

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT)	
OF ORBITCOM, INC. AGAINST MCI)	TC08-135
COMMUNICATIONS SERVICES, INC.)	
D/B/A VERIZON BUSINESS SERVICES)	VERIZON'S
AND TELECONNECT LONG DISTANCE)	POST-HEARING REPLY BRIEF
SERVICES & SYSTEMS COMPANY D/B/A)	
TELECOM*USA FOR UNPAID ACCESS)	
CHARGES)	
)	

VERIZON'S POST-HEARING REPLY BRIEF

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I. INTRODUCTION

MCI Communications Services, Inc. d/b/a Verizon Business Services (“MCI”) and Teleconnect Long Distance Services & Systems Company d/b/a Telecom*USA (“Teleconnect”) (collectively referred to as “Verizon”), hereby respectfully submit their reply brief in the above-referenced proceeding.

In its opening brief,¹ Verizon showed that OrbitCom has not met its burden of proving that it is entitled to payment of the switched access charges that are the subject of its complaint. Verizon demonstrated that OrbitCom failed to bill for service in accordance with its tariff and that its billing practices were unreasonable. The record shows that OrbitCom did not accurately determine the jurisdiction of calls for which it billed Verizon, that the bills it issued were incorrect, and that it overcharged Verizon. In its post-hearing Memorandum,² OrbitCom did not overcome the substantial showing made by Verizon, much less meet its own burden of proving that it is entitled to relief. OrbitCom’s Memorandum frequently ignores or misconstrues the applicable law, relevant provisions of its tariff, and the record evidence. None of the arguments put forth by OrbitCom succeed in proving that its billing practices are reasonable or that its complaint should be granted.

II. VERIZON IS NOT CHALLENGING THE REASONABLENESS OF ORBITCOM’S TARIFF; IT OBJECTS INSTEAD TO ORBITCOM’S PERSISTENT FAILURES TO COMPLY WITH ITS OWN TARIFF

OrbitCom characterizes Verizon’s position in this case as “an impermissible attack on OrbitCom’s tariff.” OrbitCom Memo at 5, 12. This contention is manifestly incorrect.

¹ Verizon’s Initial Post-Hearing Brief, filed December 4, 2009 (referred to herein as “Verizon Brief” or “Verizon Br.”).

² OrbitCom’s Post-Hearing Memorandum of Law in Support of its Complaint, filed December 4, 2009 (referred to herein as “OrbitCom Memorandum” or “OrbitCom Memo”).

Verizon has not argued that the provisions of OrbitCom's intrastate access tariff in South Dakota³ are unreasonable or unlawful, and OrbitCom can point to no instance in which Verizon has done so. Rather, Verizon's position is that OrbitCom has consistently failed to comply with the provisions of its own tariff. As the evidence shows, during the time relevant to this case:

- OrbitCom did not follow the procedures set forth in section 3.4 of its tariff for determining the jurisdiction of switched access traffic for which it billed Verizon (*see* Verizon Br. at 3-10);
- Prior to April 2009, OrbitCom had actual call detail information available to it, but did not use that information to determine the jurisdiction of calls, despite the mandatory provision in section 3.4 of its tariff that OrbitCom "will use . . . call detail to render bills" (*see* Verizon Br. at 5-7);
- OrbitCom ignored the unambiguous mandatory language in its tariff that specifies how jurisdiction is to be determined, and asserted incorrectly that it can instead "choose" among "several options" for determining the jurisdiction of access traffic (*see* Verizon Br. at 7-9);
- OrbitCom arbitrarily applied PIU factors to *all* of Verizon's traffic, contrary to language in section 3.4 of its tariff which prohibits OrbitCom from using PIU factors when it has sufficient call detail available to determine jurisdiction (*see* Verizon Br. at 7-8);
- OrbitCom arbitrarily applied a PIU factor of 5% interstate/95% intrastate to Verizon's switched access bills during a 13-month period, from July 2007 through July 2008, even though that PIU factor is not mentioned anywhere in its tariff (*see* Verizon Br. at 9-10);
- OrbitCom's invoices to Verizon apply a composite charge of \$ 0.06 per minute for "local switching" or "usage" (depending on the month), but this rate does not appear anywhere in the list of "Rates and Charges" for Switched Access in section 15.1.3.4 of its intrastate tariff (*see* Verizon Br. at 34);
- OrbitCom's invoices to Verizon do not specify any charges for individual rate elements that are set forth in OrbitCom's intrastate tariff (*see* Verizon Br. at 34-35);

³ Tariff references are to VP Telecom, Inc. Tariff No. 1.

- OrbitCom admits that its composite rate includes charges for “tandem switching,” but its invoices do not specify the rate for tandem switching contained in section 15.1.3.4.3 of its tariff (*see* Verizon Br. at 34);
- OrbitCom’s practice of billing Verizon tandem switching charges on calls that were not switched by a tandem switch, but were routed instead over Direct End Office trunks (“DEOTs”) between Verizon’s interexchange network and Qwest’s end offices, violates sections 14.2.3.1 and 14.2.3.3 of OrbitCom’s tariff, which defines “Tandem Connect” service as service that “is provided in conjunction with the tandem provider serving the area” and must use “circuits from the ... tandem provider” (*see* Verizon Br. at 36); and
- OrbitCom failed to fairly and reasonably “investigate the merits” of Verizon’s disputes, as mandated by section 4.8 of its tariff, but instead summarily and immediately rejected each of Verizon’s billing disputes in cursory fashion. *See* Exhibit A (Direct Testimony of Leslie Freet) at 16-23 and Exhibits LF-16 through LF-19.

Verizon has not challenged the reasonableness of the above-referenced provisions, or any other provision, in OrbitCom’s tariff. Verizon has argued instead that OrbitCom repeatedly failed to comply with the language in its own tariff. OrbitCom is bound by and should be compelled to comply with the provisions of its tariff.⁴ Because OrbitCom has not billed Verizon in accordance with its tariff, it is not entitled to the relief it seeks through its Amended Complaint.

Ironically, the only party to complain about the language in OrbitCom’s tariff has been OrbitCom itself. Its witness, Mr. Powers, attempted to explain away OrbitCom’s failure to comply with the tariff requirement that OrbitCom use available call detail information to generate bills by blaming the author of its tariff for getting “a little ahead of the curve.” Exhibit 2 (Powers Rebuttal Testimony) at 18:13-14. Mr. Powers also lamented what he referred to as a “disconnect between the tariff and the OrbitCom reality.” Tr. at 53:13-15; *see*

⁴ *See, e.g., Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, FCC 09-103, File No. EB-07-MD-001, Second Order on Reconsideration (Nov. 25, 2009) at ¶ 24 (“The ... facts of this case ... do not alter the fact that [the LEC] is bound by the terms of its tariff.”)

also Verizon Br. at 6-8.⁵ It is this admitted “disconnect” between OrbitCom’s billing practices and the provisions of its tariff that underlies Verizon’s complaint, and not any flaw in the language of the tariff itself.

III. ORBITCOM MISCONSTRUES THE LANGUAGE OF ITS SOUTH DAKOTA TARIFF THAT PRESCRIBES THE MANNER IN WHICH IT IS TO DETERMINE THE JURISDICTION OF SWITCHED ACCESS TRAFFIC

As Verizon demonstrated in its opening brief (at 3-5), Section 3.4 of OrbitCom’s tariff unambiguously requires OrbitCom to use available actual call detail to determine the jurisdiction of access traffic for billing purposes:

When the Company receives sufficient call detail to determine the jurisdiction of some or all originating and terminating access minutes of use (MOU), the Company will use that call detail to render bills for those MOU and will not use PIU factors. When the Company receives insufficient call detail to determine the jurisdiction of some or all originating and terminating access MOU, the Company will apply PIU factor(s) provided by the Customer or developed by the company to those minutes for which the Company does not have sufficient call detail. (Emphasis added)

As Verizon also demonstrated, the evidence presented to the Commission establishes conclusively that, at all times relevant to the dispute, OrbitCom, as a UNE-P provider, received, on a daily basis, electronic call records⁶ from Qwest, the underlying network provider.⁷ OrbitCom has admitted that those EMI records provide the information necessary to determine the jurisdiction of most originating and terminating switched access traffic that is

⁵ While Verizon cited several provisions of OrbitCom’s tariff to demonstrate that OrbitCom’s billing practices are inconsistent with its tariff, and are thus unreasonable, OrbitCom’s Memorandum does not point to any specific language in its tariff that supports its billing practices. OrbitCom makes only vague references to its tariff but, as shown below, it frequently misstates the tariff’s actual contents.

⁶ These have been referred to in the proceeding as EMI (Electronic Message Interface) or DUF (Daily Usage Feed) records.

⁷ See Verizon Br. at 5; see also Exhibit A (Direct Testimony of Leslie Freet) at Exhibit LF-9 (e-mail message from OrbitCom employee, dated March 4, 2008, stating that call detail records [“CDRs”] “are sent directly to our third party billing vendor.”)

handled by Qwest's switches. *See* Verizon Br. at 5. At no time has OrbitCom contended, let alone proved, that it lacked sufficient call detail to determine the jurisdiction of the vast majority of access traffic for which it billed Verizon. In fact, Mr. Powers admitted that only a tiny fraction of call records – only “one to four percent” – do not contain “enough information to bill it.” Tr. at 199:13-18. Thus, for the vast majority of traffic (*i.e.*, 96 – 99 percent), the record shows that OrbitCom had sufficient call detail information to determine the jurisdiction of the access traffic for which it billed Verizon.

OrbitCom's attempts to justify the manner in which it determined the jurisdiction of access traffic for which it billed Verizon are vague and unpersuasive. On the one hand, OrbitCom acknowledges that “[*i>n the event* that the jurisdiction of a call cannot be determined, OrbitCom's tariff requires the application of a percent interstate use factor ('PIU'); OrbitCom Memo at 2; *see also id.* at 5 (“*In the instance* when the jurisdiction of a call is not readily ascertainable, OrbitCom, pursuant to its tariff, applies a PIU factor to that traffic.”) (Emphasis added) Those descriptions of OrbitCom's tariff are correct. But OrbitCom never even attempts to show that the initial qualifying condition – the “instance” or “event” that the jurisdiction of a call cannot be determined – was met for the traffic at issue in this case.

On the other hand, OrbitCom claims that, under its tariff, it “can” use PIU factors and it “can” establish a PIU in one of three ways.⁸ OrbitCom Memo at 2, 5. These claims imply that OrbitCom has discretion to apply a PIU even when actual call detail information is

⁸ OrbitCom's tariff also provides that an access customer may submit PIU factors. OrbitCom admits that in August 2008 Verizon submitted PIU factors to be used by OrbitCom (OrbitCom Memo at 2-3), but wrongly alleges that Verizon “demanded that the PIU factor be applied retroactively.” Nowhere in Verizon's request that OrbitCom apply PIU factors did it state that the factors were to be applied “retroactively” to prior billing periods. *See* Exhibit A (Direct Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-25; *see also* Verizon Br. at 10-11 fn. 11.

available, as OrbitCom contended at the hearing. That position cannot be squared with the plain language of OrbitCom's tariff, which states that when OrbitCom receives sufficient call detail to determine the jurisdiction of individual calls, it "*will use that call detail to render bills for those MOU and will not use PIU factors.*" (Emphasis added) Only if there is insufficient call detail to determine jurisdiction may the company apply PIU factors to access traffic. This tariff provision is reasonable because it recognizes that actual call detail is the most accurate and reliable indicator of a call's jurisdiction. PIU factors are appropriately considered only as a "default" mechanism, and are to be used only when a carrier lacks sufficient information to accurately determine the jurisdiction of a call. But that is not the situation here.

OrbitCom's argument completely ignores this critical language of its tariff.⁹ It is nonetheless the language of its tariff to which OrbitCom is bound for purposes of determining whether its practices are in compliance with its tariff. *See, e.g., Qwest v. Farmers, supra*, at ¶ 24. While its tariff also describes the means by which and by whom PIU factors may be established, those provisions only come into play in circumstances when OrbitCom cannot determine the jurisdiction of traffic by reviewing actual call records. As the record makes clear, because OrbitCom had sufficient call detail information available at all relevant times, it was improper for it to apply PIU factors to Verizon's traffic.

OrbitCom's failure to determine the jurisdiction of Verizon's switched access traffic in accordance with its tariff was an unreasonable practice which led OrbitCom to issue invoices to Verizon that incorrectly imposed OrbitCom's higher intrastate access rates on what were,

⁹ "It is a well settled rule that "[t]ariffs are to be interpreted according to the reasonable construction of their language." *Qwest v. Farmers, supra*, at ¶ 23, citing *Commodity News Services, Inc. v. Western Union Telegraph Co.*, Initial Decision, 29 FCC 1208, 1213, *aff'd* 29 FCC 1205 (1960).

in fact, interstate calls.¹⁰ As a result, the invoices issued to Verizon were improperly inflated and included amounts for which OrbitCom is not entitled to payment.

IV. ORBITCOM FAILED TO JUSTIFY THE PIU FACTORS THAT IT APPLIED TO VERIZON'S TRAFFIC AT DIFFERENT POINTS IN TIME

OrbitCom claims that, “[i]n accordance with the terms of its tariff, [it] used a PIU which it developed and applied to the traffic at issue.” OrbitCom Memo at 2. As explained above, OrbitCom’s use of PIU factors when call detail information was available violated the terms of section 3.4 of its tariff. Not only did OrbitCom fail to comply with those provisions of its tariff, but it also failed to demonstrate that the specific PIU factors that it applied to Verizon’s traffic at various times were reasonable.

OrbitCom claims that it computed the PIU “using existing traffic patterns and based on the LPIC or PIC for South Dakota.” *Id.* at 2; *see also id.* at 6-7. The record does not support either claim.

OrbitCom asserts that it “can use the actual jurisdiction of the traffic or call detail records” to establish a PIU. *Id.* at 2. For certain types of originating traffic, that is true, as Section 3.4.1.1 of OrbitCom’s tariff provides. However, OrbitCom has failed to introduce any evidence that it used actual call detail to create the PIUs it applied to Verizon’s traffic. On the contrary, the admitted fact that OrbitCom did not use any call detail information to determine the jurisdiction of *any* of Verizon’s traffic prior to May 2009 belies any notion that it used such call detail records to create a PIU factor. Further, OrbitCom has never even claimed that it followed the process actually authorized by section 3.4.1.1 of its tariff, which states: “[W]here the Company can determine jurisdiction by its call detail, the projected PIU

¹⁰ OrbitCom’s composite intrastate switched access rate of \$0.06 per minute is ten times higher than its interstate access rate. *See Verizon Br.* at 3, fn. 2.

will be developed by the Company on a quarterly basis by dividing the measured interstate originating minutes by the total Originating Access Minutes.” OrbitCom has never produced any evidence demonstrating that it followed that process and performed the calculation specified, let alone performed the calculation on a “quarterly basis” using current data, as its tariff requires.

OrbitCom also provided nothing, either in its Memorandum or during the hearing, to support its claim that it developed a PIU factor “using known traffic patterns.” In particular, it did not produce any data demonstrating what Verizon’s traffic patterns actually were at any times relevant to the parties’ dispute. This is a significant omission, because the PIU factors OrbitCom applied to Verizon’s traffic varied widely over time: in June 2007, OrbitCom billed 34% of Verizon’s traffic at interstate rates and 66% at intrastate rates; for the next 13 months it billed all traffic using a PIU factor of 5% interstate/95% intrastate; and in August 2008, it began applying a PIU factor of 32% interstate/68% intrastate to all Verizon traffic. *See Verizon Br.* at 11-12, 14-17. Neither factor was reasonable or lawful.

A. 5%/95% PIU Factor

OrbitCom’s rationale for applying a 5%/95% PIU factor to all of Verizon’s traffic over a 13-month period from June 2007 through July 2008 is meager at best. OrbitCom did not cite its tariff as justification for using this 5%/95% PIU, because its tariff makes no mention whatsoever of this particular factor. *See VP Telecom, Inc. Tariff*, § 3.4.1.4. Instead, OrbitCom asserts that the 5%/95% factor “was a product of the environment within which OrbitCom operated.” OrbitCom Memo at 6. As further explanation, OrbitCom states that it often selects one or more carriers to serve as a PIC and LPIC, and that “the carrier selected as the LPIC will receive almost exclusive intrastate originating traffic from OrbitCom’s end

users.” *Id.* at 7. Based on these general statements, OrbitCom concludes there is “a factual and statistical basis for the application of this 5/95 PIU.” *Id.*

There is nothing in the record, however, that ties these overly general statements to the actual facts about Verizon’s status and the jurisdiction of its interexchange traffic between June 2007 and July 2008. Notably, OrbitCom did not produce any evidence showing that Verizon was an LPIC but not a PIC throughout that 13-month period. Nor did it produce any evidence demonstrating that Verizon received virtually no interstate traffic during that period of time.¹¹ On the contrary, OrbitCom’s statements made during discovery indicated otherwise. In response to a data request, OrbitCom represented that since July 1, 2002, “MCI has been considered as a PIC and LPIC *each and every month* in South Dakota.” *See* Tr. at 99:20-21 (emphasis added); *see also* Verizon Br. at 15-16. This acknowledgment that Verizon was considered a PIC each month is contrary to OrbitCom’s apparent position that Verizon was not receiving any interLATA traffic during the 13 months in question. Mr. Powers also testified that OrbitCom uses “about four carriers and all of them are considered a PIC or an LPIC. In other words, we consider choosing any of them as a PIC or any of them as an LPIC.” Tr. at 99:7-10; *see also* Tr. at 19:10-11 (“three or four” IXCs are going to have originating access.) If OrbitCom wanted to demonstrate that its practice of applying intrastate access rates to 95% of Verizon’s traffic during the 13-month period was legitimate, it should have produced reliable evidence that, throughout the entire period, Verizon was used only as an LPIC, was never used as a primary interexchange carrier, and carried only minimal amounts of interLATA long distance calls originated by OrbitCom’s customers. However, it never produced any such information. Accordingly, there is no basis in the record for the

¹¹ Moreover, during the entire period of time in question, OrbitCom did not take any steps to preserve call detail records that would have demonstrated what the actual jurisdiction of the traffic was; it instead allowed those records to be “purged.” *See* Verizon Br. at 21-23.

Commission to conclude that OrbitCom's application of a 5%/95% PIU factor to Verizon's traffic from June 2007 through July 2008 was reasonable.

In contrast to OrbitCom's vague explanation of why it billed 95% of Verizon's traffic at intrastate rates and only 5% of the traffic at interstate rates, Verizon provided a comprehensive analysis – based on records of actual calls made by OrbitCom customers during the relevant time period – which showed that OrbitCom's arbitrary allocation of traffic was incorrect. Verizon's witness, Ms. Freet, fully described the analysis Verizon conducted and the results. Stated briefly, Verizon obtained the telephone numbers (ANIs) of OrbitCom customers and then reviewed its network records to identify all of the calls carried over Verizon's long distance network that were originated by, or terminated to, those same OrbitCom end users' ANIs, on four days in April and May of 2008. That study showed that the percentage of all originating and terminating interstate traffic combined was 60.7% on those days – *twelve times* the percentage OrbitCom actually applied. *See* Verizon Br. at 13-14; Exhibit B (Supplemental Testimony of Leslie Freet) at 13-14 and CONFIDENTIAL Exhibit LF-35.

OrbitCom did not address or attempt to rebut Verizon's analysis, either in pre-filed testimony or during the hearing. It refers briefly to that analysis for the first time in its post-hearing Memorandum. Even then, OrbitCom cites only a single result of Verizon's study ("Ms. Freet's ... testimony establishes a PIU on *terminating* traffic of 27% interstate and 73% interstate for the months of April and May 2008"). OrbitCom Memo at 6 (emphasis added).¹² OrbitCom suggests that these "findings support OrbitCom's analysis," but it is wrong. As an

¹² Ms. Freet identified the actual jurisdiction of calls placed on the days studied; she did not identify a "PIU" factor which, as previously explained, is a defined term that applies only to traffic whose jurisdiction cannot be determined from actual call detail.

initial matter, OrbitCom was actually applying its 5%/95% PIU ratio to *all* Verizon traffic (including terminating traffic) during that period, so that even taken on its own terms OrbitCom's argument would show that it overstated the appropriate percentage of interstate usage by a factor of five.

More to the point, the *terminating* traffic ratio is of only peripheral significance to the actual dispute between the parties about the 5%/95% ratio. OrbitCom has attempted to justify its use of the 5%/95% PIU factor based on the jurisdiction of calls *originated* by its end users, as indicated by its discussion of PICs and LPICs. A customer's choice of a PIC and LPIC only applies to calls that the customer originates. Only calls originated by an end user are routed to the carrier(s) that are selected as the PIC or the LPIC, depending on the destination of the call. Conversely, calls that are delivered to OrbitCom's customers are routed by the carriers that the calling parties select. Thus, OrbitCom's reference to Verizon's finding about calls that were *terminated* to OrbitCom's end users is not relevant to OrbitCom's application of the 5%/95% PIU factor on all *originating* traffic.¹³ Moreover, Verizon's study contained a more significant finding that OrbitCom chose to ignore: on the four days for which call records were examined, the percentage of *originating* interstate traffic, based on minutes of use, ranged between 58.1% and 93.1%, and averaged 72% -- *more than fourteen times* the percentage OrbitCom actually applied. *See* Verizon Br. at 13; Exhibit B (Supplemental Testimony of Leslie Freet) at CONFIDENTIAL Exhibit LF-35.

Thus, the only evidence about calls placed by OrbitCom end users during the 13-month period in which OrbitCom applied the 5%/95% PIU factor to Verizon's access traffic

¹³ OrbitCom admits that it erroneously applied the 5%/95% PIU factor to toll-free calls and calls terminated to OrbitCom's end users. *See* OrbitCom Memo at 7, Verizon Br. at 16-17. Significantly, Verizon's findings relating to *terminating* traffic provide concrete evidence confirming that OrbitCom's practice of applying the 5%/95% PIU factor to Verizon's terminating traffic was improper.

demonstrates that the jurisdictional allocator OrbitCom used was inaccurate and hence invalid. Because OrbitCom based its bills to Verizon on an erroneous and unsupported assumption, its bills were incorrect, and it substantially overcharged Verizon from June 2007 through July 2008. Accordingly, OrbitCom has not met its burden of proving that it is entitled to recover the charges it billed Verizon during that period of time. On the contrary, the Commission should require OrbitCom to refund or credit Verizon the full amount of such overcharges.

B. 32%/68% PIU Factor

Beginning in August 2008, OrbitCom began applying a 32% interstate/68% intrastate PIU factor to all of Verizon's traffic.¹⁴ OrbitCom defends its choice of this factor by stating it "was developed by individuals well-versed in the telecommunications industry and ... in the nature of their customers." OrbitCom Memo at 7.¹⁵ OrbitCom also asserts that "[o]n average," small business customers in the state "make mostly intrastate calls." *Id.* at 8. However, OrbitCom presented no evidence, such as call records, to substantiate either of these very general assertions. Moreover, in light of OrbitCom's admission that it did not rely on actual call detail records obtained from Qwest to generate bills, there is no plausible basis for crediting OrbitCom's conclusory claim that its personnel were "well versed" in industry practice and possessed sufficient information to accurately assign all of Verizon's access traffic to the correct jurisdiction.

¹⁴ For certain terminating switched access calls whose jurisdiction could not be determined, OrbitCom was bound by sections 3.4.2 and 3.4.3 of its tariff to use the PIU factors that Verizon submitted in August 2008, but it did not do so.

¹⁵ It is apparent from this explanation that OrbitCom did not establish this PIU factor by using actual call detail and calculating it on a quarterly basis, as specified in section 3.4.1.1 of OrbitCom's tariff.

OrbitCom makes the additional claim that “the 32/68% PIU has been borne out in [its] relationship with other carriers.” OrbitCom Memo at 8. As support for this proposition, OrbitCom submitted a one-page document containing excerpts of two bills issued by Global Crossing in January and February 2004, four and one-half years before OrbitCom started applying the 32%/68% PIU factor to Verizon’s traffic. These old invoices to another carrier are not probative of the jurisdiction of Verizon’s access traffic in 2008 and 2009.¹⁶ Moreover, OrbitCom indicated that it uses “about four [long distance] carriers,” including Verizon. Tr. at 99:7-10; 99:19-21. Clearly, if OrbitCom wanted to support its position that the use of a 32%/68% allocator between August 2008 and April 2009 was valid, it should have presented contemporary documentation, such as current invoices from its long distance supplier(s). However, it did not do so. Accordingly, the Commission should not rely at all on the stale document proffered by OrbitCom as reasonable justification for the company’s billing practices more than four years later.¹⁷

¹⁶ The Global Crossing invoices included calls that were originated and terminated in states other than South Dakota. *See* Verizon Br. at 17-18. Absent additional information, which OrbitCom did not provide, there is no basis for finding that the jurisdictional allocation of traffic reflected on those bills was representative of switched access traffic within South Dakota in early 2004, as well as four and five years later.

¹⁷ OrbitCom states that it “also produced records during this process” to verify that it has properly jurisdictionalized traffic since June 2009. OrbitCom Memo at 8. This is not correct. OrbitCom provided Verizon with certain call records during discovery (*see id.* at fn. 5) after the Commission granted Verizon’s motion to compel, but OrbitCom did not submit any call records into evidence in the proceeding. Moreover, OrbitCom timely produced call records for only one of Verizon’s long distance networks, CIC 0555, and Verizon did not have an opportunity to review any call detail information relating to its other network, CIC 0222. *See* Verizon Br. at 24 fn. 32. Verizon was the only party to introduce any call records into the record, as well as analyses showing that the actual jurisdiction of calls contained in those records was materially different than that reflected on OrbitCom’s invoices issued at the time.

C. Verizon's Analysis of Actual Call Records Casts Substantial Doubt on the Validity of the PIU Factors that OrbitCom Applied to Verizon's Traffic and the Accuracy of its Bills

OrbitCom makes the astonishing claim that Verizon did not “produce any evidence that OrbitCom’s PIU factors were invalid, unreasonable or in any way arbitrary.” OrbitCom Memo at 9. As demonstrated above, Verizon has shown that OrbitCom’s use of various PIU factors was contrary to the express terms of its tariff. Verizon also presented evidence – unchallenged by OrbitCom -- demonstrating that the 5%/95% PIU factor OrbitCom applied between June 2007 and July 2008 was incorrect. Verizon’s analysis of the actual call records showed that a substantial majority of originating traffic during that period was, in fact, interstate. Thus, OrbitCom’s arbitrary application of an invalid PIU factor was an unreasonable practice.

OrbitCom raises questions about Verizon’s analysis based on Verizon’s internal network records and EMI formatted records produced during discovery. OrbitCom Memo at 9-10. However, none of its criticisms are valid.¹⁸ OrbitCom argues that Verizon’s analysis was unreliable because Verizon’s call records lacked necessary detail, including Verizon’s carrier identification code (or “CIC”), the OCN (a network identifier) of OrbitCom, or an OrbitCom ANI. *Id.* Verizon thoroughly refuted each of these objections during the hearing

¹⁸ To summarize Verizon’s study, it obtained the ANIs associated with OrbitCom’s end users and then identified call detail records for traffic on Verizon’s long distance network associated with those same ANIs. Once it identified all of the long distance calls on the Verizon network associated with ANIs assigned to OrbitCom’s end users, Verizon determined the jurisdiction of the traffic using standard industry protocols. Verizon also compared the call records of the two companies. That review showed that many calls originated by or terminated to OrbitCom end users and that were transported over Verizon’s long distance network did not appear in the EMI formatted files produced by OrbitCom. The primary conclusion of these studies was that the percentage of interstate usage of calls originated by or terminated to OrbitCom end users that were handled by Verizon’s 0555 network during the five days for which call records were provided was considerably higher than the percentage of interstate usage reflected on invoices that OrbitCom issued Verizon during the same billing period. The results of that analysis and the underlying data were all introduced into evidence. *See* Verizon Br. at 23-26. OrbitCom alleges that this analysis “did not meet the search criteria” established by Ms. Freet (OrbitCom Memo at 10), but this claim is unsupported and is clearly incorrect.

and in its initial brief (at pages 26-32). Rather than repeat that detailed explanation, Verizon offers only a brief response to those same points here.¹⁹

There is no merit to OrbitCom's contention that the internal network records that Verizon reviewed lacked pertinent information and thereby rendered Verizon's analysis invalid. First, Ms. Freet provided a logical explanation for why Verizon's internal records do not contain Verizon's own CIC. All the call records were produced by Verizon's switches that handled the calls. Because the information came directly from its own network, it was not necessary for Verizon to stamp its own CIC on its own internal records. *See Verizon Br. at 27-29.* More important, Ms. Freet conducted a further review of the data and explained that "even in those instances where the CIC is not displayed on some of Verizon's call records," Verizon found the "exact call in OrbitCom's call detail records." Thus, the fact that Verizon's CIC was not displayed on its own network records had no bearing on the fact that the calls were originated or received by OrbitCom end users, as evidenced by OrbitCom's own call records. *Verizon Br. at 28-29.*

Second, Ms. Freet explained why the OCN of OrbitCom (or any other UNE-P provider) does not appear on Verizon's call records (or those of any other long distance provider). All of OrbitCom's traffic is routed through Qwest's local exchange switches in

¹⁹ OrbitCom also attacks Verizon's analysis on the basis that Verizon identified calls on its network that were placed to or from OrbitCom end users that did not appear in the 5-day sample of EMI formatted records that OrbitCom provided to Verizon. *OrbitCom Memo at 9-10.* OrbitCom asserts in its post-hearing Memorandum that it did not bill these so-called "phantom" calls, but it has offered no evidence to show that this is true. OrbitCom has never produced (or offered in evidence) a full month of call records covering a complete billing cycle, which could then be compared with an actual OrbitCom invoice to show what it did and did not bill. Further, OrbitCom does not claim that it has reviewed its billing records to ascertain whether or not they are complete or what the source of the mismatch might be, and does not substantiate its assertion that the calls were not provided to OrbitCom in the Daily Usage Files provided by Qwest. Verizon does not know for certain why some calls to and from OrbitCom end users did not appear in the records provided by OrbitCom; however, it did identify a number of factors that could have affected the reliability of the data. *See Verizon Br. at 32-33 fn. 38.* OrbitCom cannot meet its burden of proof with unsupported aspersions cast on Verizon's analysis without offering any affirmative evidence or analysis of its own.

South Dakota. Those calls are identified in industry routing guides as belonging to Qwest, the network provider, even if the end user is a customer of a UNE-P provider that obtains service through those end offices. For this reason, Verizon's network records show Qwest as the originating OCN, or the owner of the telephone number. Thus, the fact that OrbitCom's OCN is not shown in Verizon's records should not be surprising; indeed, that simply reflects standard industry protocol. Once again, the more salient fact is that Verizon's call records indicated that the calls were placed by or delivered to OrbitCom customers. *See Verizon Br.* at 29-31.

OrbitCom's third objection is that Verizon's records do not include "an OrbitCom ANI." The undisputed evidence is to the contrary. Based on her analysis, Ms. Freet confirmed that "every one of those calls had an originating or terminating ANI" associated with OrbitCom. *See Verizon Br.* at 30-31. Neither in testimony nor in its post-hearing Memorandum has OrbitCom identified a single call record provided by Verizon that did not contain the telephone number assigned to an OrbitCom customer.

OrbitCom suggests that the validity of the 32%/68% PIU factor it began applying in August 2008 was "borne out by [its] commencement of jurisdictional billing" in May 2009 (OrbitCom Memo at 8). However, Verizon's detailed and thorough analyses based on actual call records covering five days in June 2009 undermine OrbitCom's claim.²⁰ Verizon's analyses raise substantial questions about the completeness of OrbitCom's call records and the accuracy of its bills. Because OrbitCom did not produce sufficient evidence to

²⁰ Verizon has explained that it is not reasonable to extrapolate from a small sample of call records (which only included calls on three weekdays) to validate a full month's bill. *Verizon Br.* at 54. Thus, OrbitCom's claim that the jurisdiction of calls contained in the 5-day sample is "entirely consistent with the total Verizon CABS bills from OrbitCom" for two months, June and July 2009, (OrbitCom Memo at 8) is both unsupported and incorrect, as evidenced by Verizon's analyses described in the text above.

demonstrate that its billing practices were valid and reasonable, it did not satisfy its burden of proving the material elements of its complaint. In contrast, Verizon produced substantial evidence demonstrating that OrbitCom did not accurately identify the jurisdiction of Verizon's access traffic or bill Verizon appropriately. Verizon's detailed evidentiary showing is entitled to substantial weight, and the Commission should rule in its favor.

V. IT IS UNREASONABLE AND UNLAWFUL FOR ORBITCOM TO CHARGE VERIZON FOR A "TANDEM SWITCHING" SERVICE THAT IT DOES NOT, IN FACT, PROVIDE

OrbitCom claims that it may properly bill Verizon for "tandem switching," but none of the arguments advanced in support of this position have merit.²¹ To begin, it is undisputed that the EMI formatted call records that Qwest provided OrbitCom (and that OrbitCom produced during discovery) show that more than 98% of the calls for which OrbitCom billed Verizon were directly routed through the local exchange carrier's end offices, and that fewer than 2% of the calls were "tandem routed." *See* Verizon Br. at 37-38. A separate review of Verizon's internal network records also confirmed that more than 97% of its interexchange traffic in South Dakota is routed over Direct End Office Trunks ("DEOTs"), and not through tandem switches. *Id.* at 38-39. Verizon also produced documents demonstrating that it had ordered DEOTs to virtually every end office in South Dakota in which OrbitCom has end user customers. *Id.* at 40-51.

²¹ Verizon provided a comprehensive analysis of the facts relating to this issue, and rebutted the reasons offered by OrbitCom for why it may bill for tandem switching, in its initial brief, at pages 33-50. Verizon will not repeat that discussion here, but will focus on the specific points made by OrbitCom in its Memorandum.

A. OrbitCom's Theory Ignores the Way in Which Traffic is Actually Routed

OrbitCom's response to these uncontroverted facts is to ignore the reality of how calls are actually being routed and delivered to its end users in South Dakota. OrbitCom asserts that the existence of the extensive deployment of DEOTs between Verizon's network and Qwest's end offices is of no significance because Verizon has not purchased any DEOTs from OrbitCom. OrbitCom contends that because Verizon "does not have a DEOT to OrbitCom, its calls must go through the tandem." OrbitCom Memo at 13. This is not a question of what "must" occur, and OrbitCom is clearly wrong.

The network records of both Qwest and Verizon demonstrate that nearly all of the calls placed by or delivered to OrbitCom's end users that are carried over Verizon's interexchange network in South Dakota are, in fact, routed over circuits that directly connect Verizon's network to Qwest end offices.²² The same network records show that only a small fraction of the calls are ever routed through a tandem switch. OrbitCom admits this crucial fact.²³ Given that admission, OrbitCom's desire that Verizon order additional DEOTs separately from OrbitCom is simply irrelevant. The traffic at issue has already been routed over the DEOTs that are in place between Verizon's network and Qwest's end offices. Regardless of OrbitCom's wishes, the Commission is not free to ignore the substantial evidence about how traffic is actually being routed.

²² This routing arrangement is not inconsistent with the QLSP agreement between Qwest and OrbitCom. That agreement provides that a CLEC's calls are routed "us[ing] the existing routing tables resident in Qwest Switches" and are "carried on the same transmission facilities between ... Switches in its network facilities that Qwest uses for its own traffic." Exhibit 6 (QLSP) at Attachment 2, § 1.5.1.

²³ See, e.g., Tr. at 117:17-19 (admission by Mr. Powers that "most" call records are stamped "as though it was directly routed"); see also Tr. at 94:24-95:3, and Exhibit 3 (Powers Supplemental Testimony) at 17:6-7 (Mr. Powers "agree[d] that the DUF/EMI records do show a large percentage of the calls routed through a direct connect").

Verizon has explained why OrbitCom's argument that Verizon should be required to order DEOTs from OrbitCom makes no sense from either an operational or a financial perspective. Verizon Br. at 44-45, 47-48. As one example, if Verizon were to purchase DEOTs from OrbitCom, it could not actually *use* those facilities when it terminates long distance calls in South Dakota. This is because telephone numbers assigned to OrbitCom end users are associated with a Qwest end office (not a "virtual" OrbitCom location²⁴) and are identified as Qwest telephone numbers in industry routing guides. Following standard industry routing protocols, Verizon (and other interexchange carriers) must necessarily terminate long distance calls to the specific Qwest end office in which those telephone numbers reside. They do so by routing interexchange traffic over facilities established by Qwest for that purpose. Verizon lacks sufficient information to identify and segregate calls destined for OrbitCom end users and route them over separate facilities. Accordingly, even if Verizon theoretically were to order DEOTs from OrbitCom, it could not use those facilities to route any calls destined for OrbitCom's end users. This serious limitation would render the DEOTs useless for a significant portion of the traffic, and would thereby negate the efficiencies and economic benefits that DEOTs are intended to provide.

The network architecture envisioned by OrbitCom would also require Verizon and other interexchange carriers to purchase multiple, redundant DEOTs from each UNE-P provider whose customers are served by a particular end office. But establishing multiple separate trunks between the IXC's network and each end office would destroy the networking efficiencies and cost advantages that carriers seek to obtain by combining substantial amounts of traffic on a single trunk. *See* Verizon Br. at 47-48.

²⁴ As a UNE-P provider, OrbitCom does not have a physical presence or network facilities of its own.

Reasonable public policy should promote efficient competition, but OrbitCom's approach would result in inefficient networking arrangements and needlessly drive up IXCs' costs. Notably, OrbitCom did not explain why the unorthodox ordering arrangement it advocates is reasonable, nor how it would benefit its customers or any of the carriers involved, except perhaps OrbitCom itself.

OrbitCom asserts that if "Verizon's traffic is allowed to travel over the [DEOTs] leased by Verizon from Qwest, OrbitCom's traffic will effectively be rejurisdictionalized." OrbitCom Memo at 15. It claims that if Qwest's and OrbitCom's traffic were "commingl[ed]" on the same circuits, the actual jurisdiction of calls could not be determined, resulting in an increased amount of "unknown traffic." There is no merit to this argument. The record shows that nearly all of Verizon's traffic is already being transported between its network and Qwest's over DEOTs. Qwest provides OrbitCom each day with EMI records that provide sufficient information about the origination and termination of those calls to enable OrbitCom to determine their jurisdiction. In fact, OrbitCom claims that it has been using that information since April 2009 to perform "jurisdictional billing." Exhibit 2 (Rebuttal Testimony of Michael Powers) at 17:5-7. It could not do so if all of Verizon's traffic was shown to be of "unknown" jurisdiction. Thus, the fact that Verizon's traffic is being carried over DEOTs in no way affects the ability of the carriers to identify the correct jurisdiction of calls. The hypothetical scenario OrbitCom posits is simply unrealistic and ignores what is actually taking place today.

B. OrbitCom's Practice of Billing Verizon for "Tandem Switching" Violates the Commission's Administrative Rules and OrbitCom's Own Tariff

Because nearly all of the traffic is directly routed through end offices and is not transported through tandem switches, OrbitCom does not provide any "tandem switching" service on the vast majority of Verizon's traffic. Its practice of billing Verizon for "tandem switching" violates both the Commission's Administrative Rules and the terms of its own tariff. *See* Verizon Br. at 35-36. The definition of "Tandem-switched transport" in ARSD 20:10:29:01 (37) requires that traffic be "switched at a tandem switch." Similarly, ARSD 20:10:29:16.03 provides that a LEC may impose a "tandem switching" charge only on IXC's "that use the ... carrier's tandem switching facilities." Most of the calls for which OrbitCom billed Verizon tandem switching charges do not meet either of these requirements. Accordingly, OrbitCom's practice conflicts with the Commission's rules.

OrbitCom's tariff also specifies that "Tandem Connect Service is provided in conjunction with the tandem provider serving the area" and "consists of circuits from the point of interconnection with Customer's tandem provider." VP Telecom, Inc. Tariff No. 1 at §§ 14.2.3.1 and 14.2.3.3. Again, neither condition is met for the vast majority of Verizon's traffic. OrbitCom asserts that it "is lawfully entitled" to bill Verizon for tandem switching (OrbitCom Memo at 3), but it fails to demonstrate how its billing practice conforms to the Commission's Administrative Rules or its own tariff.²⁵ The record shows that OrbitCom's imposition of charges for tandem switching on calls that are not switched at a tandem switch is contrary to each of these provisions and is therefore improper.

²⁵ OrbitCom states that its tariff "defines the rate at which it may bill carriers." OrbitCom Memo at 12. This is true but, as Verizon explained earlier, OrbitCom's invoices do not contain a separate charge for tandem switching and do not specify the rates for "Tandem Switching" and "Tandem Transport" that are set forth in OrbitCom's tariff. Verizon Br. at 34. As explained in Section II above, Verizon is not attacking the reasonableness of the provisions in OrbitCom's tariff that relate to tandem switching. Instead, Verizon objects to OrbitCom's failure to bill in accordance with the terms of its tariff.

OrbitCom completely ignores these South Dakota-specific requirements, and relies instead on a single FCC decision as support for its authority to bill for tandem switching. OrbitCom Memo at 14. Even if OrbitCom were correct about the federal rule (which it is not), this Commission’s Administrative Rules establish the legal requirements that govern intrastate service in South Dakota and, where intrastate service is concerned, prevail even over a different view advanced by the FCC.

In any event, OrbitCom is wrong about the federal policy on this issue. OrbitCom seeks to wrap itself in language used by the FCC in a 2004 decision by claiming that it “provides the functional equivalent of all of the access service elements.” *Id.* As demonstrated above, however, this is not correct: OrbitCom does not perform tandem switching functions in connection with the vast majority of Verizon’s traffic, and OrbitCom has not shown that it provides Verizon an “equivalent” service. Thus, the passage it cites is inapplicable to OrbitCom’s actual circumstances and does not support its position.

Equally important, OrbitCom overlooks a key holding in the FCC decision it cites. Applying a “long-standing policy” to CLEC switched access charges, the FCC ruled that CLECs “should charge only for those services that they provide.” *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 19 FCC Rcd 9108 (2004) at ¶ 21. The FCC reaffirmed this policy in a more recent decision that Verizon addressed in its initial brief (at 35 fn. 41):

Applying this principle to a situation where a single switch is capable of providing tandem and end office functions, the Commission found that competitive LECs can charge the end office switching rate when they originate or terminate calls to end users, and the tandem switching rate when they pass calls between two other carriers. When a competitive LEC performs both functions, however, using two separate switches, it may charge for both functions, as would an incumbent LEC.

Access Charge Reform, PrairieWave Telecommunications, Inc., et al, Petitions, FCC 08-49 (CC Docket No. 96-262) (2008) at ¶ 26. As the Commission is aware, Qwest has deployed separate end office and tandem switches in South Dakota. Thus, OrbitCom’s tandem switching charges would be reasonable under the FCC’s policy only if the calls were routed through a “separate [tandem] switch[]” and OrbitCom actually performed tandem switching functions. Because the calls were not and because OrbitCom performed no such function, the *PrairieWave* order would preclude it from charging for tandem switching.

C. The QLSP Agreement Does Not Sanction OrbitCom’s Practice of Billing for Tandem Switching

Although OrbitCom cannot escape the fact that it does not actually provide Verizon a tandem switching service, it claims that it may bill for such service because of its QLSP (“Qwest Local Service Platform”) agreement with Qwest. OrbitCom asserts that the QLSP “controls this issue” and its “existence and terms ... should end the inquiry” (OrbitCom Memo at 12, 13). This argument lacks merit for three separate reasons: (1) the Commission’s Administrative Rules and the provisions of OrbitCom’s tariff take precedence over any contractual rights OrbitCom may have; (2) Verizon is not a party to OrbitCom’s QLSP agreement and is not bound by its terms; and (3) the QLSP does not actually purport to give OrbitCom the right to charge for tandem switching service that OrbitCom does not provide.

OrbitCom relies primarily on definitional provisions of the QLSP to argue that its lease of switching functions includes tandem switching. OrbitCom Memo at 12. Verizon does not dispute that a UNE-P provider’s traffic *may* be routed through a tandem switch, and that the carrier may bill an IXC for tandem switching when that occurs. However, nothing in

the QLSP says that a UNE-P provider's traffic will *always* be routed through a tandem switch, or that the provider has any right to control when traffic is or is not tandem-switched.

On the contrary, the QLSP agreement makes clear that, as the network provider, Qwest is responsible for provisioning service and routing all traffic. *See, e.g.*, Exhibit 6 (QLSP) at Attachment 2, §§ 1.1.1 (“Qwest combines the Network Elements that make up QLSP Service”) and 1.5.1 (“CLEC traffic will be carried on the same transmission facilities between end-office Switches [and] between end-office Switches and tandem Switches ... that Qwest uses for its own traffic”). In addition, OrbitCom only pays the recurring and nonrecurring charges that are applicable to the services that it actually uses.²⁶

If Qwest routes Verizon's interexchange traffic “on the same transmission facilities ... that Qwest uses for its own traffic” that it delivers to Verizon's interexchange network, those calls are carried predominantly over the existing DEOTs and are not routed through a tandem switch. If the calls are not routed through the tandem, Qwest only bills the CLEC the charges applicable to local switching. Because the calls are not routed through the tandem, OrbitCom is not providing a tandem switching service, and it is not entitled to charge Verizon for a service it does not perform.

Simply put, the QLSP does not (and cannot) give OrbitCom *carte blanche* authority to bill for anything it wants.²⁷ OrbitCom's own tariff dictates what services it may bill for and,

²⁶ While Qwest does not charge carriers for switched access when a UNE-P provider serves an end user through a QLSP agreement (*see* Exhibit 6 at Attachment 2, §3.7), Qwest may charge carriers for DEOTs and entrance facilities ordered through its tariffs. *See, e.g.*, CONFIDENTIAL Exhibit D.

²⁷ OrbitCom argues that if Verizon disagrees with its interpretation of the QLSP, it should seek a declaratory ruling in court, but then asserts, inconsistently, that only a party to a contract can challenge its validity. OrbitCom Memo at 13. Verizon's CLEC affiliate has entered into a QLSP with Qwest, and Verizon is not quarreling with the terms or validity of that agreement. Rather, Verizon's position is that OrbitCom has misconstrued the nature and scope of the QLSP by claiming that it authorizes OrbitCom to bill for a service it does not provide. An agreement between two other carriers cannot abrogate Verizon's reasonable rights. The QLSP cannot be used as an excuse for improperly charging Verizon for a tandem

as shown above, its tariff does not authorize OrbitCom to charge for tandem switching unless it provides such service “in conjunction with the tandem provider” and the calls are routed over “circuits from the point of interconnection with Customer’s tandem provider.” Here, where those conditions were not met, OrbitCom may not bill a tandem-switching charge.

VI. VERIZON SUBMITTED REASONABLE, GOOD FAITH DISPUTES OF ORBITCOM’S INVOICES

OrbitCom admits that Verizon began disputing its invoices in early 2008, but complains that Verizon “did not file a dispute as defined by OrbitCom’s tariff.” OrbitCom Memo at 8, 3. The problem with this argument is that OrbitCom’s intrastate tariff says nothing about the format of a customer’s dispute.²⁸ Section 4.8 of its South Dakota tariff states that “[t]he Customer may dispute a bill only by written notice to the Company.” OrbitCom does not dispute that Verizon periodically sent it dispute letters via e-mail, to which spreadsheets were attached that detailed the nature of Verizon’s dispute with OrbitCom’s invoices. Thus, Verizon did all that the tariff required.

OrbitCom’s characterization of Verizon’s billing disputes is schizophrenic. On the one hand, it claims Verizon’s dispute letters were “evasive” and, on the other hand, complains that the spreadsheets Verizon provided to support its disputes were too lengthy and detailed to

switching service it does not obtain, especially since Verizon is already paying for DEOTs that are being used to route its interexchange traffic in South Dakota. If, however, the QLSP somehow did purport to provide OrbitCom with a right to bill Verizon for service not provided, this Commission would have the jurisdiction to determine whether that provision of the QLSP rendered OrbitCom’s billing practices reasonable.

²⁸ Verizon’s dispute initially addressed OrbitCom’s charges for interstate access service (specifically, its failure to comply with the FCC’s price cap rules for CLEC-provided switched access). OrbitCom did not even file an interstate switch access tariff until February 9, 2009. *See* Exhibit A (Direct Testimony of Leslie Freet) at 9:16-18. Thus, there was no tariff language relating to dispute processes when Verizon began disputing OrbitCom’s invoices.

review. OrbitCom Memo at 8-9.²⁹ On the stand, Mr. Powers contradicted the first point, acknowledging that OrbitCom “reached [an] understanding” about what Verizon was disputing. Tr. at 18:9-19. With respect to the second point, Ms. Freet explained Verizon’s billing disputes, many of which were submitted into evidence. *See* Exhibit A (Direct Testimony of Leslie Freet) at 16-18 and Exhibits LF-12 through LF-15; Hearing Exhibit 8. The length of Verizon’s dispute notifications is primarily a function of the fact that OrbitCom bills Verizon for interstate and intrastate access services under some 43 separate accounts (“Billing Account Numbers”) in 14 states (*see* Tr. at 23:13-15), and that Verizon’s disputes addressed all of the outstanding billing issues (many of which did not involve charges for intrastate access service in South Dakota). As part of its documentation, Verizon provided OrbitCom with a break-down of the dispute by issue (*e.g.*, interstate rate, PIU, etc.), BAN, OCN, and state. *See, e.g.*, Exhibit A (Direct Testimony of Leslie Freet) at 16-18 and Exhibit LF-15. Referring to one particular Verizon dispute report (*see* Exhibit 8), Ms. Freet pointed out the columns on the spreadsheet that specified the invoice date, OCN, state, BAN, rate element, minutes (volume), and billed amount -- which is precisely the information OrbitCom claimed was needed to be able to review a dispute. Tr. at 132:10-133:12.³⁰

Thus, it is undeniable that Verizon’s billing disputes were both specific and comprehensive. OrbitCom, however, gave short shrift to each of Verizon’s billing disputes.

²⁹ OrbitCom also complains that Verizon’s disputes were “evolving in nature.” OrbitCom Memo at 9. Ms. Freet testified that this is a common result of the audit process. After Verizon identified one issue with OrbitCom’s bills (“the interstate rate issue”), it began “looking at everything on that vendor.” That further investigation uncovered other issues that had previously gone “under the radar.” Tr. at 184:9-22. OrbitCom also points out that the amount of Verizon’s disputes increased over time (OrbitCom Memo at 9), but this merely reflects the fact that subsequent dispute notices addressed additional invoices issued in later months.

³⁰ Ms. Freet also testified about the complexities involved in auditing access bills. Tr. at 148:9-150:10. As she explained, the process is not as simplistic as “(Rate) x (Minutes),” as OrbitCom asserts. OrbitCom Memo at 4.

Section 4.8 of its tariff states that OrbitCom, “upon receiving a written dispute will investigate the merits of the dispute. Upon completion of its investigation, the Company will provide written notice to the customer regarding the disposition of the claim.” Disregarding this requirement, OrbitCom consistently rejected Verizon’s disputes, often within 24 hours. *See* Exhibit A (Direct Testimony of Leslie Freet) at 23. Particularly given the extensive documentation that Verizon provided, these summary denials hardly suggest that OrbitCom undertook a fair and reasonable investigation of Verizon’s billing disputes.

OrbitCom argues that Verizon’s billing disputes were not valid because they were based on the theory that Verizon could “use the traffic of other carriers to calculate a PIU that should be used by” OrbitCom. OrbitCom Memo at 10-11. This argument misstates Verizon’s position.³¹ Verizon has described above many reasons why the PIU factors that OrbitCom arbitrarily applied over time were not reasonable. When Verizon began questioning OrbitCom’s invoices, it was because the jurisdictional allocation of traffic (at the time, OrbitCom was applying its 5%/95% PIU factor) was way out of line with Verizon’s experience in South Dakota and elsewhere. At the time, Verizon reviewed its network records and found that approximately 77% of its interexchange traffic originating from or terminating to South Dakota end offices in which OrbitCom was billing Verizon was interstate. *See, e.g.*, Tr. at 185:10-15; Exhibit A (Direct Testimony of Leslie Freet) at 35:4-36:5. A subsequent review of the jurisdiction of Verizon’s switched access traffic in South Dakota in 2007, 2008 and the first half of 2009 confirmed that this earlier assumption was accurate. *See* Exhibit A (Direct Testimony of Leslie Freet) at 36:13-37:2 and

³¹ The PIU factors that Verizon submitted in August 2008 (and that OrbitCom refused to use) were intended to be applied to the small percentage of calls that could not be measured and for which the jurisdiction could not be identified. Verizon explained in discovery that these PIU factors were developed based on information about all of its switched access traffic in South Dakota.

CONFIDENTIAL Exhibit LF-23. Ms. Freet also testified that she was not aware of any CLEC in the country that was billing less than a 50/50 PIU. Tr. at 184:25-185:9. Based on these facts, Verizon had a reasonable, good faith basis on which to question the accuracy of OrbitCom's bills. Before commencing a formal dispute, Verizon sought call detail records to enable it to verify that the charges were accurate. Only after OrbitCom refused to provide it with any CDRs did Verizon formally dispute its invoices. As Ms. Freet testified, the foregoing information provided a sufficient basis for disputing OrbitCom's bills and for calculating the amount of the dispute. *Id.* at 175:9-22.

OrbitCom tries to twist this legitimate basis for initiating a dispute into an argument that Verizon is trying "to use the traffic of other carriers to calculate a PIU that should be used by" OrbitCom. OrbitCom Memo at 10. This is incorrect. Verizon has not argued that OrbitCom's bills should reflect the jurisdiction of all interexchange traffic that passes between Verizon and Qwest in South Dakota. Verizon believes that information about all of its access traffic in the state is useful and can provide a reasonable proxy for analyzing the accuracy of OrbitCom's invoices and for quantifying the dispute. Moreover, this was the best information available to Verizon at the time in light of OrbitCom's refusal to produce EMI records that could have verified the actual jurisdiction of the traffic and helped to resolve the parties' dispute.

Ultimately, Verizon's position is that, under its tariff, OrbitCom should not have applied arbitrary PIU factors to the vast majority of Verizon's traffic, but instead should have used available call detail records to determine jurisdiction. Thus, OrbitCom's claim that Verizon is trying "to dilute OrbitCom's PIU" (OrbitCom Memo at 11) simply

mischaracterizes Verizon's position.³² The record demonstrates overwhelmingly that the PIU factors OrbitCom applied to Verizon's traffic were inaccurate and unreasonable, and that Verizon had appropriate grounds for disputing them.

Finally, OrbitCom argues that it was improper for Verizon to engage in "self-help" and withhold payment of certain charges invoiced by OrbitCom. OrbitCom Memo at 15-16.³³ This argument overlooks the provisions of OrbitCom's tariff that expressly contemplate that an access customer may withhold payment when it disputes a bill. Section 4.8 of the tariff describes what occurs after a billing dispute is resolved; in two separate bulleted paragraphs, the tariff explains how credits or payments are to be applied if "the customer has withheld the disputed amount." Because OrbitCom's tariff recognizes that an access customer may dispute a bill and withhold disputed amounts, Verizon's decision to withhold certain payments was not "unlawful," and OrbitCom's criticism is without merit.

Even aside from its tariff's plain language, OrbitCom's claim that withholding of payment for tariffed charges "is prohibited by well-established law" lacks merit. As an initial matter, none of the orders it cites for this proposition were rendered in South Dakota, and two of the three cases involved disputes over tariffed interstate access charges, which are not at issue in this case. Further, even federal law imposes no liability for "nonpayment of amounts

³² To the extent OrbitCom is alleging that Verizon's position is that the traffic analyses Verizon conducted are intended to be used "to compute an OrbitCom PIU," this, too, is incorrect. Verizon reviewed actual call records to show what the actual jurisdiction of calls was on the days for which such records were available. This evidence demonstrated that the PIU factors applied by OrbitCom at those times were inaccurate, and showed that OrbitCom had not met its burden of proving that its billing practices were reasonable. Verizon explained that a full month of EMI records would need to be reviewed and matched with a monthly invoice to accurately determine the jurisdiction of all calls made during the billing period. Verizon Br. at 54-55.

³³ While OrbitCom complains about Verizon's payment history (OrbitCom Memo at 3), the record shows that Verizon made payments to OrbitCom totaling \$214,271.78 between April 9, 2008 and January 2, 2009. See Exhibit A (Direct Testimony of Leslie Freet) at 50:13-21 and Exhibit LF-29 (the exhibit was filed on October 1, 2009).

not actually owed” under a carrier’s federal tariff.³⁴ As OrbitCom has failed on many counts to show that its bills reflected amounts actually owed under its tariff, its argument that Verizon violated the law by declining to pay them must also fail.

Verizon’s approach to the dispute was measured and reasonable, and thus lawful. After it began questioning the jurisdictional allocation reflected on OrbitCom’s invoices, Verizon tried over the next several months to resolve the issues informally and requested call detail records to assist in that review. Only after OrbitCom continually refused to provide call records to support its invoices and did not fairly address Verizon’s billing disputes, did Verizon begin withholding future payments. *See* Exhibit A (Direct Testimony of Leslie Freet) at 10:1-12:2, 16:1-17:20, 18:14-19:27, 23:1-22. Based on its calculation of past overcharges, Verizon determined that it had overpaid OrbitCom significant amounts, and was entitled to refunds or credits for the amounts that OrbitCom had collected and improperly retained. Exhibit A (Direct Testimony of Leslie Freet) at 51:4-52:2. Even OrbitCom admits that it has not yet refunded or credited Verizon certain amounts that OrbitCom improperly charged Verizon for terminating and toll-free calls between June 2007 and July 2008. OrbitCom Memo at 7. Accordingly, Verizon’s actions were neither unlawful nor inappropriate.

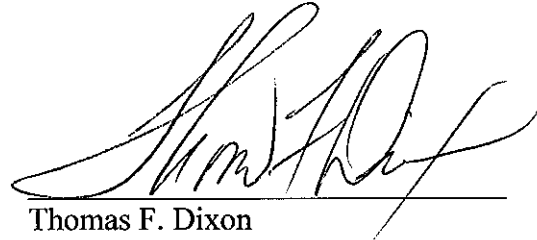
VII. CONCLUSION

For the reasons set forth herein and in its initial brief, Verizon respectfully requests that the Commission deny OrbitCom’s Amended Complaint in all respects, and that it not grant any of the relief requested by OrbitCom. Verizon requests that the Commission instead grant Verizon’s counter-claim, and that it require OrbitCom to issue

³⁴ *E.g., Iowa Network Servs. v. Qwest Corp.*, 385 F. Supp. 2d 850, 903-04 (S.D. Iowa. 2005) (accepting this argument as advanced by Qwest).

Verizon credits or refunds for the amounts that OrbitCom has unreasonably and improperly overcharged Verizon.

Dated January 8, 2010.



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CERTIFICATE OF SERVICE

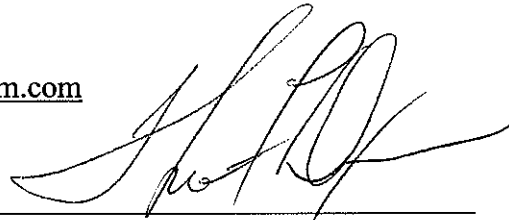
I, Thomas F. Dixon, hereby certify that on the 8th day of January 2010, I filed electronically and served by e-mail a true and correct copy of the foregoing in the above captioned action to the following:

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