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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: *TC08-005 – In the Matter of the Complaint of Orbitcom, Inc. Against Global Crossing Telecommunications, Inc.*

Dear Ms. Van Gerpen:

Enclosed for filing in the above matter, please find Orbitcom's Response to Global Crossing Telecommunications, Inc.'s Motion to Dismiss, Affidavit of Peter Rasmusson and Affidavit of Michael C. Powers. Should you have any questions or concerns, please do not hesitate to contact me.

Thank you for your assistance.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore
For the Firm

MAM/cmc
Enclosure

cc: Mr. Keith Senger (via email)
Ms. Kara Semmler (via email)
Mr. William Van Camp (via email)
Mr. Matthew Meert (via email)

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

IN THE MATTER OF THE COMPLAINT
OF ORBITCOM, INC. AGAINST GLOBAL
CROSSING TELECOMMUNICATIONS,
INC.

TC08-005

**ORBITCOM'S RESPONSE TO GLOBAL
CROSSING TELECOMMUNICATIONS,
INC.'S MOTION TO DISMISS**

COMES NOW Orbitcom, Inc., by and through its counsel, and hereby submits the following Response in resistance to the Motion to Dismiss filed by Global Crossing Telecommunications, Inc.

FACTUAL BACKGROUND

On August 15, 2002, Orbitcom, Inc. ("Orbitcom") f/k/a known as VP Telecom, Inc., filed with this Commission a petition for approval of its intrastate switched access tariff. Orbitcom also sought a waiver of the requirements of A.R.S.D. §§ 20:10:27:11 and 20:10:27:12, effectively requesting relief from the requirements of establishing its switched access rates based on company specific costs. This Commission granted the request on October 28, 2002, thereby allowing Orbitcom to mirror the tariffed access rates filed by Qwest Corporation. Since that time, Orbitcom has taken the appropriate steps to maintain its tariff and the corresponding exemption.

Orbitcom, Inc. ("Orbitcom") and Global Crossing Telecommunications, Inc. ("Global Crossing") have had a carrier relationship since approximately 2003. Orbitcom uses a third party to bill those interexchange carriers ("IXCs") and other carriers with which Orbitcom has a relationship. In approximately June 2007, Orbitcom discovered that the company handling its billing had improperly billed certain amounts owed by Global Crossing. See Affidavit of Michael C. Powers, ¶8. Specifically, Orbitcom discovered that its billing company had not used Orbitcom's thirty-two percent ("32%") Percentage of Interstate Use factor ("PIU") on all of its originating

direct distance dialed (“ODDD”) calls. Id. The amount of the bills did not change; however, the portion of the bills attributable to interstate and intrastate traffic did change. Orbitcom directed its billing company to recalculate the bills for the appropriate time period and send them to Global Crossing, which was done. Id. To date, Global Crossing has refused to pay these amounts. Id.

AUTHORITY AND ANALYSIS

1. **Applicable Standards of Review: Motion to Dismiss and Motion for Summary Judgment.**

Global Crossing filed its Motion to Dismiss pursuant to A.R.S.D. § 20:10:01:11.01, which Rule allows a party to utilize the defenses to a Complaint set forth in SDCL § 15-6-12(b). While not explicitly set forth in its Motion, Global Crossing’s Motion argues that Orbitcom’s Complaint fails to state a claim. See SDCL § 15-6-12(b)(5).¹ Accordingly, the applicable law and standards that should be applied to the instant matter are those set forth in SDCL § 15-6-12(b) and corresponding common law. A motion to dismiss under SDCL § 15-6-12(b)(5) tests the legal sufficiency of the pleading, along with any conclusions reasonably drawn therefrom, and not the facts that support it. See Estate of Billings v. Deadwood Congregation, 506 N.W.2d

¹ SDCL §15-6-12(b) provides in relevant part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Insufficiency of process;
- (4) Insufficiency of service of process;
- (5) Failure to state a claim upon which relief can be granted;
- (6) Failure to join a party under § 15-6-19.

138, 140 (S.D. 1993) (citing Hunt v. Hunt, 309 N.W.2d 818, 820 (S.D. 1981); Schlosser v. Norwest Bank South Dakota, 506 N.W.2d 416, 418 (S.D. 1993)). As such, the Court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. See Johnson v. Kreiser's, Inc., 433 N.W.2d 225, 226 (S.D. 1988). Pleadings should not be dismissed merely because the reviewing court or agency entertains doubts as to whether the pleader will prevail in the action as this is a matter of proof, not pleadings. Thompson v. Summers, 1997 S.D. 103, 567 N.W.2d 387, 390. “The question is whether in the light most favorable to the plaintiff, and with doubt resolved in his or her behalf, the complaint states *any valid claim of relief*. The court must go beyond the allegations for relief and ‘examine the complaint to determine if the allegations provide for relief on *any possible theory*.’” Id. (quoting Schlosser, 506 N.W.2d at 418 (emphasis in original)) (citation omitted). Significantly, motions to dismiss are viewed with disfavor and are rarely granted. Id.

The applicable standard of review in this case may change depending upon the reading which this Commission gives to Global Crossing's Motion.² Because Global Crossing has filed its Motion to Dismiss and relied upon information not contained in the Complaint itself, unless this Commission chooses to expressly disregard the additional documentation submitted by Global Crossing, the Motion must be treated as a Motion for Summary Judgment. See SDCL § 15-6-12(b) (providing that if “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided

² See Eide v. E.I. Du Pont De Nemours & Co., 1996 S.D. 11, ¶ 5, 542 N.W.2d 769, 770 (if court intends to treat motion to dismiss as one for summary judgment, it must advise parties of such intent and provide them with reasonable opportunity to present all material pertinent to such motion).

in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.”).

The standard for the grant of summary judgment is familiar and well settled. Summary judgment is only appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.” SDCL § 15-6-56(c). “The court's inquiry is to determine ‘whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may not reasonably be resolved in favor of either party.’” Garay v Missouri Pac. R.R. Co., 38 F.Supp.2d 892, 896 (D. Kan. 1999) (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). All reasonable inferences “must be viewed in favor of the non-moving party.” Northstream Invs., Inc. v. 1804 Country Store Co., 2005 S.D. 61, ¶11, 697 N.W.2d 762, 765 (citation omitted).

2. Dismissal of Orbitcom’s Complaint is Inappropriate.

Regardless of the standard of review applied to Orbitcom’s Complaint, Global Crossing’s Motion must fail. Global Crossing has alleged that Orbitcom’s Complaint is “fabrication” and that Orbitcom has engaged in violations of federal law. See Motion to Dismiss, p.1. The conclusory statements made in support of Global Crossing’s Motion to Dismiss do not meet the legal standard for a motion to dismiss or a motion for summary judgment.

Under the applicable standard for a motion to dismiss, this Commission must treat as true those facts as alleged in Orbitcom’s Complaint. As set forth above, this Commission’s obligation on a motion to dismiss is to review the complaint and “determine if the allegations

provide for relief on any possible theory.” Thompson, 1997 S.D. 103 at ¶5 (additional citation omitted).

The standard of review on a motion for summary judgment imposes a similarly high bar for the moving party. The primary question facing the reviewing court or agency is whether there are any genuine issues of material fact for the fact finder to resolve. See Wulf v. Senst, 2003 S.D. 105, ¶17, 669 N.W.2d 135, 140.

In this case, the burden of proof to establish that Orbitcom’s complaint is either legally deficient or that there are no genuine issues of material fact. This matter is not the vast conspiracy that Global Crossing claims. To the contrary, Orbitcom’s Complaint sets forth a claim for nonpayment of outstanding invoices by Global Crossing. Orbitcom has adduced facts which support that the amounts billed to Global Crossing were incorrectly calculated by the third-party engaged to calculate its billing statements. When the error was discovered, the bills were recalculated and sent to Global Crossing. To date Global Crossing has refused to pay those bills and has instead threatened Orbitcom with action before the Federal Communications Commission and the Federal District Court of South Dakota. Global Crossing cannot defeat the instant claim through veiled allegations of violations of federal law.

CONCLUSION

The remedies available to Global Crossing through its motion are extreme and, at this juncture, a dismissal of Orbitcom’s Complaint is not justified and allows Global Crossing a windfall. See Wulf v. Senst, 2003 S.D. 105 at ¶17. In this case, Orbitcom, under the facts it alleged in its Complaint, as well as those in the affidavits accompanying this brief, has set forward a theory on which it may be entitled to recover.

Dated this 20th day of May, 2008, in Sioux Falls, South Dakota.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 20th day of May, 2008, upon the following:

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