

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

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

TC08-135

PRE-FILED TESTIMONY

DIRECT TESTIMONY OF MICHAEL POWERS

ON BEHALF OF ORBITCOM, INC.

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4 **Introduction**

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7 **Q. Please state your name, employer and business address.**

8 A. My name is Michael Powers. I am the Vice-President and Chief Financial Officer of
9 OrbitCom, Inc. ("OrbitCom"), formerly known as VP Telecom, Inc. My business
10 address is 1701 North Louise Avenue, Sioux Falls, South Dakota, 57107.

11 **Q. On whose behalf are you testifying?**

12 A. I am testifying on behalf of OrbitCom. OrbitCom provides local telephone exchange
13 service and exchange access service predominantly in the Qwest exchanges in South
14 Dakota and all other states in which Qwest operates.

15 **Q. What is your current position?**

16 A. I am the Vice-President and Chief Financial Officer of OrbitCom.

1 **Q. What are your duties and responsibilities at OrbitCom?**

2 A. I am responsible for overseeing operations and financial matters for the company.

3 **Q. What was your professional experience prior to your current position?**

4 A. I have worked in the telecommunications industry for 21 years, the last 8 years of which
5 have been at OrbitCom. My experience includes positions such as Sales Director, Sales
6 Executive, General Manager, and Director of Operations for various telecom companies.
7 Prior to my position with OrbitCom, I worked as a private investor. Prior to that position,
8 I worked for Concorde Gaming, a publicly traded company. I was president and Chief
9 Executive Officer.

10 **Q. What is your educational background?**

11 A. I have a Master's degree in Business Administration from USD.

12 **Q. Have you previously testified before the South Dakota Public Utilities Commission?**

13 A. No.

14 **Q. Will you please identify the areas of dispute raised in this proceeding for which you
15 will be providing testimony and identify issues raised in which direct testimony will
16 be provided on behalf of OrbitCom by other witnesses?**

17 A. Yes, I will identify those issues for which I will provide direct testimony. Some of these
18 areas are identified as issues in the Complaint and Amended Complaint filed by
19 OrbitCom and the Answer and Counterclaim filed by Verizon. I will define other issues
20 as sub-issues as they are discussed under the main topical issues identified in the
21 Amended Complaint and Answer and Counterclaim.

22 **Summary of Issues**

1 **A. Issue 1:** Issue 1 is: “Whether Verizon has improperly withheld sums justly due
2 and owing for intrastate traffic.”

3 **B. Issue 2:** The second issue is: “Whether OrbitCom properly jurisdictionalized the
4 traffic for which it billed Verizon.”

5 **Issue 1: Whether Verizon has improperly withheld sums justly due and owing for**
6 **intrastate traffic?**

7 **Q. Does OrbitCom provide services to Verizon?**

8 A. Yes, it does. OrbitCom has had a business relationship with Verizon for a number of
9 years. During that time, OrbitCom has provided Verizon with switched access services
10 and invoiced it for interstate and intrastate access services. OrbitCom has invoiced
11 Verizon on a monthly basis pursuant to its intrastate tariff which is on file with this
12 Commission.

13 **Q. When did Verizon stop paying OrbitCom’s invoices?**

14 A. Verizon stopped paying OrbitCom after August 2008. Prior to that, Verizon withheld
15 intrastate payments to settle what they believed to be an interstate overbilling. After they
16 withheld their \$285,000 from the properly billed intrastate payments due, Verizon began
17 paying its bills. A short time later Verizon started withholding monies owed for new
18 disputes which they came up with. They retroactively adjusted billings for 24 months
19 prior bills and withheld current amounts due for what they believed to be past
20 overbillings. This was contrary to OrbitCom’s tariff where in Section 4.8 where it says
21 disputes must be filed with 60 days of a due date and after that 60 days, the bill is deemed
22 correct and considered due and payable in full. After August of 2008 Verizon has not
23 paid any amounts due to OrbitCom.

1 **Q. Do you agree with Verizon's claim that it properly withheld payments due**
2 **OrbitCom for access bills Verizon received from OrbitCom?**

3 A. No I do not. OrbitCom strongly believes in following the law that is, the Filed Rate
4 Doctrine. This doctrine says that an interexchange carrier such as Verizon must pay the
5 tariffed rates charged to it and if that interexchange carrier has a problem with a tariffed
6 rate or rate element, it must either follow the dispute procedures outlined in the billing
7 carrier's tariff or pursue other action such as filing a complaint with this Commission.
8 The billed carrier must continue to pay any undisputed portions of a bill. It cannot use
9 self-help as Verizon has done here and withhold payments.

10 **Q. In this case, do you believe Verizon has lodged a proper dispute of those invoices**
11 **sent to it by OrbitCom?**

12 A. No, I do not.

13 **Q. Why not?**

14 A. When Verizon stopped paying OrbitCom's invoices, various OrbitCom personnel
15 attempted on numerous occasions to engage Verizon representatives in conversation so as
16 to determine the reason for Verizon's failure to pay. One of those numerous occasions, I
17 spoke with Verizon employee, Leslie Freet, who indicated to me that Verizon believed
18 that OrbitCom was charging an incorrect interstate rate and therefore Verizon decided to
19 withhold intrastate payments for supposed interstate overcharges. These discussions
20 continued for a number of months. However, each time we attempted to discuss
21 settlement with Verizon the dispute seemed to evolve into a different issue. During each
22 of these conversations, Verizon also found a way to dispute additional amounts which it
23 had not disputed previously.

1 **Q. What were some of the reasons Verizon provided for its supposed dispute?**

2 A. On one occasion we were told we would need to discuss negotiating a contract with
3 another Verizon representative, Mike Maxwell, before Verizon would agree to pay its
4 invoices from OrbitCom. When we discussed a contract with Mr. Maxwell, he indicated
5 that he was indeed the person to discuss contracts for Verizon. He indicated that Verizon
6 did not like or accept OrbitCom's intrastate and interstate access rates but he would not
7 discuss or consider a contract between Verizon and OrbitCom. On other occasions,
8 Verizon also identified a DEOT dispute, a PIU dispute, and a tandem switching dispute.
9 The disputes were not properly defined as per OrbitCom's switched access tariff or
10 industry standard practice and seemed to be blended together as to the dollar amounts. In
11 fact, some of the documents identified by Verizon as purportedly quantifying the amount
12 of the dispute confirms this by labeling it as a PIU/DEOT/Tandem Switching dispute.

13 **Q. Do you believe that OrbitCom properly invoiced Verizon for intrastate charges?**

14 A. Yes. Pursuant to South Dakota Administrative Rule 20:10:29:04, intrastate switched
15 access charges are billed for the provision of intrastate telecommunications services.
16 Thus, it is clear that the jurisdiction of the call determines the appropriate tariff under
17 which to bill the carrier terminating traffic onto OrbitCom's network. OrbitCom uses the
18 actual calling number and called numbers to determine the jurisdiction of the call when
19 they are available. That is exactly what was done in this case and Verizon refused to pay
20 pursuant to OrbitCom's intrastate tariff.

21 **Issue 2: Whether OrbitCom properly jurisdictionalized the traffic for which it billed**

22 **Verizon**

1 **Q: Do you agree with Verizon's claim that OrbitCom has failed to properly**
2 **jurisdictionalize the traffic at issue in this case?**

3 A: No I do not.

4 **Q: Why not?**

5 A: OrbitCom's tariff provides that the company can use actual jurisdiction if possible, or use
6 a PIU developed by the company, or use a PIU supplied by the customer. In this case,
7 the company-OrbitCom-used a PIU that it calculated that best represented the actual
8 traffic pattern. This PIU was computed using existing traffic patterns and based on the
9 LPIC or PIC for that state. In this case, Jaque Moore from Verizon has indicated in
10 emails to OrbitCom that he has --rejurisdictionalized—his words- OrbitCom's intrastate
11 traffic and made it interstate traffic. When asked why he did this, he could offer no legal
12 basis that allowed him to do this. He attempted to force OrbitCom to use a PIU factor of
13 anywhere from 77% interstate to 91% interstate-the latter being supplied by Robin
14 Fishbein of Verizon in August of 2008 after the disputes were filed. Prior to this time,
15 Verizon never supplied OrbitCom with a PIU.

16 **Q. What is the effect of Verizon's rejurisdictionalization of OrbitCom's traffic?**

17 A. Through its actions, Verizon has taken some of OrbitCom's claim and attempted to
18 make it interstate in nature. Effectively, Verizon has attempted to deprive this
19 Commission of jurisdiction over intrastate disputes. In fact Verizon has demanded that
20 OrbitCom not put any interstate issues before the South Dakota Public Utilities
21 Commission. By doing this Verizon has attempted to force legitimate South Dakota
22 issues away from the South Dakota Public Utilities Commission and its review.

23 **Q. What PIU did OrbitCom to calculate those invoices billed to Verizon?**

1 A. For the period of July 2007 through August 2008, OrbitCom used a PIU factor of 95%
2 intrastate and 5% interstate.

3 **Q. Did Verizon dispute the use of this PIU?**

4 A. Yes. As explained earlier, OrbitCom has the authority pursuant to its tariff to identify the
5 appropriate PIU factor. Verizon did not provide its own PIU factor nor did it properly
6 dispute OrbitCom's bills, but it instead refused to pay OrbitCom's invoices.

7 **Q. Is the PIU factor that OrbitCom used to invoice Verizon supportable?**

8 A. Yes. OrbitCom is in a position where it acts as its own IXC. In addition to selling the
9 customer local phone service, OrbitCom offers packages of long distance services with
10 its contracts. OrbitCom's commercial agreement with Qwest requires that OrbitCom
11 choose both the PIC and the LPIC for the customer and enter them into Qwest's system.
12 OrbitCom fulfills its obligations to the customer and to Qwest by contracting for
13 wholesale long distance services from carriers. These services are billed in bulk to
14 OrbitCom who then bills the customer. Under these circumstances, if OrbitCom uses one
15 carrier for the PIC and a different carrier for the LPIC in South Dakota, the carrier used
16 for the LPIC will see very nearly all of the originating traffic from OrbitCom end users as
17 Intrastate, since the state and the LATA are identical with the exception of a few border
18 towns.

19 **ADDITIONAL ISSUES RAISED BY VERIZON**

20 **IN ITS ANSWER AND COUNTERCLAIM**

21 **Issue 1: Calculation of the PIU.**

22

1 **Q: Verizon has told OrbitCom that OrbitCom must use a PIU factor of 91/9 the 91**
2 **being interstate usage and apply it retroactively. Do you agree with this PIU?**

3 A: No, I do not.

4 **Q: Why don't you agree with it?**

5 A: OrbitCom filed an access tariff with the SD PUC in late 2002. The tariff was approved
6 with no revisions shortly thereafter. That tariff provides a procedure to use or apply
7 when the jurisdiction of a call cannot be determined. The tariff provides 3 options for
8 OrbitCom to choose from. These options are: 1) the Company will use actual call detail
9 if possible; 2) the Company will apply PIU factor(s) provided by the Customer; or 3) the
10 Company will use a PIU developed by the company to those minutes for which the
11 Company does not have sufficient call detail. As I explained previously, if Verizon is
12 chosen as the LPIC only, virtually 100% of the originating traffic will be intrastate. For
13 terminating traffic and for originating traffic where a carrier such as Verizon is used for
14 both the PIC and the LPIC, OrbitCom applies a default 32/68 PIU --32 interstate 68
15 intrastate—to these calls as allowed for in its tariff. It has developed this 32/68 PIU from
16 call patterns and experience. It only uses a Customer provided PIU when that Customer
17 provided PIU is documented as to its accuracy and then only going forward. Verizon
18 provided several different PIUs but never supplied documentation as to how it was
19 arrived at despite repeated requests from OrbitCom. During discussions, Verizon
20 employees indicated verbally that they tracked OrbitCom only calls and that is how they
21 arrived at the various PIUs. Because Verizon refused to provide any documentation nor
22 even the name of the person who came up with the PIU and the fact that Verizon changed
23 the requested PIU on several occasions, OrbitCom would not accept any Verizon

1 supplied PIUs. During the course of discovery Verizon admitted that they did not track
2 OrbitCom only traffic as was previously told to OrbitCom, but instead used all of
3 Qwest's Verizon bound traffic for its PIU study but to date has not supplied any backup
4 information to support this. Because Qwest is not OrbitCom nor is Qwest traffic or set-
5 up similar to OrbitCom, it has turned out that OrbitCom's rejection of Verizon's
6 requested PIU was the correct decision. OrbitCom must treat all IXCs the same under the
7 rules. Applying an inaccurate and unfounded PIU such as that provided by Verizon
8 would not have been appropriate.

9 **Issue 2: Traffic Routing and Qwest Interconnection**

10 **Q: Verizon has indicated that they have direct trunks through Qwest to 87% of the end**
11 **offices of Qwest in South Dakota. Because of this direct trunking to Qwest, Verizon**
12 **claims they cannot be charged for tandem switching. Do you agree with Verizon's**
13 **position?**

14 A: No, I do not.

15 **Q: Why don't you agree?**

16 A: First, Verizon either won't or can't provide proof that it has direct trunks to all 49 Qwest
17 end offices in South Dakota. In fact, Verizon won't identify any end offices where it has
18 direct end office trunks. Second, under OrbitCom's agreements with Qwest, OrbitCom
19 not Qwest directs how traffic destined for OrbitCom is routed. OrbitCom has never
20 directed Qwest to use trunks between Qwest and Verizon to route OrbitCom traffic. One
21 can only assume Qwest would not improperly route OrbitCom destined traffic in
22 violation of its own agreement. Finally, Verizon has never ordered direct trunks between
23 it and the OrbitCom leased portion of the Qwest switch. I say the OrbitCom leased

1 portion of the Qwest switch because under OrbitCom's agreements with Qwest,
2 OrbitCom leases facilities -loops and switching-both tandem and local. Qwest agrees
3 that it will not charge IXCs for these services and that OrbitCom shall charge for the
4 services. This arrangement would be similar to leasing a commercial truck from a
5 company like Penske. Once I lease the truck and pay for the lease, I can charge
6 customers for the use of that truck. Those charges do not get paid to Penske—they get
7 paid to me. Just as here the charges do not get paid to Qwest—they are rightfully
8 OrbitCom's. Under the FCC holding in its Eighth Report and Order, Paragraph 15, a
9 competitive LEC such as OrbitCom that is providing access to its own end users is
10 providing the functional equivalent of the services associated with the benchmark rate
11 and is entitled to charge for those services. OrbitCom does not provide services to
12 anyone other than its own end users and does not route traffic through more than one
13 tandem. Therefore OrbitCom is entitled to charge and be paid for tandem switching.

14 **Q. As of the date of your testimony, what sum of money is OrbitCom owed by Verizon?**

15 A. \$576,678.18. Because Verizon is still continuing to improperly withhold sums from
16 OrbitCom, this amount continues to grow. I will provide additional supplementation in
17 advance of the hearing in this matter.

18 **Q. Does this conclude your testimony?**

19 A. Yes, it does.