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July 28, 2008

Patty Van Gerpen
South Dakota PUC
500 E Capitol
Pierre SD 57501

Re: TC08-005 Global Crossing

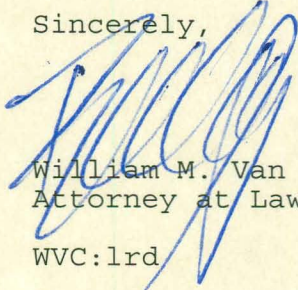
Dear Patty:

Attached please find the Answer, Affirmative Defenses and Counterclaims of Global Crossing in this matter.

We are filing this on this date as was agreed upon between myself and Orbitcom's counsel as the responsive due date for our Answer in this matter.

If you have any questions on this, please feel free to let me know.

Sincerely,



William M. Van Camp
Attorney at Law

WVC:lrd

enclosures

cc: Kara Sommer
Meredith Moore
Michael J. Shortley, III-Global Crossing

7. States that the allegations contained in paragraph 7 of the complaint are without legal significance. To the extent necessary, denies the allegations contained in paragraph 7 of the complaint.

8. States that the document referred to in paragraph 8 of the complaint speaks for itself. To the extent an answer is necessary, denies the allegations contained in paragraph 8 of the complaint.

9. States that the allegations contained in paragraph 9 of the complaint are without legal significance. To the extent necessary, denies the allegations contained in paragraph 9 of the complaint.

10. States that the document referred to in paragraph 10 of the complaint speaks for itself. To the extent an answer is necessary, denies the allegations contained in paragraph 10 of the complaint.

11. Denies the allegations contained in paragraph 11 of the complaint.

12. Denies the allegations contained in paragraph 12 of the complaint.

13. Denies the allegations contained in paragraph 13 of the complaint.

14. States that the allegations contained in paragraph 14 of the complaint are without legal significance. To the extent necessary, denies the allegations contained in paragraph 14 of the complaint.

**AS AND FOR A FIRST
AFFIRMATIVE DEFENSE**

15. The complaint fails to state a claim upon which relief may be granted.

**AS AND FOR A SECOND
AFFIRMATIVE DEFENSE**

16. The Commission lacks subject matter jurisdiction, in whole or in part, over the complaint.

**AS AND FOR A THIRD
AFFIRMATIVE DEFENSE**

17. The complaint is within the primary jurisdiction of the Federal Communications Commission.

**AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE**

18. The complaint is barred, in whole or in part, by the applicable statutes of limitations.

**AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE**

19. The complaint is barred by the doctrines of laches, waiver and estoppel.

**AS AND FOR SIXTH
AFFIRMATIVE DEFENSE**

20. The complaint is barred by the doctrine of unclean hands.

**AS AND FOR A SEVENTH
AFFIRMATIVE DEFENSE**

21. The complaint is barred by plaintiff's prior breaches of applicable regulations and its own tariff.

**AS AND FOR AN EIGHTH
AFFIRMATIVE DEFENSE**

22. The complaint is barred by the filed tariff doctrine and plaintiff's own tariff.

COUNTERCLAIMS

Global Crossing for its counterclaims against plaintiff/counter-defendant Orbitcom, respectfully alleges as follows:

Parties

23. Global Crossing is a Michigan corporation with its principal place of business at 225 Kenneth Drive, Rochester, New York 14613. Global Crossing is certificated to provide interexchange long-distance services within South Dakota and on an interstate and international basis.

24. Upon information and belief, Orbitcom is a South Dakota corporation with its headquarters at 1701 N. Louise Ave., Sioux Falls, South Dakota 57107.

Jurisdiction

25. The Commission has jurisdiction over the intrastate switched access rates and business practices of Orbitcom as hereinafter described, further, pursuant to ARSD 20:10:01:01.02 and SDCL 15-6-13, Global Crossing files its Counterclaims.

Background

26. In order to terminate calls to a called party, Global Crossing, as a long-distance -- or interexchange -- carrier, must hand the call off to the local exchange carrier that provides service to the end-user customer receiving the call. The same is true on the originating end of the call. A Global Crossing long-distance customer may use another company as its local telephone company. When that consumer places a long-distance call, the consumer's local telephone company hands the call off to Global Crossing for transport to the called party.

27. With respect to terminating calls, the local exchange carrier of the called party (the "Terminating LEC") assesses Global Crossing a charge for completing the call. This charge is known as "terminating access." If the end points of the call are both (or all) within the State of South Dakota, intrastate access charges apply. If the end point of the call are located in different states, interstate access charges apply.

28. Access charges are subject to tariff regulation. As this Commission is aware, this Commission regulates intrastate access charges and the Federal Communications Commission ("FCC") regulates interstate access charges.

29. Tariffs constitute more than contracts between the parties. Tariffs are the "law" and bind both carrier and customer alike. Tariffs are considered contracts of adhesion and are construed strictly against the drafter.

30. The FCC has established a regime governing the filing of tariffs (or lack thereof) with respect to interstate access services provided by competitive local exchange carriers or "CLECs," as they are known. The FCC announced its regime in *Access Charge Reform*, 16 FCC Rcd. 9923 (2001) ("*CLEC Access Charge Reform Order*"). In the *CLEC Access Charge Reform Order*, the FCC established benchmarks against which to govern CLEC access charges. Under the benchmark, a CLEC may file a federal tariff if it wishes to charge access rates at or below the benchmark. A CLEC whose access rates are above the benchmark is presumptively detariffed and therefore is required to enter into an individual agreement with an individual interexchange carriers – such as Global Crossing -- to charge that carrier rates for interstate access services in excess of the benchmark.

31. Orbitcom, as a CLEC, has never filed and does not currently have a tariff for interstate access services on file with the FCC. Orbitcom's rates for interstate access services

exceed the FCC benchmark and Orbitcom's interstate access services are presumptively detariffed. Despite its failure to have an interstate tariff on file, Orbitcom has not negotiated an agreement to charge Global Crossing in excess of the FCC benchmark for interstate access services. Global Crossing has declined and will continue to decline to permit Orbitcom to charge it in excess of the federal benchmark for interstate access services. In the absence of a tariff or agreement, Orbitcom may not charge Global Crossing for interstate access services.

32. Rather than correcting this infirmity in its business operations, Orbitcom has persistently sought to mischaracterize its *interstate* access services as *intrastate* and to charge Global Crossing pursuant to its South Dakota intrastate access tariff. The rates contained in its intrastate access tariff significantly exceed the FCC benchmark.

33. Orbitcom filed its first complaint with this Commission on June 14, 2007, in which it sought an order from this Commission requiring Global Crossing to pay its then-unpaid invoices, which were virtually entirely for interstate services. After receiving full payment for all outstanding intrastate access service Orbitcom voluntarily withdrew its complaint.

34. Not to be deterred, Orbitcom filed a second complaint with this Commission in February 2008 seeking recovery of approximately \$227,000 in unpaid access invoices. From the face of the complaint and the attachment, it appeared that Orbitcom has arbitrarily reclassified its services as intrastate. Global Crossing moved to dismiss on the grounds primarily that, based upon Orbitcom's own contemporaneous records, Global Crossing had paid every penny of intrastate charges owed to Orbitcom and that, therefore, Orbitcom was, in reality, seeking an order from this Commission for the payment of interstate charges – an order that this Commission is not empowered to issue.

35. Without amending its second complaint or otherwise properly pleading its action, Orbitcom has changed the entire theory of its case. It now alleges that it has retroactively billed Global Crossing -- going back apparently to 2004 -- for access services based upon a 32% percent interstate usage ("PIU") factor. Orbitcom appears to assert that the 32% PIU factor that appears in its *intrastate* access tariff is a "default" PIU that Orbitcom is essentially free to apply in its own discretion.

36. A PIU factor is a device to separate traffic between the interstate and the intrastate jurisdictions. As a separations factor, a PIU is presumptively a federal matter. In the absence of a federally-approved PIU or PIU methodology, Orbitcom may not rely upon any PIU factors contained in intrastate tariffs.

37. *Assuming* the validity of the 32% PIU factor and the PIU provisions in Orbitcom's intrastate tariff, Orbitcom has misapplied those provisions. Under the plain language of sections 3.4 and 3.4.1.1 of Orbitcom's intrastate access tariff, Orbitcom must base a PIU upon actual call detail and may rely upon a "default" factor only if there insufficient detail in the call records to determine an actual PIU. Moreover, under section 3.4.1.4, the "default" PIU of 32% may only apply to originating access services.

38. In applying the 32% PIU factor retroactively, Orbitcom never asserted or demonstrated that Global Crossing failed to provide sufficient call detail to determine an actual PIU. In fact, Global Crossing did supply sufficient detail in the call records for Orbitcom to apply an actual PIU. Orbitcom has also, in violation of its tariff, purported to apply the 32% PIU to terminating access service.

39. In addition, *assuming* that the 32% PIU factor is valid *and assuming* that Orbitcom properly applied it retroactively, Orbitcom still owes Global Crossing a significant

refund. In calculating the amount it asserts in its amended complaint (that apparently is based upon retroactive, improper application of the 32% PIU factor) Orbitcom failed to take into account the moneys that Global Crossing has paid it over the years. With the payments that Global Crossing has made over the years covered by Orbitcom's retroactive billing and even at a 32% PIU, Orbitcom owes Global Crossing in excess of \$470,000. In fact, because the 32% PIU factor is invalid or, at a minimum, was improperly applied, Orbitcom owes Global Crossing in excess of \$700,000 for which this Commission should grant Global Crossing as full relief as the sum represents Orbitcom's claimed amounts based on an improper PIU for interstate services – funds to which Orbitcom is not entitled.

Count I
(Declaratory Relief -
Invalidity of PIU Factor)

40. Global Crossing repeats and realleges the allegations contained in paragraphs 23-39 hereof as if herein set forth in full.

41. PIU is a separations matter that is entrusted to the FCC after it receives recommendations from a Joint Board.

42. Orbitcom does not have a federal tariff or federal PIU on file with the FCC.

43. Orbitcom's 32% PIU fails to conform to the separations methodologies established by the FCC.

44. Accordingly, the provisions of Orbitcom's intrastate tariff that contain PIU provisions or a PIU factor are without legal merit. Orbitcom is not entitled to rely upon or utilize its 32% PIU factor in invoicing interexchange carriers for access services.

45. Orbitcom has purported to rely upon the 32% PIU factor found solely in its intrastate tariff to invoice Global Crossing for access charges.

46. There is an actual controversy between Global Crossing and Orbitcom regarding the propriety of the 32% PIU factor and Orbitcom's application of that factor to Global Crossing.

47. Global Crossing is entitled to a declaration, pursuant to ARSD 20:10:01:34 and SDCL 21-24-1,3 regarding SDCL 49-31-4,11 and 49-13-14.1 that Orbitcom's 32% PIU factor is invalid and that Orbitcom may not use that factor to bill Global Crossing for access services.

Count II
(Declaratory Relief –
Unjust and Unreasonable Practice –
Application of PIU Factor)

48. Global Crossing repeats and realleges the allegations contained in paragraphs 23-47 hereof as if herein set forth in full.

49. Orbitcom's application of an invalid PIU factor or, at a minimum, its misapplication of its own tariff, constitutes an unjust, discriminatory and unreasonable practice in violation of SDCL 49-31-4, 11, as well as 49-13-13.

50. There is an actual controversy between Orbitcom and Global Crossing regarding the reasonable of Orbitcom's application of its 32% PIU factor.

51. Global Crossing is entitled to a declaration pursuant to ARSD 20:10:01:34 and SDCL 21-24-1,3 regarding SDCL 49-31-4, 11, and 49-13-13 in that Orbitcom's application of its 32% PIU factor to Global Crossing constitutes an unjust, discriminatory and unreasonable practice in violation of SDCL 49-31-4, 11 and 49-13-13.

Count III
(Damages –
Application of 32%
PIU Factor)

52. Global Crossing repeats and realleges the allegations contained in paragraphs 23-51 hereof as if herein set forth in full.

53. Assuming the validity of the 32% PIU factor, Orbitcom has overbilled Global Crossing in excess of \$470,000 since at least September 2005 for access services.

54. Global Crossing has properly disputed Orbitcom's billings.

55. Global Crossing has been damaged by and in the amount of its Orbitcom's overbillings.

56. Global Crossing is entitled to a judgment against Orbitcom in the aggregate amount of \$473,051.64 as set forth in Attachment A annexed hereto.

**Count IV
(Restitution)**

57. Global Crossing repeats and realleges the allegations contained in paragraphs 23-56 hereof as if herein set forth in full.

58. Global Crossing has overpaid Orbitcom for access services in an amount to be determined.

59. Orbitcom is unlawfully in possession of Global Crossing's funds as set forth above.

60. Global Crossing has demanded return of such funds.

61. Orbitcom has refused to comply with such demand.

62. Global Crossing is entitled to restitution of such funds.

**Count V
(Damages – Violation of Tariff-
Retroactive Billing)**

63. Global Crossing repeats and realleges the allegations contained in paragraphs 23-62 hereof as if herein set forth in full.

64. Section 15.4.1 of Orbitcom's intrastate access tariff limits Orbitcom to retroactive billing for only six months prior to the discovery of the relevant billing error.

65. Orbitcom has, in contravention of its own tariff, attempted to bill Global Crossing retroactively for a period significantly greater than six months.

66. Orbitcom's billings are invalid, at least to that extent.

67. Global Crossing has been damaged at least to the extent of Orbitcom's retroactive billings of greater than six months.

68. Global Crossing is entitled to an award of damages in the amount of Orbitcom's retroactive billings that extend back for a period beyond six months from the discovery of the alleged billing error.

Count VI
(Damages – Unjust and Unreasonable
Practice - Retroactive Billing)

69. Global Crossing repeats and realleges the allegations contained in paragraphs 23-68 hereof as if herein set forth in full.

70. Orbitcom has retroactively applied, for a period in excess of three years, a 32% PIU factor to its invoices to Global Crossing for access services.

71. Orbitcom has no justification for such retroactive billing and such retroactive billing is in error in any event.

72. Global Crossing is unable to pass through to its customers the charges occasioned by Orbitcom's retroactive billing.

73. Global Crossing has been damaged by Orbitcom's retroactive billing.

74. Orbitcom's retroactive billing is an unjust and unreasonable practice in violation of SDCL 49-31-4, 49-31-11 and 49-13-13.

75. Orbitcom's retroactive billing is in contravention of Orbitcom's intrastate access tariff.

76. Global Crossing is entitled to an award of damages in an amount to be determined at a hearing.

**Count VII
(Attorney's Fees)**

77. Global Crossing repeats and realleges the allegations contained in paragraphs 23-76 hereof as if herein set forth in full.

78. Under section 2.5.4 of Orbitcom's intrastate access tariff, the prevailing party in any action to enforce any provision of Orbitcom's tariff is entitled to its costs and attorneys' fees.

79. Global Crossing is (or will be) the prevailing party in this action to enforce the provisions of Orbitcom's tariffs.

80. Global Crossing is entitled to an award of its costs and attorneys' fees in an amount to be determined by the Commission.

Prayer for Relief

1. For the foregoing reasons, Defendant Global Crossing Telecommunications, Inc. respectfully requests that the Commission enter an Order:

- (a) dismissing the complaint in its entirety, with prejudice;
- (b) awarding to Global Crossing its costs of this action, including reasonable attorney's' fees; and
- (c) awarding to Global Crossing such other, further and different relief as the Commission deems just and proper in the premises.

2. For the foregoing reasons, Global Crossing is entitled to judgment:

- (a) On Count I, for a declaration that the PIU factor and PIU provisions contained in Orbitcom's intrastate tariff are invalid and may not be used by Orbitcom to bill Global Crossing for access services;

- (b) On Count II, for a declaration that Orbitcom's attempt to apply a PIU factor that is invalid or that, at a minimum, Orbitcom applied in contravention of its tariff is invalid;
- (c) On Count III, for an award of money damages in the amount of \$473,051.64
- (d) On Count IV, for restitution in an amount to be determined;
- (e) On Count V, for an award of money damages in an amount to be determined at a hearing for damages sustained by Global Crossing as a result of Orbitcom's unlawful retroactive billings;
- (f) On Count VI, for an award of money damages in an amount to be determined as a result of Orbitcom's unjust and unreasonable practices pursuant to South Dakota law and in violation of Orbitcom's tariff;
- (g) On Count VII, for an award of attorneys' fees and costs pursuant to Orbitcom's tariff; and
- (h) For such other, further and different relief as to the Commission deems just and proper in the premises.

Respectfully submitted this 28th day of July, 2008.

Olinger, Lovald, McCahren & Reimers, P.C.
117 E. Capitol – PO Box 66
Pierre, SD 57501

/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 28th day of July, 2008, he mailed a true and correct copy of the Global Crossings' Answer, Affirmative Defenses and Counterclaims to:

Meredith Moore
Attorney at Law
100 No. Phillips Ave.
9th Floor
Sioux Falls SD 57104

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

and that said mailing was by U.S. Mail, first-class with postage thereon prepaid and mailed at the U.S. Post Office in Pierre, South Dakota.

/s/ William M. Van Camp