

**Before the
PUBLIC UTILITIES COMMISSION
of the
STATE OF SOUTH DAKOTA**

**In the Matter of Complaint of Orbitcom,)
Inc. against Global Crossing) Docket No. TC08-005
Telecommunications, Inc.)**

MOTION TO DISMISS

Global Crossing Telecommunications, Inc. ("Global Crossing") respectfully submits, pursuant ARSD 20:10:01:11:01, this motion to dismiss the complaint of Orbitcom, Inc. ("Orbitcom"). In its complaint, Orbitcom attempts to portray its action as a complaint to recover intrastate access charges that Global Crossing has allegedly failed to pay. Orbitcom asserts that the total amount outstanding from Global Crossing, at the time the complaint was filed, was \$283,121.33, of which \$227,042.76 represented charges for intrastate services.¹

The complaint is a fabrication. This is *not* a dispute over intrastate charges. Indeed, the *only* reason that Orbitcom is attempting to classify this dispute as an intrastate matter is because it is operating in violation of federal law. Orbitcom does not have an interstate tariff on file with the Federal Communications Commission ("FCC"). It does not because it cannot. Orbitcom wishes to charge (and indeed has attempted to charge Global Crossing) access rates for interstate access services in excess of the federal benchmark. It cannot do so pursuant to tariff, because the FCC has presumptively detariffed CLEC access charges above the benchmark.² Under the FCC's rules, CLECs are *only* permitted to charge rates for interstate access services in excess of the benchmark pursuant to contract with a particular interexchange carrier.³ Orbitcom would

¹ *Complaint*, ¶¶ 12-13 & Att. A.

² *Access Charge Reform*, CC Dkt. 96-267, Seventh Report and Order, 16 FCC Rcd 9923, ¶¶ 45-62 (2001).

³ *Id.*, ¶¶ 84-87 (mandatory detariffing of access charges in excess of benchmark).

like permission to overcharge Global Crossing,⁴ but Global Crossing has declined this invitation. Because Orbitom has no federal tariff and no contract with Global Crossing, there is no lawful rate for interstate access that Orbitcom may charge Global Crossing.⁵ In fact, Global Crossing has *overpaid* Orbitcom approximately \$750,000 in interstate access services and will soon be filing a complaint with the FCC to recover those erroneous payments.

None of this is (or at least should be) of any moment to this Commission. What Orbitcom's own documents will show is that Global Crossing has fully paid *all intrastate* access charges assessed by Orbitcom. Thus, there is nothing for this Commission to adjudicate as there is no controversy over which this Commission has jurisdiction.

In its complaint, Orbitcom asserts that Global Crossing owes its \$227,042.76 in intrastate access charges. It submits a one page attachment in support of its claim. That attachment is unsworn, unexplained and undocumented. There are no source materials – like invoices, payments, dispute letters etc.

In this motion, Global Crossing will demonstrate, *through Orbitcom's own documents and through properly authenticated records*, that the complaint is a fabrication. In summary, Orbitcom's own records, together with collateral supporting documentation from Global Crossing shows the following:

Orbitcom billing from Jan '07-Jan. '08	\$559,676.14
Global Crossing payments for same period	\$310,656.38
Disputes for same period	\$249,019.82

⁴ Cf. *Complaint*, ¶ 14 ("Orbitcom would like to negotiate a 'going forward rate.'").

⁵ See *Sprint PCS and AT&T Corp.*, WT Dkt. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2001), *pet'n for rev. disp'd. AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

The difference between the \$249,019.82 that Global Crossing disputed and the \$283,121.33 in total that Orbitcom claims Global Crossing owes is a \$34K payment for intrastate charges that Global Crossing recently sent out. See Affidavit of Sean Herrick, attached hereto.

More importantly, the total amount that Orbitcom claims is due simply cannot be true. Orbitcom *admits* that Global Crossing paid it for all intrastate charges prior to July 12, 2007.⁶ Yet, Orbitcom's own invoice records *do not and cannot* support a claim that Global Crossing has an unpaid balance for intrastate (or for that matter any) charges of 283 thousand dollars since July 12, 2007.

Each month, Orbitcom sends invoices electronically to Global Crossing. Attached as Confidential Exhibit 1 to the Herrick Affidavit is an Excel file summarizing the invoices as billed by account code, by month. The spreadsheet shows the total billings by Orbitcom, broken down based upon the face of the bill between the interstate and intrastate jurisdictions. Attached as Confidential Exhibit 2 are cancelled checks that represent proof of payment by Global Crossing of the undisputed amount of the invoices.

Attached as Confidential Exhibits 3-21 of the Herrick Affidavit are the face pages of the invoices, by account code that Orbitcom has identified in its complaint, by month, together with the associated payment and dispute history. What is apparent is that Global Crossing has paid all of the amounts billed as intrastate (and some charges billed as interstate) and had disputed *only those amounts billed by Orbitcom as interstate*. Global Crossing is, unlike Orbitcom, not asking the Commission to take Global Crossing's word. It is asking the Commission to *take Orbitcom's word when it prepared its own invoices in the ordinary course of business*. Those records are markedly different from what Orbitcom purports to represent to the Commission in its complaint.

⁶ See *Complaint*, ¶ 12; Letter from Matthew J. Meert, Orbitcom, to Patti VanGerpen, Executive Director, Public Utilities Commission (July 27, 2007), filed in Dkt. TC 07-079.

At the end of the day, the documentary evidence shows that Global Crossing has paid Orbitcom \$310,656.38 in intrastate access charges *as classified by Orbitcom itself*. Global Crossing has further disputed \$249,019.82 of charges that *Orbitcom itself classified as interstate*.

There is nothing for the Commission to decide. Global Crossing has fully paid Orbitcom for the services that Orbitcom itself invoiced to Global Crossing as intrastate. Whether Global Crossing owes Orbitcom \$200+ thousand for interstate charges, as Orbitcom contends (once the factual errors in its complaint are corrected), or whether Orbitcom owes Global Crossing approximately \$750,000, as Global Crossing contends, are matters that the FCC will ultimately decide.

This Commission should dismiss Orbitcom's complaint with prejudice.

Respectfully submitted this 22nd day of February, 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 22nd day of February, 2008, he mailed a true and correct copy of the Motion to Dismiss along with the attached Affidavit and its Exhibits to

Matthew J. Meert
Director, VoIP & Network Services
Orbitcom, Inc.
1701 N. Louise Avenue
Sioux Falls SD 57107

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.