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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: *TC08-135*

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 for Unpaid Access Charges

Dear Ms. Van Gerpen:

Enclosed for filing in the above matter, please find the Reply of OrbitCom, Inc. to the Corrected Motion to Compel of MCI Communications Services, Inc. d/b/a Verizon Business Services and Teleconnect Long Distance Services & Systems Company, as well as the supporting Affidavit of Counsel and exhibits. Thank you for your assistance. Should you have any questions or concerns, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore
For the Firm

MAM/cmc
Enclosure

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

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

TC08-135

**ORBITCOM'S RESPONSE TO
VERIZON'S MOTION TO COMPEL,
DELAY HEARING AND SUPPLEMENT
PRE-FILED TESTIMONY**

RESPONSE TO VERIZON'S MOTION TO COMPEL

This matter is before the Commission upon Verizon's Motion to Compel Responses to Discovery Requests. OrbitCom respectfully submits this Response to Verizon's Motion.

BACKGROUND

OrbitCom filed its Complaint in this matter in November 2008. After attempting to engage in discussion regarding the various issues raised in OrbitCom's Complaint, the parties agreed to a Stipulation for Scheduling Order in June 2009. Following the entry of the Scheduling Order, the parties commenced with discovery. In its first set of discovery requests, Verizon served the following request for production:

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

OrbitCom provided the following objection and response.

OBJECTION AND RESPONSE: OrbitCom objects to this Request to the extent that it is overly broad, unduly burdensome and vague as to that information which it seeks. OrbitCom further objects to this Request to the extent that it

seeks to impose a greater obligation on OrbitCom than that required by the applicable administrative rules and rules of civil procedure. The CDR is a virtual record of OrbitCom's customers in SD. Given the fact that Verizon is one of OrbitCom's competitors in SD, OrbitCom does not believe it acceptable to give Verizon a complete listing of its SD customers.

Without waiving these objections, see Response to Request No. 47 above. Currently records do not exist in the format Verizon has requested. OrbitCom is willing to work with Verizon to provide Verizon with existing records that will fulfill its needs while still protecting OrbitCom's customer confidentiality and any legal obligations related thereto.

Following the service of OrbitCom's responses to Verizon's Second Set of Data Requests, the undersigned spoke with counsel for Verizon and indicated that OrbitCom was willing to provide information for Verizon's review. After conferring with counsel for Verizon, OrbitCom offered to produce documentation in response to DR 48. Specifically, on August 5, 2009, OrbitCom produced a sampling of call detail information from 3 days in June 2009.¹ See Affidavit of Counsel ("Aff. Counsel"), Exhibit 1. The documents produced required the expenditure of more than 30 hours of time and effort on the part of two OrbitCom personnel to prepare as they were not records ordinarily available. After the production of several hundred pages of call detail information, Verizon indicated that the information provided was insufficient, arguing that the information was not provided in a usable format, failed to contain CDRs for a weekend, and that it did not contain the automatic number identifiers ("ANIs"). See Aff. Counsel, Exhibit 2. OrbitCom, in e-mail correspondence through undersigned counsel, responded with additional explanation and offer for production of more information. See Aff. Counsel, Exh. 3. OrbitCom explained that it had in fact provided all fields, e.g., the calling number, the called number, the date and the time of the call from its billing system, with the exception of the last 4 digits of the ANIs of OrbitCom customers. Id. It further indicated that it would provide Verizon with a statistical representative sample of the complete ANIs so that

¹ The total number of records produced to Verizon contained 34,257 calls.

Verizon could confirm the accuracy of the information. It further indicated that it would provide the spreadsheets in Excel format as requested by Verizon. Id. Finally, OrbitCom indicated that if Verizon wanted the same information, less the last 4 digits, taken from the daily usage feed (“DUF”), OrbitCom would hire an independent programmer to pull that information for Verizon. Id. OrbitCom made it clear, however, that it could not provide the actual DUF as it contains information for more than 60 other IXCs which is confidential, proprietary and irrelevant. Id.

Verizon again responded by indicating that this information was insufficient, now requesting the entirety of the DUF in EMI format for the month of June 2009 or July 2009, with all fields and the complete ANI. See Aff. Counsel, Exhibit 4. In response to Verizon’s ever-changing requests, OrbitCom offered to again produce additional information, without the last four digits of the ANIs, and also offered to produce information to a third-party for verification. See Aff. Counsel, Exhibit 5. Verizon, however, refused OrbitCom’s offers and filed the instant motion to compel.

ANALYSIS

Verizon’s Motion to Compel should be denied for a number of reasons, the most significant of which are that OrbitCom has produced information satisfying its obligations under the applicable rules and that Verizon now seeks to compel information which was not the subject of its original discovery request. While OrbitCom can only speculate on Verizon’s reasons for making this motion at this juncture, delay of the currently scheduled hearing seems to be the most obvious.

South Dakota’s Rules of Civil Procedure set out the scope of discovery, providing that the parties may obtain discovery regarding all relevant matters. SDCL § 15-6-26(b)(1). Relevant matters are those which are “reasonably calculated to lead to the discovery of admissible evidence,”

and which are not privileged. Id. “No overbroad or “carte blanche” disclosure, unduly burdensome or lacking in specificity, should be allowed.” Maynard v. Hereen, 1997 S.D. 60, ¶25, 563 N.W.2d 830, 838 (citing Lopez v. Huntington Autohaus Ltd., 540 N.Y.S.2d 874, 876 (N.Y. App. Div. 1989)). Discovery is subject to limitation, and Rule 26 further provides as follows:

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

- (A) (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- (iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

SDCL § 15-6-26(b)(1)(A).

The discovery request made by Verizon and the legitimacy of the response to it does not fall directly into one of the limitations on discovery as set forth above. However, in many ways this makes the applicable limitations to the scope of discovery even more clear. Verizon is seeking to compel information which it did not originally request. Moreover, this is not a case where information was not produced. To the contrary, OrbitCom produced a significant amount of information. It is Verizon which claims that this information is inadequate despite the fact that what was requested was provided.

When one reviews the request originally made by Verizon, notably absent from the instruction and general definitional sections of Verizon's first set of discovery requests is any specific definition for a “CDR” or call detail record. Verizon, in fact, requested “Call Detail Records or other call detail”. There was no specific directive given as to of what the requested information must consist or in what format it should have been delivered. These comments are

not made to leave the impression that OrbitCom was provided with an opportunity to evade the question or produce non-responsive information; to the contrary, it is intended to show that there are several ways in which the accuracy of a record, a bill and a PIU can be validated. This is precisely why OrbitCom provided the information which it did.

Even more importantly, in this instance, counsel for OrbitCom and Verizon worked together in order to identify a format which would provide Verizon with the information it requested. Because of the significant time and effort required to produce the information that was not readily available as requested by Verizon, OrbitCom wanted to ensure that its efforts were not made in vain. OrbitCom's personnel spent more than 30 hours to compile several hundred pages of documentation for the 3-day period that Verizon requested. OrbitCom was then told that this information was inadequate. OrbitCom then made an additional offer to produce the documents in Excel format and to provide an entire month's worth of records. This, however, was also deemed to be unacceptable and Verizon asked for the daily usage feed ("DUF"). However, this was *not* the original discovery request.

Verizon's request for information has continued to evolve thereby making its requests a moving target which OrbitCom simply cannot "hit". An explanation of the types of records now requested by Verizon is helpful. In its last informal request for data, made by letter and not through formal discovery, Verizon requested the entirety of the DUF in EMI format. "EMI" stands for "Exchange Message Interface". It is also synonymous with the term "Exchange Message Record" or "EMR". Newton's Telecom Dictionary defines it as: "The standard format used for exchange of telecommunications message information among Local Exchange Carriers for billable, nonbillable, sample, settlement, and study data." See Newton's Telecom Dictionary, 24th Edition (March 2008). To set up the relationships in this case, OrbitCom leases its facilities

from Qwest. Qwest is a local exchange carrier “LEC”, as is OrbitCom. Verizon operates as an IXC and is therefore the end user which will be billed using the records which have been exchanged between Qwest and OrbitCom.

The DUF to which Verizon refers is a compilation of the usage at all of Qwest’s central offices which usage relates to OrbitCom’s customers. The DUF contains the access records for all long distance carriers, toll directory assistance, local calls, etc. The EMI format of which Verizon speaks is 210 characters long and contains the information necessary to rate calls and bill the end user. Ultimately, it contains a significant amount of unnecessary information. In its bare format, it cannot provide the information now sought by Verizon. The raw data must be run through billing software to rate and jurisdictionalize it. Verizon has indicated they need the information to verify the jurisdiction of the call. How can jurisdiction be verified from raw data (e.g. EMI) that has not yet been jurisdictionalized? The answer is simple—it can’t. The raw data needs to be run through the billing system which jurisdictionalizes the calls. That record or CDR has been produced. A sample of the EMI record fields is attached. See Aff. Counsel at Exhibit 7.

OribtCom’s billing system accepts the DUF in “raw” form. It then extracts the pertinent information from each record which is necessary to create a bill. The remaining information is a call detail record or “CDR”. Simply stated, the CDR is the original EMI record, less the irrelevant information, but plus the necessary rating or billing information. The CDRs are thus the actual records underlying the CABs bills ultimately sent to Verizon. A commonly seen CDR is a person’s monthly telephone bill. Without a billing system to jurisdictionalize and rate the calls, the data is meaningless numbers without context.

Using the above scenario as a guide, the information that OrbitCom has produced, contrary to Verizon's assertions, is in fact the information underlying those CABs statements sent to Verizon. A CDR cover page showing 31 fields, including the jurisdiction from the billing system (Column 11-3 intrastate, 6 interstate) and Settlement Code (Column 22 from the EMI record field (8 intrastate, J interstate)). See Aff. Counsel, Exhibit 8. These fields must match and a simple comparison validates the data. Most importantly, the information produced is more than sufficient to allow Verizon to verify the accuracy of OrbitCom's bills. Moreover, in its testimony, Verizon's witness has testified as to the existence of a number of direct end office trunks ("DEOTs") between Verizon and Qwest. If Verizon has the direct end office trunks ("DEOTs") which have been referenced in testimony to date, Verizon should have the information which it seeks available in its switch. Verizon also has in its possession SS7 information which is often used for record verification purposes. See Aff. Counsel, Exhibit 5. This information is clearly available to Verizon through not only that information provided by OrbitCom, but also through another source: Verizon's own records.

One other point needs to be made. Verizon has pointed out in its Motion that the LERG (Local Exchange Routing Guide) that "all of the telephone numbers associated with its [OrbitCom's] customers are in the industry database." See Verizon's Corrected Motion at Paragraph 9. This is a false statement. OrbitCom personnel are familiar with and have entered data for the LERG. Contrary to Verizon's assertion, the LERG does not contain ANIs. It is loaded only with an NPA/NXX. The LERG routes calls to an end office. The end office switch routes the remaining call route. The LERG simply was not set up for input of ANIs. It would have to be supplemented thousands of times each day just for SD.

Throughout the entirety of the discovery process, and for months prior to, OrbitCom explained to Verizon that it did not have CDRs in the format as requested by Verizon. The information which OrbitCom uses for billing comes from Qwest. The DUF information is loaded onto the billing platform in raw form. The billing platform extracts from the Qwest information the fields necessary for billing. No “flat” file is created. The problem with Verizon's request is that the information from Qwest contains not only information for Verizon, but also information for Sprint, Willtel, AT&T and sixty or more other carriers. In addition to the fact that OrbitCom does not have the CDRs in the format requested, there are legitimate confidentiality concerns as the information requested by Verizon contains CPNI as well as information for other carriers and customers.²

Despite numerous attempts to provide Verizon with information that it had requested and numerous offers to produce additional information to Verizon, Verizon continues to seek documentation which is outside of its discovery request, beyond the applicable rules related to discovery, and which raises significant concerns regarding confidentiality. The discovery process is intended to provide answers, to narrow the scope of issues for hearing and to ensure that no party is unfairly surprised. It is not, however, an opportunity to repeatedly ask for new and additional information which was not originally requested. In this instance, granting Verizon's Motion to Compel in no way streamlines this process; to the contrary, it will only result in delay and allow Verizon to continue its improper self-help practices.

² OrbitCom is familiar with a recent federal court lawsuit in which Verizon was chastised by the federal court and ordered that it could no longer use proprietary information from its competitors. In the lawsuit, Verizon was utilizing CPNI and other proprietary information from its various competitors in order to induce the customers of those competitors into changing their service to Verizon.

CONCLUSION

To date, Verizon has improperly withheld more than \$600,000 from OrbitCom. Verizon has admitted in its discovery responses that it has withheld validly billed intrastate amounts for what it claims is an interstate dispute over which this Commission has no jurisdiction. Despite continued and ongoing attempts to work with Verizon to produce information or even have discussions with OrbitCom personnel regarding its records, Verizon has refused at every turn these offers. To now punish OrbitCom by delaying a hearing that has been set for a number of months only rewards Verizon's unlawful self-help. Accordingly, OrbitCom respectfully requests that this Commission deny Verizon's Motion to Compel and its corresponding request for delay of the September 9 hearing.

Dated this 24th day of August, 2009, in Sioux Falls, South Dakota.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 24th day of August, 2009, upon the following:

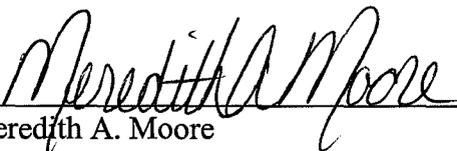
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