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July 25, 2007

**RECEIVED**

JUL 25 2007

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Patty Van Gerpen  
Public Utilities Commission  
500 E Capitol  
Pierre SD 57501

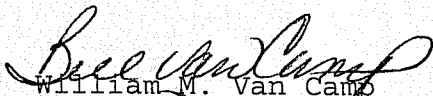
Re: Global Crossing/Orbitcom #07-079 Confidential Exhibits

Dear Patty:

Enclosed please find Confidential Exhibits 1, 2 and 3 which are exhibits for the Motion to Dismiss. We were unable to receive the exhibits from our client in electronic format and are unable to format them in my office in electronic format so we are filing them with you via hard copy. We will file the Motion to Dismiss separately by electronic format today.

This letter is intended as service of process to all interested parties in this matter.

Sincerely,

  
William M. Van Camp  
Attorney at Law

WVC:lrd

enclosures

cc: Michael Shortley  
Kara Von Bockern  
Darla Rogers

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

<b>In the Matter of</b>	)	
	)	
<b>Complaint of Orbitcom, Inc.</b>	)	<b>Docket No. TC 07-079</b>
<b>against Global Crossing</b>	)	
<b>Telecommunications, Inc.</b>	)	

**MOTION TO DISMISS**

Global Crossing Telecommunications, Inc. (“Global Crossing”) respectfully moves to dismiss the complaint of Orbitcom, Inc. (“Orbitcom”), pursuant to SDCL §15-6-12(b)(1) and 15-6-12(b)(5). As Orbitcom seeks to recover exclusively *interstate* charges from Global Crossing, the matter is beyond the jurisdiction of the Commission. If Orbitcom wishes to pursue this matter, its must present its case to the Federal Communications Commission (“FCC”).

**Statement of Facts**

According to the complaint, Orbitcom is a competitive local exchange carrier (“CLEC”) that provides switched access services to, among others, Global Crossing. While Orbitcom does have an access tariff on file with this Commission, it has not filed a tariff for *interstate* switched access services with the FCC. Rather, Orbitcom has sought to charge Global Crossing pursuant to its *intrastate* switched access tariff for *interstate* switched access services.

Orbitcom neglects to mention that the rates in its intrastate tariff are approximately ten times the maximum permissible amount that may be tariffed at the federal level for interstate switched access.<sup>1</sup> At the rate Orbitcom seeks to charge for

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<sup>1</sup> Under the FCC’s access charge regime, a CLEC’s charge for interstate access charges is capped at the rate charged by the incumbent LEC in the relevant study area. *See Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd. 9923 (2001); 47 C.F.R. § 61.26.

interstate switched access, its services are presumptively detariffed and it must have an agreement with its customer in order to charge those rates. It has no such agreement with Global Crossing and Global Crossing has no intention of executing one.

Orbitcom attaches to its complaint a file showing amounts that are allegedly due. As can be seen from the filed annexed hereto as Confidential Exhibit 1, Orbitcom's figures and Global Crossing's figures are close –Orbitcom's complaint alleges that \$322,657.64 is past due, while Global Crossing shows a corresponding amount of \$322,500.62. However, of the \$322,500.62, Global Crossing has paid \$134,312.99 which represents Orbitcom's intrastate access charges. What remains outstanding are billings of \$188,344.65, which are comprised exclusively of Orbitcom's *interstate* access charges. Confidential Exhibit 2 hereto consists of the face pages of Orbitcom's invoices to Global Crossing. As is evident, Orbitcom itself separates its usage charges into interstate and intrastate components. The sum of the interstate and intrastate components from the invoices equals the interstate and intrastate charges shown on Confidential Exhibit 1. Attached as Confidential Exhibit 3 is a cancelled check as evidence of payment to Orbitcom of its \$134,312.99 in intrastate access charges.

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CLEC rates above the benchmark are mandatorily detariffed and may be assessed upon an interexchange carrier, such as Global Crossing, only pursuant to a negotiated agreement. *See id.*, Eighth Report and Order, FCC 04-110, ¶ 4 (2004). As plaintiff admits (Complaint, ¶¶ 6, 12), Orbitcom has no such agreement with Global Crossing. Absent such an agreement or an effective tariff (of which Orbitcom has neither), the carrier may not lawfully assess any access charges. *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192 (2002) (finding that wireless providers whose interstate services were detariffed by statute could not collect access charges absent a contract with the affected interexchange carrier).

This footnote is by way of background, as this motion does not present the merits of the complaint to the Commission. It does, perhaps, explain Orbitcom's reluctance to pursue its complaint in the proper forum.

Thus, on the basis of the complaint and the documentary evidence that is referenced in the complaint, it is apparent that Orbitcom is seeking to recover interstate charges through a complaint filed with this Commission.

### **Argument**

#### **THE COMMISSION LACKS JURISDICTION TO ENTERTAIN ORBITCOM'S COMPLAINT.**

As is apparent from the complaint and the documentary evidence cited in the complaint and compiled by Global Crossing, Orbitcom is seeking an order from a State Commission compelling Global Crossing to pay federal charges. Simply stating the nature of the relief requested provides the grounds for the dismissal of the complaint. It is an elementary principle of federalism, not to mention the relevant statutes, that the states maintain authority over *intrastate* rates, while the federal government maintains authority over *interstate* rates. *See generally Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 360 (1986) (“[t]he [Communications] Act establishes, among others things, a system of dual state and federal regulation over telephone service.”); *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 234 (1930). *See also Iowa Network Services, Inc. v. Qwest Corp.*, 363 F.3d 683, 686 (8<sup>th</sup> Cir. 2004) (observing that carriers file rates for interstate access services with the FCC and intrastate access tariffs with the state commissions.).

Section 49-31-3 of the South Dakota Consolidated Laws sets forth the scope of this Commission’s authority. It provides that “[t]he Commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation.” This section implements the dual authority both by providing the

Commission the authority over communications matters within the state and denying authority over matters governed by federal law.

Interstate charges, including interstate access charges, are governed by federal law. Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), makes the provisions of the Act applicable to “all interstate and foreign communication by wire or radio. . .” and section 2(b) of the Act reserves to the states authority over “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”

South Dakota and federal law are fully complementary in this regard. This Commission possesses jurisdiction over intrastate rates and services. The FCC possesses jurisdiction over interstates rates and services. Orbitcom has impermissibly confused the two by bringing a complaint relating to interstate charges before this Commission.

### **Conclusion**

Orbitcom’s complaint raises federal issues. Accordingly, Orbitcom must bring that complaint to the FCC and this Commission should dismiss the complaint.

Dated this 25 day of July, 2007.

OLINGER, LOVALD,  
McCAHREN & REIMERS, P.C.  
117 E. Capitol-PO Box 66  
Pierre, SD 57501

By: /s/ William M. Van Camp  
William M. Van Camp  
Attorney for Global Crossing  
Telecommunications, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25 day of July, 2007, he filed electronically (excluding the confidential exhibits which are being filed and served separately on this date) pursuant to commission rules and mailed a true and correct copy to Darla Rogers of Global Crossing Telecommunications, Inc. Motion to Dismiss to:

Kara Van Bockern  
SD Public Utilities Commission  
500 E. Capital  
Pierre SD 57501

Patty Van Gerpen  
SD Public Utilities Commission  
500 E. Capital  
Pierre SD 57501

Darla Rogers  
Attorney for Orbitcom, Inc.  
PO Box 280  
Pierre SD 57501

and that said mailing was by US mail, first class with postage thereon prepaid and mailed at the US Post Office in Pierre, South Dakota.

/s/ William M. Van Camp  
William M. Van Camp  
Attorney for Global Crossing  
Telecommunications, Inc.