

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

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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 )

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TC08-135

**VERIZON'S  
INITIAL POST-HEARING BRIEF**

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December 4, 2009

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ORBITCOM BEARS THE BURDEN OF PROOF IN THIS COMPLAINT PROCEEDING.....1

III. ORBITCOM FAILED TO PROVE THAT IT IS ENTITLED TO PAYMENT OF ALLEGEDLY “INTRASTATE” SWITCHED ACCESS CHARGES INCLUDED ON INVOICES ISSUED TO VERIZON.....2

A. OrbitCom Failed to Follow the Language of its own Tariff that Describes How the Jurisdiction of Switched Access Traffic is to be Determined.....3

1. OrbitCom Admitted That It Did Not Use the Available Call Detail Information to Determine the Jurisdiction of Access Traffic.....6

2. OrbitCom Has Misconstrued the Plain Language of Its Tariff.....7

3. OrbitCom’s Use of “Default PIU” Factors was Contrary to the Express Terms of its Tariff .....9

4. OrbitCom Failed to Justify the Specific Jurisdictional Factors that It Applied to Verizon’s Access Traffic.....11

a. Analysis of Call Records Demonstrates that the Jurisdictional Factors Used by OrbitCom are Unsupported and Unreasonable.....12

b. OrbitCom’s Purported Justification for the Default PIU Factors It Used is Unreasonable.....14

B. OrbitCom Failed to Provide any Evidence that the Charges it Billed for Allegedly Intrastate Switched Access Service were Valid.....19

1. OrbitCom Did Not Produce Any Call Detail Records That Would Prove That its Access Bills Were Accurate.....19

2. Verizon’s Analysis of the Available Call Records Demonstrates that OrbitCom Did Not Accurately Jurisdictionalize the Traffic and Apply the Correct Jurisdictional Rates.....23

a.	OrbitCom’s Criticisms of Verizon’s Detailed Analysis are Invalid.....	26
IV.	ORBITCOM FAILED TO PROVE THAT IT IS ENTITLED TO BILL VERIZON FOR INTRASTATE “TANDEM SWITCHING” SERVICE.....	33
A.	OrbitCom Bills Verizon a Composite Rate that Does Not Appear in its Tariff.....	34
B.	OrbitCom’s Practice of Billing Tandem Switching Charges Violates the Commission’s Rules and its Own Tariff.....	35
C.	The EMI Records Produced by OrbitCom Confirm That 98 Percent of Verizon’s Traffic Was Not Routed Through Tandem Switches.....	37
D.	Verizon Produced Documentary Evidence Demonstrating that Virtually All of its Long Distance Traffic in South Dakota is Routed Over DEOTs to and From LEC End Offices, and Not Through Tandem Switches.....	40
E.	OrbitCom’s Explanation for Why it May Bill Tandem Switching Charges Is Not Reasonable.....	42
a.	OrbitCom’s Insistence that Verizon Order DEOTs from it is Unreasonable on Both Technical and Economic Grounds.....	43
b.	OrbitCom’s Contractual Arrangement with Qwest Does Not Justify its Practice of Billing Verizon for Tandem Switching .....	48
V.	ORBITCOM’S BILLING PRACTICES ARE UNREASONABLE; ACCORDINGLY, IT IS NOT ENTITLED TO ANY OF THE RELIEF IT REQUESTED IN ITS AMENDED COMPLAINT.....	50
VI.	THE COMMISSION SHOULD GRANT VERIZON’S COUNTER-CLAIM.....	53
VII.	CONCLUSION.....	55

**TABLE OF AUTHORITIES**

South Dakota Case Law

*City of Sioux Falls v. Henry Carlson Co.*, 258 N.W.2d 676; 1977 S.D. LEXIS 185 (1977).....9

*Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149; 1986 S.D. LEXIS 363 (1986).....9

*Evans v. Heaton*, 233 N.W. 281; 1930 S.D. LEXIS 135 (1930).....9

*Forester v. Weber*, 298 N.W.2d 96, 97 (1980).....9

*Gordon v. St. Mary’s Healthcare Center*, 2000 SD 130; 617 N.W.2d 151; 2000 S.D. LEXIS 133 (2000).....2

*Hicks v. Brookings Mall, Inc.*, 353 N. W. 2d 54, 56; 1984 S.D. LEXIS 358 (1984).....9

*Midzak v. Midzak*, 2005 SD 58; 697 N.W.2d 733, 2005 S.D. LEXIS 61 (2005).....2

*Samsung Electronics Co., Ltd. V. Rambus Inc.*, 439 F. Supp. 2d 524 (E.D. Va. 2006)....21

*Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443 (C.D. Cal. 1984).....21

*Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 709 N.W.2d 350; 2006 S.D. LEXIS 7 (2006).....9

South Dakota Public Utilities Commission Rules

A.R.S.D. 20:10:01:15.01.....1

ARSD 20:10:29:01 (37).....35, 38

ARSD20:10:29:16.03.....35, 38

Federal Communications Commission Decisions

*In the Matter of Access Charge Reform, PrairieWave Telecommunications, Inc., et al, Petitions*, FCC 08-49 (CC Docket No. 96-262) (2008).....35

*In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).....43

*In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108 (2004).....35, 43

*In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990).....43

Federal Communications Commission Rules

47 C.F.R. § 42.6.....23

Treatises

*Williston on Contracts*, § 621 (1961).....9

## **I. INTRODUCTION**

Pursuant to the briefing schedule agreed upon by the parties, MCI Communications Services, Inc. d/b/a Verizon Business Services (“MCI”) and Teleconnect Long Distance Services & Systems Company d/b/a Telecom\*USA (“Teleconnect”) (collectively referred to as “Verizon”), file their initial post-hearing brief in the above-referenced proceeding.

As explained herein, OrbitCom, Inc. (“OrbitCom”) has not met its burden of proving that it is entitled to payment of switched access charges that are the subject of its complaint.<sup>1</sup> The record shows that OrbitCom did not bill Verizon for access services in accordance with its tariff. Moreover, OrbitCom did not produce any concrete evidence to demonstrate that it accurately identified the jurisdiction of calls or applied the correct jurisdictional rates on the bills it issued Verizon. Verizon, on the other hand, was the only party to submit any evidence based on actual call records. Verizon’s detailed analyses cast significant doubt on the validity and legitimacy of OrbitCom’s charges. Because OrbitCom failed to prove that it is entitled to payment of any amount, its Amended Complaint should be denied in all respects. The Commission should instead grant Verizon’s counter-claim and require OrbitCom to refund or credit amounts that Verizon has overpaid and that OrbitCom has improperly retained.

## **II. ORBITCOM BEARS THE BURDEN OF PROOF IN THIS COMPLAINT PROCEEDING**

In its Amended Complaint, OrbitCom alleges that it is entitled to payment of certain charges that it billed in accordance with its intrastate access tariff and that Verizon supposedly did not pay. Amended Complaint at ¶¶ 1, 9. As required by A.R.S.D. 20:10:01:15.01, OrbitCom, as the complainant, “has the burden of proof as to factual allegations which form the

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<sup>1</sup> Amended Complaint of OrbitCom, filed June 17, 2009.

basis of the complaint.” *See also Midzak v. Midzak*, 2005 SD 58; 697 N.W.2d 733 at 738, 2005 S.D. LEXIS 61 at ¶ 19 (2005) (“The plaintiff in a civil proceeding bears the burden of proving every material allegation in his or her complaint.”) This burden of persuasion also encompasses the burden of production, the obligation to come forward with evidence to support the party’s claim. *Gordon v. St. Mary’s Healthcare Center*, 2000 SD 130; 617 N.W.2d 151 at 157-158; 2000 S.D. LEXIS 133 at ¶ 24 (South Dakota case law recognizes “the generally accepted rule that the moving party has the burden of going forward as well as the burden of persuasion in administrative hearings.”); *see also Midzak, supra*, 697 N.W.2d at 738; 2005 S.D. LEXIS 61 at ¶ 19. This requirement is embedded in A.R.S.D. 20:10:01:15.01 (“In any contested case proceeding, the complainant ... has the burden of going forward with presentation of evidence” unless the Commission orders otherwise.).

Thus, the burden was squarely on OrbitCom to produce substantial, credible and reasonable evidence to support all of the material allegations in its Amended Complaint. OrbitCom also bears the burden of persuading the Commission that it is entitled to the relief it seeks. It is clear from the evidence and testimony presented at the hearing that OrbitCom did not meet either burden. Accordingly, its Amended Complaint must be denied in all respects.

### **III. ORBITCOM FAILED TO PROVE THAT IT IS ENTITLED TO PAYMENT OF ALLEGEDLY “INTRASTATE” SWITCHED ACCESS CHARGES INCLUDED ON INVOICES ISSUED TO VERIZON**

The evidence shows that OrbitCom did not comply with the provisions of its own tariff that describe the process which OrbitCom is required to follow to determine the jurisdiction of switched access traffic. Because it failed to follow the language of its own tariff, OrbitCom did not bill Verizon the proper jurisdictional rates (i.e., interstate or intrastate) for much of the switched access traffic at issue. Instead, OrbitCom improperly assessed its much higher

intrastate access rates on a large amount of switched access calls that were, in fact, interstate.<sup>2</sup> OrbitCom did so by applying arbitrary jurisdictional factors, which OrbitCom did not prove were reasonable using actual call records. On the contrary, Verizon submitted evidence, based on actual call detail records, which showed that the actual jurisdiction of access traffic was substantially different from that reflected on OrbitCom's invoices. Verizon's detailed analysis showed that a far greater percentage of the access traffic was interstate, and that OrbitCom charged it the wrong rate on those calls. As a result of its unreasonable billing practices, OrbitCom sent invoices to Verizon that contained improper charges, and thereby inflated the amounts for which it requested payment. OrbitCom is not entitled to recover any amounts that it improperly billed.

**A. OrbitCom Failed to Follow the Language of its own Tariff that Describes How the Jurisdiction of Switched Access Traffic is to be Determined**

Central to a finding of whether OrbitCom charged the correct rates for the access traffic at issue is a determination of whether OrbitCom properly identified the jurisdiction of the calls for which it billed Verizon. Section 3.4 of OrbitCom's tariff<sup>3</sup> specifies how this is to be accomplished:

**3.4 Jurisdictional Reporting**

*When the Company receives sufficient call detail to determine the jurisdiction of some or all originating and terminating access minutes of use (MOU), the Company will use that call detail to render bills for those MOU and will not use PIU factors. When the Company receives insufficient call detail to determine the*

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<sup>2</sup> OrbitCom's witness, Mr. Powers, agreed that the difference in rates "is a significant issue" that has "quite a financial implication." Tr. at 14:10-13. OrbitCom charged Verizon \$0.06 per minute for intrastate switched access service, which was ten times more than it charged (i.e., \$0.006 per minute) for interstate switched access. See, e.g., Exhibit B (Supplemental Testimony of Leslie Freet) at Exhibit LF-4; and Exhibit 2 (Rebuttal Testimony of Michael Powers) at Exhibit MP 2-20, pages 9-11 of 270.

<sup>3</sup> Tariff references are to "VP Telecom, Inc. Tariff No. 1" (see Exhibit A [Direct Testimony of Leslie Freet] at Exhibit LF-2), which OrbitCom stated is the applicable tariff.



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

OrbitCom submitted this tariff language to the Commission in March 2007, and the language has been in effect since April 2007. The process it sets forth is reasonable, logical and consistent with industry practice. Because actual call detail is the most accurate and reliable indicator of a call's jurisdiction, it makes perfect sense to use that information when it is available to determine jurisdiction, assign the applicable rates, and generate bills. Likewise, when actual call detail is available, there is no reason to rely instead on proxy measures, such as PIU factors.<sup>4</sup> Only when actual call detail information is not available is it appropriate to employ other methods to determine the jurisdiction of traffic.

OrbitCom's witness, Mr. Powers, used the term "jurisdictional billing" to refer to the situation in which a carrier uses actual call detail records to determine a call's jurisdiction. Exhibit 2 (Rebuttal Testimony of Michael Powers) ("Powers Rebuttal Testimony") at 17:5-6. He claimed that OrbitCom began using this approach in April or May of 2009 – two years after it amended its tariff to make the use of actual call detail mandatory.<sup>5</sup> *Id.* at 17:6-7; Hearing Transcript at 51:20-23.<sup>6</sup> According to Mr. Powers, "[i]f we can bill by jurisdiction, we're not

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<sup>4</sup> "PIU" is defined as Percent Interstate Usage. When a carrier applies a PIU factor, the percentage of traffic deemed to be interstate is charged the carrier's interstate rates, and the remainder of the traffic is billed at intrastate rates.

<sup>5</sup> The record is not precise as to the exact month this occurred. This is likely due to the fact that access bills are issued in arrears. Thus, an invoice issued in May 2009 reflected usage for the month of April. Regardless of which date is correct, there are serious questions about the accuracy of OrbitCom's billing procedures since it took over that function from a third-party vendor sometime in the spring of 2009. *See* 23-26 below.

<sup>6</sup> The hearing transcript is cited hereinafter in the format "Tr. at page number:line number," *e.g.*, Tr. 51:20-23.

going to use the PIU.” Tr. at 52:19-20. But, he also admitted that neither OrbitCom nor its billing agent followed that approach – using call data to determine jurisdiction – at any time before April 2009. Exhibit 2 (Powers Rebuttal Testimony) at 18:13-19:1; Tr. at 51:20-23.

OrbitCom acknowledged that, as a UNE-P provider, it receives each day electronic call detail records from Qwest, the underlying network operator.<sup>7</sup> Tr. at 55:4 -56:9. Mr. Powers agreed that those EMI records provide the information necessary to determine the jurisdiction of most originating and terminating switched access traffic that is handled by Qwest’s switches. Tr. at 57:6-11. Because it received the necessary call detail, OrbitCom was required by its tariff to use that information to determine the jurisdiction of the access traffic for which it billed Verizon. The record shows, however, that OrbitCom never used that information to determine the jurisdiction of calls prior to April 2009.

This is so despite the fact that OrbitCom amended its tariff in March 2007 to provide expressly for jurisdictional billing. Tr. at 46:19-24. OrbitCom made this tariff change because “more and more of the calls were being appropriately identified by the ILEC.” Ex. 2 (Powers Rebuttal Testimony) at 18:18-22. To implement this process, OrbitCom added the requirement in section 3.4 quoted above: “When the Company receives sufficient call detail to determine the jurisdiction of some or all originating and terminating access minutes of use (MOU), the Company will use that call detail to render bills for those MOU and will not use PIU factors.”

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<sup>7</sup> Exhibit 3 (Supplemental Rebuttal Testimony of Michael Powers) (“Powers Supplemental Testimony”) at 4 (“The Qwest data center collects all this information from every switch in its system on a daily basis and assembles it into final EMI records and puts the ones relating to OrbitCom’s OCN into an electronic file for our use.”) *See also* Exhibit 6 (Qwest Local Service Platform Agreement) at Attachment 2, § 2.3.1 – 2.3.4 (“Qwest will provide CLEC with usage information necessary for CLEC to bill interLATA and IntraLATA Exchange Access to the toll carrier.... These Exchange Access records will be provided as Category 11 EMI records.”)

**1. OrbitCom Admitted That It Did Not Use the Available Call Detail Information to Determine the Jurisdiction of Access Traffic**

OrbitCom admitted that prior to April 2009, it did not use any of the call detail information it received from Qwest to determine the jurisdiction of any of the access traffic for which it billed Verizon. Instead, it explained its practice as follows:

Mr. Dixon: And so you've used a company-determined percentage of intrastate use from June of 2007 through April of 2009. Am I correct?

Mr. Powers: In this case we used what is actually the default method of – we used the default PIU of 32 percent.

Mr. Dixon: All right. And you used that from June of 2007 to April of 2009?

Mr. Powers: Other than the period where we had it set at 5 percent, percentage of interstate use, yes.

Tr. at 43:18 – 44:1.

OrbitCom explained that up until April 2009, it relied on a third-party service bureau to prepare and issue switched access bills on its behalf. Tr. at 47:4 – 48:10. Mr. Powers acknowledged that its billing vendor did not “implement jurisdictional billing to OrbitCom’s satisfaction.” Tr. at 47:4-8. More pointedly, he conceded that “the billing company was not able to implement jurisdictional billing with any – with any degree of, let’s say, reliability.” Tr. at 53:13-18. He characterized this situation as a “disconnect between the tariff and the OrbitCom reality during that period.” Tr. at 53:13-15.

OrbitCom acknowledged that its billing agent obtained EMI call records from Qwest, but did not use that information to generate access bills issued to Verizon. Tr. at 55:5 – 56:9. As Mr. Powers explained, the billing company instead applied certain jurisdictional factors supplied by OrbitCom to allocate traffic between the intrastate and interstate jurisdictions. The billing

vendor then assessed OrbitCom's tariffed intrastate rates on the traffic that it had classified as "intrastate," and it charged interstate rates on the remainder of the traffic, which it classified as "interstate."

Because OrbitCom's billing agent did not determine the jurisdiction of the access traffic and render bills based on actual call records, neither OrbitCom nor its billing representative followed the process set forth in section 3.4 of OrbitCom's tariff. That section states unambiguously that "[w]hen the Company receives sufficient call detail" it "*will use that call detail to render bills* for those MOU." (Emphasis added) The same sentence contains an explicit prohibition that OrbitCom "*will not use PIU factors*" to determine the jurisdiction of access traffic when, as here, the company receives sufficient call detail information. (Emphasis added) But that is precisely what OrbitCom did, and it did so in obvious violation of the express language of its tariff.

## **2. OrbitCom Has Misconstrued the Plain Language of Its Tariff**

OrbitCom seeks to avoid responsibility for ignoring the clear requirements of its tariff by claiming that its tariff includes "several options" (Tr. at 15:3) and that the company may "choose" which option to use to determine the jurisdiction of access traffic. Exhibit 1 (Direct Testimony of Michael Powers) ("Powers Direct Testimony") at 8:7. This argument ignores the plain language of the tariff. Section 3.4 of OrbitCom's tariff provides that "[w]hen the Company receives sufficient call detail," it "*will use that call detail to render bills . . . and will not use PIU factors.*" (Emphasis added.) Use of the mandatory word "will" is alone enough to show that this provision of the tariff does not merely create an "option" that OrbitCom is free to disregard.<sup>8</sup>

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<sup>8</sup> Mr. Powers' desire that the tariff might have been worded differently does not justify the company's failure to abide by the terms of its tariff on file with the Commission. *See* Tr. at 52:17; Ex. 2 (Powers Rebuttal Testimony) at 18:14 (suggesting that the author of the tariff "got a little ahead of the curve").

Significantly, when asked to explain “where in the tariff it states that OrbitCom can choose one of three methods to bill access minutes for originating and terminating minutes of use,” Mr. Powers failed to identify any such language. Tr. at 53:8-18.

Mr. Powers referred to two other methods for determining jurisdiction. One involves a percentage of interstate use factor provided by the access customer, and the other involves a percentage of interstate use factor developed by the carrier. Tr. At 52:22-53.7. According to Mr. Powers, “if we haven’t used any of the other methods” for determining jurisdiction, OrbitCom may establish and apply “a default PIU.” Tr. at 16:15-22. In making this argument, OrbitCom once again ignores the actual language of its tariff.

The second sentence of section 3.4 of the tariff states:

*When the Company receives insufficient call detail to determine the jurisdiction of some or all originating and terminating access MOU, the Company will apply PIU factor(s) provided by the Customer or developed by the company to those minutes for which the Company does not have sufficient call detail.*

(Emphasis added) As this passage makes clear, OrbitCom’s ability to use jurisdictional factors of its own making is both limited and conditioned. It may only use PIU factors if the company lacks sufficient call detail to determine the jurisdiction of the traffic. The record shows that this situation does not exist here because Qwest has provided OrbitCom with EMI call records during the entire period covered by the parties’ billing dispute. Accordingly, neither of these two approaches may be applied to traffic for which OrbitCom obtains the underlying call detail.

The provisions of its tariff are binding on OrbitCom, and the carrier is obligated to comply with its own tariff. Mr. Powers attempted to excuse OrbitCom’s failure to use the available call detail to generate bills until April of 2009 by blaming OrbitCom’s tariff writer for getting “a little ahead of the curve.” Exhibit 2 (Powers Rebuttal Testimony) at 18:13-14. But

OrbitCom bears responsibility for the language contained in its tariff that OrbitCom filed with the Commission. Even if there were any ambiguity in the tariff language (and there is none), the tariff language should be construed against the carrier (which is responsible for drafting the language) and in favor of the customer. Indeed, South Dakota law provides that ambiguities are to be most strongly construed against the drafter. *See Ziegler Furniture & Funeral Home, Inc. v. Cicmanec*, 709 N.W.2d 350, 357; 2006 S.D. LEXIS 7 (2006); *Enchanted World Doll Museum v. Buskohl*, 398 N.W.2d 149, 152; 1986 S.D. LEXIS 363 (1986); *Hicks v. Brookings Mall, Inc.*, 353 N. W. 2d 54, 56; 1984 S.D. LEXIS 358 (1984); *Forester v. Weber*, 298 N.W.2d 96, 97 (1980); *City of Sioux Falls v. Henry Carlson Co.*, 258 N.W.2d 676, 679; 1977 S.D. LEXIS 185 (1977); *Evans v. Heaton*, 233 N.W. 281, 282; 1930 S.D. LEXIS 135 (1930); and *Williston on Contracts*, § 621 (1961).

### **3. OrbitCom’s Use of “Default PIU” Factors was Contrary to the Express Terms of its Tariff**

OrbitCom admitted that, instead of using the available call detail information to determine the jurisdiction of access traffic, it applied “default PIU factors” to all of the access traffic for which it billed Verizon up until at least April 2009. During a 13-month period, July 2007 through July 2008, OrbitCom applied a 5% interstate usage factor to all of Verizon’s access traffic.<sup>9</sup> This means that OrbitCom considered only 5 percent of the traffic to be interstate and applied its interstate rates on that portion of the traffic; the remaining 95 percent of the traffic was classified as “intrastate” and billed at OrbitCom’s higher intrastate access rates. Tr. at 43:25 – 44:1; *see also* Exhibit A (Direct Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-22. Significantly, this 5 percent – 95 percent jurisdictional split (unlike the 32 percent – 68

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<sup>9</sup> In the previous month, June 2007, OrbitCom billed about 34% of the traffic at interstate rates and 66% of the traffic at intrastate rates. *See* Exhibit A (Direct Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-22.

percent split OrbitCom applied at other times) is not even mentioned as an option in OrbitCom's tariff. Accordingly, there is nothing in its tariff that authorized the application of this PIU factor to Verizon's access traffic.

Beginning in August 2008, OrbitCom began to apply a "default PIU of 32 percent" to all of Verizon's access traffic, and it continued to use that same factor until at least April 2009. Tr. at 43:21-24. This means that during those eight or nine months 32 percent of the traffic was categorized as interstate, and the remaining 68 percent of the traffic was treated as "intrastate."

As explained above, section 3.4 of OrbitCom's tariff specifies that the company "will not use PIU factors" to render bills when the company receives sufficient call detail to bill the traffic. Because OrbitCom at all times obtained the necessary call records, OrbitCom's use of PIU factors to generate bills to Verizon was not in conformity with its tariff.

OrbitCom's reliance on PIU factors was misplaced for other another reason as well. Mr. Powers acknowledged that the "industry norm" is to apply PIU factors to "unknown traffic." Tr. at 15:16-18; 14:6-9.<sup>10</sup> However, OrbitCom did not follow the industry norm. Mr. Powers acknowledged that only a *de minimis* amount of traffic – "one to four percent" of call records – do not contain "enough information to bill it." Tr. 199:13-18. This suggests that PIU factors should be applied, if at all, to only a very small percentage of the total traffic. Instead of following the industry norm and limiting the use of PIU factors to "unknown" traffic, OrbitCom applied its own "default PIU factors" to 100% of the access traffic for which it billed Verizon over a two-year period (from June 2007 through April 2009).<sup>11</sup>

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<sup>10</sup> See also Exhibit 1 (Powers Direct Testimony) at 8:10-11 (the company applies a PIU "to those minutes for which the Company does not have sufficient call detail"); Exhibit 2 (Powers Rebuttal Testimony) at 19:21-23 (OrbitCom may use customer-provided PIU "for unknown traffic").

<sup>11</sup> Section 3.4 of OrbitCom's tariff states that when there is insufficient call detail, OrbitCom "will apply PIU factor(s) *provided by the Customer* or developed by the company to those minutes for which the Company does not have sufficient call detail." (Emphasis added) In August 2008, Verizon provided OrbitCom with PIU factors to be

#### 4. OrbitCom Failed to Justify the Specific Jurisdictional Factors that It Applied to Verizon's Access Traffic

Even if OrbitCom's use of company-developed jurisdictional factors was appropriate (and it was not, given the tariff language discussed above), OrbitCom provided no evidence to justify the specific jurisdictional factors that it applied to Verizon's traffic during the period covered by the parties' billing dispute. Prior to July 2007, OrbitCom billed about 66% of the access traffic at intrastate rates, and 34% of the traffic at interstate rates.<sup>12</sup> A dramatic shift occurred beginning in July 2007, and continued for the next 13 months. During that period, 95% of the access traffic included on OrbitCom's bills to Verizon was classified as intrastate and billed at OrbitCom's high intrastate rates, and only 5% of the traffic was billed at OrbitCom's interstate access rates.<sup>13</sup> See Exhibit A (Direct Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-22.<sup>14</sup> In August 2008, and continuing through the filing of testimony in this

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applied to traffic for which OrbitCom did not have sufficient call detail. See Exhibit A (Direct Testimony of Leslie Freet) at 41-42 & CONFIDENTIAL Exhibit LF-25. Consistent with the language of OrbitCom's tariff and industry practice, Verizon assumed that OrbitCom would bill traffic based on actual jurisdiction where call detail was available, and would apply the PIU factors it provided only to the relatively small amounts of traffic for which sufficient call detail was lacking. Even though OrbitCom's tariff provides for the use of customer-provided PIU factors when sufficient call detail is not available, OrbitCom admits that it has not applied the PIU factors that Verizon furnished. Exhibit 2 (Powers Rebuttal Testimony) at 20:15-21:6; Tr. at 45:10-23. If OrbitCom had concerns about Verizon's filed PIU factors, it could have followed the process in section 3.4.5 of its tariff ("if a billing dispute arises or the Commission questions the project [PIU] factor, the Customer will provide the data used to determine the projected PIU factor"), but it did not do so. OrbitCom was not free to ignore the customer-supplied factors. Mr. Powers complained that Verizon improperly sought to have the PIU factors it supplied applied "retroactively" (Tr. at 45:13-16; Exhibit 3 [Powers Supplemental Testimony] at 8), but he is wrong. Verizon's letter setting forth the PIU factors that it asked OrbitCom to apply said no such thing. See Exhibit A (Direct Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-25. Thus, OrbitCom's stated reason for refusing to use the Verizon-provided PIU factors on traffic for which there was not sufficient call detail was invalid, and its failure to apply those factors was therefore unreasonable.

<sup>12</sup> See footnote 9 *supra*.

<sup>13</sup> As evidenced by the invoices referred to in footnote 2 *supra*, at all times relevant to the parties' billing dispute, OrbitCom charged Verizon a composite intrastate switched access rate of \$0.06 per minute of use, and one-tenth that amount, or \$0.006 per minute, for interstate switched access.

<sup>14</sup> Two of the columns in CONFIDENTIAL Exhibit LF-22 are labeled "ITA Use Q" and "ITE Use Q." The first refers to the quantity of intrastate usage, and the second refers to the quantity of interstate usage. To clarify Verizon's intent in labeling this exhibit, Verizon considers traffic volumes, i.e., usage figures, to be confidential, but for purposes of this proceeding, the "PIU" factors shown are not.



proceeding, OrbitCom's invoices to Verizon reflected a jurisdictional split of approximately 68% intrastate and 32% interstate. *Id.*

**a. Analysis of Call Records Demonstrates that the Jurisdictional Factors Used by OrbitCom are Unsupported and Unreasonable**

OrbitCom did not produce any evidence to support the 5% interstate/95% intrastate allocation of traffic that it used to generate Verizon's access bills from July 2007 through July 2008. As explained above, OrbitCom admitted that it did not use actual call detail information to determine the jurisdiction of the traffic included in access bills it issued during that period. Tr. at 51:20-23; Exhibit 2 (Powers Rebuttal Testimony) at 18:13 - 19:1. Early on in the dispute process, Verizon asked OrbitCom to provide it with call detail records so that Verizon could validate OrbitCom's billings. Exhibit A (Direct Testimony of Leslie Freet) at 10-11 and Exhibits LF-3, LF-5, LF-6 and LF-7. Not only did OrbitCom repeatedly refuse Verizon's requests, but it also did not provide any call detail information in this proceeding to justify the extreme and unreasonable jurisdictional allocation of traffic that it implemented during that 13-month period of time.<sup>15</sup> Indeed, as is discussed more fully below, OrbitCom did not even retain any of the call record information that could have provided factual support for its bills during that timeframe. See pp. 21-23 below. Having discarded all of the data that could have been used to support its billings, OrbitCom has been unable to carry its burden of proving that its charges were valid.

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<sup>15</sup> Following the Commission's decision granting Verizon's motion to compel, OrbitCom provided certain call records to Verizon. Those records contained data for calls made during five days in June 2009. See Exhibit B (Supplemental Testimony of Leslie Freet) at CONFIDENTIAL Exhibits LF-32 and LF-33. OrbitCom has never provided to Verizon or the Commission any records of calls made between July 2007 and July 2008. The record therefore lacks any evidence that could support a finding that OrbitCom's assignment of 95% of the calls to the intrastate jurisdiction during that period was valid.

In contrast to OrbitCom's failure to produce any factual evidence to justify its assignment of 95 percent of the traffic to the intrastate jurisdiction, Verizon did produce specific, detailed data that cast substantial doubt on the validity of the jurisdictional split that OrbitCom applied to its access bills. After the Commission granted Verizon's motion to compel the production of call detail records,<sup>16</sup> OrbitCom provided Verizon with certain EMI records. Those records contained the telephone numbers (or ANIs) that have been assigned to OrbitCom's retail end user customers. Once Verizon obtained that information, it reviewed its own internal network records to identify all of the calls that were originated by, or terminated to, those same OrbitCom end users' ANIs and that were carried over Verizon's long distance network on four days in four different weeks in 2008 (April 29, May 6, May 13 and May 20). Verizon's witness, Ms. Freet, described the analysis that Verizon conducted, explained the methodology the company used, and provided the detailed results of that analysis. See Exhibit B (Supplemental Testimony of Leslie Freet)<sup>17</sup> at 13-14 and CONFIDENTIAL Exhibit LF-35. As she explained, Verizon's analysis showed that on those four days, the percentage of originating interstate traffic, based on minutes of use, ranged between 58.1% and 93.1%, and averaged 72%. The volume of terminating traffic on the same days was smaller, and interstate usage averaged about 27% on those days. The percentage of all originating and terminating interstate traffic combined was 60.7% over those four days – *twelve times* the percentage OrbitCom actually applied. *Id.*

Mr. Powers failed even to address this detailed Verizon showing, let alone rebut it, either in his Supplemental Rebuttal Testimony filed on October 15, 2009, or subsequently during the

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<sup>16</sup> On August 25, 2009, the Commission granted in part Verizon's motion to compel. See *Order Granting Motion to Compel in Part; Order Approving Resetting Hearing Dates and Order Granting Filing of Supplemental Testimony, TC08-135*, dated September 15, 2009.

<sup>17</sup> References herein to Ms. Freet's Supplemental Testimony are to the "Corrected Supplemental Testimony of Leslie Freet," dated October 13, 2009.

evidentiary hearing. Not only were the results of Verizon's analysis unchallenged, but they are extremely significant. Verizon was the only party to produce any evidence about actual calls and the jurisdiction of calls that were placed to and from OrbitCom end users' telephone numbers during the period of time in which OrbitCom arbitrarily classified 95% of the traffic as intrastate.<sup>18</sup> Verizon's analysis of the call records reveals that the jurisdictional split on the days that it examined was vastly different, by orders of magnitude, from that reflected on OrbitCom's invoices during the same time. Because OrbitCom did not provide any factual information demonstrating that its billings based on the 5% interstate/95% intrastate jurisdictional split were correct, it has failed to meet its burden of proof that its access billings to Verizon during that 13-month period were accurate. The only evidence in the record shows that OrbitCom's billings based on an arbitrary "default 5% PIU factor" were not accurate, and OrbitCom has not proven otherwise.

**b. OrbitCom's Purported Justification for the Default PIU Factors It Used is Unreasonable**

OrbitCom offered only minimal explanation for the two sets of "default PIU factors" (5%/95% and 32%/68%) that it applied to Verizon's access traffic at different points in time. The first relates to OrbitCom's practice of classifying only 5% of the traffic as interstate, and 95% of the traffic as intrastate, during the 13-month period from July 2007 through July 2008.<sup>19</sup> According to Mr. Powers, "if OrbitCom uses one carrier for the PIC and a different carrier for

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<sup>18</sup> Verizon's analysis assumed that the ANIs assigned to OrbitCom's end users in June 2009 (as indicated in the EMI formatted records provided by OrbitCom) were also assigned to OrbitCom customers during the earlier time period because Verizon has no other way of identifying OrbitCom's end users during the relevant period due to the limited information that OrbitCom has provided. OrbitCom had the opportunity to challenge that assumption in Mr. Powers' supplemental testimony, but did not do so.

<sup>19</sup> As explained above, there is no mention of a 5% interstate– 95% intrastate PIU factor anywhere in OrbitCom's tariff.

the LPIC in South Dakota,<sup>20</sup> the carrier used for the LPIC will see very nearly all of the originating traffic from OrbitCom end users as Intrastate.” Exhibit 1 (Powers Direct Testimony) at 7:14-17. Nowhere in his prepared testimony, however, did Mr. Powers attempt to demonstrate how this general observation could be used to justify the specific default PIU factors that OrbitCom used to bill Verizon for access from July 2007 through July 2008.

Mr. Powers’ testimony on this point is confusing and inconsistent. On the stand, Mr. Powers stated: “[i]n this case we were – the 5 percent we used – for a period of time we used Verizon as an LPIC.” Tr. at 19:20-21. This statement appears to imply that OrbitCom did not consider Verizon a PIC during that 13-month period and therefore sent Verizon little or no interLATA traffic, which might make a 5 percent factor seem somewhat more reasonable. But Mr. Powers did not testify that Verizon was not a PIC, as well as an LPIC, during the period from July 2007 through July 2008. OrbitCom’s statements made during discovery, moreover, are to the contrary. In response to a data request, OrbitCom represented that “OrbitCom signed a wholesale agreement with MCI on 7-1-02 and since that date MCI has been considered as a PIC and LPIC *each and every month* in South Dakota.” See Tr. at 99:19-21 (Emphasis added). The fact that MCI was considered a PIC “each and every month” belies the suggestion that it was not handling any interLATA traffic during the 13 months in question. Also, Mr. Powers stated that “we use about four carriers and all of them are considered a PIC or an LPIC. In other words, we consider choosing any of them as a PIC or any of them as an LPIC.” Tr. at 99:7-10. Clearly, if OrbitCom wanted to demonstrate that its practice of classifying 95% of the traffic as intrastate during the 13 months in question was legitimate, it was incumbent on OrbitCom to produce reliable evidence that, throughout the entire period, Verizon was used only as an LPIC, was not

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<sup>20</sup> A long distance customer, or a reseller that purchases service on the end user’s behalf, may select a primary interexchange carrier, or “PIC,” to carry his or her interLATA long distance calls, and an intraLATA primary interexchange carrier, or “LPIC,” to handle the customer’s interexchange calls within a LATA.

considered a primary interexchange carrier, and carried only minimal amounts of interLATA (including interstate) long distance calls originated by OrbitCom's end user customers.

However, OrbitCom did not produce any such evidence.

In contrast to OrbitCom's meager showing on this point, Verizon produced substantial specific data, based on an analysis of its long distance network records, which showed what the actual jurisdiction of calls originated to and terminated by OrbitCom end users was on four days during the period in which OrbitCom was arbitrarily applying the default 5% interstate allocation factor. *See* pages 13-14 above. Verizon's documentary evidence is far more probative of what the jurisdictional nature of the traffic actually was during that 13-month period, and is more compelling than the unsupported, confusing explanation offered by OrbitCom in support of its use of the 5% interstate/95% intrastate default factor on bills it issued Verizon from July 2007 through July 2008. Thus, OrbitCom has failed to meet its burden of proving that the default PIU factor it used during that period was reasonable.

Mr. Powers admitted that OrbitCom improperly applied the 5% PIU to terminating and 800 (and other toll-free) traffic during that 13-month period (July 2007 through July 2008). Tr. at 20:1-17. *See also* Exhibit 3 (Powers Supplemental Testimony) at CONFIDENTIAL Exhibit MP 3-31. He said that this was "due to a mistake."<sup>21</sup> Tr. at 20:1-3. To remedy this error, Mr. Powers stated that OrbitCom was willing to adjust its billings for terminating and 800 traffic during that period of time by re-rating the terminating and 800 traffic as if 32% of the traffic

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<sup>21</sup> OrbitCom claimed that the 5% default PIU factor was appropriate if an IXC was not selected as the end users' "primary interexchange carrier." *See* discussion above at 14-15. But a customer's choice of a PIC only affects the routing of interexchange calls that an end user originates. Calls that the end user receives are transmitted by the IXC selected by the calling party. "800" and other toll-free calls are routed to the IXC selected by the customer assigned to the toll-free number. Thus, a customer's selection of a PIC or LPIC has no bearing on the identity of the carriers that transport terminating and toll-free traffic, nor does it have any effect on the jurisdiction of such traffic.

were interstate (as opposed to 5%). He added that “[i]t would be fairly easy to calculate” what that adjustment should be. Tr. at 20:11-17.<sup>22</sup>

With respect to the second default PIU factor used by OrbitCom, Mr. Powers stated that “OrbitCom can demonstrate, based on past and current records, that its PIU of 32% is extremely accurate.” Exhibit 3 (Powers Supplemental Testimony) at 14:12-13. It must be noted, however, that OrbitCom did not produce any factual evidence to back up this claim. Instead, Mr. Powers simply reported that the 32% interstate/68% intrastate jurisdictional split was set based on “where we thought it would be based on our experience” and OrbitCom’s familiarity with its customer base. Exhibit 2 (Powers Rebuttal Testimony) at 18:1-7. As evidence of this “experience,” OrbitCom presented only a single, one-page document. According to Mr. Powers, that document contained portions of two bills “from our main supplier of long distance services.” *Id.* at 18:9-11; *see* Exhibit 2 (Powers Rebuttal Testimony) at Exhibit MP-18.

That document does not substantiate OrbitCom’s use of a 32%/68% factor to allocate traffic from August 2008 forward. This is so for several reasons. First, the invoices Mr. Powers produced were issued in January and February 2004 (Tr. at 77:9-12), which was more than four years before OrbitCom started applying its “32%/68% default PIU” to Verizon’s traffic. Mr. Powers offered no contemporary documentation (such as current invoices from its long distance supplier(s))<sup>23</sup> to support his position that the use of a 32%/68% allocator between August 2008 and April 2009 was valid. This was a major failing. Second, those early invoices were not specific to South Dakota. Rather, the bills also included long distance traffic to or from at least

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<sup>22</sup> OrbitCom has not yet issued Verizon any credits for the amounts it admittedly overbilled.

<sup>23</sup> The bills that Mr. Powers relied upon were issued by Global Crossing. Tr. at 76:14 – 77:4. However, Mr. Powers stated that OrbitCom uses “about four carriers” and that, beginning in July 2002, OrbitCom considered MCI a PIC and LPIC each and every month. *See* Tr. at 99:7-10, 99:19-21. Obviously, information about long distance traffic carried by these other IXCs during the period relevant to the billing dispute in this case would have been more probative than the invoices issued by a single carrier four years earlier.

two other states. Tr. at 77:22-78:22. Thus, there is no basis for knowing whether the jurisdictional allocation of traffic reflected on the bills was representative of switched access traffic within South Dakota at the time, let alone four or five years later. And third, the volume of long distance traffic in early 2004, taking into account Mr. Powers' recollection that only about one-half of the traffic volumes shown on the two bills involved long distance traffic in South Dakota,<sup>24</sup> was significantly less than the volume of access traffic for which OrbitCom billed Verizon during the past year.<sup>25</sup>

In short, OrbitCom's reliance on a stale document to justify its billing practices more than four years later is seriously inadequate. The two Global Crossing bills are not probative of the actual jurisdiction of calls that OrbitCom began billing Verizon for in August 2008. Clearly, OrbitCom's meager showing is far outweighed by the detailed factual analysis Verizon provided using call records of actual traffic carried during the relevant time period. Thus, even if OrbitCom was permitted by its tariff to apply a "default PIU factor" (and, as demonstrated above, it was not), OrbitCom failed to satisfy its burden of proving that the allocator it chose was reasonable and appropriate.

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<sup>24</sup> Tr. at 78:17-22.

<sup>25</sup> Exhibit 2 (Powers Rebuttal Testimony) at MP-18 identifies the total number of calls each month in all of the states covered by the invoices. In early 2004, there were, on average, about 100,000 "switched outbound" domestic calls, and a similar amount of "switched inbound" domestic calls each month, but only about one-half of these calls originated or terminated in South Dakota. Exhibit 3 (Supplemental Testimony of Leslie Freet) at CONFIDENTIAL Exhibits LF-32 and LF-33 provides a summary of data contained in OrbitCom's call detail records, and specifies the total number of access calls per day in South Dakota on five days in June 2009. While the three exhibits do not provide for an easy "apples-to-apples" comparison, Exhibits LF-32 and LF-33 indicate that over the intervening five years, the volume of OrbitCom's long distance (and, hence, access) traffic in South Dakota has increased substantially.

**B. OrbitCom Failed to Provide any Evidence that the Charges it Billed for Allegedly Intrastate Switched Access Service were Valid**

As shown above, OrbitCom did not satisfy its burden of proving that it correctly determined the jurisdiction of access traffic and accurately assigned Verizon's switched access traffic to the proper jurisdiction. These deficiencies in its business practices resulted in OrbitCom not applying the correct jurisdictional rates to the access traffic for which it billed Verizon. Significantly, OrbitCom provided no evidence to demonstrate that the invoices it issued Verizon were accurate, valid, and consistent with its tariffs.

In Exhibit 1 to its Amended Complaint, OrbitCom provided a one-page summary of what it claimed were the total "intrastate amounts invoiced" to MCI and Teleconnect. Subsequently, OrbitCom included copies of actual invoice pages as part of its testimony. *See* Exhibit 4 and Exhibit 2 (Powers Rebuttal Testimony) at Exhibit MP 2-20. At most, the invoices show only that certain amounts were billed for the volumes of traffic shown. However, they do not constitute proof that the charges contained therein are valid, that OrbitCom's bills were issued in conformity with its intrastate tariff, or that the company applied the correct rates to the access traffic.

**1. OrbitCom Did Not Produce Any Call Detail Records That Would Prove That its Access Bills Were Accurate**

OrbitCom did not produce any call records – either prior to or during the hearing -- to demonstrate that the switched access charges it billed Verizon were valid and consistent with its tariff. By their nature, call detail records are the best evidence of actual calls that take place. Such records are initially created by switches in telephone carrier networks that process and transmit telephone calls. *See, e.g.*, Exhibit B (Supplemental Testimony of Leslie Freet) at 2:22-4:2, 7:14-22; Exhibit 3 (Powers Supplemental Testimony) at 3:19-4:4. Call records that contain



the originating and terminating phone numbers provide the most accurate indication of the jurisdiction of individual calls. Tr. at 162:10-11, 148:18-22. Accordingly, these types of records contain reliable information that can be used to demonstrate whether charges on a bill are correct, or not. As such, they are the best evidence for resolving any billing dispute.

For this reason, Verizon attempted to obtain call detail records once it began questioning the way in which OrbitCom was allocating traffic between the intrastate and interstate jurisdictions (that is, when OrbitCom started applying a 5% PIU to Verizon's traffic.) As early as February 2008, Verizon began asking OrbitCom to provide it with call detail records so that Verizon could determine if OrbitCom was billing the correct jurisdictional rates. Exhibit A (Direct Testimony of Leslie Freet) at 10-11 and Exhibits LF-3, LF-5, LF-6 and LF-7 and LF-12. Ms. Freet testified that, consistent with its normal auditing process, Verizon sought call records so that it could compare OrbitCom's bills with its own call detail records and validate the charges. Tr. at 148:9-150:23; 164:4-7; Exhibit A (Direct Testimony of Leslie Freet) at 10:3-11:2; Exhibit B (Supplemental Testimony of Leslie Freet) at 7:22-8:10.<sup>26</sup>

OrbitCom, however, repeatedly refused to provide any of the call detail information that Verizon requested, including in response to Verizon's discovery requests in this proceeding. Exhibit A (Direct Testimony of Leslie Freet) at 11:22-12:2, 13:1-15:21. Only after the Commission granted Verizon's motion to compel did OrbitCom provide Verizon with a sample of call records for five days in June 2009. OrbitCom did not, however, introduce any call detail records into evidence in this proceeding. Thus, it provided no concrete evidence to prove that it

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<sup>26</sup> Verizon's concern with OrbitCom's bills was prompted by the fact that Verizon's internal network records showed that approximately 77 percent of Verizon's interexchange traffic in South Dakota was interstate, and only 23 percent was intrastate. Exhibit A (Direct Testimony of Leslie Freet) at 35:17-36:5. This figure was confirmed by a more recent study of Verizon's interexchange traffic in South Dakota from 2007 through mid-2009. *Id.* at 36:13-37:2 and CONFIDENTIAL Exhibit LF-23.

had correctly identified the jurisdiction of all calls and had applied the correct jurisdictional rates to all of the access traffic for which it billed Verizon at any time relevant to this proceeding. Moreover, because OrbitCom never produced any records of calls made between July 2007 and July 2008, it did not provide the kind of evidence that would be needed to substantiate its claim that its assignment of 95% of the calls to the intrastate jurisdiction during that time period was correct and reasonable.

Not only did OrbitCom not introduce any call detail records into evidence, but it failed even to maintain any call detail records that might have demonstrated that its access bills were valid. OrbitCom made no effort to preserve such records even after Verizon began disputing its invoices and asked for relevant call records so that it might review the charges and resolve the dispute. Thus, even after the accuracy of its bills had been called into question, OrbitCom still did not keep the necessary information that could have shown whether or not the charges were accurate. And even after OrbitCom filed a formal complaint asking the Commission to rule that its process for jurisdictionalizing traffic was proper and that the charges it billed were valid, OrbitCom still did not preserve any of the underlying call records that might have supported its claims, or been used to refute them.<sup>27</sup>

OrbitCom offered no reasonable justification for its lack of a record retention policy. When Verizon first requested call detail records in February 2008, OrbitCom simply stated that its billing vendor “purged” call detail records from its system. Exhibit A (Direct Testimony of Leslie Freet) at 13:16-18 and Exhibit LF-9. Despite the fact that Verizon continued, in the

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<sup>27</sup> Once OrbitCom knew that the billing dispute was headed for litigation, it had an obligation to preserve relevant evidence, rather than continue to allow it to be destroyed. *See, e.g., Samsung Electronics Co., Ltd. V. Rambus Inc.*, 439 F. Supp. 2d 524 at 543 (E.D. Va. 2006)(overruled on other grounds) (“[w]hile a litigant is under no duty to keep or retain every document in its possession . . . , it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.”) (quoting *Wm. T. Thompson Co. v. General Nutrition Corp.*, 593 F. Supp. 1443, 1455 (C.D. Cal. 1984).

ensuing months, to request call detail records, OrbitCom took no steps to preserve those records. *See* Exhibit B (Supplemental Testimony of Leslie Freet) at 15:1-16. OrbitCom admitted during discovery that there had been no communications between it and its third-party billing vendor concerning the retention of call detail records. And, when asked to produce all correspondence and other documents concerning “any directions OrbitCom provided its third-party billing vendor ... concerning the retention of call detail records and other information used to produce invoices issued to Verizon, OrbitCom responded that there were “None.” *See* Exhibit E (OrbitCom Responses to Verizon Data Request Nos. 071 and 072). During his testimony, Mr. Powers also confirmed that OrbitCom had not instructed its billing company to retain call detail records or EMI-formatted data that were used to prepare bills. Tr. at 62:17 – 63:9, 65:21-66:12.<sup>28</sup>

Thus, not only did OrbitCom not present any concrete evidence to demonstrate that its charges were accurate, but it took no steps to actually preserve any documentary evidence that could have been used to substantiate, or refute, the legitimacy of its bills. Based on her experience,<sup>29</sup> Ms. Freet testified that OrbitCom’s practice of failing to keep call detail records itself and permitting its billing agent to immediately delete billing records was “highly unusual.” Exhibit A (Direct Testimony of Leslie Freet) at 13:19-20. As she explained, carriers typically retain such records because they are subject to record retention requirements imposed by

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<sup>28</sup> Mr. Powers testified that, since OrbitCom stopped using a third-party billing agent in the spring of 2009, “[o]ur policy right now is to keep [call detail records] until we’re sure we no longer need them.” Tr. at 69:9-10. However, he admitted that during the period of time when Verizon was seeking call detail records, “[w]e had no policy” regarding the retention of call records. Tr. at 70:3-7.

<sup>29</sup> Ms. Freet manages an organization that reviews, processes, audits and pays invoices that Verizon receives from more than 500 different service providers nationwide. Exhibit A (Direct Testimony of Leslie Freet) at 1:19-2:2.

regulators,<sup>30</sup> and the companies often rely on such data to respond to billing inquiries, audits or questions from regulatory agencies. *Id.* at 13:20-14:11. In this instance, OrbitCom’s intrastate tariff requires that, upon receiving a written dispute, “[t]he Company ... will investigate the merits of the dispute.”<sup>31</sup> It is difficult to imagine how OrbitCom could fairly investigate the merits of a billing dispute if it had discarded the underlying call records that were used to generate the bills in question. Thus, OrbitCom’s business practice in this regard was patently unreasonable. Because OrbitCom unreasonably failed to preserve documents that were highly relevant to the merits of its complaint even after it knew a dispute had arisen, the Commission should infer that these records would not support OrbitCom’s position.

**2. Verizon’s Analysis of the Available Call Records Demonstrates that OrbitCom Did Not Accurately Jurisdictionalize the Traffic and Apply the Correct Jurisdictional Rates**

The only analysis of call records submitted for the record was conducted by Verizon. That analysis casts serious doubt about the completeness of OrbitCom’s records and the validity of its bills. Verizon’s analysis provides strong evidence that OrbitCom did not correctly jurisdictionalize all of the access traffic for which it billed Verizon.

In her Supplemental Testimony, Ms. Freet described the process that Verizon used to review the available call records, and provided the detailed results of that analysis. She explained that, after the Commission granted Verizon’s motion to compel, OrbitCom provided Verizon call records that “were taken out of the daily usage files” and presented in EMI format. These records included calls made on three weekdays, June 24, 25 and 29, 2009, and two

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<sup>30</sup> For example, the Federal Communications Commission requires carriers to retain for a period of 18 months all records necessary to provide billing information associated with a call, including the name, address and telephone number of the caller; the telephone number called; and the date, time and length of the call. 47 C.F.R. § 42.6.

<sup>31</sup> VP Telecom, Inc. Tariff No.1, § 4.8.

weekend days, June 27 and 28, 2009.<sup>32</sup> Exhibit B (Supplemental Testimony of Leslie Freet) at 5:4-19. Ms. Freet prepared a summary of the number of calls and the amount of usage reflected on the EMI-formatted records that were provided. *Id.* at CONFIDENTIAL Exhibit LF-33.

The EMI formatted records produced by OrbitCom contained the telephone numbers (or ANIs) of the calling and called parties for each long distance call. Thus, the records identified the telephone numbers that are unique to OrbitCom's end users. *Id.* at 3:9-14. Using that information, Verizon reviewed its network records and attempted to match its own internal records with those provided by OrbitCom. Ms. Freet described the information that Verizon used for this analysis. She explained that

Verizon extracts call detail records from all of the switches in its long distance network on a daily basis, catalogues and stores the data, and uses the information for billing, cost management and network management purposes. Among other information, Verizon's internal records contain the telephone numbers of the calling and called parties for each long distance call.

*Id.* at 7:14-22. Once it obtained the ANIs associated with OrbitCom's end users, Verizon was able to identify and isolate call detail records of traffic on Verizon's long distance network associated with those same ANIs. Verizon pulled the long distance call records for all of the calls originated by or terminated to the ANIs associated with OrbitCom's end users on each of the five days in June 2009 listed above. *Id.* at 7:22-8:10. When comparing the two carriers' records, Verizon used broad search parameters in order to capture as many calls as possible. In particular, Connect Times and Call Duration were matched with a variance of plus or minus 5

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<sup>32</sup> The records included calls carried over only one of Verizon's two long distance networks in South Dakota. This network has been referred to in the record as CIC ("Carrier Identification Code") 0555. OrbitCom did not timely provide any EMI records for the second CIC, 0222. Accordingly, Verizon did not have an opportunity to review call detail information relating to that network. *Id.* at 5:21-6:17 and fn. 3. Several days before the hearing, Mr. Powers submitted two confidential exhibits (MP3-29 and MP3-30) which purported to summarize call volumes and PIUs for traffic associated with the 222 CIC, but those summaries were not supported by any actual call detail records.

seconds to allow for some slight variations, such as differences in call seizure time. *Id.* at 8:18-9:9.

After Verizon identified all of the long distance calls on the Verizon network associated with ANIs assigned to OrbitCom's end users, Verizon determined the jurisdiction of the traffic using standard industry protocols. *Id.* at 9:9-12. Ms. Freet produced a summary of the number of calls, the amount of usage, and the jurisdictional split of calls that Verizon had identified as a result of its examination of Verizon's internal records. *Id.* at 9:12-15 and CONFIDENTIAL Exhibit LF-34. To provide complete evidentiary support for her summary data, Ms. Freet also produced the entire set of call records that Verizon compiled and used to conduct its analyses. Those voluminous electronic records appear in CONFIDENTIAL Exhibit LF-37. *See also id.* at 11:21-12:3.

Ms. Freet testified that when Verizon compared OrbitCom's EMI formatted files with Verizon's own network records, Verizon found that the quantity of records did not match.<sup>33</sup> Verizon's records included numerous long distance calls that were placed by or terminated to OrbitCom end users during the five-day period that were not reflected in the EMI formatted records provided by OrbitCom. *Id.* at 10:4-11:19 and CONFIDENTIAL Exhibit LF-36. That exhibit shows the number of long distance calls for which Verizon could find "no match" (designated "NM") in OrbitCom's records, and the percentage of calls that those calls represented. Ms. Freet explained that, during the five-day period, Verizon's network records contained 70 percent more long distance calls than were included in OrbitCom's files. *Id.* at 11:14-19.

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<sup>33</sup> Ms. Freet explained that Verizon attempted to match the two companies' calling records using several criteria: (1) Originating ANI + Terminating ANI + Connect Time + Call Duration, (2) Originating ANI + Connect Time + Call Duration, and (3) Terminating ANI + Connect Time + Call Duration. *Id.* at 8:14-17.

After Verizon identified all of the calls in its switch records that did not appear in the OrbitCom EMI formatted records, Verizon reviewed each of the calls to determine its jurisdiction. Based on that review, Verizon determined that an overwhelming majority of the calls -- more than 90% -- were interstate. *Id.* at 12:5-12 and CONFIDENTIAL Exhibit LF-38. Verizon also examined all of the calls originated by or terminated to OrbitCom end users that were handled by Verizon's 0555 network during the five-day period. Ms. Freet provided the results of that analysis, as well. She explained that, for the traffic whose jurisdiction could be determined (based on the ANIs contained in the call detail records), 53.32% of the originating minutes of use during those five days were found to be interstate, and 67.3% of the terminating minutes of use were interstate. *Id.* at 12:12-21. Those results are also depicted in Exhibit B (Supplemental Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-34.

Based on these analyses, Ms. Freet drew several important conclusions. She explained that the percentages of interstate usage reflected on Verizon's network records cited in the previous paragraph are much higher than the percentages of interstate usage reflected on invoices that OrbitCom issued Verizon for the June 2009 billing period. Had OrbitCom used these figures instead, the amount of intrastate usage would have been much lower, and OrbitCom would have assessed its higher intrastate rates on a much smaller volume of traffic. This, in turn, would have reduced the amount that it billed Verizon. *Id.* at 12:21-13:4.

**a. OrbitCom's Criticisms of Verizon's Detailed Analysis are Invalid**

Mr. Powers attempted to challenge the reliability of Verizon's detailed analysis described above, but none of his criticisms are valid. Although Mr. Powers initially suggested that Verizon had not provided support for its study, the parties stipulated during the hearing that "Verizon has, in fact, produced documentation in response to [OrbitCom's] data requests which were partly

looking for source documents.” Tr. at 90:5-91:6. Accordingly, there is no basis for challenging Verizon’s detailed analysis of call detail records on the assumption that Verizon did not provide relevant supporting information. Moreover, as shown in the preceding section, Verizon fully explained the methodology it followed and the information it used to perform its analyses and the calculations it provided for the record.

Mr. Powers questioned three aspects of the call detail records produced by Verizon in Exhibit B (Supplemental Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-37. He commented that neither Verizon’s CIC (“Carrier Identification Code”) nor OrbitCom’s OCN appears in Verizon’s call records, and alleged that some of the call records did not include a telephone number associated with OrbitCom. During the hearing, Ms. Freet addressed each of his concerns, explained where pertinent information can be found in the extensive spreadsheets introduced by Verizon, and demonstrated that the alleged flaws in Verizon’s study do not exist. The record clearly shows that Mr. Powers’ criticisms lack merit.

First, Mr. Powers stated that many of the call records “didn’t have Verizon’s CIC of 555 on it;” rather, the CICs were of different telephone companies. Tr. at 25:6-9, 27:11-12, 28:1-2, 30:4-8. Based on this observation, he concluded that “there’s nothing that indicates that they’re Verizon calls.” Tr. at 28:5-6. Ms. Freet thoroughly refuted this point. She explained that all of the call records were taken “directly off our long distance switches. So there could only be calls that traveled over our long distance switches in these records.” Tr. at 192:23-192:2. Because the call records were pulled directly from Verizon’s own switches, it was not necessary for the company to stamp its own CIC on its own internal records.

Ms. Freet also responded to a related question concerning the fact that on some of the call records in Exhibit LF-37, “000” appears in Column O, which is labeled “Carrier Identification



Code.” That column identifies the long distance carrier that transported the call. Tr. at 192:17-18. During cross-examination, Ms. Freet was asked: “If this was a Verizon call, why wouldn’t Verizon’s CIC of 555 be on that?” Tr. at 165:19-21. She replied as follows:

Well, we know – number one, we know this is a Verizon call because these records were not sent to us by any other provider. They were actually pulled directly off our network records...our switch records which contain the calls that traveled over our long distance network. ... So when Craig Crowley queried this data he would have pulled all of the calls ... for the OrbitCom phone numbers ... for the 555 network. So we know that all of these calls traveled over the 555 network....

Tr. at 165:22-166:9. In a follow-up question, Mr. Smith asked whether this was true “even if those codes 555 or 222 aren’t on [the call records].” Tr. at 193:4-5. Again, Ms. Freet explained:

Well, these particular records are terminating calls. And in some – the information gets populated on the call along the way. And the carrier that handed these calls off to us did not populate the CIC in the record. But because the call went over our network and was terminated by OrbitCom, our network captured the call and that’s where these records resided was on our switches for our long distance network. So the only way that we could have pulled these records is if they were – if they traveled over our long distance networks and were captured in our records.

Tr. 193:8-18.

Ms. Freet also explained why the CIC field might not be populated in every instance. The most common scenario is when a carrier that has a wholesale agreement with Verizon directs traffic to Verizon’s long distance network but does not populate the CIC 555 in the call records. Tr. at 166:14-25, 194:5-10. Even if Verizon receives the call and the CIC is not populated, the call still goes over the Verizon network. According to Ms. Freet, “[w]e know that those calls did go over our network because they’re in our network records.” Id. at 168:6-13.

Of paramount importance, though, was Ms. Freet’s observation that, even in those instances where the CIC is not displayed on some of Verizon’s call records, “we found this exact

call in OrbitCom's call detail records." Tr. at 167:13-15; *see also* Tr. at 195:11-16, 193:19-21 ("I think what's key to note is that some of these calls where the CIC wasn't populated, those particular calls were found in OrbitCom's EMI records."). Using a specific example, Ms. Freet showed how to review Verizon's call records and find that even if a particular call record indicates a "CIC 000 in the OCN" field, other information in the same record shows that the call is associated with an OrbitCom end user. Tr. at 167:1-23. Ms. Freet concluded by stating that "the fact that the CIC may be 000 certainly didn't prohibit it from being a call that was also in OrbitCom's EMI records." Tr. at 167:15-18; *see also* Tr. at 195:18-22. Thus, the absence of any particular information in the CIC field in Verizon's call records has no bearing on whether OrbitCom received the call and billed Verizon for it.

Mr. Powers' second criticism of Verizon's call records was that "OrbitCom's OCN of 8080 is not shown on any of these records." Exhibit 3 (Powers Supplemental Testimony) at 11:7-10. But the fact that OrbitCom's OCN does not appear on Verizon's switch records should come as no surprise. This is because OrbitCom is a UNE-P provider and all of its traffic is routed through Qwest's local exchange switches in South Dakota. All of the calls routed through those switches are identified in industry routing guides as belonging to Qwest, even if the end user is a customer of a UNE-P provider that obtains service through those end offices. Exhibit A (Direct Testimony of Leslie Freet) at 34:11-20. As Ms. Freet explained, "all of our network records will always reflect Qwest as the originating OCN or the owner of the phone number because those ANIs appear to be owned by Qwest to everyone but OrbitCom." Tr. at 136:10-14.<sup>34</sup> Although OrbitCom obtains EMI records from Qwest that contain OrbitCom's OCN, the call detail records that Verizon, as a long distance service provider, receives from Qwest (or any other carrier) do not include the OCN of the UNE-P provider. Tr. at 141:14-22. As Ms. Freet

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<sup>34</sup> *See also* Verizon's Corrected Motion to Compel (filed August 20, 2009) at ¶ 9.

explained further, OrbitCom's "OCN wouldn't appear on anyone's network record anywhere." Tr. at 142:8-9. Because that information is not provided to Verizon, it logically would not appear in Verizon's internal network records. Accordingly, Mr. Powers' objection is of no significance.

Mr. Powers also observed that in some instances Verizon's call records contain the OCN of some carrier other than Qwest. Exhibit 3 (Powers Supplemental Testimony) at 11:10-15. Ms. Freet explained that this was likely the result of customers "porting" their telephone numbers from one carrier (e.g., PrairieWave) to Qwest. Because "there's a little bit of a lag time in getting [the] database updated," "[f]or a period of time the network is going to continue to reflect that OCN as a PraireWave OCN instead of a Qwest OCN." Tr. at 137:5-19.

After OrbitCom raised questions about some call records that did not show Qwest as the OCN, Ms. Freet conducted further analyses of the data in order to respond to this issue. She explained her approach and findings, as follows:

I took a look at the call detail records, and I took a look at every single call that did not have an originating or terminating OCN of 9631,<sup>35</sup> which is at issue here, and I extracted those records from this report and compared every ANI associated with those calls to the list of ANIs off the OrbitCom's records and validated that every one of those calls had an originating or a terminating ANI phoned [sic] by OrbitCom.

Tr. at 134:15-22; *see also* Tr. at 136:18-137:5. Ms. Freet stated that, for these call records, she used an access database to compare the ANIs in Verizon's call records with the ANIs obtained from OrbitCom.<sup>36</sup> "And in 100 percent of the examples for the phone numbers here, there was a

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<sup>35</sup> Qwest's OCN is 9631. Tr. at 138:2-3.

<sup>36</sup> In response to questions from Commissioner Kolbeck, Ms. Freet explained that Verizon obtained the terminating phone numbers of all of OrbitCom's customers from the EMI formatted records provided by OrbitCom. Tr. at 194:11-20.

match. So all of those phone calls are actually OrbitCom's end users, and calls either made to or from OrbitCom's end users," even though Qwest was not identified in the call records as the originating or terminating carrier (OCN). Tr. at 136:18-137:5.

Ms. Freet supplied two exhibits that supported her analysis. CONFIDENTIAL Exhibits G and H.<sup>37</sup> Each of the exhibits identifies the handful of OCNs other than Qwest's that appeared in Verizon's call records. Next to each OCN is a list of the telephone numbers that originated calls (the "From Number" in Exhibit G) or received calls (the "To Number" in Exhibit H). Ms. Freet confirmed that every one of these telephone numbers was obtained from OrbitCom's EMI formatted records, and is thus associated with an OrbitCom end user. And while Mr. Powers had suggested that there were a great number of calls associated with these OCNs, Ms. Freet explained that "[e]ven though it appears to be quite a few ANIs, really it's the same ANIs for multiple calls over and over again. So the summarized data shows you really the true number of phone numbers that were likely ported." Tr. at 139:19-22. A review of the summary page in each exhibit confirms that the actual number of ported phone numbers was not substantial.

The foregoing discussion also responds to Mr. Powers' third critique: that "some of these calls do not even have an OrbitCom ANI associated with the originating or terminating number." Exhibit 3 (Powers Supplemental Testimony) at 11:10-12. Significantly, Mr. Powers failed to identify a single call record provided by Verizon that did not contain the telephone number assigned to an OrbitCom customer. Mr. Powers explained this failure by saying that he did not "have a program ... to see if [the ANIs] are ours or not" (Tr. 28:9-11), but if his statement had any merit he should certainly have been able to support it with at least one concrete example. As he did not, the Commission may safely conclude that his contention is baseless.

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<sup>37</sup> Ms. Freet explained both of these exhibits in her testimony. Tr. at 135:21-136:3, 137:20-141:7.

Accordingly, there is absolutely no factual basis for Mr. Powers' suggestion that the calls contained in Verizon's records "are either fictitious or selected from records belonging to another carrier." Exhibit 3 (Powers Supplemental Testimony) at 11:23-12:1.

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OrbitCom, which bears the burden of proof, provided no call records or other evidence to substantiate the validity of any of the charges that it billed Verizon. Verizon, on the other hand, produced extensive factual evidence using actual records of long distance calls to and from OrbitCom's end users during a period of time relevant to the parties' billing dispute.

Accordingly, Verizon's showing is the best and only evidence concerning the sufficiency and validity of OrbitCom's call records. Verizon's detailed analysis demonstrated that the limited sample of call records furnished by OrbitCom was not sufficient to support the company's June 2009 invoice, and cannot be relied upon to validate any of OrbitCom's other bills issued during the two-year span of the carriers' dispute. Verizon's analysis of call records showed that a far greater percentage of calls on the days for which call information was available were interstate than was reflected on OrbitCom's invoice, thereby establishing that OrbitCom did not accurately determine the jurisdiction of the traffic or bill the correct jurisdictional rates.

While Verizon's detailed factual showing raised significant doubts about the completeness of OrbitCom's call records and the accuracy of its bills, it was not incumbent on Verizon to demonstrate the root cause of the apparent discrepancies and omissions in OrbitCom's call records. Nevertheless, the record does contain information about OrbitCom's downstream processes that may indicate potential sources of error.<sup>38</sup> Regardless of the causes,

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<sup>38</sup> OrbitCom expressed some dissatisfaction with its third party billing vendor. *See* Exhibit 2 (Powers Rebuttal Testimony) at 18:22-23, Tr. at 53:13-18 ("the billing company was not able to implement jurisdictional billing with any – with any degree of, let's say, reliability."); Tr. at 62:25-53:1 ("They didn't work that hard for us, but we used their services, yes.") Despite this lack of confidence, OrbitCom purchased billing software from that company, plus

there is nothing in the record that supports OrbitCom's claim that it correctly identified the jurisdiction of Verizon's access traffic, applied the correct rates and rendered bills to Verizon that fully comply with its own tariff. In the final analysis, OrbitCom did not satisfy its burden of proving that it is entitled to recover any amounts from Verizon.

#### **IV. ORBITCOM FAILED TO PROVE THAT IT IS ENTITLED TO BILL VERIZON FOR INTRASTATE "TANDEM SWITCHING" SERVICE**

The second major issue presented by the complaint is OrbitCom's claim that it may charge Verizon for "tandem switching" service. There are many reasons why it may not. The fundamental problem is that there is no evidence in the record which demonstrates that OrbitCom, in fact, performs tandem switching functions and provides tandem switching service to Verizon. On the contrary, the EMI call records generated by Qwest's switches demonstrate that *less than three percent* of the access traffic delivered by or to Verizon's long distance network to or from OrbitCom's customers was routed through and switched by Qwest's tandem switches on the days on which such call records were made available. This is because, as Verizon's evidence showed, virtually all of its interexchange traffic in South Dakota is routed directly to and from Qwest end office switches using direct end office trunks (or "DEOTs"), and

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hardware, so that it could move the billing functions in-house. See Exhibit 2 (Powers Rebuttal Testimony at 19:3-4), OrbitCom's response to Verizon Data Request 068(c). As the Commission is aware, it is not uncommon for software and new hardware to experience system glitches. Also, Mr. Powers' description of the processes that OrbitCom went through to produce call records for Verizon include a number of steps in which errors could occur. First, "OrbitCom takes the EMI records from Qwest and inputs them into the billing system... The billing system extracts the pertinent data, rates it, and creates an access bill." Exhibit 3 (Powers Supplemental Testimony) at 4:12-13. He added that "the billing system we use was designed to pull the information from the fields it needs, rate that information, and assemble the product into a bill." *Id.* at 4:18-19. According to Mr. Powers, "the system does not create CDR's, that is, call detail reports, when it does the billing." *Id.* at 4:19-20. Later, if a carrier requests CDRs, "the system must work through the files again and pull the actual records used to generate the bills." *Id.* at 5:1-2. Prior to providing Verizon with EMI formatted records, OrbitCom reported that it "was able to find a local programmer to separate the Verizon/MCI records out of the daily usage files for the dates that we provided you with CDR's out of our CABS billing system." *Id.* at Exhibit MP3-28. No information was provided about the identity, experience, or qualifications of this programmer. While Verizon does not have actual knowledge of how OrbitCom or its programmer performed all these tasks, it is possible that errors may have occurred at any one of these steps in the process.

is not routed through tandem switches. Because OrbitCom does not actually provide tandem switching service, its practice of billing Verizon for “tandem switching” is unreasonable; its position is also contrary to the Commission’s rules and OrbitCom’s own tariff.

**A. OrbitCom Bills Verizon a Composite Rate that Does Not Appear in its Tariff**

At the outset, it must be noted that the access bills that OrbitCom has issued Verizon do not specify rates for access service that appear in OrbitCom’s intrastate tariff. OrbitCom’s bills include a charge of \$0.06 per minute for intrastate access under a single line item that, on some invoices, has been labeled “local switching,” and on others, a “composite rate” for “usage charges.” See Exhibit A (Direct Testimony of Leslie Freet) at 42:16-19 and Exhibit LF-4; Exhibit 2 (Powers Rebuttal Testimony) at Exhibit MP 2-20, 9-11 of 270. This \$0.06 rate does not appear in any of the rate tables in OrbitCom’s intrastate tariff.<sup>39</sup> OrbitCom does have a rate for “Local Switching” in its tariff, but that rate is less than the rate shown on its bills. The rate for “Local Switching” that appears in Section 15.1.3.4.1 of OrbitCom’s tariff is \$0.008610 per access minute of use for originating and terminating calls.

OrbitCom’s bills do not contain a separate charge for tandem switching, even though discrete charges for “tandem switching” and “tandem transport” are set forth in OrbitCom’s tariff.<sup>40</sup> Instead, it appears that OrbitCom simply lumps all of the switched access rate elements together and charges a single composite rate. There does not appear to be anything in OrbitCom’s tariff that authorizes its practice of billing a single composite rate instead of the individual charges set forth in its tariff on file with the Commission. Billing in this fashion also

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<sup>39</sup> See VP Telecom, Inc. Tariff No. 1, Section 15.1.3 (Rates for Switched Access Services).

<sup>40</sup> See *id.* at § 15.1.3.4.3. The tariff rate for “Tandem Switching” is \$0.0077 per minute of use and \$0.0077 per mile. “Tandem Transport” rates in OrbitCom’s intrastate tariff begin at \$0.000237 per minute for distances of less than 8 miles, and are higher on calls of greater distances. Thus, charges for “tandem switching” represent approximately 13% of the \$0.06 per minute composite “local switching” rate that OrbitCom has billed Verizon.

makes it difficult to make billing adjustments and issue refunds or credits where, as here, the record shows that OrbitCom's imposition of charges for "tandem switching" was improper. Billing in a manner not authorized by its tariff is an unreasonable practice.

**B. OrbitCom's Practice of Billing Tandem Switching Charges Violates The Commission's Rules and its Own Tariff**

The Commission's Administrative Rules define "Tandem-switched transport" as traffic that is "switched at a tandem switch" located between the serving wire center and an end office, or between "a carrier's office containing the tandem switching equipment" and the local exchange carrier's end office. ARSD 20:10:29:01 (37). The Commission's rules also specify that a local exchange carrier's rate structure for tandem-switched transport is to be comprised of two rate elements. One is "tandem switching," and the other is tandem switched transport. ARSD 20:10:29:16.03. That same rule states that the tandem switching charge is to be assessed on interexchange carriers "that use the carrier's carrier's tandem switching facilities."

To be in compliance with these rules, two things must occur. First, the calls must be "switched at a tandem switch." Second, an IXC must "use" the carrier's tandem switching facilities in order to be charged for tandem switching. As will be explained below, OrbitCom has not demonstrated that either condition has been met with respect to Verizon's interexchange traffic.<sup>41</sup>

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<sup>41</sup> While Federal Communications Commission rules are not applicable to the intrastate charges at issue here, it bears noting that this Commission's Administrative Rules are consistent with the FCC's rules governing CLEC switched access rates. The FCC has emphasized that CLECs "can charge only for services that they provide." *In the Matter of Access Charge Reform, PrairieWave Telecommunications, Inc., et al, Petitions*, FCC 08-49 (CC Docket No. 96-262) at ¶ 26 (2008), citing *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd 9108 at ¶ 21 (2004). "Applying this principle to a situation where a single switch is capable of providing tandem and end office functions, the Commission found that competitive LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers. When a competitive LEC performs both functions, however, using two separate switches, it may charge for both functions, as would an incumbent LEC." *PrairieWave, supra*, at ¶ 26. As the Commission is aware, Qwest has deployed separate end office and tandem switches in South Dakota. Verizon demonstrates below that only a tiny fraction of its long distance traffic in South



The language of OrbitCom's intrastate tariff is consistent with these administrative rules. The tariff states that Switched Access Service consists of two rate categories: Direct Connect and Tandem Connect. VP Telecom, Inc. Tariff No. 1, at § 14.2.3 (Rate Categories). The tariff describes Tandem Connect service as follows: it "consists of *circuits from the point of interconnection with Customer's tandem provider* to the Company's Local Switching Center. This Tandem Connect rate category is comprised of a Minutes of Use (MOU) based End-Office switching and tandem switched transport charges." *Id.* at § 14.2.3.3 (emphasis added). The tariff also specifies that "Tandem Connect Service is *provided in conjunction with the tandem provider* serving the area." *Id.* at § 14.2.3.1 (emphasis added). Thus, the definition of OrbitCom's Tandem Connect service includes two key components. First, the service must be provided in conjunction with a tandem provider. And second, the service must include the provision of "circuits from the point of interconnection with [the] tandem provider."

As explained below, there are no facts in the record which show that the "tandem switching" service for which OrbitCom has billed, and continues to bill, Verizon included either of these elements. This is because, as a matter of fact, only a tiny fraction of Verizon's long distance traffic was routed through "the tandem provider serving the area." Instead, nearly all of Verizon's traffic is routed between its network and Qwest's local exchange switches using DEOTs. Verizon pays Qwest for these DEOTs precisely so that it can route its traffic more efficiently and cost-effectively than a tandem would permit. Thus, OrbitCom billed Verizon for a service that it did not provide per the explicit terms of its own tariff and the Commission's Administrative Rules.

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Dakota is routed through a tandem switch. Applying the principles enunciated by the FCC to the remaining traffic, if no tandem switching is performed, a LEC may not charge the IXC for that function.

**C. The EMI Records Produced by OrbitCom Confirm That 98 Percent of Verizon's Traffic Was Not Routed Through Tandem Switches**

It is undisputed that the EMI call records that Qwest provides OrbitCom (and other carriers) contain information that indicates if a call is routed through Qwest's tandem switch, or not. Mr. Powers described these records as follows: "EMI records are created by the LEC telephone switches that handle the phone calls transmitted through them. Every switch that the call goes through may contribute something to the same EMI record depending on what the switch is programmed to do." Exhibit 3 (Powers Supplemental Testimony) at 3:19-21.

Ms. Freet explained that the Category 11 EMI records that Qwest provides OrbitCom<sup>42</sup> include an indicator, called the "Routing Method," that indicates whether a call is routed through a tandem switch. She stated that this information appears in Position 51 of the Category 11 record. The industry guidelines for EMI records specify that this field is to be populated on each call record with a "1" if the call is routed through the LEC's tandem switch, and "0" if the call is "direct" routed from or to an end office without going through the tandem. Exhibit B (Supplemental Testimony of Leslie Freet) at 2:5-15, 16:8-16 and Exhibit LF-31 at 4.<sup>43</sup>

According to Ms. Freet, the Category 11 EMI records initially generated by Qwest provide the best and most reliable indicator of whether a call is routed through a tandem, or whether it is

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<sup>42</sup> Pursuant to the Qwest Local Services Platform Agreement ("QLSP") that OrbitCom entered into, Qwest agrees to provide the "CLEC with usage information necessary for CLEC to bill for InterLATA and IntraLATA Exchange Access to the toll carrier ... These Exchange Access records will be provided as Category 11 EMI records." See Exhibit 6 (QLSP) at Attachment 2, §2.3.2.

<sup>43</sup> Mr. Powers echoed Ms. Freet's testimony on these points. He described his "understanding ... [that] when the call goes through the tandem switch, which is a separate switch from the central office switch, [it] literally stamps a 1 into that field. And that means been here and now it's gone, went through the tandem. ... The computer puts it there." Tr. at 118:7-21. Referring to Position 51 in the EMI record, Mr. Powers stated that "a 0 is direct routed, bypassing the tandem, supposedly went over a DEOT. That's the indicator for it. Actually I think the field is blank in the first place and after it goes through the tandem the tandem switch actually stamps a 1 on the record and sends it on its way." Tr. at 117:21-18:2. See also Tr. at 94:22-25 ("There's a field on the EMI record field 51 that is stamped or it has a 0. It's not stamped with a 1 which means it didn't go through the tandem. If it goes through the tandem the tandem switched [sic] stamps are a 1.")

routed directly from an end office to an IXC's network or, in the opposite direction, whether it is routed directly from the IXC's network to the LEC's end office. *Id.* at 21:14-17.<sup>44</sup>

Ms. Freet explained that Verizon reviewed the EMI formatted records provided by OrbitCom to determine if the calls billed by OrbitCom were routed through a tandem switch. This is a simple, straight-forward process, because one only needs to review the call record to see if a "1" appears in the file, or not. *Id.* at 16:18-21. Ms. Freet provided the results of Verizon's analysis of the EMI formatted records produced by OrbitCom. The analysis showed that 98.34 percent of the calls were direct routed, and that only 1.66 percent of the calls were "tandem routed." *Id.* at 16:21-17:1. The detailed results of that analysis were presented in her testimony. *See id.* at CONFIDENTIAL Exhibit LF-39.

Mr. Powers did not seriously contest Verizon's findings. On the contrary, he "agreed that most [call records are] stamped as though it was directly routed." Tr. at 117:17-19. Similarly, he acknowledged that "[i]f [a call] goes through the tandem the tandem switched [sic] stamps are a 1. And I would agree that not many of them are stamped with a 1." Tr. at 94:24-95:3.

In addition to Verizon's analysis of OrbitCom-provided EMI formatted records, Ms. Freet testified that Verizon reviewed its own network records for the same days for which OrbitCom had produced call records. Verizon analyzed calls that were originated by or terminated to ANIs that were identified as OrbitCom end users in OrbitCom's EMI formatted files. Ms. Freet explained that Verizon's internal records contain information that permit the company to determine whether long distance calls were routed to or from the local exchange

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<sup>44</sup> Verizon's CLEC affiliate, MCImetro, relies on the EMI call records it obtains from Qwest when determining whether to charge interexchange carriers for tandem switching. Section 5.2.3.1.2 of MCImetro's South Dakota access tariff ("Tandem Connect") states that "[t]he Company will bill the Tandem Connect rate *when the ILEC's Category 11 Daily Usage Feed Records indicate that the call was routed through the ILEC's tandem.*" (Emphasis added) *See* Exhibit 2 (Powers Rebuttal Testimony) at Exhibit MP 2-16; *see also* Tr. at 96:10-97:8. This practice is consistent with the Commission's Administrative Rules, ARSD 20:10:29:01 (37) and 20:10:29:16.03, discussed above.

network via DEOTs or through the access tandem switch. She reported that Verizon's internal network records were entirely consistent with the information contained in the Tandem/DEOT "Routing Method" field in the EMI formatted records provided by OrbitCom. Specifically, the analysis of Verizon's internal network records confirmed that more than 97% of the total long distance calls to and from OrbitCom end users were routed over DEOTs, and fewer than 3% were routed through a tandem. Exhibit B (Supplemental Testimony of Leslie Freet) at 17:11-18:2.

The reasonable conclusions to be drawn from these detailed and complementary analyses are that (1) only a small minority of Verizon's long distance calls were, in fact, tandem routed, and (2) OrbitCom improperly imposed "tandem switching" charges on calls that were not actually routed through a tandem switch. *Id.* at 18:4-11.

Mr. Powers "agree[d] that the DUF/EMI records do show a large percentage of the calls routed through a direct connect." Exhibit 3 (Powers Supplemental Testimony) at 17:6-7. Nevertheless, and despite his acknowledgment that "EMI records are created by the LEC telephone switches that handle the phone calls transmitted through them [and that] [e]very switch that the call goes through may contribute something" to the call record (*id.* at 3:19-21), Mr. Powers asserted that "OrbitCom's experience ... has demonstrated that this field in the DUF/EMI records is notoriously inaccurate." *Id.* at 17:16-19. His testimony revealed, however, that his claim was based not on "experience" but on hearsay (i.e., his "contacts" with other carriers), which the Commission should disregard as unsubstantiated and unreliable. Moreover, Mr. Powers did not present any factual information to substantiate his accusation that the EMI records generated by switches operated by the largest and most well-established network provider in South Dakota (Qwest) are "inaccurate." Accordingly, his attempt to deny the

accuracy of the information contained in the EMI records that were initially provided by OrbitCom and subsequently analyzed by Verizon is not credible, and his argument is entitled to no weight. His claim was also contradicted by the additional independent evidence submitted by Verizon that corroborated the fact that virtually all of Verizon's traffic in South Dakota is routed through DEOTs, and not through tandem switches. (See below).

**D. Verizon Produced Documentary Evidence Demonstrating that Virtually All of its Long Distance Traffic in South Dakota is Routed Over DEOTs to and From LEC End Offices, and Not Through Tandem Switches**

As demonstrated above, the EMI records produced by OrbitCom show that about 98% of Verizon's long distance traffic to and from OrbitCom customers is routed directly through LEC end offices, and not through tandem switches. In addition, Verizon provided concrete evidence demonstrating how its traffic is actually routed in South Dakota.

Ms. Freet testified about Verizon's extensive use of Direct End Office Trunks, or "DEOTs," between its long distance network and local exchange carrier end offices in South Dakota. *See* Exhibit B (Supplemental Testimony of Leslie Freet) at 19:6-21:17.

In South Dakota, Verizon has ordered DEOTs from Qwest that are used to carry long distance calls between Verizon's long distance network and Qwest's local exchange network through which OrbitCom's end users receive and place long distance calls. When these facilities are used to transport traffic between the two carriers' networks, the calls "bypass" the tandem switch.

*Id.* at 19:11-18. In his Rebuttal Testimony, Mr. Powers expressed skepticism about some of the facilities that Verizon had identified as DEOTs,<sup>45</sup> however, Ms. Freet's response demonstrated that his contentions were wrong. She provided a detailed description of the relationship between "host" and "remote" switches in Qwest's local network architecture, and explained that "the existence of a

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<sup>45</sup> *See* Exhibit B (Powers Rebuttal Testimony) at 25:14-27:13.

remote-host switching architecture has nothing to do with whether or not calls are also routed through tandem switches.” *Id.* at 20:2-21:14 and Exhibit LF-41. Mr. Powers subsequently conceded the point. During the hearing, in response to a question from Mr. Rislov, Mr. Powers stated that he was not “argu[ing] any further about that.” *See* Tr. at 105:14-106:10; *see also* Tr. at 214:20-21 (noting that a DEOT can be used to route traffic to a specific CO [central office] or to “the CO and whatever remotes that it’s hosting for.”)

After OrbitCom challenged Verizon’s initial showing about the extent to which its long distance traffic is routed to or from OrbitCom customers over DEOTS (rather than through tandem switches), Verizon provided additional documentation about the DEOT facilities that it has installed and uses. In response to a data request issued by OrbitCom, Verizon provided copies of numerous service orders it had placed with Qwest to install DEOTs between the Verizon and Qwest networks in South Dakota. These Access Service Requests (“ASRs”) were admitted into evidence. *See* Exhibit C.<sup>46</sup> Mr. Powers acknowledged that this production was substantial, noting “[t]here must be 50 of them here.” Tr. at 92:9. In response to another data request from OrbitCom, Verizon also produced samples of bills for “entrance facilities” that it had received from Qwest; these entrance facilities are used in conjunction with DEOTS. *See* Exhibit D.

OrbitCom did not produce any evidence to refute Verizon’s specific factual showing that it has DEOTs into virtually every end office in South Dakota in which OrbitCom has end user customers. Thus, all of the record evidence – both the EMI formatted records provided by OrbitCom, and the separate analysis of Verizon’s internal network records – demonstrates conclusively that more than 97% of Verizon’s long distance traffic in the state is routed over DEOTs, and not through tandem switches. Accordingly, it was improper for OrbitCom to charge

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<sup>46</sup> *See* Tr. at 120:15-121:17 (indicating that Verizon provided responses to OrbitCom’s data requests, issued on October 9, 2009, on October 14 and 20).

Verizon for “tandem switching” on 100 percent of the traffic. Its ongoing practice of doing so is unreasonable, in violation of the Commission’s Administrative Rules and the terms of its own tariff.

**E. OrbitCom’s Explanation for Why it May Bill Tandem Switching Charges Is Not Reasonable**

OrbitCom did not seriously challenge Verizon’s demonstration that it has deployed a substantial number of DEOTs and that nearly all of its long distance traffic in South Dakota is routed over those facilities. OrbitCom’s claim that it may lawfully bill Verizon tandem switching charges was instead premised on two theories. First, OrbitCom argues that, while Verizon may have installed DEOTs between its network and Qwest’s end offices, Verizon has not ordered DEOTs from OrbitCom. OrbitCom’s second theory appears to be that, because it leases certain network functionalities from Qwest pursuant to the QLSP agreement, it is free to charge whatever it likes, even if it does not actually perform any tandem switching function or provide tandem switching, and even if Verizon’s long distance calls are not actually routed through any tandem switches. Neither theory is valid, and neither justifies OrbitCom’s unreasonable practice of charging Verizon for tandem switching on all of Verizon’s long distance traffic.

OrbitCom’s practice is particularly egregious because at no time did it produce any evidence to prove that, in situations where Verizon has a DEOT installed into Qwest end offices, those facilities are not used to route traffic and that, instead, calls are actually routed through the tandem switch. Rather, OrbitCom is simply seeking payment for a “service” regardless of whether it actually provides that service. But this notion is flatly inconsistent with general principles of public utility regulation. Particularly for a service like switched access, for which access customers have no competitive choice, and the rates for which are not disciplined by

competitive market forces, it is imperative that a carrier's rates and practices be just and reasonable.<sup>47</sup>

**a. OrbitCom's Insistence that Verizon Order DEOTs from it is Unreasonable on Both Technical and Economic Grounds**

Ms. Freet testified that Verizon installs high-capacity direct end office trunks, when warranted, in order to achieve certain networking and operational efficiencies and reduce costs. Exhibit A (Direct Testimony of Leslie Freet at 43:16-44:2). Mr. Powers argued, however, that Verizon's deployment of DEOTs is not relevant to OrbitCom's ability to charge for tandem switching, because "a DEOT to Qwest is not a DEOT to OrbitCom." Exhibit 2 (Powers Rebuttal Testimony) at 28:11-12. According to Mr. Powers, Verizon must also place orders with OrbitCom and purchase separate and redundant DEOTs if Verizon wants to avoid paying OrbitCom for "tandem switching."

Mr. Powers' position is apparently based on the following notion: "Verizon's calls have to get to and from OrbitCom's end users somehow. And if they don't have a DEOT to us, it has to go through the tandem." Tr. at 38:5-7. This extraordinary statement bears no relation to the facts of record. The call records of both Qwest and Verizon clearly show that virtually all of Verizon's long distance calls to and from OrbitCom end users do not go through a tandem switch. Verizon does not dispute that it has not ordered any DEOTs from OrbitCom, but that fact has no bearing on how its long distance traffic is routed in South Dakota. Thus, Mr. Powers' contention is based on a false premise. His statement is also not supported by any evidence

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<sup>47</sup> See *In the Matter of Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6791 (1990); *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶¶ 28-40 (2001); and *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶¶ 17 & 119 (2004).



showing that OrbitCom, in fact, provides a tandem switching service in connection with the vast majority of Verizon's long distance traffic.

OrbitCom's theory is seriously flawed. The suggestion that Verizon should order DEOTs from OrbitCom makes no sense from an operational standpoint. Mr. Powers' statements appear to imply – wrongly – that OrbitCom's end offices and network are somehow operationally separate and distinct from Qwest's. In fact, OrbitCom's end users are served over the same facilities that Qwest uses to provide service to other customers throughout its local exchange network.

The notion that Verizon should purchase DEOTs between its network and "OrbitCom's end offices"<sup>48</sup> makes little sense because, as a practical matter, Verizon could not use such facilities when it terminates long distance calls in South Dakota. As explained previously, telephone numbers assigned to OrbitCom's end users are associated with a Qwest end office, and there is nothing from an IXC's perspective that distinguishes OrbitCom customers from the customers of Qwest or any other UNE-P provider served by a particular end office. For example, an Orbitcom customer in a given Qwest end office may have the phone number 650-341-2222. That same NPA-NXX (650-341) is used for every Qwest customer and every other UNE-P CLEC customer that is served by that same end office. For routing purposes, the telephone numbers (650-341-xxxx) are associated with Qwest as the "owner" of that end office, and they appear as Qwest telephone numbers in industry routing guides. For these reasons, long distance calls terminated by an interexchange carrier are necessarily routed to a specific *Qwest*

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<sup>48</sup> Mr. Powers acknowledged that, even in that scenario, Qwest would be responsible for physically provisioning the circuits between a Qwest end office and the IXC's network, emphasizing that "[w]e're not even allowed to work on their network." Tr. at 208:24-209:8. OrbitCom's role would simply be that of an intermediary that takes an order and passes it on to Qwest to implement. OrbitCom did not explain what value it would add by assuming that role.

end office.<sup>49</sup> This critical fact contradicts the hypothetical situation posited by OrbitCom, because there is no information available to Verizon indicating that a particular call is intended for an OrbitCom customer. Even if it were possible for Verizon to order a DEOT from Orbitcom (which has not been established), Verizon would have no way of knowing if it should route any particular call over the DEOT that it paid OrbitCom for, presumably so that it could directly route calls to “OrbitCom’s end office.” Instead, in accordance with standard industry routing protocols, Verizon’s long distance network would deliver the call (and all calls) to the Qwest end office in which the telephone number(s) resides.<sup>50</sup> As a result, the DEOTs purchased from OrbitCom would be entirely useless; they would remain idle on all long distance calls that are terminated to OrbitCom’s customers.<sup>51</sup> Purchasing the DEOTs, then, would be a wasteful expense that benefits no one, especially long distance service customers who would, at least indirectly, be forced to bear the additional unnecessary cost.

OrbitCom’s theory that “DEOTs to OrbitCom” can be used to re-direct long distance traffic over Qwest’s network is also in conflict with Qwest’s QLSP agreement. That agreement describes Qwest’s provision of the “Shared Transport Network Element” as part of QLSP Service: “Shared Transport provides interoffice switching within the local calling area and is the collective interoffice transmission facilities shared by various carriers (including Qwest) between end-office Switches and between end-office Switches and local tandem Switches.” *See* Exhibit 6

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<sup>49</sup> *See, e.g.*, Verizon’s Corrected Motion to Compel, filed August 20, 2009, at ¶ 9.

<sup>50</sup> With respect to calls originated by OrbitCom end users, Ms. Freet questioned whether “OrbitCom has any ability to tell Qwest how to route that traffic.” Tr. at 187:20-22. OrbitCom did not present any evidence on this point. Accordingly, there is nothing in the record proving that OrbitCom has the authority to direct Qwest, with respect to calls that Qwest switches, how the calls should be routed and over what facilities.

<sup>51</sup> Purchasing a high-capacity two-way trunk that can only be used, at most, in a single direction would undermine the operational efficiencies that typically provide the incentive for an IXC to install the DEOTs in the first place.

(QLSP Agreement), Attachment 2 at § 1.5.1. The description of Shared Transport service includes some critical conditions:

*CLEC traffic will be carried on the same transmission facilities between end-office Switches, between end-office Switches and tandem Switches, and between tandem Switches in its network facilities that Qwest uses for its own traffic, [and]*

*Shared Transport uses the existing routing tables resident in Qwest Switches to carry the End User Customer's originating and terminating local/extended area service ("EAS") interoffice traffic on the Qwest interoffice message trunk network.<sup>52</sup>*

The QLSP clearly specifies that Qwest will route traffic for a CLEC's customers in the same manner -- using its standard routing protocols and the same network facilities -- that Qwest uses to route all other traffic over its local exchange network.<sup>53</sup> Accordingly, Mr. Powers' claim that if "you've got a direct end office trunk to Qwest, OrbitCom's traffic's not supposed to run over that" (Tr. at 103:2-4) is flatly wrong. Importantly, OrbitCom did not produce any evidence to prove its proposition that it has the right to prevent Qwest from routing an IXC's traffic over DEOTs that Qwest installed at the IXC's request. Nor did OrbitCom produce any evidence to support its suggestion that it may require Qwest to alter its routing tables for traffic associated with OrbitCom's customers, and dictate the manner in which Qwest routes traffic over its network. Thus, absent compelling evidence supporting such a theory, it is apparent that the deployment of hypothetical "DEOTs to OrbitCom" would conflict with standard routing protocols and the QLSP agreement itself.

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<sup>52</sup> *Id.* at §1.5.1 (emphasis added); *see also id.* at §1.5.2 (for transport beyond Qwest's local interoffice network, "[t]he existing routing tables resident in the Switch will direct both Qwest and CLEC traffic over Qwest's interoffice message trunk network.")

<sup>53</sup> Although Mr. Rislov questioned whether "it really makes any sense for them [OrbitCom] to transport over direct trunking connections that you [Verizon] have established with Qwest" (Tr. at 187:5-7), the QLSP agreement makes clear that Qwest assumes responsibility for routing calls through its network, over its facilities, pursuant to the routing protocols it has established.

OrbitCom's theory leads to other irrational results, as well. Ms. Freet explained that, in almost all instances, Verizon's "network information is telling us that those calls are not going through the tandem. Those calls are being routed through our DEOT and sent to the OrbitCom end office." Tr. at 187:22-25. She explained that the use of DEOTs between the Verizon and Qwest networks (as opposed to hypothetical DEOTs suggested by Mr. Powers) produces "an efficiency for us" and saves the company from having to pay the tandem switching and tandem transport rates. *Id.* 187:14-188:1; *see also* Exhibit A (Direct Testimony of Leslie Freet) at 43:16-44:2. But, as she explained in response to a question from Mr. Smith, "if we're paying for the DEOT and then we also get billed tandem switching for calls that traversed over the DEOT" – which is what OrbitCom has done for the past two years – then Verizon is being billed twice, once by Qwest and again by OrbitCom, for transiting the call. *Id.* at 191:22-192:5. Because so few calls actually get routed through the tandem, the extra charges imposed by OrbitCom for "tandem switching" are clearly unwarranted.

This economic distortion becomes exacerbated if OrbitCom's theory is taken to its logical conclusion. In testimony and in cross-examination, Verizon's representatives addressed scenarios in which from four to six competing UNE-P providers all have customers served by a particular Qwest end office switch. Tr. at 189:10-17, 214:15-215:25. In order to avoid paying tandem switching and transport charges, an IXC would, using OrbitCom's logic, be required to purchase a DEOT from each CLEC. These multiple DEOTS would then provide multiple, redundant connections between the IXC's network and the same Qwest end office. In addition, each of the trunks would be dedicated to a single CLEC and could only be used to carry calls for that particular CLEC's end users (setting aside, for the moment, the IXC's inability to use the facilities when terminating long distance traffic, as discussed above). It is obvious that these

arrangements would negate the efficiencies that DEOTs are intended to achieve. In addition, the need to purchase multiple, redundant DEOTS between the same two locations would increase the IXC's cost for no apparent good reason. While Mr. Powers acknowledged that "[t]hat would be my understanding," (Tr. at 214:22-215:25) he made no effort to explain how such an approach represents sound network engineering, let alone makes economic sense. Indeed, it does not.

**b. OrbitCom's Contractual Arrangement with Qwest Does Not Justify its Practice of Billing Verizon for Tandem Switching**

OrbitCom's final point appears to be that, as a customer of Qwest's QLSP service arrangement, it is lawfully entitled to bill Verizon for tandem switching. Verizon does not dispute that a UNE-P provider that actually performs tandem switching functions for calls that are actually routed through a tandem switch may bill the IXC for the tandem switching it provides. That said, merely because, under a QLSP arrangement, a UNE-P carrier's customer's traffic *may* in some instances be routed through a Qwest tandem switch does not necessarily mean that all traffic does. Tandem switching charges are appropriate only if the calls are, in fact, switched at the tandem.

Mr. Powers claimed that "[b]ecause OrbitCom is actually providing either all of the access service elements or the functional equivalent of them to its own end users, it is allowed to charge all of the elements of the bill for that service." Exhibit 3 (Powers Supplemental Rebuttal) at 15:16-16:3. But his merely saying so does not make it so. OrbitCom has not provided any evidence demonstrating that it "is actually providing" all of the access service elements including, in particular, tandem switching. In fact, the evidence in the record overwhelmingly demonstrates that all but a tiny fraction of Verizon's long distance traffic is routed over DEOTs, and not through a tandem switch.

During the hearing, Mr. Powers asserted that under the QLSP agreement, “OrbitCom has the right – can use these Qwest – the services we purchase to provide any telecommunications service.” Tr. at 37:12-14. Verizon does not dispute that OrbitCom may use the services it leases from Qwest, but the real issue is whether OrbitCom, in fact, provided tandem switching services for which it can legitimately charge Verizon. The record shows it did not. There is nothing in the record to support Mr. Powers’ vague suggestion that the QLSP essentially establishes “a partition switch.” See Tr. at 102:17-19.<sup>54</sup> Nor does the QLSP grant OrbitCom the unfettered ability to use Qwest’s entire network as it chooses. Rather, OrbitCom only pays the applicable recurring and nonrecurring rates for the services that it uses. See Exhibit 6 (QLSP) at Attachment 2, §3.0 (Rates and Charges).<sup>55</sup> While it is appropriate for the company to recover costs that it reasonably incurs, it is not legitimate for OrbitCom to impose charges on other carriers if it does not actually provide a “tandem service.”<sup>56</sup>

As explained at page 46 above, the QLSP agreement specifies that all “CLEC traffic will be carried on *the same transmission facilities* between end-office Switches [and] between end-office Switches and tandem Switches *that Qwest uses for its own traffic.*” See Exhibit 6 (QLSP) at Attachment 2, §1.5.1 (emphasis added). OrbitCom has not shown how its theory that an IXC

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<sup>54</sup> Similarly, suggestions that OrbitCom has “a system,” “provision[s] that system” and that IXCs “use [its] system” (Tr. at 105:8-10) misstate the nature of the service arrangement described in the QLSP contract. Mr. Powers acknowledged that the interexchange traffic “has to go into the Qwest switch because that’s who’s collecting the traffic.” Tr. at 103:18-19.

<sup>55</sup> OrbitCom did not produce any evidence that it has paid Qwest’s charges for “Shared Transport” service (which pursuant to the QLSP, as described above, includes the use of Qwest’s interoffice switching and transmission facilities between tandem and end office switches) for those calls for which OrbitCom has billed Verizon tandem switching charges. If a call was truly tandem routed, Qwest would have charged OrbitCom, pursuant to the QLSP, the applicable usage-based tandem-related charges for that particular call. OrbitCom did not show that it has been billed or paid any such charges on calls to or from Verizon’s network.

<sup>56</sup> Under the QLSP agreement with Qwest, OrbitCom purchases certain services, not an entire “network.” The rates it pays include recurring charges (which are usage based) and vary by volume. See Exhibit 6 (QLSP Agreement at Attachment 2 §§ 3.1 and 3.2.) A CLEC, therefore, can reasonably recover its costs through the services that it actually provides to its end users and access customers. Reasonable cost recovery does not contemplate that a CLEC may charge its customers for services that it does not provide.

must order a “DEOT to an OrbitCom end office” comports with this language in its contract with Qwest. This language in the QLSP should also serve to eliminate some of the confusion about that agreement that was apparent during the hearing. For example, one questioner assumed that the QLSP “states that any kind of direct trunking service would have to be ordered from OrbitCom under its agreement with Qwest rather than a trunking arrangement ordered through Qwest directly by the customer.” Tr. at 102:5-9. As shown above, however, the QLSP says no such thing. The QLSP agreement states that traffic will be routed over Qwest’s network “on the same transmission facilities” that Qwest uses for its own traffic. The QLSP therefore does not contemplate that a UNE-P provider will even have the ability to establish separate DEOTs, and the QLSP certainly does not mandate that an access customer *must* order direct trunking service from the CLEC. Instead, Qwest is responsible for the routing of all traffic over its network, including that of UNE-P providers that obtain service pursuant to contracts for QLSP service.

To conclude, nothing in the QLSP agreement provides any justification for OrbitCom’s practice of charging Verizon for tandem switching service. Accordingly, OrbitCom is not entitled to be paid for a service that it does not provide.

**V. ORBITCOM’S BILLING PRACTICES ARE UNREASONABLE;  
ACCORDINGLY, IT IS NOT ENTITLED TO ANY OF THE RELIEF IT  
REQUESTED IN ITS AMENDED COMPLAINT**

As the record demonstrates and as shown above, OrbitCom’s billing practices are unreasonable in many respects. To summarize, during the period of time relevant to this case:

- OrbitCom did not follow the procedures set forth in its intrastate tariff for determining the jurisdiction of switched access traffic;
- OrbitCom did not use available call detail information to determine the jurisdiction of calls for which it billed Verizon;

- OrbitCom failed to take appropriate measures to preserve essential call records that constituted evidence of the actual jurisdiction of the traffic for which it billed Verizon, but instead permitted those records to be deleted or destroyed;
- OrbitCom applied arbitrary PIU factors to Verizon's traffic, contrary to language in its tariff which prohibits OrbitCom from using PIU factors when it has sufficient call detail available to determine jurisdiction;
- OrbitCom failed to produce any evidence to justify any of the PIU factors that it applied to Verizon's traffic since July 2007;
- OrbitCom failed to justify the use of a 5% PIU factor that it applied to Verizon's switched access bills during a 13-month period, from July 2007 through July 2008;
- Verizon's network records show that a much higher percentage of Verizon's calls (an average of 72% on the days studied) during that period were interstate;
- OrbitCom admitted that its application of a 5% PIU factor to toll-free and terminating traffic between July 2007 through July 2008 was a "mistake;" however, it has not yet issued Verizon credits or made any refunds for the amounts it admittedly overcharged Verizon;
- Analyses of the available call detail records for five days in June 2009 show that the actual percentage of interstate traffic on those days was significantly higher than the percentage reflected on OrbitCom's invoice to Verizon that month;
- OrbitCom's invoices to Verizon since July 2007 improperly imposed "intrastate" rates on many calls that were, in fact, jurisdictionally interstate;
- OrbitCom's invoices to Verizon include a charge of \$ 0.06 per minute for "local switching," but this rate does not appear anywhere in its intrastate tariff;
- OrbitCom's invoices to Verizon do not specify charges for individual rate elements that are set forth in OrbitCom's intrastate tariff;
- OrbitCom charges Verizon for "tandem switching," but the charges for that alleged "service" are not separately stated on its invoices, and the invoices do not specify the rate for tandem switching that is set forth in OrbitCom's intrastate tariff;
- EMI formatted records provided by OrbitCom and Verizon's own network records demonstrate that less than 3% of Verizon's long distance traffic is routed through a tandem switch in South Dakota;
- OrbitCom produced no evidence demonstrating that it actually performs tandem switching functions or provides tandem switching on long distance traffic for which it bills Verizon;



- OrbitCom's practice of billing Verizon tandem switching charges on 100% of the switched access traffic is unreasonable because less than 3% of Verizon's long distance traffic is routed through a tandem switch in South Dakota;
- OrbitCom's practice of billing Verizon tandem switching charges on 100% of the switched access traffic violates the Commission's Administrative Rules, which only authorize a carrier to charge for "tandem-switched transport" service if calls are "switched at a tandem switch" and if an IXC uses the LEC's tandem switching facilities;
- OrbitCom's practice of billing Verizon tandem switching charges on 100% of the switched access traffic violates its own tariff, which states that "Tandem Connect" service must be provided "in conjunction with the tandem provider serving the area" and must use circuits to the tandem provider;
- OrbitCom's insistence that Verizon obtain DEOTs from OrbitCom to connect to OrbitCom end offices is infeasible, impracticable, unsound from an operational standpoint, uneconomic and wasteful; and
- OrbitCom failed to produce any evidence demonstrating that the amounts contained on the invoices it issued Verizon were proper, reasonable and consistent with its tariff.

OrbitCom has the burden of proving all material facts that form the basis of its Amended Complaint. As the complainant, the burden of persuasion also rests on OrbitCom. The foregoing shows that OrbitCom failed to satisfy either of these burdens. It did not prove that the charges it billed Verizon were legitimate. In particular, OrbitCom did not prove that its invoices correctly applied its tariffed intrastate rates only to traffic that was, in fact, jurisdictionally intrastate. On the contrary, the substantial detailed factual evidence presented by Verizon, based on the available call detail records and Verizon's own internal network records, demonstrates that OrbitCom failed to properly apply the correct jurisdictional rates on many calls for which it billed Verizon. Accordingly, OrbitCom is entitled to none of the relief requested in its Amended Complaint, and the Commission should deny its Amended Complaint in full.

## **VI. THE COMMISSION SHOULD GRANT VERIZON'S COUNTER-CLAIM**

The preceding discussion recites a litany of problems with OrbitCom's billing procedures. Those problems resulted in OrbitCom making significant errors in the switched access bills it issued Verizon, causing OrbitCom to overcharge Verizon in several respects.

By failing to determine the correct jurisdiction of all of Verizon's interexchange traffic, OrbitCom improperly imposed its higher intrastate rates on large amounts of calls that were, in fact, interstate. Because OrbitCom's intrastate switched access rates are *ten times higher* than its interstate rates, this error caused OrbitCom to substantially inflate Verizon's bills by substantial amounts. OrbitCom billed Verizon using certain arbitrary PIU factors that were not justified and did not represent the actual jurisdictional distribution of traffic, as reflected in the EMI formatted records provided by OrbitCom and Verizon's own network records. This practice also caused OrbitCom to impose its higher intrastate charges on large amounts of interstate calls. Because these practices resulted in OrbitCom substantially overcharging Verizon, Verizon is entitled to either credits or refunds for the amounts that OrbitCom overcharged it. To the extent Verizon paid the amounts in dispute and OrbitCom retained those amounts, Verizon is entitled to a refund of the amounts it overpaid.

OrbitCom admitted that it improperly applied a 5% PIU factor to all of Verizon's terminating long distance traffic, as well as all 800 and other toll-free traffic, during a 13-month period, from July 2007 through July 2008. OrbitCom admitted that Verizon is entitled to credits or refunds for the amount of the overcharges. Because OrbitCom has not yet issued any credits or refunds, the Commission should require it to do so now.

OrbitCom's bills to Verizon also included charges for tandem switching. The tariffed rates for such service were not separately stated on OrbitCom's invoices, but were buried in the

composite \$0.06 per minute rate that OrbitCom charged for “local switching.” Because OrbitCom did not perform any tandem switching function or provide tandem switching service on more than 97% of Verizon’s long distance traffic, these charges were improper and unreasonable. Verizon is entitled to credits or refunds for the charges OrbitCom billed it for a “tandem switching” service that OrbitCom did not provide. To calculate the amount owed Verizon will require OrbitCom to re-rate all of the traffic from July 2007 through the present, by backing-out the tariffed rates for tandem switching from the composite “local switching” rate that OrbitCom billed Verizon. The tandem switching rates should be applied to no more than 3% of the entire traffic volume during that period of time.

Serious questions about OrbitCom’s billing practices are highlighted in the record, in particular, the manner in which OrbitCom determines the jurisdiction of switched access traffic. Those questions were not resolved by the limited five-day sample of call records that was produced after the Commission granted Verizon’s motion to compel. Ms. Freet testified that it would not be reasonable to try to extrapolate from the five-day call sample (which only included calls on three weekdays) to validate a full-month’s bill. Accordingly, she recommended that OrbitCom produce complete EMI call records for a full month, as this would enable both companies to match call records with actual invoices, which reflect a full month of usage. Tr. at 160:3-18.<sup>57</sup>

The results of that analysis would better inform all sides and the Commission about the actual volume and jurisdictional nature of the traffic. Verizon would agree that the results of that analysis could be applied to resolve the historical billing disputes that are the subject of this proceeding. The analysis could help determine an appropriate jurisdictional factor that could be

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<sup>57</sup> Ms. Freet explained that monthly bills “don’t contain any call detail records. They contain summary-level data which contains no phone numbers.” Tr. at 162:8-10.

used to more precisely calculate the amount of overcharges and the amount of credits or refunds to which Verizon is entitled. The amount of overcharge would be calculated based on the difference between the jurisdictional split determined through the analysis of one full month's worth of call detail records and the jurisdictional split arbitrarily applied by OrbitCom during two different periods (i.e., 5% interstate/95% intrastate between July 2007 through July 2008, and 32% interstate/68% intrastate from July 2008 forward).

Based on the record, it should not be difficult for OrbitCom to produce a full month of EMI records.<sup>58</sup> More important, the effort would enable the parties, for the first time, to fully reconcile OrbitCom's call records with its invoices. While OrbitCom's complaint should be denied for the reasons stated above, the additional call records discussed here would provide a more informed basis for determining the amounts that should be credited or refunded to Verizon as a remedy for OrbitCom's improper overcharges.

## VII. CONCLUSION

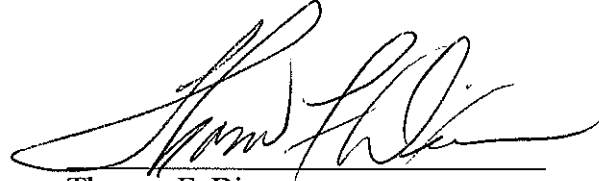
For all of the foregoing reasons, Verizon respectfully requests that the Commission deny OrbitCom's Amended Complaint in all respects, and that it not grant any of the relief requested by OrbitCom. Verizon requests that the Commission instead grant Verizon's counter-claim, and

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<sup>58</sup> OrbitCom produced five days of EMI formatted records for CIC 055 on September 1, 2009, only seven days after the Commission ruled on Verizon's motion to compel. Subsequently, on October 2, 2009, OrbitCom produced five days of EMI formatted records for CIC 0222, which was only three days after Verizon reminded OrbitCom that those records had not yet been produced. *Compare* Exhibit 2 (Supplemental Testimony of Leslie Freet) at 6 n. 3 with Exhibit 3 (Powers Supplemental Testimony) at 6:10-12.

that it require OrbitCom to issue Verizon credits or refunds for the amounts that OrbitCom has unreasonably and improperly overcharged Verizon.

Dated this 4th day of December, 2009.



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**CERTIFICATE OF SERVICE**

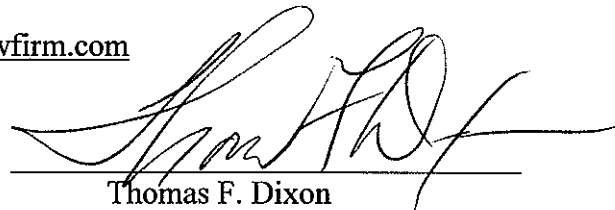
I, Thomas F. Dixon, hereby certify that on the 4<sup>th</sup> day of December 2009, I filed electronically and served by e-mail a true and correct copy of the foregoing in the above captioned action to the following:

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