCom records. They are an independent party's records, and, in fact, the records that they're required to provide are the QLSP to OrbitCom. That is, Qwest is.

And so those records very clearly reflected that 97 to 98 percent of the time OrbitCom's traffic was not tandem switched. OrbitCom makes a big point that we don't have a direct end office trunk between it personally and Verizon.

The reality is that the -- OrbitCom has no

network. They just said that in its testimony through Mr. Powers. It leases its network all through Qwest. As a practical matter, it relies and made reference even to the MCI tariff as pointing out you can order DEOTs between MCI and the -- the provider that's being charged access rates.

The point here is very simply this: When Mr. Powers referred to the MCI tariffs and talked about how we authorized the charging of tandem switching under the section he cited to referring to direct end office trunking and pointing out that we provide that same service, he ignored in his testimony the paragraph that followed a section he cited that related to the MCI's billing for DEOTs stated very clearly and unequivocally that in the tariff MCI does not charge tandem switching if, in fact, the underlying carrier does not provide tandem switching. That's in the record in the transcript at page 97, lines 6 to 8.

And so to compare the OrbitCom tariff to the MCI tariff ignores one key factor. MCI's tariff very clearly says we will not charge for tandem switching in the event that traffic is transported by direct end office trunks, which is exactly what we're seeking from OrbitCom. So I would point out the evidence that we put in the record -- and I'm not going to go through it. We put in orders.

We put in circuit IDs. We put in a volume of confidential Exhibits, C and D, that demonstrated we have direct end office trunks throughout South Dakota. And in spite of Mr. Powers' assertion that we are a bright company and wouldn't do things like this, for whatever reason our network engineers have determined they want these direct end office trunks and they are indeed there.

And for him to argue that it might be a bad business decision is a great opinion, but it has nothing to do with the reality of what our evidence demonstrated, and that was we clearly had trunks.

The last thing I want to touch base on -- I hope it's the last thing -- is the assertion we're out there doing self-help, we're not paying these people. In fact, Mrs. Moore has tempered the argue that's been raised in the Briefs. They said in the Reply Brief that Verizon has withheld all payments from OrbitCom on page 1. Now I understand we haven't withheld all payment. And, in fact, the evidence demonstrates -- particularly LF 29 demonstrated $214,000 has been paid to OrbitCom. There were checks that were attached to that.

In addition, OrbitCom's own hearing Exhibit No. 4, which identified a number of bills and that had on the billing amounts paid, et cetera, there were cash payments that I took the time to at least add up. And if

my math is correct and my calculator was any good, I got 325,000. I'm not trying to say that was in addition, but I'm saying those were payments that were paid to OrbitCom.

Our issue has always been OrbitCom should not be billing us under the PIU, that it should have been billing based on call detail record. And it was our position that we've already paid OrbitCom based on our own review of records more than they would be entitled to if they had used call detail information that was provided to them.

In addition, OrbitCom's own tariff, 4.8 Section contemplates what they term to be self-help. That tariff has specifically language that indicates that in the event there's a dispute -- and it is a dispute language. That in the event of a dispute if the company has withheld payment and OrbitCom indeed wins, then it receives the payment plus interest.

On the other hand, it indicates that if the company has paid the payments up front, that is had Verizon paid at all, it would have received the return plus interest on that part.

The point is the tariff indeed contemplates withholding. And it's common in the industry in spite of what Ms. Moore might suggest. That tariff very clearly

has that Section 4.8.

And so I would suggest to you once again that OrbitCom's argument that we have not paid anything or that we have not paid OrbitCom is simply incorrect. We have a legitimate dispute. We have set forth evidence, particularly Confidential Exhibit 34, which was the Verizon analysis, that if the PIUs were to be used, our information would demonstrate that those PIUs could be -- I'm talking a combined total 58 percent on LF 34. And if you look at LF -- I should point out LF 34 is an exhibit that identifies the minutes of use in the five days in June -- five days in 2009. Exhibit 35 is going and using the PIUs in 2008, the four days that we took the numbers and tried to at least extrapolate from what we had received in the Motion to Compel data.

So the long and the short of it is that that data showed, and I'm talking on a combined basis, between 58 and 61 percent as a PIU based on Verizon's records.

Now let me explain one last thing regarding that. Those records were based on the telephone numbers that were provided to us through the response to data Request 48. They were not based on OCNs. They were not based on CIC codes. It was Verizon's records and saying these numbers which OrbitCom provided us, these telephone numbers, both originating and terminating, were OrbitCom

phone numbers that in our switches had provided the long distance -- had gone through long distance service and were transiting switches that Verizon had.

So it isn't that an OCN was critical or anything else. The issue was that's why we asked for the phone numbers in the Motion to Compel. I believe that's why you granted us the phone numbers in the Motion to Compel and that's how we can compared our records against OrbitCom's records.

So with that, I would say this: We request simply that you dismiss the Complaint, that our Counterclaim be granted. And as stated in the testimony, and I'm a little concerned about numbers coming out, through the current date when none of that's in evidence. This case ended on October of 2009, and the evidence in the case goes back to August of 2009. So hearing new numbers again I have no opportunity to verify.

I will point out this: In our testimony we stated that Verizon had overpaid based on our calculations $142,834.09. And that is in the testimony of Leslie Freet, the supplemental testimony, Exhibit B, and I believe it's on page 54, line 17. I'm sorry. 34, line 17.

So the long and the short of it is we believe they have failed to comply with their tariff. They have

failed to meet their burden of proof. And because they've failed to comply and failed to use the call detail information -- and if that reason has to do with their inability to create the billing system to do it, there's no exception in their tariff for such a thing, and they have to comply with their tariff. So we believe under the circumstances we're entitled the relief we've requested.

Thank you very much.

CHAIRMAN JOHNSON: Thank you, Mr. Dixon.

Ms. Cremer.

MS. CREMER: Staff has nothing. Thank you.

CHAIRMAN JOHNSON: With that, we will open it up to some questions.

Maybe I'll start with one. So, Mr. Dixon, let's presume for a moment that the Commission buys your legal argument that the evidence in this case indicates that OrbitCom did not comply with their tariff.

What then is the appropriate rate that should have been charged?

MR. DIXON: First of all, I thank you for that question. The burden of proof was on OrbitCom to determine what the appropriate charge was, not Verizon. This is an agency created by statutes, not a court of equity. OrbitCom had the burden of proofing that number.

As a practical matter, you have some PIU data but in our opinion some reliable. We're the first to acknowledge it was five days of data that now represents 27 months of billing. And it was five days that was provided in discovery when our people indicated indeed 30 days might be a better sample.

But as a practical matter, given the fact that you are not, in my opinion, a court of equity and that the evidence does not give you the proper number to bill, then you should assess the -- assuming you're going to assess any billing, it would be at the lowest rate, the interstate rate, and all traffic would be deemed interstate. Because, in fact, in this case there is no evidence of what the proper jurisdiction is.

If you pick a number, any number, by definition there is no evidence to support that number that is reliable. And so as a practical matter, the way to create the least harm to Verizon -- Verizon didn't destroy the call detail records. Verizon asked for it -- is to give us a rate at the exact price of the interstate for all traffic. That would certainly not cause harm to us and would be consistent with OrbitCom's failure to present its evidence to demonstrated what it should be charged at.

CHAIRMAN JOHNSON: Mr. Dixon, remind me what

Verizon Motion to Compel asked for. I mean, you received five days. What was requested?

MR. DIXON: Well, after the Motion to Compel was granted, yes.

CHAIRMAN JOHNSON: What was the Motion to Compel? How much did you all ask for?

MR. DIXON: We asked for five days. First of all, remember we had asked for informally three days. We couldn't get it. We asked three separate times. That's in the record. There are exhibits that show that.

CHAIRMAN JOHNSON: No. I understand that.

MR. DIXON: Our goal was not to be burdensome, not to make a request that required a great deal of effort, and indeed when we even asked for that, OrbitCom said it's burdensome. Ironically, they were able to produce it two days after the Motion to Compel was granted.

CHAIRMAN JOHNSON: Mr. Dixon, what I'm getting at is now we're being told that five days is insufficient evidence, is an sufficient amount of data for this Commission to have any confidence in it. If that's the case, if five days doesn't cut it, why did you ask for five days?

MR. DIXON: We were in discovery. And as Ms. Freet's testified -- it's in her testimony, and she

addressed it in cross-examination. She said our initial procedure is to ask for a small sample to see if we can get a validation at that point. And, of course, we didn't get that.

So in discovery our approach was -- and remember our discovery was issued long before the Motion to Compel was acted on. We were asking for five days at that point because, again, hopefully maybe that would validate some numbers.

Because the Motion to Compel didn't get resolved until August and the hearing was coming up on October and we didn't -- you know, there was no additional time to get 30 days of discovery, 30 days of additional data. And as Ms. Freet testified, when the sample is not sufficient to justify, as she indicated, Verizon's practice is ask for 30 days.

And, again, if you look at the Qwest tariff, the tariffs that once again were cited by OrbitCom, you'll see the same kind of process exists, that you can ask for background data.

MR. SMITH: Tom, can I ask you to focus a little on keeping your cadence just a little slower for our court reporter, please. I can always tell. I can see her struggling there. My apologies for saying that.

MR. DIXON: I apologize for speaking quickly. I

noted that early. I've been watching the clock. I know we're after 5. I apologize. I'm trying to move quickly.

CHAIRMAN JOHNSON: Well, the work of the Commission doesn't end at 5:00. But thank you for keeping an eye on it for us, in any case.

Ms. Moore, I'll ask you the same question to get -- the first question, which is if the Commission were to buy Mr. Dixon's argument that OrbitCom did not follow the -- follow its tariff, then what is reasonable for the Commission to determine what the appropriate rate would be?

MS. MOORE: I would disagree with Mr. Dixon's argument that we didn't demonstrate that the PIU that we utilized for the majority of this time period is accurate, that being the 32 percent interstate factor.

I think -- excuse me. I think through the testimony that was originally submitted by Mr. Powers, I think through OrbitCom's own numbers, which it utilized with Ms. Freet's Exhibit 37, and if you look for a specific analysis of those particular exhibits in OrbitCom's Reply Brief, it demonstrates that that 32 percent factor in many ways was generous.

And so I would submit that this Commission has at its authority the discretion to use that 32 percent amount because it is an amount identified within

OrbitCom's tariff.

And I think the other important thing to note here is that what Mr. Dixon's suggested is that this Commission effectively rejurisdictionalized all of that traffic to interstate. And I think that's an argument that walks a very, very fine line under these circumstances.

As the Commission may recall, initially OrbitCom amended its Complaint to assure Verizon that it did not intend to seek interstate amounts through its Complaint in this particular process, and Verizon's argument was, of course, that this Commission doesn't have jurisdiction over interstate amounts, which OrbitCom never contested.

And so, therefore, to now ask this Commission to effectively render what OrbitCom has identified as valid intrastate traffic as interstate I would submit is not only an inappropriate suggestion but one that really I'm not sure that this Commission has the authority to do that given the nature of its jurisdiction.

So I would ask that the Commission adopt the 32 percent PIU factor based on the testimony and the evidence.

CHAIRMAN JOHNSON: I'll pause my questioning and see if there are other Commissioner questions.

COMMISSIONER HANSON: Not from me, Chairman.

CHAIRMAN JOHNSON: Thanks. Commissioner Kolbeck.

COMMISSIONER KOLBECK: As far as the tandeming -- because I -- I do have some opinions on some of the other matters, but on the tandeming, how do you -- do UNE-Ps -- and I'll ask you both the same question. But I'll start with Mr. Dixon.

Do UNE-Ps typically charge as tandeming as a whole, or do they actually pay for the tandeming that they actually use?

In other words, if you're an unbundled element, can you pick out what you charge for, or do you have to charge the whole amount?

MR. DIXON: Let me see if I understand your question.

COMMISSIONER KOLBECK: Sure.

MR. DIXON: When you talk about a UNE-P are you talking about CLEC who uses UNE-Ps?

COMMISSIONER KOLBECK: Yes.

MR. DIXON: As I pointed out, MCI does not charge tandem switching if indeed traffic does not transit a tandem switch. And it's very clearly stated in its tariff.

I can't speak to any other CLEC. I really don't know. You have the tariffs on file with the Commission.

But, again, for the reasons we've stated, we don't believe that's appropriate to charge for all elements, unless indeed they're provided. And, again, we think that's consistent with your rule, which we cited, that talks about tandem switching in general and you charge for it if it's provided. And clearly here it's not.

COMMISSIONER KOLBECK: Ms. Moore.

MS. MOORE: Mr. Commissioner, I would suggest that paragraph 1.1.1 of that QLSP, which --

MR. SMITH: What's the exhibit number?

MS. MOORE: I think it's Exhibit 6.

COMMISSIONER KOLBECK: I don't have that up with me. Do you?

MS. CREMER: Do you have the transcript? It's in the front of that.

MR. SMITH: There's no copy of it in there.

MS. CREMER: No. Just what exhibit number it is.

CHAIRMAN JOHNSON: Let's give Ms. Moore the latitude to explain what it says, and we can follow up.

MS. MOORE: And I have the language quoted in the Brief. This would be page 12 of OrbitCom's original or initial Posthearing Brief. Page 12, first full paragraph or the middle paragraph on that page.

MR. SMITH: Hold on here a minute here,

Ms. Moore. People are scrambling around now looking for --

CHAIRMAN JOHNSON: And it's in the middle of that page, on page 12; is that right, Ms. Moore? Is that where we're looking?

MS. MOORE: Correct. And it would be the fifth line down of that first full paragraph.

MR. SMITH: Is it Exhibit MP 215?

MS. MOORE: That sounds right as far as the testimony exhibit. We did put that in as a separate exhibit too at the time of the hearing.

MR. DIXON: Mr. Chairman, I'm with the page. I understand it's page 12 of OrbitCom's opening Brief? Thank you. Thank you for the courtesy.

CHAIRMAN JOHNSON: Yes. Absolutely. Go ahead, Ms. Moore.

MS. MOORE: Thank you. And what Paragraph 1.1 provides in part is that "QLSP services consist of local switching (Including the basic switching function, the port plus the features, functions, and capabilities of the switch, including all compatible and available vertical features)."

That QLSP then defines the term "switch" as including but not limited to end office switches, tandem switches, access tandem switches.

So I would suggest, Commissioner Kolbeck, that the answer to your question is that OrbitCom as the UNE-P provider here has purchased from Qwest that bundle of rights that enables it to bill for all switching functions, which would specifically include the tandem switching function as defined by that contract.

COMMISSIONER KOLBECK: Even if not all of the tandem switching elements are supplied?

MS. MOORE: And that's where I think you can also look to the FCC's Order on this particular subject. Because what the FCC has said in the past is that as long as a company such as OrbitCom provides the functional equivalent to its end users, it can bill for that function.

So I think you can find support for both propositions, Commissioner, either using that contract or using the FCC's decision.

COMMISSIONER KOLBECK: Okay.

MR. DIXON: Mr. Commissioner, could I respond to the Brief?

First of all, I want to point out on page 23 of our Reply Brief we actually address this issue that's been raised about paragraph -- about the QLSP.

And our point there very simply is the Commission's Administrative Rules and even OrbitCom's

tariff takes precedence over what might be in the QLSP. That's what the Commission's approved. Those are the rules of the Commission.

Secondly, Verizon's not a party, yeah, to the QLSP. So how can another contract between other parties adversely impact third-party rights? That seems to be a contract issue, and it doesn't seem appropriate.

Thirdly, if you look at the QLSP, and it is in evidence, there is nothing in it that purports to give, in our opinion, OrbitCom the right to actually charge for tandem switching services that it does not provide.

Rather, as Ms. Moore asserted, they rely on an FCC ruling which is a contested ruling. MCI has gone the opposite direction on that particular ruling.

The point is this Commission's not bound by FCC rulings. It's bound by its own rules. It's bound by the tariffs. And if it is not providing tandem switching, that is OrbitCom, OrbitCom shouldn't be entitled to charge for it.

COMMISSIONER KOLBECK: Response.

MS. MOORE: Thank you, Commissioner.

I think the answer to Verizon's question here is actually simpler than probably what either of us have articulated. And that is that under OrbitCom's tariff Verizon, if it so chooses, can essentially order a direct

trunk to OrbitCom. As admitted by Ms. Freet, it never did that. Therefore, tandem switching charges apply.

COMMISSIONER KOLBECK: And Mr. Dixon's comment about the Commission is bound by the tariff and not by the others, your comment on that.

MS. MOORE: Well, in that circumstance then I'd say the tariff -- if the tariff applies here, which I would submit that it does, then OrbitCom wins under that scenario as well because it charges for tandem switching unless Verizon orders a direct trunk.

Now I don't think those two operate to the exclusion of one another because I think at the same time if you simply indicate that, well, we can't look at the QLSP at all, you're ignoring the very platform on which OrbitCom operates. So while there certainly might be certain circumstances where that would be the case, that's not here because that would be ignoring how these parties specifically operate and how they're able to obtain the facilities that they use to provide services.

COMMISSIONER KOLBECK: That's a deep problem. I've got a -- like I said, I do have opinions on the call details and everything like that. But I struggle very much with the tandem switch issue. But that's my questions for now.

CHAIRMAN JOHNSON: Well, and, Commissioner, I'll

pick up where you left off.

Ms. Moore, you're aware of the Commission Rule 20:10:29:16:03 which does talk about some of the rules the Commission has regarding tandem switching and charging for it.

Maybe I'll just read the first sentence in the final paragraph of that rule. "A tandem switching charge expressed in dollars and cents per access minute is assessed on all interexchange carriers and other persons that use the carrier's carrier's tandem switching facilities."

How is the Commission legally to read this rule in harmony with your arguments if Verizon didn't use the tandem switching facilities?

MS. MOORE: And I don't mean to be redundant, but I think I'm going to provide the same answer that I did to Commissioner Kolbeck in that under OrbitCom's tariff Verizon had the ability to essentially submit an order for a direct trunk. It didn't do that. So, therefore, the tandem charge is applicable.

And I think that's also where the FCC looked at this issue and -- I apologize. I've been looking for the cite. I know it's in my Brief, and I don't have it at my fingertips. But they were saying there -- and they were looking at rules such as that in more of a national

context. And what they were saying is if you're providing the equivalent of that function, which clearly they are or which clearly OrbitCom is, in the event that a carrier such as Verizon doesn't have a direct trunk, then it could bill for that particular service.

So I don't believe it's inconsistent with the reading of that rule because I think in the end it's as simple as if you didn't order the trunk, then the traffic has to traverse the tandem, which means that the tandem charge is applicable.

CHAIRMAN JOHNSON: So what you're telling me is to read it in harmony, Commissioner, you need to add in some other words? The FCC read in some other things, and you need to too.

You shouldn't read it to just be to use the carrier's carrier's tandem. You should read it, Commissioner Johnson, instead use it or use some like service that has the same effect?

MS. MOORE: I think that's a fair statement simply because I don't think you have to leave your common sense at the door again. And from the standpoint of how OrbitCom operates, you may not have a carrier that falls neatly within that particular rule every single time. So, therefore, you have to have the facts necessary to support it.

And I think here not only with the QLSP, the fact they didn't order the trunk and with that rule, you can arrive at a very logical result, and that is that OrbitCom was able to bill for that tandem function.

CHAIRMAN JOHNSON: You mentioned -- you've mentioned a couple of times, Ms. Moore, the FCC Decision. I mean, give us the waterfront on State Commission decisions. Neither of you made any note of PUC decisions on this very issue.

Are there any?

MS. MOORE: I don't know that there are any, Commissioner. I looked. I'll freely admit that it's not as easy to search other Commission's decisions simply because there isn't a great legal search engine like there is for Federal and State Court cases.

But I think any time you get the FCC ruling on a particular issue it's typically because that issue has risen to a level of national import. And so, therefore, it's something that all commissions can look to for the purposes of guidance and direction as far as how they handle the issue at a state level.

CHAIRMAN JOHNSON: Well, and I do -- I do understand those FCC decisions have important policy ramifications. They often send State Commissions sort of scrambling to make their rules align with the FCC policy.

Here, though, you have a Commission rule that reads I think on its face a little differently than the FCC Decision does.

MS. MOORE: I understand where you're coming from there. And just for the record, it's the Eighth Report and Order and Fifth Order on Reconsideration in the Matter of Access Charge Reform of Access Charges Imposed by Competitive Local Exchange Carriers. So just so I'm not referring to an Order throughout my argument without any citation. I wanted to clarify that.

I think again what you're looking at, Commissioners, when you look at your rule you can arrive at that same conclusion, even just viewing that rule in isolation. And that's simply because Verizon admitted it didn't order a trunk, and by its very nature those calls have to traverse the tandem because they would never otherwise arrive at the end user without actually utilizing that function.

CHAIRMAN JOHNSON: Are we aware of decisions -- maybe not dealing with this particular rule but any of the Commission's rule where the Commission has taken that broader interpretation that "use" can mean use or -- use those facilities or some similar -- or some similar facility that ends up in the same -- that hits the same target?

MS. MOORE: I don't know of any other State Commissions who --

CHAIRMAN JOHNSON: I'm talking this State Commission.

MS. MOORE: Oh. Excuse me.

CHAIRMAN JOHNSON: Has this Commission looked at wording within these rules with that sort of broad interpretation in mind?

MS. MOORE: I suspect that it's happened quite a bit. I can't point you to a specific instance. And the only reason I say that is because typically when one defines the rules there's usually some give and take in those rules.

And that's not to suggest that in any way that you sort of throw everything to the wind by doing that. But I can't cite you to a specific example. No, I'm sorry.

CHAIRMAN JOHNSON: Other questions of advisors or Commissioners?

MR. SMITH: Go ahead, Commissioner.

CHAIRMAN JOHNSON: Pause just a moment. Commissioner Kolbeck has the light on first.

COMMISSIONER KOLBECK: I just wanted to -- Mr. Dixon and Ms. Moore, to help me draw the line between what -- Verizon thinks they overpaid 142, and OrbitCom

thinks they're owed 836.

Now, Ms. Moore, you had said the $836,000 mark. Does that include the payments that Mr. Dixon had said that were made?

MS. MOORE: No, it does not, Commissioner. And thank you for allowing me to clarify that.

OrbitCom has always admitted that Verizon did make some payment from February to August of 2008. It's after that time period that payments weren't made.

The $214,000 figure that Mr. Dixon has referenced today relates to payments not only in South Dakota but in the other states in which OrbitCom operates as well because OrbitCom operates in 14 different states.

And so that 214,000 figure is a separate figure that we have always put on a separate shelf, if you will. And so the amounts that I referenced today are the amounts of intrastate charges specifically for South Dakota which are unpaid to date.

COMMISSIONER KOLBECK: Okay. Would you agree with that, Mr. Dixon?

MR. DIXON: No. Because, first of all, you have to determine the jurisdiction. And at this point I'm totally confused. I'll be very up front. I don't know if they're giving us credit at 32 percent now for the

13 months when they come up with the 836,000 because that concession's just been made. Or are they billing on what it was billed in July of '07 through all of '08 at the 5 percent and then July of '08 to the present at 32 percent. I don't know how they're getting their number.

But the long and the short of it is until you know the jurisdiction, until you have the call detail, you can't make these determinations. That's the whole point. I mean, if we pull -- I agree. If you pull a number out of the air --

Assume the Commission says we're going to go 60 percent interstate. Then we should be able to go back, take the number of minutes -- and by the way those are in evidence, and I think Exhibit 4 shows all the minutes. We should be able to take those minutes and run the numbers.

I don't know how the numbers are being computed at this point. So I can't even begin to suggest right -- I can't agree with them by definition, and I don't know how they're being run. That's the point. I don't know what PIU has been used, if it's 32 percent all the way. That's the first time I'm aware of it.

COMMISSIONER KOLBECK: Okay. Now that I think about it, my question is probably premature. Thank you.

CHAIRMAN JOHNSON: Mr. Smith.

MR. SMITH: Yeah. I've got a few things here. In looking at the F -- I mean, pouring over this FCC case, you know, the Eighth Report and Order, I had to admit when I first read that that confused me because it seemed to me to be in conflict with an oft repeated FCC axiom that you can only bill for that which you provide.

And I looked at that and was trying to figure out what are they trying to say there? And I did note one oddity in the one sentence. And maybe it's irrelevant. I don't know.

But the thing where they talk about the function equivalent. Then they use, Even if the call is routed from the competitive LEC to the IXC. In this case we're talking, I guess, both directions but through an incumbent LEC tandem.

Okay. Now, I mean, in fact -- I mean, I'm not saying the Commission has found this. But there is certainly at least some evidence in the record that except with respect to a relatively small percentage of calls in the physical world, that didn't happen. Now maybe in the virtual world of UNE-P or this case maybe it did. But based on those EMI records that at least there's evidence in the record that would indicate they were lacking the tandem code.

And I guess my question here and what I'm trying to bring up, okay, that kind of triggered off with me is, okay, what is this really trying to say?

And burrowing into it then a little bit later in the opinion you get to -- I get even more confused when I get to paragraph 21. Okay. And I do note then we hear the -- that the same lingo you hear a lot in these decisions says -- and again this is a situation which is slightly different, but then they're talking about the case of where you have a switch that functions dually as both a tandem and end office switch. I'll admit that's a distinction to some extent.

But there you get, As noted by AT&T and MCI, our longstanding policy with respect to incumbent LECs is that they should charge for only those services that they provide. Again, here they're talking about competitive LECs, but they cite that as the governing principle for then what they go on to say.

And with respect to dual functioning switches what they say is if you're the person delivering to and from the end user, you can only bill for local switching. Not for tandem.

And I guess now to get to my final point and the question is the PrairieWave case where you had sort of this ambiguity, if you want to call it that, kind of

caused between some confusing language in that first thing and then this. And the COX portion of that case, if you recall, basically saying now wait a minute. You said this with respect to dual use switches, but what about the other situation where you have direct end office trunks?

And it looked to me like in the PrairieWave case and I see Mr. Mastel is sitting back there but I don't know if he had any involvement if that or not. But at any rate, it appeared in that case as though the FCC kind of made some clarifying rulings and said -- went back to the old adage that the CLEC only gets paid if it actually provides the service.

And that's why I asked the question at the hearing that day of Mr. Powers about third parties, you know. Here we tend to focus just on the situation -- the weird thing of it being a UNE-P. But, I mean, this service could have been provided -- that DEOT could be provided by SDN. And, I mean, there would not be an argument, would there, by you that you would be able to bill for tandem switching if that was direct trunk into the local Qwest switch by SDN?

And maybe that's an unfair question. Maybe I'll ask it much more generally.

MS. MOORE: I would appreciate that.

Hypotheticals always scare me.

MR. SMITH: How do you think the PrairieWave what I would call attempt to clarify, how does that impact what appeared -- the Commission might have been appeared to have been saying in its earlier Eighth Report and Order?

MS. MOORE: This isn't an attempt to dodge your question by any attempt or stretch of the imagination, even though it might seem to be here. But one of the things that we drew from that Eighth Report and Order is the statement that when a competitive LEC that provides access to its own end users it's providing the functional equivalent of the services associated with the rate elements, it's entitled to bill the full benchmark rate.

And at the outset of this dispute when Verizon first identified as an issue the direct end office trunk issue OrbitCom contacted an attorney with the FCC and explained the circumstances as far as what was actually happening here, and that FCC attorney -- and this is in the testimony, and I believe the evidence was provided as an exhibit to Mr. Powers' prefiled testimony. She indicated that in this particular instance OrbitCom would be able to bill for the tandem switching service.

So I would -- I wouldn't be honest if I sat here in front of you right now and said that any FCC Order is

ever a model of clarity by any stretch of the imagination. And I read that Order a number of times and thought there might have been contradictory statements within that Order.

However, I think based on what that Order said with regard to CLECS and the clarification that was provided to OrbitCom by the FCC would indicate that it can bill the functional equivalent of all of those services if it is providing access to an IXC or access -- if it provides an IXC with access to the competitive LEC's own end users. And I don't think that premise has been upset by the PrairieWave Order.

MR. SMITH: And, I don't know. Do you want to -- do you have a position at all on that?

MR. DIXON: I didn't know if I was going to get involved or not. Very quickly I'll say simply this. You've raised the issue we've raised. The FCC is not abundantly clear. It also relates to its jurisdiction. Its jurisdiction is interstate and international. It is not intrastate. You have a rule, and so on that basis I'm not sitting here saying what the FCC did is controlling.

The other thing I'll point out in this room today we had a half a dozen lawyers who had different opinions as to what the law is or what should be done.

With all due respect to the FCC attorney, she's interpreting the FCC's activities. She is their attorney. That's not certainly binding on this Commission regardless of whose testimony it's in.

MR. SMITH: Let me see here. In terms of the -- you know, the issue about the QL -- what is it, the acronym? QLSP or PS or whatever it is.

MS. MOORE: QLSP.

MR. SMITH: You know, I mean, I buy the argument that there may be a contractual issue there. I have to say to me that document is just perplexing a little bit and less than crystal clear, truthfully, in terms of exactly what -- you know, as I think Mr. Dixon pointed out in one of his Reply Briefs.

You know, there's other language in there that would seem to indicate -- you know, on the routing language that would seem to indicate calls are to be routed in accordance with the routing regime of Qwest.

But more to the point, and I'll get to my question now, if you have a contractual right with Qwest to have Qwest conduct itself in a certain way with respect to other carriers that afford you then rights to profit from your UNE-P relationship in a certain way, is that -- is that contractual issue really not a dispute between OrbitCom and Qwest that ought to be resolved

through some kind of proceeding by OrbitCom against Qwest arguing that it breached its UNE-P -- it's QLSP agreement?

MS. MOORE: No. I don't believe so. Because OrbitCom has billed consistently with its understanding of how the QLSP applies. There is evidence in the record which would demonstrate that Qwest has not billed Verizon for that. My understanding is what Qwest has billed Verizon for are those direct trunks.

And so I would submit OrbitCom has always operated consistently with its contractual obligations. We believe Qwest has. And if Verizon somehow believes it's paying twice, I would submit that Verizon's remedy is with Qwest because I don't know what kind of an agreement they have. I don't know what kind of an order they have.

I can't recall if there was even evidence on that subject provided. I don't believe there was. But I think that's Verizon's remedy with Qwest, not OrbitCom's remedy with Qwest.

MR. SMITH: I guess where I -- you know, just on a personal level here, I struggle with that, is they have a -- I think we have some evidence in there about their agreements with Qwest on the DEOT ordering, at least on order forms.

I guess the problem I have with that is those would appear to provide them with a transport conduit into that switch. And here we're talking about not something that I'm going to be able to look at that agreement and say, well, here's where they breached that agreement between Qwest and Verizon. Looking at it as a situation where if you believe Qwest has a contractual obligation to permit you to have that traffic routed through the tandem so you get to bill that, again, there's some assumptions in that, that would seem more to me to be a contractual relationship between OrbitCom and Qwest. And if Qwest is violating that, that they would be the one that would be liable to you for having denied you the right to either sell your own DEOT or to -- or to collect on the tandem switching, you know.

MS. MOORE: I don't think Qwest has done anything, though, to violate the terms of that QLSP because it specifically gives OrbitCom the right to bill for all switching functions. That's what OrbitCom has billed for not only with Verizon but with every other IXC which terminates calls to OrbitCom's end users.

And from that standpoint I don't know what type of cause of action we would have against Qwest because I don't believe it's violated it because we paid for the right. We billed pursuant to that right. Qwest didn't

bill pursuant to that right. And in no way are they interfering with OrbitCom's ability under its tariff to offer direct trunks to IXCs who might want to interconnect indirectly.

And if I recall correctly, at the time of the hearing you posed specific questions to Mr. Powers as it related to almost the partitioning of the switch I think is the language that was used in almost a virtual partition under these particular circumstances.

And what I again think this comes down to is the fact that what Verizon did here was order a direct trunk from Qwest. It didn't order one from OrbitCom. It has the ability to do that under the tariff, and it could have avoided those charges. It's just that simple.

It chose not to do that. Instead it chose to order that through Qwest. It's now been billed for a service, and it's seeking to avoid that service. And I don't think we need to turn the QLSP on its head or create a cause of action against Qwest for OrbitCom in order to arrive at the simple conclusion that if Verizon had ordered a direct trunk to OrbitCom, it wouldn't pay those charges and it didn't do it.

MR. SMITH: Did you want to weigh in on any of that?

MR. DIXON: There is some evidence in the

record. On cross-examination Mr. Powers in response to my question indicated using that very theory that every CLEC would have to order a DEOT to avoid tandem switching. And the question would be would Qwest really install a DEOT for OrbitCom, a DEOT for MCI, a DEOT for everyone else so that we had a network with five DEOTs if there were five CLECS going to -- avoiding the same tandem and going to the same end office.

The answer is unlikely no. And yet that is exactly what this argument would require. It would either require Qwest to build a number of DEOTs, or all of it would be routed over the same DEOT that we've already paid for.

Nothing in the QLSP indicates that that's what's supposed to be done, that we're supposed to not be able to use our direct end office trunks and that somehow they've overrided what we're paying for through this contract.

I also would point out that as we noted in the testimony and in cross-examination of Mr. Powers, you asked the question, Are the CLECS doing this? MCI is consistent with this approach. Its own tariff says we will not charge tandem switching if the traffic traverses DEOTs. That's the approach that I think is the policy you should set. It makes no sense to have five or six

DEOTs being paid -- charged when, in fact, there's only going to be one going to each end office in all likelihood. And it wouldn't be good network engineering to build that much redundancy into end office trunking.

MR. SMITH: So your position is just flat out, Mr. Dixon, that all OrbitCom should be entitled to for the -- for the minutes it billed is the interstate rate, regardless of what the evidence sitting before us realistically seems to show in terms of fairly normative -- you know, at least a relatively justifiable actual intrastate level of traffic.

MR. DIXON: Let me say -- I'll explain this issue very clearly. What I was saying is that I don't know how you're going to figure out the jurisdiction of all of this traffic. Verizon has never challenged the quantity. Verizon has never challenged either rate. Is to say that the intrastate rate in the tariff is unreasonable, that's not what we're doing. We're saying that's the rate that should be applied if the traffic, in fact, is intrastate.

I don't know how you come up with that number with this evidence except to make -- effectively to pull one out of the air. I don't know where it is.

And so under those circumstances the other concern I have is if you allow OrbitCom to use its

default PIU, you've effectively said it's okay to eliminate all your underlying call detail records when they're asked for. It's okay to establish a policy that you don't retain them when they're being asked for, and then come into the hearing and say we're bound to show that they were insufficient when we couldn't get them.

I mean, it's rewarding them for behavior that you should not allow. It's inconsistent with their tariff. The tariff's not ambiguous at all. In fact, the testimony was ambiguous. Mr. Powers kept talking about I have a choice. I could chose any one of the three approaches. He said that over and over again. And went into that on cross-examination for obvious reasons. That's not what the tariff says.

And so I'm saying, okay, in your position how do you pull a number? And if you give him 32, their default number, that seems totally unfair for a company that denied us any ability to determine the accurate jurisdiction when we had asked for it repeatedly.

And to go in after the fact and say, oh, well, this or that shows whatever -- and I'm even talking about the Verizon records, to take a five-day sample and say I'm going to figure out 27 months worth of billing, which will represent millions of dollars, that seems inappropriate.

So when I say the interstate rate, my point is the quantity's known. There's no evidence in this record that's credible, that's reliable, that says what that number should be. Because all of the call detail information is missing, and that's purely the case going back historically. There is none. And that's the reality.

MR. SMITH: I was going to -- and here, Mr. Dixon, again on the -- it just -- I think it's what I heard you say a little while ago, and it's different from what I remembered in the briefs. But that based -- based on the --

And it was one of the Leslie Freet exhibits, 35, 36, 37, in there, and I thought I heard you say based upon that -- at least that five days. And I admit that's not a huge sample.

MR. DIXON: Right.

MR. SMITH: Did you say that that would justify -- or demonstrated an interstate percentage of 58 to 61?

MR. DIXON: Right. What I said is our data used the data we were provided. And we took those five days and the telephone numbers we were provided and then went to our switches. And when we did that that's what we got.

But we're talking about 27 months. We're talking about what, 900 days and we're going to use five? Is that a representative sample? We're going to use three days of weekdays and two weekends? Is that representative of 900 -- I'm just estimating what 27 months works out to, but I think it's around 880 or 850 days.

And the point is five days? What we're looking -- and that's what we said in the testimony. Once you get to that level if you still haven't figured it out, we'll go for a full month and compare the entire month of billing against the actual call detail information.

CHAIRMAN JOHNSON: Other questions?

MR. SMITH: I have one last question maybe. And I think this is really more for Mr. Dixon. And I didn't mean to not let you respond to my question I just asked.

And I know your numbers were different, Ms. Moore, in terms of what you had in your Brief about what Leslie Freet's analysis of your own data showed.

Okay. Now I guess the last question and it came up and it's been batted around over and over and over again in both the hearing and in Briefs. But can anybody point us to any authority, if there is any, or at least whatever argument you have I guess as to the -- I guess

the -- what commissions have done and also what's fair to do in terms of the issue of should traffic that cannot be billed at all by OrbitCom be utilized in the calculation of a reasonable rate if we're going to try to find that, I guess. Should it be used in a calculation of a PIU?

And I'm not saying -- I'm not saying here a PIU should be used for all traffic, but is it reasonable to use calls that cannot be billed in the calculation of a PIU?

Mr. Dixon.

MR. DIXON: Well, first of all, I'm not sure I understand your question. Let me see if I can clarify what I think you're saying, and then if I'm wrong, please correct me.

What we're dealing with is what is the jurisdiction of the traffic. Then we have something called a PIU factor, which is something different than the jurisdiction of the traffic.

Jurisdiction of the traffic is determined by known data, call detail information. There is a portion of that call detail information that is received that may miss something. It could miss the North American numbering plan 10 digit numbers and not -- appear to be an unknown or something of that nature for that reason. And that's what's in the Qwest tariff that we attached to

our Surreply.

So if you're getting at is it appropriate to use a PIU for all traffic, the answer is no.

MR. SMITH: Yeah. I'm not really getting at that. I think, you know, to me the tariff here appears to be pretty clear, that their tariff and in general -- I think every tariff we look at usually, to the extent you can bill actual jurisdiction, you ought to do that. And it really is what the law probably requires.

But what I'm getting at here is just, okay, let's assume we still have traffic left over. Some of it's billable; right? But it cannot be -- the actual jurisdiction cannot be determined through various -- for various reasons. And those reasons can include missing data. And sometimes they're just practicably not determinable like with certain 800 numbers and stuff where, you know, the actual locations of things are just extremely tough to pin down and it's not worth it.

But what I'm getting at is in terms of is it -- is it done typically or is it reasonable to base the calculation of that PIU factor -- or to require the inclusion of data that is not billable by the company at issue?

MR. DIXON: Well, if I -- again, if I understand your position, you're saying the traffic is unknown, its

jurisdiction, do you use a PIU factor?

MR. SMITH: Right.

MR. DIXON: That's the whole purpose.

MR. SMITH: Or the carrier identity isn't known so it doesn't --

MR. DIXON: That's a different issue. I don't think the issue has ever been about carrier identity. The issue is about the jurisdiction of the traffic, whether it's inter or intrastate.

So at the point it's being identified to determine whether it's jurisdiction through the call detail record we know the carrier. That's what's coming into the AMI records that's going to OrbitCom. They pointed out they get Qwest records that are unique to them and it may be sent to other carriers but they are unique to them.

So the issue becomes that portion, which is a small amount according to the testimony of Mr. Powers and also I think Ms. Freet, you come up with this PIU factor, and that represents the difference between what inter and intrastate traffic normally is.

The Qwest tariff that was referred to is the one I said that's 50/50. It's on page 20. It's attached to our Brief. It's one of the pages that was included -- referenced in OrbitCom's Reply Brief. It also says the

parties have the right to provide each other different PIUs and use them and try and justify them and also points out you can request background information to determine how that number's been estimated.

It's essentially saying give us evidence so we can come up with a number. And that's what you're confronted with. Yes. You have to have something to base the PIU factor on.

CHAIRMAN JOHNSON: But, Mr. Dixon, I think what Mr. Smith is trying to drive at is, is it -- has any State Commission ruled on whether or not it's appropriate to use all of the calls that Verizon had information on but that OrbitCom didn't?

Is it worthwhile to use those calls in trying to come up with what your PIU factor is for those calls that are not otherwise taken care of?

MR. DIXON: I don't know. I have no idea. I mean, we've never to my knowledge been in a situation like this. So I'm not aware of it.

MR. SMITH: Ms. Moore, do you want to respond?

MS. MOORE: If I could, please. And to -- the short answer to your question is I wasn't able to find any Commission decision that's looked at this issue.

The longer answer to your question is that if we can't bill for it, either we don't have a record for it,

we don't have the jurisdiction for it. I don't know how we can include that in our PIU factor. I don't believe that's consistent with the idea of a PIU factor in general.

And I don't want to use confidential numbers here by any stretch of the imagination, but I think that when one looks at what results from including all of what we've characterized as phantom traffic that Verizon essentially added to the five-day call detail record sample that was given, has a very dramatic impact on the PIU factor. And that would be contained at page 15 of our Brief. And it's an analysis of Verizon's own records. And the PIU factor goes up in Verizon's favor by almost 28 percent.

So there's a reason that Verizon wants to include those additional calls, and that's the exact reason why it's not appropriate. If we can't bill for it, why are we then punished on two fronts?

Not only is does it rejurisdictionalize our traffic but we also can't derive any regular access off of it.

MR. DIXON: Mr. Smith, can I respond?

MR. SMITH: Sure.

MR. DIXON: I have not attributed any kind of intent to OrbitCom on why it has no call detail records.

To suggest that for us to include all of those calls helps us, we're saying that's what was in our switch.

I can argue back and forth about who benefits from what's going on. Charging 10 times the rate obviously benefits OrbitCom to have more intrastate tariff.

This isn't an issue of intent. This is an issue of what do the documents show. Verizon switch showed -- this is pure and simple. It showed it using the telephone numbers we were provided those five days for the information we got on the Motion to Compel. That's all it shows. I have no intent to attach to it that we used it to get better -- it was here's our data. This is what it shows.

MR. SMITH: And I think all I'm trying to get at here, I'm not going down that path at all of people's -- you know, I'm not attributing moral motives to any of this.

MR. DIXON: I didn't take --

MR. SMITH: I'm trying to get at the issue of -- here's my point. I'm getting tired here is one of the reasons I'm mumbling around. I am. I'm tired. And I haven't had a cigarette, you know.

But here's the bottom line, I think. Isn't the purpose of a PIU, though, to get -- for traffic where you

can't jurisdictionalize it, the point, right, is to get as close as possible to an approximation under the assumption that you get as close as possible to that which you can jurisdictionalize and bill as a normative -- as a normative amount.

And so perhaps if it's -- if that data is not data that OrbitCom would get through the EMI records, if it doesn't get it, then it -- is it reasonable for the Commission to think that we ought to consider that in a calculation of an approximation which is meant to reflect their actual billable accounts as close as we can? I think that's what I'm trying to get at.

CHAIRMAN JOHNSON: Commissioner Kolbeck, did you have a response?

COMMISSIONER KOLBECK: Yes. It actually goes along with what Mr. Smith is trying to get at.

Would it be too onerous for OrbitCom since they've been billing since May of 2009 to the present -- you've been billing jurisdictionally. That's in your testimony. Would it be too onerous for you to figure out a PIU factor from May of 2009 until now?

Because you've already billed that traffic. You should have already had that separated out between inter and intraLATA, take that data, figure out a percentage of what's inter and what's intra and come to the Commission

with that?

MS. MOORE: Just to make sure I understand your question, Commissioner, are you looking for us to produce an average?

Because OrbitCom began billing jurisdictionally in May of 2009 and has rendered a bill using that jurisdictional every single month since then. So are you looking for the average of those months?

COMMISSIONER KOLBECK: Yes. Well, I'm looking for something to come up with a PIU that's worth a hoot prior to -- I mean, we can -- the data's been destroyed so we can't use that data. If we --

You have been billing jurisdictionally so that should be a very accurate account of what's inter and intraLATA. I'm wondering, there's 10 months of data there that's already been collected. Can you come up with a PIU factor for that 10 months of data?

MS. MOORE: I'm looking to my client because obviously I have no control over billing processes, but they are indicating yes.

MR. DIXON: And I will simply say this: We have raised with their data completeness because of what our data showed. So we would want to compare it.

COMMISSIONER KOLBECK: Sure.

MR. DIXON: And the issue may not be with either

of us. It may be with Qwest for all I know. I don't know what inquiry OrbitCom has done with Qwest when it has information from us that says you're underbilling 40 percent of the traffic according to Verizon's switches, right or wrong.

So my concern is, you know, again the same issue. It isn't as if we're trying to -- we're trying to take their numbers and come up with a number from our perspective. Somehow that's got to be resolved. And it could be with a third party. I'm the first to acknowledge that's a possibility.

But when we're looking at it, we're looking at our data. And that's what we looked at when this all began, what was going on with other, you know, companies in the state.

COMMISSIONER KOLBECK: I was just going to say that just in the interest of finding a compromise and a solution to this, I don't think we can get anywhere unless we find a PIU that we can agree to, for one thing. And that's -- and the trunking issue I still have trouble with.

So I know -- I'm going to need to take this under advisement, I guess. I would like to figure out how we're going to get a decent PIU.

CHAIRMAN JOHNSON: Let's see if there are any

other questions by Commissioners and advisors. Any further questions?

Hearing none, Commissioner comments and action. Commissioner Kolbeck.

COMMISSIONER KOLBECK: Yes. I would think that we -- I would like to go forward with finding a reasonable PIU from OrbitCom since it is their burden of the last -- since they've started billing jurisdictionally on May of -- shoot. Now I turned my page. May of 2009 until present.

I do sit pretty well with a couple of other issues that we could -- but I would rather we gave it a couple -- I don't know. How much time do you think that would take, Ms. Moore?

MS. MOORE: Two weeks, Commissioner.

MR. SMITH: And to Mr. Dixon's point which I -- you know, there's always been -- is there any way -- and I don't know. Are you going all the way down to the base level records here, the EMI type records? That's a heck of a lot of stuff. Oh, just the bills?

UNIDENTIFIED SPEAKER: Actually we do have EMI records from May of '09.

MR. SMITH: Oh, you do. Okay. I guess my only point was at this time because there's been -- you know, the issue with the inconsistency between what their

switch shows and apparently what the EMI records show, is there any way where a process could be followed where Verizon could make sure they're getting what you got right from the horse's mouth, you know?

Does that -- am I clear on that, what I'm getting at? So there's no question about cherry picking or anything like that?

MR. DIXON: Mr. Smith, that's exactly what I'd ask for. I mean, again, if they're going to make a determination for bills, it's a unilateral determination. We don't have underlying data to review how they've come up with the number. We'd want the EMI records. We'd want EMI records they used to determine what they're going to come up with. As a PIU factor, which is different than how they're actually billing. But we need the EMI records to do it.

And I would ask for all of them. If we're going do it since May of '09 and we're going to set it up based on what's happened since May of '09, we should have all the records from May of '09 to compare. And that's with the telephone numbers again.

CHAIRMAN JOHNSON: Other Commissioner comments or action?

I would suggest -- certainly there's plenty to digest. I would -- I would move that the Commission take

this item under advisement.

Any discussion on the pending Motion?

COMMISSIONER KOLBECK: Are we -- how are we going to get a PIU?

I mean, Mr. Dixon was saying that he wanted everything. Are we going to come back and revisit?

CHAIRMAN JOHNSON: At this point, Commissioner, I'm not comfortable going where you're going. I want to look at these legal arguments. And it may be that there's plenty of evidence in the record to come up with a PIU factor. Maybe there's not. I suspect there may not be.

But I don't want to rule today on any of these issues. My thought would be let's let this sift in our minds a little bit. And then we can come back in two weeks at our next Commission meeting, and if we feel additional information is required from the parties, rather than do it piecemeal, we can have -- at least one or more of us can have a well thought out idea kind of how to proceed.

Now that's my thought. If we want to try to bifurcate these into one or more issues that we can deal with today, I mean, that's fine.

COMMISSIONER KOLBECK: No. I understand where you're coming from now. I was actually being selfish

because in my mind that's my only issue, and I wasn't taking into consideration what the other Commissioners were thinking.

So it's probably a better idea for us to go and collaboratively back on our own figure out what our issues are with the Docket, and then come back as soon as we can and go from there.

CHAIRMAN JOHNSON: Because some of these issues are a bit interrelated, and so I just want to make sure that any game plan that --

Now that being said, I mean, frankly you've given me some things to think about. So that's been valuable. I don't want to poo-poo the idea that we talked about possible steps forward because I feel a little differently about how to move forward than I would have had I not heard some of the exchanges between you and Mr. Dixon.

So we do have -- we have a Motion pending. That being said, I think we can discuss other steps forward if we think that will be helpful as we use this two weeks to kind of think in our own minds how best to move forward.

Any other discussion on the pending Motion?

COMMISSIONER HANSON: Mr. Chairman.

CHAIRMAN JOHNSON: Yes. Go ahead, Commissioner.

COMMISSIONER HANSON: As long as these open

meetings are the only times that we have an opportunity to express our thoughts and opinions, something additional for my colleagues to chew on over the next couple of weeks is that from my standpoint at least it appears to me that there's a Catch-22 for Verizon to argue that OrbitCom did not comply with the provisions of its tariff when OrbitCom is to an extent dependant upon Verizon for information in order to comply.

I don't agree with the premises that the PIU data isn't any good, that we're not a court of inequity and no evidence supporting any number is valid, and, therefore, the only conclusion is to award the lowest amount.

I think it gets into a gotcha type of a situation that if, in fact, Verizon did not think that five days was sufficient, they could have informed us that they wanted to have an extension. Here we are again. At the duration of this Docket is -- has been considerable.

We have on many occasions given continuance for good reasons, and there certainly would have been a good reason for doing that. I don't think that our rules ever intended to allow a utility to be held hostage, which, in essence -- in essence, I believe that this does. If someone -- if an entity felt they needed 30 days or

60 days, certainly that information could have been provided by this time without any challenge.

So I, frankly, am -- at this juncture from the information I've seen, I'm comfortable with the 32 percent factor. I'll be interested in looking over the information over the next couple of weeks and seeing what proposal there would be at that time.

Thank you, Mr. Chairman.

CHAIRMAN JOHNSON: No. Thank you, Commissioner Hanson.

Any further discussion on the pending Motion?

Hearing none, we'll proceed to vote. The Motion is to take no action today.

Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN JOHNSON: Kolbeck.

COMMISSIONER KOLBECK: Aye.

CHAIRMAN JOHNSON: Johnson votes aye. Motion carries 3-0.

If there is no further business to come before the Commission today, is there a motion to adjourn?

COMMISSIONER HANSON: So moved.

MS. MOORE: I apologize, Commissioner Johnson. There is one outstanding issue that -- I understand the Commission has a lot on its plate and has significant

amounts of work to undertake in order to feel comfortable with whatever decision it reaches. I don't want to deprive the Commission of that time.

The problem that OrbitCom has is it's not getting paid. It's billing jurisdictionally. It's not getting paid. I anticipate that there are disputed amounts and undisputed amounts. And without any end point in sight, they're going to continue not to get paid. And as the Commission is aware, regardless of whose numbers you take, the number advanced by OrbitCom is approaching a million dollars. And that's significant.

And I don't know if the Commission could undertake any action to have Verizon at this point in time pay any undisputed amounts going forward.

CHAIRMAN JOHNSON: Well, okay. Let's have that discussion. I mean, Mr. Dixon, your client has been receiving bills that have been jurisdictionally billed according to Verizon since May of 2009.

Is there a reason -- is there a reason those bills haven't been paid?

MR. DIXON: First I don't know what the status is, and I have no understanding of the reasons because we haven't discussed it. It's after the case.

CHAIRMAN JOHNSON: Uh-huh.

MR. DIXON: And we've raised the dispute. The only thing I would point out is the 214,000 in spite of Ms. Moore's statement is South Dakota specific that was paid. It's in our testimony to that effect. It's in the Brief. So it's not interstate.

Some of the other money, the 325, as I said -- but the fact of the matter is we've paid what we think is more than what we should be paying. So paying additionally -- give us 30 days. We'll take a look at it. I know that OrbitCom can produce 30 days of EMI records with a month of this billing since May of '09. Next month. Last month. Give it to us. I'll send it to our people and see what I can do to get undisputed parts paid. I will make the commitment to make that effort.

But I don't think the Commission should order us because I don't know what's disputed or undisputed at this point.

CHAIRMAN JOHNSON: I understand what you said earlier about that you view self-help as an industry standard. I guess I don't know what an industry standard is. But to me self-help -- I mean, I don't want to rule on the facts before us today, but I guess I would say that from a personal standpoint I view self-help as a far more narrow appropriate remedy than perhaps you do.

And if there are bills that are not being

properly disputed and are not being paid, I kind of think that's a problem.

Mr. Smith, any thoughts on what jurisdiction we have?

MR. SMITH: Well, I mean, I -- you know, I guess in terms of -- you know, like I said, I mean, in one sense I think Mr. Dixon has a point. You know, I don't have a clue as to how the numbers shake out.

If I'm getting what you're saying, Mr. Chairman, you're saying, come on, let's act in good faith here, and if you believe you've got money that's owing that's reasonably not going to be affected by this decision, shell it out. You know, I think that's what you're saying, isn't it?

MR. DIXON: Mr. Chairman, I'll carry that back to my client. I'll carry back what's been said.

I also would note that there are concessions that we've been overbilled. It would be nice if we got those numbers. What does that translate into?

So if we're going to get credit for the 5 percent for 13 months shouldn't have been paid, let's recompute the bills. These are things we can do separate and apart from you.

But I will communicate to my client your concerns and the concerns raised by Ms. Moore.

CHAIRMAN JOHNSON: Although the overbilling issue, I mean, if we're going to compartmentalize them, that really is a part of this Docket.

MR. DIXON: I know that.

CHAIRMAN JOHNSON: It seems like if there was going be to any payment that was withheld, it might be those portions that do deal with the dispute before us. And things that have come after that, again maybe a good-faith effort as good industry partners to --

MR. SMITH: Right. And at least -- I can't recall. I mean, we don't obviously have -- we can't have -- with ongoing billings and it's one of those things which happens and it's not the first time we've had this.

Where you've got ongoing billings you can never have a hearing that gets you to the point of being able to handle all things up to the present. It's the same way with prejudgment interest when we go into the Circuit Court. At the time I have my hearing I can't know what the prejudgment interest is because it's an ongoing, changing value.

And that's the case here. And the relief you've asked for, OrbitCom, in your case is that you be paid for your billings up to the present. You know, and, again, we don't know what that number is. And it's going to

evolve and change until we finally get a dang decision out here and we know where we stand at that moment in time, you know.

And I wouldn't even rule out that -- you know, it's possible we could have one last dispute that we'd have to hear some evidence on if it gets to that. I hope not. I hope not.

MR. DIXON: That makes two of us and I suspect three. I will convey the Chairman's comments. I will convey Commissioner Hanson's statement to my client and see if I can address some of the issues that are being raised.

But I'm the attorney. I can make recommendations. We'll go from there.

CHAIRMAN JOHNSON: Ms. Moore, have we addressed the issue you've raised?

MS. MOORE: I appreciate your comments, Mr. Chairman and Commission.

CHAIRMAN JOHNSON: If there's no further business to come before the Commission, is there a Motion to adjourn?

COMMISSIONER KOLBECK: So moved.

CHAIRMAN JOHNSON: Motion has been made. No second is required. We'll proceed to vote.

Hanson.

COMMISSIONER HANSON: Aye.

CHAIRMAN JOHNSON: Kolbeck.

COMMISSIONER KOLBECK: Aye.

CHAIRMAN JOHNSON: Johnson votes aye. Motion carries 3-0. Have a great day.

(The proceeding is concluded at 6:10 p.m.)

STATE OF SOUTH DAKOTA)

:SS CERTIFICATE

COUNTY OF SULLY)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter, Certified Realtime Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 23rd day of February, 2010, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Onida, South Dakota this 17th day of March, 2010.

Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter
Certified Realtime Reporter

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