

**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.                            )**

**GLOBAL CROSSING'S REPLY IN SUPPORT  
OF ITS MOTION TO DISMISS**

This case has truly developed a Through-the-Looking-Glass quality. Plaintiff filed its first complaint with this Commission seeking recovery of *all* access charges that Global Crossing allegedly owed it. When Global Crossing pointed out that it had actually paid the intrastate access charges that plaintiff billed, plaintiff voluntarily dismissed its complaint.

Plaintiff then filed a second complaint alleging that Global Crossing owed it \$227,042.76 in intrastate access charges. Global Crossing responded in detail. Global Crossing showed -- through a detailed review of plaintiff's invoices -- and the sworn affidavit of its Senior Manager -- Cost of Access -- that Global Crossing had paid every penny that plaintiff had billed Global Crossing for intrastate access. In its response, *plaintiff does not deny this*. Rather, it asserts -- incredibly and at this late date -- that it "discovered" a billing error *over a year ago* and "caused" new invoices to be prepared.

The one fact that plaintiff has *never* denied is that it has consistently refused to file an interstate access tariff with the Federal Communications Commission. Plaintiff's source of woe is that it wishes to charge Global Crossing more for interstate access than federal regulation permits. The Commission should declare that enough is enough and dismiss this case with prejudice and award costs and attorneys' fees as well as damages pursuant to SDCL §49-13-14 to Global Crossing. Further, the Commission should open a docket to investigate the billing practice of Orbitcom.

The essence of plaintiff's newest theory is that, *in June 2007, over a year ago*, it "discovered" a billing error. It then claims it billed Global Crossing for revised amounts and Global Crossing failed to

pay those amounts since July 2007. See Orbitcom Response at 1-2; Affidavit of Michael Powers, ¶ 8. Indeed, Orbitcom's principal, Mr. Powers, continues and avers that "Global Crossing has the billing statements which support and confirm Orbitcom's claim [that it is seeking intrastate charges from Global crossing]." *Id.*, ¶ 9.

Mr. Powers (and Orbitcom) conveniently ignore the fact that *Global Crossing attached to its motion and analyzed in detail each and every one of those invoices*. As Mr. Herrick demonstrates, Global Crossing paid every penny of every charge on every such invoice that Orbitcom itself had labeled as an intrastate charge. Orbitcom does not dispute Mr. Herrick's showing – a showing that is based upon *Orbitcom's own records*.

Orbitcom's latest factual allegations are mystifying. Orbitcom never affirmatively states that it sent revised bills to Global Crossing or for what period. Mr. Rasmusson -- of Orbitcom's billing vendor -- merely states he was directed to prepare revised bills and send them to Global Crossing. Affidavit of Peter Rasmusson, ¶4. He never actually states that he did so. He also indicates that the relationship between the Martin Group and Orbitcom ended in June 2007. *Id.*, ¶ 2. Therefore, one would assume that Martin Group could not have sent out revised bills after June 2007.

In fact, if Orbitcom is alleging that it re-billed Global Crossing for periods prior to July 2007, there are two responses. First, that allegation is nowhere to be found in the complaint, and therefore cannot form the basis for any recovery. Second, in fact, Global Crossing never received any such revised invoices (*see* reply affidavit of Sean Herrick, attached hereto). Amazingly, Orbitcom never attached any such revised invoices to its response despite having waited over four months to file its response.

The omissions in Orbitcom's late-filed response are startling. Orbitcom could have attached any "revised" invoices to its response; it chose not to. Orbitcom could have explained how Mr. Herrick's reconciliation of Orbitcom's billings was in error; it chose not to. Orbitcom could have explained how its "revised" billings rendered Mr. Herrick's analysis inaccurate or outdated; it chose not to. Indeed,

Orbitcom does not even attempt to relate its supposed new billings with its complaint at all. That omission is fatal.

The Commission would be perfectly justifiable in denying any creditability or weight to these "eleventh hour" affidavits submitted to prevent dismissal. In the case at hand, Global Crossing merely took the information that was submitted to the Commission, the billing records supplied by Orbitcom, and the complaint of Orbitcom in filing its Motion to Dismiss. Global Crossing clearly demonstrated what the basis of the dispute is. Global Crossing moved for dismissal. In response, and to avoid such dismissal, the affidavits appear which must be seen to either contradict the original pleading of Orbitcom, or would require some repleading, which would be contradictory, and which has not been done. Accordingly, barring an explanation for this change, these late filed affidavits cannot create an issue of material fact to survive dismissal or summary judgment. See, *Taggart v. Ford Motor Credit Company*, 462 NW2d 493, 503 (S. D. 1990). Orbitcom's submission of its complaint and its exhibit were sufficient in its mind to lodge a complaint. When confronted with the light being shown on the original exhibit these affidavits appeared. Barring further explanation or documentation these affidavits cannot create a material issue of fact warranting this matter to go forward.

Thus, whether the Commission treats Global Crossing's motion as a motion to dismiss or a motion for summary judgment, the result should be the same. A complaint "requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Rather plaintiff must allege enough fact to "raise a reasonable expectation that discovery will reveal evidence" that supports the claim. *Id.* Orbitcom's complaint and its affidavits only tell an ever-changing story that falls far short of raising any such expectation.

A Motion to Dismiss under Rule 12(b)5 requires a Circuit Court, or in this case, the Commission, to consider the Complainant's allegations and any exhibits which are attached. *Wojewski v. Rapid City*

*Regional Hospital*, 730 NW2d 626, 631 (S.D. 2007). In this case a Complaint filed by Orbitcom included an exhibit. The response by Global Crossing does not introduce additional evidence, it merely takes the information attached to the exhibit of Orbitcom and provides the Commission with the total view lacking from the incomplete and inaccurate exhibit.

It is well settled that a Motion to Dismiss under Rule 12(b)5 tests the legal merits of the claim made by the Plaintiff not the facts which support it. *Id.* If the exhibit of Orbitcom and its original complaint was an inaccurate representation of the split between interstate and intrastate access charges billed Global Crossing, as detailed by the Motion to Dismiss and original Affidavit of Sean Herrick, then certainly this Commission cannot entertain an action by Orbitcom to recover improperly billed interstate access charges. Accordingly, dismissal would be warranted under Rule 12(b) 5.

Alternatively, if the Commission treats Global Crossing's motion as one for summary judgment, the Commission should grant that motion. Orbitcom has utterly failed to show the existence of a genuine dispute as to any material fact. *See Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). The raising of contradictory "eleventh hour" affidavits does not create a material fact. This docket is the example of what the relief of summary judgment exists for. "Summary Judgment is a preferred process to dispose of legally unmeritorious claims." *Kobbeman v. Oleson*, 574 NW2d 633, 635 (S.D. 1998). If the complaint alleges that Global Crossing failed to pay invoices for intrastate access from July 2007 forward, Global Crossing demonstrated to the contrary and plaintiff did not controvert that showing. Further, the party opposing a Motion for Summary Judgment "must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a Judgment." *Rotenburger v. Burghduff*, 729 NW2d 175, 178 (S.D. 2007). If – which is *never* alleged – plaintiff suggests that it re-billed Global Crossing, plaintiff never affirmatively states this, never attaches any such invoices and Global Crossing affirmatively controverted such a claim.

Orbitcom had full opportunity to come forward with facts that would justify going forward. It has conspicuously failed to do so. The Commission should dismiss the complaint with prejudice, order costs and attorney's fees as well as damages pursuant to SDCL §49-13-14 to Global Crossing, open a docket to investigate the billing practices of Orbitcom and provide further relief to Global Crossing as the Commission deems just.

Dated this 2nd day of June, 2008.

Olinger, Lovald, McCahren & Reimers, P.C.  
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/s/ William M. Van Camp  
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#### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 2nd day of June, 2008, he mailed a true and correct copy of the Global Crossing's Reply in Support of its Motion to Dismiss to:

Meredith Moore  
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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.

