BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT OF ORBITCOM, INC. AGAINST MCI COMMUNICATIONS SERVICES, INC. D/B/A VERIZON BUSINESS SERVICES AND TELECONNECT LONG DISTANCE SERVICES & SYSTEMS COMPANY D/B/A TELECOM*USA FOR UNPAID ACCESS CHARGES	TC08-135 **VERIZON'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, A MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF**

VERIZON'S MOTION TO STRIKE OR, IN THE ALTERNATIVE, A MOTION FOR LEAVE TO FILE SUR-REPLY BRIEF

MCI Communications Services, Inc. d/b/a Verizon Business Services and Teleconnect Long Distance Services & Systems Company d/b/a Telecom*USA (collectively referred to as "Verizon") respectfully move the Commission to strike portions of OrbitCom's Post-Hearing Reply Memorandum of Law in Support of Its Amended Complaint ("Reply Brief"). OrbitCom's Reply Brief contains new arguments and material that are not permissible or appropriate to be included in a "reply" brief, and contains information that is not part of the evidentiary record. Due process and considerations of fairness demand that all such argument and material be stricken. If, however, the Commission decides not to strike the offensive material, Verizon hereby moves, in the alternative, for leave to file a sur-reply to respond to the new arguments and information contained in OrbitCom's "reply" brief. In support of its Motion, Verizon states as follows:

I. It Is Well-Established that a Party May Not Include New Matter in a Reply Brief

The purpose of a "reply" is normally restricted to rebuttal of arguments made in the opposing party's initial brief. A "reply" brief is not the place to include additional facts or make new legal arguments. Nor may an answering brief be used to expand arguments or add material that properly should have been included in the party's opening brief, as this tactic deprives the other party of an opportunity to respond to such new or additional points.

The Supreme Court of South Dakota has held that a "reply" brief may not raise "new issues" and "new facts." *Brookside Townhouse Assn. v. Clarin*, 682 N.W.2d 762, 768 n.6; 2004 SD 79; 2004 S.D. LEXIS 86; *Fullmer v. State Farm Insurance Co.*, 514 N.W.2d 861, 865 n.4; 1994 S.D. LEXIS 43. In each of these decisions, the Court relied upon S.D. Codified Laws §15-26A-62, which provides that a reply brief "must be confined to new matter raised in the brief of" the opposing party.

Other courts have ruled consistently. *See, e.g., Bearden v. Lemon*, 475 F.3d 926, 930; 2007 U.S. App. LEXIS 2281 (8th Cir. 2007) (claim in reply brief "was not argued in [defendant's] brief in chief and, therefore, we will not consider the argument as 'it is well settled that we do not consider arguments raised for the first time in a reply brief.'"); *United States v. Thornberg*, 326 F.3d 1023, 1026 n.3; 2003 U.S. App. LEXIS 8080 (8th Cir. 2003), citing *Navarijo-Barrios v. Ashcroft*, 322 F.3d 561, 564 n.1 (8th Cir. 2003); *United States v. Ceballos*, 116 Fed. Appx. 45, 48; 2004 U.S. App. LEXIS 24331 (8th Cir. 2004) ("Absent some justification, we refuse to consider new arguments raised for the first time in a reply brief."), citing *United States v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997); *United States v. Vincent*, 167 F.3d 428, 431; 1999 U.S. App. LEXIS 1462 (8th Cir.

1999) ("We do not generally consider new arguments raised in a reply brief."), citing *Dyer v. United States*, 23 F.3d 1421, 1424 (8th Cir. 1994); *McGhee v. Pottawattamie County*, 547 F.3d 922, 929; 2008 U.S. App. LEXIS 24065 (8th Cir. 2008) ("The reply brief submitted by [defendants] is not in compliance with the local rule in that it raises new issues not addressed in [their] initial brief").

The purpose for the requirement limiting the scope of material contained in a reply brief is to ensure fundamental fairness and to prevent disadvantage to any party. *See, e.g., Boustead v. Barancik*, 151 F.R.D. 102, 106; 1993 U.S. Dist. LEXIS 12382 (D.C. E.D. WI. 1993) (reply brief "introducing new factual assertions leaves the opposing side with no opportunity to respond."); *Norwest Bank v. Doth*, 159 F.3d 328, 334; 1998 U.S. App. LEXIS 24535 (8th Cir. 1998) (Plaintiff "failed to raise the issues until it filed its reply brief. Thus, [defendant] has not had the opportunity to brief these issues."); *Hall v. South Dakota*, 712 N.W.2d 22, 27; 2006 SD 24; 2006 S.D. LEXIS 29 (S.D. Sup. Ct. 2006) ("To raise a legal argument ... in an answering brief without first addressing it below puts the adverse party at an extreme disadvantage. Had the issue been raised [earlier], the parties ... certainly would have had an opportunity to brief the issue for the trial court's consideration."). This Commission has recognized the same fairness principle. *See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996*, 2002 S.D. PUC LEXIS 289 (attempt by a party to introduce arguments at briefing stage "obviously would allow a party the luxury of making whatever comments it chooses to make not subject to [review] by other parties to the proceeding.")

The requirement that a reply brief may only contain matter that responds to points raised in the other party's initial brief has three components. First, the reply brief may not contain new argument. Second, a reply brief may not contain new material that should have been raised (if at all) in the party's own opening brief. If a party makes an argument in its initial brief, it may not elaborate upon the argument by including additional factual or other support related to that point in its "reply" brief, because the other party would not have an opportunity to respond to the new material raised for the first time on "reply." *Navarijo-Barrios v. Ashcroft, supra*, 322 F.3d at 564 n.1 (striking portion of reply brief because a sentence in party's opening brief was "not sufficient to support the [lengthier] argument ... that appears in [the same party's] reply brief."); *Boustead v. Barancik, supra*, 151 F.R.D. at 106 (granting motion to strike information in a reply brief that was available to the party when it originally filed its initial brief); *United States v. Brown*, 108 F.3d 863, 867; 1997 U.S. App. LEXIS 4268 (8th Cir. 1997) ("Absent some reason for failing to raise an argument in an opening brief, this court will not consider an argument first raised in a reply brief."), citing *United States v. Darden*, 70 F.3d 1507, 1549 n.18 (8th Cir. 1995); *City National Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308, 1313; 1991 U.S. App. LEXIS 5728 (8th Cir. 1991) ("until the filing of their reply brief, the appellants do not even provide any examples from the record to support the assertion in their initial brief. The arguments, therefore, come too late."); *Anderson v. Larson*, 62 S.D. 552, 553; 255 N.W. 151, 152; 1934 S.D. LEXIS 69 (S.D. Sup. Ct. 1934) ("To allow [a party] through the medium of the reply brief" to set forth a new summary of the evidence "and rely upon an argument contained in the

original brief as to its sufficiency, deprives respondent of any fair opportunity to answer.")

And third, a reply brief may not contain matter that is not in the evidentiary record.[1] *Balk v. Sachs*, 47 S.D. 55, 58; 195 N.W. 837, 838; 1923 S.D. LEXIS 113 (SD Sup. Ct. 1923) (Striking party's supplemental brief containing matters not of record, and filed in reply); *Fullmer v. State Farm Insurance Co.*, 514 N.W.2d 861, 865 n.4; 1994 S.D. LEXIS 43 (S.D. Sup. Ct. 1994) (materials in reply brief which are not a part of the record violate the appellate rules of civil procedure.)

Where a party's reply brief contains impermissible material, the sanctions are clear. All such improper argument should be stricken, and may not be considered by the decision-maker. *K.C. 1986 Limited Partnership v. Reade Manufacturing*, 472 F.3d 1009, 1018 n.2; 2007 U.S. App. LEXIS 95 (8th Cir. 2007) (granting motion to strike portions of reply brief wherein party asserts new argument because "[i]t is well settled that we do not consider arguments raised for the first time in a reply brief"); *Navarijo-Barrios v. Ashcroft, supra,* 322 F.3d at 564 n.1 (granting motion to strike portion of reply brief); *Brookside Townhouse Assn., supra*, 682 N.W.2d at 768 n.6 ("Because the new issues and facts were not raised in appellee's [initial] brief, we decline to address them."); *McGhee, supra*, 547 F.3d at 929 (court "did not abuse its discretion or otherwise commit error" when it did not consider an argument raised for the first time in a reply brief). If, however, the Commission determines not to strike all of the offensive material, considerations of fairness require that the other party be afforded an opportunity to

[1] The Commission's decision in this proceeding must "be based exclusively on the evidence and on matters officially noticed." S.D. Codified Laws §1-26-23. The record in a contested case consists primarily of all pleadings, motions, and the "evidence received and considered." S.D. Codified Laws §1-26-21.

respond to the new argument. *Hughes v. Social Security Administration*, 277 Fed. Appx. 646; 2008 U.S. App. LEXIS 10206 (8th Cir. 2008) ("If the court does consider the [new matter], however, the [other party] should be provided with an adequate opportunity to respond."); *Norwest Bank v. Doth, supra*, 159 F.3d at 334 (because defendant "has not had the opportunity to brief these issues [raised for the first time in plaintiff's reply brief], [w]e believe additional argument on these issues would be helpful, if not required.")

II. The Commission Should Strike Portions of OrbitCom's "Reply" Brief that Contain New Argument.

The following passages of OrbitCom's reply brief contain new arguments that OrbitCom did not include in its initial post-hearing brief,[2] and should therefore be stricken in their entirety.[3] The material that should be stricken is shown in Attachment A hereto.

- Page 2, final paragraph (argument that "Verizon bears the burden of proving ... that OrbitCom had available to it sufficient call detail to render an accurate bill.")
- Page 3, final paragraph (argument that "Verizon has done nothing to prove that OrbitCom had sufficient call detail to bill jurisdictionally.")
- Page 10, first full paragraph (argument that "Verizon has failed to establish that OrbitCom had sufficient call detail to bill by jurisdiction.")

[2] OrbitCom's Post-Hearing Memorandum of Law in Support of Its Complaint ("Initial Brief"), filed December 4, 2009.

[3] OrbitCom's Reply Brief contains additional statements that are not supported by the evidence in the record, but those are not the subject of this Motion. Verizon assumes that the Commission will carefully review the parties' briefs and the evidentiary record when it decides this matter.

OrbitCom did not previously argue that Verizon bears the burden of proof on this specific issue, let alone that Verizon failed to satisfy that burden.[4] Verizon has not had any opportunity to address these new arguments,[5] so they should be stricken.

- Page 4, middle paragraph (argument that OrbitCom "did not have sufficiently detailed information to accurately bill by jurisdiction prior to April of 2009.")
- Page 5, last two paragraphs (argument based on "the fact that the jurisdictional detail present in the EMI record is insufficient to render an accurate bill.")
- Page 7, middle paragraph (assertion that "OrbitCom determined ... that the jurisdictional assignment contained in the Category 11-01-01 records furnished to OrbitCom by Qwest for access billing was insufficient to accurately bill by jurisdiction.")[6]

OrbitCom has not previously argued that "it did not have sufficient call detail" to accurately determine the jurisdiction of access traffic for which it billed Verizon. *See* OrbitCom Initial Brief, Section 2, pp. 5-11. Nor has it previously argued or presented

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[4] OrbitCom has the burden of proving it complied with its tariff. (Its tariff provides that *"[w]hen the Company receives sufficient call detail* to determine the jurisdiction of some or all originating and terminating access (MOU), the Company will use that call detail to render bills." The tariff provides further that *"[w]hen the Company receives insufficient call detail to determine the jurisdiction of some or all originating and terminating access MOU,"* the company may apply PIU factors "to those minutes of use for which the Company does not have sufficient call detail." OrbitCom Switched Access Tariff, § 3.4. (Emphasis added). Accordingly, to demonstrate that it complied with its tariff, OrbitCom, not Verizon, has the burden of proving that the call detail information available to OrbitCom was insufficient to determine the jurisdiction of calls. Only if OrbitCom presented evidence to prove that "fact" would the burden shift to Verizon to prove that call detail information was sufficient.

[5] The record demonstrates that, beginning in February 2008, Verizon repeatedly attempted to obtain call detail records from OrbitCom so that it could determine the actual jurisdiction of access traffic in 2008 and 2009. Only after the Commission granted its motion to compel in August 2009 did Verizon obtain a limited sample of call records for five days in June 2009. Having prevented Verizon from obtaining any call detail records during the pendency of the parties' billing dispute, OrbitCom is estopped from arguing that Verizon failed to prove that the call records available to OrbitCom contained sufficient information to determine the jurisdiction of the calls contained therein.

[6] OrbitCom's Reply Brief refers for the first time to "the jurisdictional indicator on the EMI records" and "the EMI indicator" (Reply Brief at 7, 5) without explaining those terms. The record makes clear that EMI Category 11 records include originating and terminating telephone numbers (NPA-NXX), which can be used to determine the jurisdiction of calls. *See* Exhibit B (Supplemental Testimony of Ms. Freet) at Exhibit LF-31 at 4, and n. 7 *infra*.

evidence demonstrating that the EMI records it receives from Qwest do not contain sufficient information to ascertain the jurisdiction of the access minutes of use for which it billed Verizon. Verizon has not had an opportunity to address these new arguments.[7] Accordingly, these portions of OrbitCom's reply brief should be stricken.

- Page 5, last paragraph, through page 7, first paragraph (contains a review of two Verizon exhibits, CONFIDENTIAL Exhibits LF-32 and LF-33, and concludes by "explain[ing]" the different results).

This discussion is not responsive to any argument in Verizon's Initial Brief, and is therefore improper to be included in a "reply" brief. If OrbitCom wished to argue that the EMI records were insufficient to determine jurisdiction and support that argument using information included in Verizon's pre-filed written testimony, it should have made that argument and presented the information in its initial brief, so that Verizon would

[7] This new argument that the call records OrbitCom obtained from Qwest did not contain sufficient information to determine the jurisdiction of access calls during the period of time covered by this complaint is contradicted by the record. *See* Exhibit B (Supplemental Testimony of Ms. Freet) at 2-3 & Exhibit LF-31 (explaining that EMI Category 11 records contain information about the originating and terminating telephone numbers); Exhibit 3 at 7:13 ("The EMI record is raw data from Qwest. It contains all of the calls."); *id.* at 3:19–4:1 ("EMI records are created by the LEC telephone switches that handle the phone calls transmitted through them.... [T]he switch that the call originates through will contribute the originating ANI and start time. The switch that sends the call to the terminating party will contribute the terminating ANI and the end time."); *id.* at 10:21 ("The EMI record ... contains the destination number."); OrbitCom Reply Brief at 6 ("The EMI records are the records OrbitCom received, and continues to receive, from Qwest."); *id.* at 17 ("Category 11-01-01 records consist of records for originating and terminating calls. [ ] Qwest provides this category of records to OrbitCom so that OrbitCom can bill access charges."); Exhibit 3 at 4:10-19 ("Qwest furnishes OrbitCom with Category 11-01-01 and 11-01-25 records for access billing. OrbitCom takes the EMI records from Qwest and inputs them into the billing system we use... To create a bill for access ... only a few of the fields [in the EMI record] are needed... [T]he billing system we used was designed to pull the information from the fields it needs, rate that information, and assemble the product into a bill."); OrbitCom Reply Brief at 2 (OrbitCom "billed Verizon ... using actual EMI call records supplied by Qwest"); Exhibit 1 at 5:17-18 ("OrbitCom uses the actual calling number and called numbers to determine the jurisdiction of the call when they are available. That is exactly what was done in this case."); Exhibit 3 at 7:17-19 ("a few of [the EMI records] are missing the NPA-NXX or other critical information and cannot be billed."); *see also* Hearing Transcript at 56:16 – 57:11 (confirming that "the EMI records provide OrbitCom or its billing agent with sufficient call detail to know the jurisdiction of long distance calls").

have an opportunity to respond. Because it did not do so, this new argument should be stricken.

- Page 7, bottom paragraph, through page 8, line 5 (discussion of mileage charge).

The "mileage component" referenced in the paragraph and in the cited exhibit relates to the parties' dispute over *interstate* charges.[8] Not only are issues relating to interstate rates irrelevant, but Verizon did not address them in its opening brief. Accordingly, this argument is improper in a "reply" brief, and should be stricken.

- Page 8, last sentence; p. 21, last paragraph; and p. 22, last paragraph (argument that Verizon's dispute notice "was not provided in the 60-day time period outlined in the tariff.")

This argument is not a response to any argument that Verizon made in its initial brief. In its opening brief, OrbitCom criticized the sufficiency and length of Verizon's disputes (at pages 8-9), but did not refer at all to a 60-day time period. Accordingly, it is improper for it to make this argument for the first time on "reply." Verizon has not had an opportunity to respond to this new argument.[9] Accordingly, new argument based on this tariff language should be stricken.

- Pages 9 – 10 (argument about "retroactive application of a PIU factor)

OrbitCom's opening brief contains a single sentence related to this issue ("Verizon also demanded that the PIU factor be applied retroactively, which OrbitCom's

[8] The testimony cited by OrbitCom refers to an exhibit, MP2-03, which addresses the "interstate rate dispute." Exhibit MP2-04, cited by OrbitCom, sets forth rates in Qwest's FCC (interstate) tariff. *See also* OrbitCom Reply Brief at 11 (portion of Exhibit 2 cited therein describes dispute over interstate rates).

[9] The record is clear that Verizon has submitted a number of written disputes over time. *See, e.g.* Exhibit A (Direct Testimony of Ms. Freet) at 16-18. Each separate dispute covers charges billed prior to the time the disputes were submitted. All disputes encompass, at a minimum, charges billed within 60 days of the payment due date.

tariff does not permit." Initial Brief at 3. It is improper to expand upon that point by including new arguments in its reply brief. *Navarijo-Barrios v. Ashcroft, supra.* Moreover, information about the timing of e-mail messages was available to OrbitCom long before it filed its initial brief, and there is no reason why it could not have presented this argument earlier, and afforded Verizon an opportunity to respond. Because this new material is improper in a "reply" brief, it should be stricken.

- Page 11 (allegation "about Verizon's documented violations of the FCC CPNI Rules.")

This argument is not responsive to any argument in Verizon's opening brief, and is thus improper to be included for the first time in a "reply" brief. The allegation is based on hearsay, not any court or FCC order of which the Commission may take official notice.[10] Verizon has not been afforded an opportunity to respond to this argument. Accordingly, the statement should be stricken.

- Page 12-13, paragraph beginning "Interestingly" (argument that "Verizon itself actually validated OrbitCom's PIU.")[11]

As stated in the text, this argument is a reaction to "Verizon's Answer and Counterclaim" filed at the outset of the litigation, and not a response to any argument contained in Verizon's initial brief. The argument contains a critique of two exhibits attached to Verizon's pre-filed testimony. If OrbitCom wished to base an argument on Verizon's "analysis" of CDR and EMI records, it should have included that argument in

[10] The argument is of dubious relevance, as the allegation does not relate to either of the two respondents, but to one of their affiliates.

[11] *See also* OrbitCom Reply Brief at 14, end of first paragraph ("Verizon's purported 'detailed analysis', which was based upon OrbitCom's EMI and CDR records, casts doubt upon Verizon's credibility.")

its initial brief, to enable Verizon to respond, rather than make an argument based on that "analysis" for the first time in its "reply" brief.[12] Accordingly, this argument is improper and should be stricken.

- Page 12, footnote 6 (argument that Verizon had many pages of OrbitCom's bills "which themselves provide significant amounts of information regarding the traffic at issue.")

OrbitCom did not argue previously that its bills contain usage information that would enable Verizon to determine the jurisdiction of access traffic, which was the purpose of Verizon's request for call detail records.[13] Verizon has not had an opportunity to respond to this new argument. Accordingly, this statement should be stricken.

- Page 14, top paragraph (argument that Verizon's call records "lack foundation")
- Page 20, last paragraph (argument that Verizon CONFIDENTIAL Exhibit LF-37 "was not based upon supporting source documents")

This is a new argument that OrbitCom did not raise previously.[14] *See* OrbitCom Initial Brief at 9-10, where it addressed Verizon's analysis of "additional calls." Verizon has not had an opportunity to respond to this argument. Accordingly, these arguments should be stricken.

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[12] OrbitCom misconstrues the nature of Ms. Freet's analysis and the exhibits she presented. Those exhibits do not "illustrate" or "show" a PIU, or "create[ ] a PIU factor," as OrbitCom asserts. *See also* OrbitCom Reply Brief at 15, first full paragraph, and 16, middle paragraph. As has been explained, Ms. Freet identified the actual jurisdiction of calls placed on the days studied; she did not identify a "PIU" factor, which is a defined term that applies only to traffic whose jurisdiction cannot be determined from actual call detail. *See* Verizon's Reply Brief at 10 and n. 12.

[13] This assertion is not supported by the bill records included in the record. *See* Exhibit 4.

[14] OrbitCom's argument is inconsistent with the stipulation that its counsel entered into during the hearing. Hearing Transcript at 90:2 – 91:3 ("we are not disputing that Verizon has, in fact, produced documentation in response to our data requests which were partly looking for source documents.")

- Page 14, last paragraph, through 15 (argument based on an "examination and comparison" of Verizon's "analysis" of call records contained in CONFIDENTIAL Exhibits LF-32 and LF-34)

This new argument does not respond to any argument contained in Verizon's initial brief. OrbitCom was free to include such an argument based on Verizon's testimony and exhibits in its initial brief, but it did not do so. *See* OrbitCom Initial Brief at 9. It is improper to interject these arguments for the first time in its reply brief. Verizon has not had an opportunity to respond to these new arguments. Accordingly, this portion of the "reply" brief should be stricken.

- Page 16, first paragraph (argument based on information in Verizon's CONFIDENTIAL Exhibit LF-32)

This new argument does not respond to any argument contained in Verizon's initial brief. If OrbitCom wanted to make an argument by extrapolating information contained in an exhibit attached to Verizon's pre-filed testimony, it was free to do so in its opening brief. However, it did not do so. It is improper to interject this argument for the first time in its reply brief. Verizon has not had an opportunity to respond to this new argument or challenge the conclusions drawn by OrbitCom. Accordingly, this argument should be stricken.

- Page 25, last three sentences (argument that bills contained in Verizon CONFIDENTIAL Exhibit LF-42 show that Qwest is billing Verizon certain access charges)

- Page 29, first paragraph (argument based on "an examination" of Verizon CONFIDENTIAL Exhibit LF-42)

These new arguments do not respond to any argument contained in Verizon's initial brief. OrbitCom had an opportunity to address Verizon's exhibit and explanatory testimony in its initial brief, but did not do so. *See* OrbitCom Initial Brief at 15. It is improper to interject these arguments for the first time in its reply brief. Verizon has not had an opportunity to respond to these new arguments. Accordingly, these portions of OrbitCom's "reply" brief should be stricken.

III. The Commission Should Strike Material Contained in OrbitCom's Reply Brief That is Not In the Record of this Proceeding

The Commission's decision in this matter must be based exclusively on the evidence and on matters officially noticed. Information and argument contained in a brief that is not based on record evidence may not be considered.

OrbitCom's reply brief includes matter that is not in the record of this case. Such matter, and any arguments based thereon, should be stricken in their entirety. The extra-record material that should be stricken is identified below and shown in Attachment A hereto.

- Page 17, first full paragraph, through page 18, first paragraph, and top of page 19 (assertions concerning Verizon's alleged "Category 11-01-20 records").

The record does not contain any information about Category 11-01-20 records. Exhibit B (Freet Supp. Testimony) at LF-31 only contains information about EMI Category 11-01-01 records that are used for "carrier access usage." Mr. Powers'

testimony only refers to Category 11-01-01 and 11-01-25 records that Qwest furnishes OrbitCom for access billing. *See* Exhibit 3 at 4:10-11. Because the record is silent about Category 11-01-20 records, there is no foundation for any arguments relating to such records. Moreover, Verizon did not testify that its long distance network switch records are "Category 11-01-20" records.[15] Thus, there is no record evidence to support OrbitCom's contentions relating to that type of record. Verizon obviously has not had an opportunity to address these arguments raised for the first time on "reply." Accordingly, all new arguments relating to Category 11-01-20 records are unsubstantiated, create unnecessary confusion, and should be stricken.

- Page 23, middle paragraph (argument based on a Qwest tariff)

The Qwest tariff was not introduced into evidence, and is not part of the record. Verizon has not had an opportunity to address the relevance or significance, if any, of that extra-record material. The Commission may not base its decision on material that is not in the record. Accordingly, OrbitCom's argument based on this non-record material should be stricken.

- Page 29, footnote 15 (argument based on Qwest tariffs filed in three other states)

None of the Qwest tariffs were introduced into evidence, and they are not part of the record. Verizon has not had an opportunity to address the relevance or significance, if any, of that extra-record material. The Commission may not base its decision on

[15] As an interexchange carrier, Verizon uses information obtained from its long distance switches to bill end users for long distance service. The record shows that Verizon's switches capture the originating and terminating telephone numbers of long distance calls, which Verizon can use to determine the jurisdiction of long distance calls and bill its long distance customers. Because of this, Verizon was able to identify calls carried over its long network that were placed by or delivered to OrbitCom's end users (based on ANI information furnished by OrbitCom) and determine the jurisdiction of such calls. Because long distance carriers do not bill local exchange carriers for switched access service, Verizon's switch records are not used for that purpose, nor would they be provided to a CLEC, as OrbitCom suggests (at 19).

material that is not in the record. Accordingly, OrbitCom's argument based on this non-record material should be stricken.

IV. OrbitCom's Reply Brief Improperly Contains Confidential Information that Should be Stricken

Verizon has made clear from the outset of this proceeding that it considers its network and customer usage data to be confidential and proprietary.[16] It expressly designated all usage information as confidential, and included such information in exhibits clearly marked "CONFIDENTIAL." It produced such information pursuant to the Stipulation and Confidentiality Agreement that the parties entered into for this express purpose, on June 26, 2009.

Despite this, OrbitCom's publicly-filed reply brief repeatedly divulges usage data that Verizon had clearly designated confidential. *See* Reply Brief at 6, 7, 13, 14, 15, 16 and 29. On those pages, OrbitCom discloses multiple usage (minutes of use) figures that were provided by Verizon in Hearing Exhibit B (Supplemental Testimony of Ms. Freet), CONFIDENTIAL Exhibits LF-32, LF-33, LF-34 and LF-42. All of those exhibits are marked "CONFIDENTIAL" and none are part of the public record. The fact that OrbitCom publicly disclosed Verizon's confidential information numerous times is a compelling indication that the disclosures were not inadvertent. This breach of the parties' Confidentiality Agreement is prejudicial and potentially harmful to Verizon.

This is not the first time in this proceeding that OrbitCom has publicly disclosed information that Verizon formally designated as confidential. *See* Hearing Transcript at 7:19-8:7. The Commission should strike all confidential data contained in OrbitCom's Reply Brief as improper. Attachment A hereto indicates where such information should

[16] *See* Exhibit B (Supplemental Testimony of Ms. Freet) at 6 fn.2.

be excised. In addition, the Commission should impose sanctions on OrbitCom for its cavalier and flagrant disregard of the parties' Confidentiality Agreement and its repeated failure to abide by the Commission's practices regarding the treatment of confidential information.

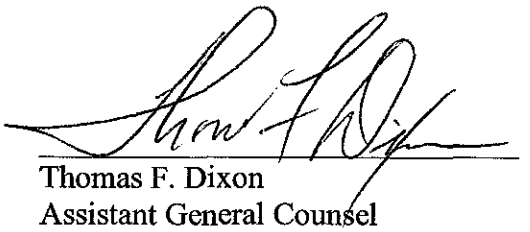
V. Relief Requested

Verizon respectfully moves that the Commission strike all of the new argument and other material that was improperly included in OrbitCom's "reply" brief. The improper material is identified above and in Attachment A. Because Verizon has not been afforded an opportunity to respond to new arguments and non-record material included for the first time in OrbitCom's "reply" brief, it would be severely disadvantaged if the Commission were to render a decision in reliance on such material. Fundamental fairness, as well as judicial precedent, dictate that all such offensive material be stricken. If, however, the Commission decides not to grant Verizon's motion to strike in full, Verizon respectfully requests that it be afforded an opportunity to file a sur-reply brief so that it may address OrbitCom's new arguments identified herein.

Respectfully submitted this 4th day of February, 2010.

David A. Gerdes
May, Adam, Gerdes & Thompson LLP
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501-0160
Telephone: (605) 224-8803
Facsimile: (605) 224-6289
dag@magt.com

and



Thomas F. Dixon
Assistant General Counsel
Verizon
707 – 17th Street, #4000
Denver, CO 80202
Telephone: (303) 390-6206
Facsimile: (303) 390-6333
thomas.f.dixon@verizon.com

ATTACHMENT A

To Verizon's Motion to Strike

(Designating those portions of OrbitCom's Post-Hearing Reply Memorandum of Law That Should be Stricken)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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

COMES NOW OrbitCom, Inc. ("OrbitCom") and respectfully submits this Post-Hearing Reply Memorandum of Law in response to Verizon's Post-Hearing Brief and in further support of its Amended Complaint.

ARGUMENT AND ANALYSIS

Not surprisingly, Verizon's Post-Hearing Brief does little to simplify the matters in this case. In fact, it injects even more unsubstantiated and unabashed misstatements into the mix. Distilled to its essence, Verizon's argument is that OrbitCom failed to comply with the terms of its tariff, failed to provide credible evidence that it billed Verizon appropriately, and thus failed to meet its burden of proof. Despite its lengthy brief, however, it is Verizon's position which remains unsupported. Most significantly, one must remember in analyzing this matter that Verizon has improperly withheld *all* payment from OrbitCom and that OrbitCom is owed money for a lengthy period of time in this proceeding. Clever drafting cannot change that critical fact.

1. OrbitCom Has Met Its Burden of Proof With Regard to the Use of a PIU Factor and the PIU Factors Which It Used to Bill Verizon.

Verizon correctly points out that OrbitCom bears the burden of proving those allegations set forth in its Amended Complaint. However, this is essentially the only statement in Verizon's brief upon which the parties seem to agree. The allegations contained in OrbitCom's Amended

Complaint are straightforward. OrbitCom provided service to Verizon, billed Verizon in accordance with its tariff using actual EMI call records supplied by Qwest and Verizon failed and refused to pay those tariffed charges. Verizon argues that OrbitCom is entitled to none of its requested relief. What Verizon forgets in its analysis, however, is that OrbitCom is in fact owed money from Verizon. As admitted to by Verizon during the hearing, it has withheld significant sums of money from OrbitCom. As such, while Verizon may dispute the amount of money which it owes OrbitCom, it cannot in good faith state that it owes OrbitCom nothing.

a. OrbitCom billed Verizon in compliance with the terms of its tariff.

Verizon argues that OrbitCom did not follow the language of its own tariff and instead applied arbitrary jurisdictional factors to the traffic at issue. Verizon further argues that OrbitCom's Tariff dictates that it *shall* use the actual call detail to render its bills. Verizon's argument, however, presumes too much.

~~As an initial matter, Verizon bears the burden of proving those affirmative defenses it raised in response to OrbitCom's Amended Complaint. See Clark County v. Sioux Equip. Corp., 753 N.W.2d 406, 412 (S.D. 2008) (citing Clancy v. Callan, 90 S.D. 115, 118, 238 N.W.2d 295, 297 (1976) and (Lang v. Burns, 77 S.D. 626, 97 N.W.2d 863, 865 (1959) (holding the burden of proof to establish an affirmative defense is on the party who seeks to rely on it)).~~

~~Specifically, Verizon's Seventh Affirmative Defense alleges that:~~

> ~~OrbitCom is not entitled to any relief because it failed to evaluate call detail available from the local exchange carrier switches used to provide switched access service to determine the jurisdiction of originating and terminating access minutes of use and to render bills consistent with that call detail.~~

~~See Verizon's Answer to Amended Complaint, p. 7. Therefore, it is incumbent upon Verizon to prove that OrbitCom had available to it sufficient call detail to render an accurate bill.~~

As previously set forth in its initial post-hearing memorandum, OrbitCom's Tariff sets forth the process by which the jurisdiction of MOUs is determined and the rate which is thereafter applied. See OrbitCom's Post-Hearing Memorandum of Law in Support of its Complaint, pp. 5-6. The Tariff explains that the jurisdiction of the traffic at issue will be determined either by actual call detail or through application of a PIU. See OrbitCom Switched Access Tariff, § 3.4 www.puc.sd.gov/commission/tariffs/telecommunications/orbitcom.pdf. Specifically, Section 3.4 of OrbitCom's tariff provides:

> 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. PIU factor(s) must be provided in whole numbers and will be used by the Company to apportion use and/or charges between interstate and intrastate jurisdictions until Customer provides an update to its PIU factor(s).

Section 3.4.1.4 provides:

> If no PIU for originating minutes is submitted as specified herein, then the projected PIU will be set on a default basis of 32 percent interstate traffic and 68 percent intrastate traffic.

In order for OrbitCom to dispense with use of a PIU, it must have available to it sufficient call information to render an *accurate* bill. Id. at § 3.4. While the language of the tariff does not specifically reference the issuance of an accurate bill, it only makes sense. Other than its conclusory statements, Verizon has done nothing to prove that OrbitCom had sufficient call detail to bill jurisdictionally. In its attempts to do so, Verizon went so far as to take completely out of context a statement made by Michael Powers during his hearing testimony. In its brief, Verizon argues that Mr. Powers testified that only one to four percent of traffic lacks the

requisite information through which to properly determine the jurisdiction of a call. See Verizon's Post-Hearing Reply Brief, p. 10. Specifically, Verizon stated the following:

> Mr. Powers acknowledged that only a de minimus amount of traffic-"one to four percent" of all records-do not contain "enough information to bill it." Tr. 199:13-18. This suggests that PIU factors should be applied, if at all, to only a very small percentage of the total traffic.

Id. This, however, is not what Mr. Powers said. Mr. Powers testified that one to four percent of traffic is not billable at *all*. See Hearing Exhibit 3, p. 7, lines 13-17.[1] There was no suggestion and no intent to suggest that only one to four percent of call records do not contain the necessary information from which to generate a bill.

~~OrbitCom provided testimony that it did not have sufficiently detailed information to accurately bill by jurisdiction prior to April of 2009.~~ Specifically, Mr. Powers testified:

> OrbitCom uses the actual calling number and called numbers to determine the jurisdiction of the call when they are available. That is exactly what was done in this case and Verizon refused to pay pursuant to OrbitCom's intrastate tariff.

See Hearing Exhibit 1, p. 5, lines 17-19. ~~Up until the point at which OrbitCom received sufficient call detail information,~~ and also, through the expenditure of significant time and expense, put in place the appropriate software to effectuate jurisdictional billing, OrbitCom took those steps which were appropriate under its tariff: application of a PIU developed by "the Company", i.e., OrbitCom. See OrbitCom Switched Access Tariff at §3.4.

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[1] In pre-filed testimony, Mr. Powers explained the difference between CDR and EMI records, what information OrbitCom received and still receives from Qwest, and what call detail is contained in those records. Mr. Powers then further explained what happens if certain information is missing from the EMI records sent by Qwest. Specifically, he testified:

> Once this data is entered into the billing system some calls drop out due to missing information like a missing code or a missing CIC. If that information is missing, the call record cannot be billed. Therefore, the billing system removes that data. This is common and is typically 0%-4% of the calls.

See Hearing Exhibit 3, p. 7, lines 11-17.

Even more tellingly, Verizon fails to reference that, in response to Verizon's own Data Requests to OrbitCom, Second Set, OrbitCom informed Verizon of these steps:

Data Request 47(c): When did OrbitCom begin billing other interexchange carriers jurisdictionally?

Response: **OrbitCom has been working for some time to test jurisdictional billing. It is a very labor intensive process to switch a carrier to this type of billing requiring the rebuilding of tables within the billing system and then repeating test billings to insure accuracy. It can take up to a year to convert a carrier. Other than test accounts, OrbitCom began billing the process of billing other carriers jurisdictionally at the same time as Verizon.**

Data Request 47(e): When OrbitCom began billing Verizon jurisdictionally, what monthly usage period did its bills cover?

Response: **April 1 through April 30, 2009.**

See OrbitCom's Responses to Verizon's Second Set of Data Requests.

While Verizon can argue that the EMI records which OrbitCom receives from Qwest are sufficient for it to determine the jurisdiction of the calls and the proper intra- or interstate rate, ~~that does not make it so for OrbitCom. See Hearing Exhibit 3, p. 3, lines 18-23; p. 4, lines 1-11. The jurisdictional detail present in the EMI indicator is simply not sufficient to do what Verizon claims it can. See Hearing Exhibit 3, p. 3, lines 18-23; p. 4, lines 12-22. Under these circumstances,~~ OrbitCom properly determined that the use of a PIU, developed by it, was appropriate for use in this context.

~~Furthermore, the fact that the jurisdictional detail present in the EMI record is insufficient to render an accurate bill is borne out by Verizon's own analysis submitted for the record. Confidential Exhibits LP-32 (an analysis of the actual CDRs underlying the June 2009 billing to Verizon and labeled as OrbitCom Non-EMI call records June 2009) pulled from OrbitCom's~~

billing system and LF-33 (Labeled OrbitCom EMI records – CIC 0555 2009 data) show the jurisdictional results set forth below.

In reviewing LF-32, one must first look to the bottom of the totals column at the far right, which documents Verizon's analysis for the actual OrbitCom CDRs submitted for the five days in June 2009:

Unknown [redacted] MOU (minutes of use)

Interstate [redacted] MOU

Intrastate [redacted] MOU

Total [redacted]

Pct Interstate 30.61

See Exhibit B, LF-32 (emphasis added).

LF-33 represents Verizon's analysis of the raw EMI records for the same five days in June of 2009. The EMI records are the records OrbitCom received, and continues to receive, from Qwest. These records are then entered into OrbitComs' billing system to produce the CDRs which Verizon analyzed in LF-32. Verizon's analysis of the raw EMI records shows the following results, again at the bottom of the far right hand column:

Unknown [redacted]

Interstate [redacted]

Intrastate [redacted]

Total [redacted]

Pct Interstate 17.16

See Exhibit B, LF-33 (emphasis added).

It is clear at a simple glance that the use of OrbitCom's CDR records produces a PIU factor which is much more favorable to Verizon. According to Verizon's own analysis of the CDR records, the resulting PIU factor is 30.61%. Use of the raw EMI records results in a PIU factor of 17.16%. See Exhibit B, LF-32 and LF-33. The difference in the factors is easily explainable. OrbitCom's billing system reduced the unknown MOUs from in excess of [redacted] MOUs to [redacted] MOUs, reclassifying virtually all of [redacted] minutes, which number represents the difference in the two categories, from ***unknown*** to ***interstate***.

As set forth above, OrbitCom determined, and rightly so, that the jurisdictional assignment contained in the Category 11-01-01 EMI records furnished to OrbitCom by Qwest for access billing was insufficient to accurately bill by jurisdiction. Accordingly, OrbitCom elected to use a PIU developed by the company (32%) (and which is clearly a permissible option under the terms of the tariff) until it could implement billing software that compared the originating NPA-NXX to the terminating NPA-NXX of each and every call and match them to a current and accurate database to determine jurisdiction. Prior to implementing this billing software, Verizon's own analysis contained in exhibits LF-32 and LF-33 demonstrate that using the 32% PIU instead of the jurisdictional indicator on the EMI records (which Verizon is claiming was sufficient for OrbitCom to bill by jurisdiction) resulted in a much more accurate and favorable result for Verizon.

Verizon also takes issue with the rate that has been applied to the traffic at issue. Specifically, Verizon alleges that OrbitCom's use of the composite rate of $0.06 is inappropriate. However, this act too, is in compliance with OrbitCom's tariff. Verizon personnel, during the initial contact with OrbitCom, failed to understand that the rates for access contain a mileage component for calls between the tandem switch and the end office. See Hearing Exhibit2, p. 3,

lines 9-18, MP2-04.0. There are only two tandem switches in South Dakota, Sioux Falls and Rapid City. There is a significant mileage difference between calls from the Sioux Falls Tandem to the Sioux Falls Sundowner end office and calls from the Sioux Falls tandem to the Pierre end office. *Id.* Because Verizon threatened to withhold payment over this issue, OrbitCom discontinued using the mileage factor. The $0.06 rate is for the local switching ($0.008610) plus the CCL ($0.038905) plus the Tandem Switching ($0.007700) plus the Interconnection Charge ($0.004681) added together, which totals $0.059896, which is then rounded up to $0.06. See OrbitCom's Switched Access Tariff, §§ 15.1.3; 15.1.3.4.2; 15.1.3.4.3. There is no mileage charge which is a benefit to Verizon. If the Commission determines that it is appropriate for OrbitCom to re-calculate the outstanding bills to date so as to include the mileage charge, OrbitCom is willing to re-calculate and re-issue Verizon's Carrier Access bills accordingly.

Finally, as an aside, Verizon's tactics as they relate to the application of OrbitCom's tariffs are plainly evident. In its Post-Hearing Brief, Verizon argued diligently for a strict application of OrbitCom's tariff. Verizon, however, must be very careful of that for which it wishes. Verizon ignores the fact that it never submitted a detailed dispute which would have allowed OrbitCom to fully investigate the nature of its dispute. Verizon ignores the fact that the Tariff requires that it submit detailed information, such as CDRs, to OrbitCom to investigate the dispute, not vice versa as Verizon so claims. See OrbitCom Switched Access Tariff, § 4.8; see also Hearing Exhibit 1, p. 4, lines 10-23; Hearing Transcript, p. 22, lines 19-25; p. 25, lines 1-16.[2] Verizon also ignores the fact that it has 60 days pursuant to the Tariff within which to

[2] Verizon also admits that it is the disputing carrier's obligation to provide sufficient details as to the reason for any billing dispute. At the time of the hearing Ms. Freet testified as follows:

> Q. But as the disputing carrier it's fair to state that if you're going to withhold payment it's incumbent upon Verizon to properly explain the nature of the dispute to the carrier whose bills you're disputing; correct?

submit a dispute in response to a bill. Id.[3] Verizon further ignores the fact that if it submits a PIU factor to OrbitCom it must provide information supporting the proposed PIU and do so on a quarterly basis. See OrbitCom Switched Access Tariff at 3.4; see also Hearing Exhibit 3, p. 8, lines 11-13; Exhibit Mp 2-21.

OrbitCom's Tariff also does not provide for retroactive application of a PIU factor. In its Post-Hearing Brief, Verizon argued that it never requested the retroactive application of a PIU factor. However, this is an untrue statement. If Verizon did not want the factor to be applied retroactively, it would have simply paid OrbitCom's billing past-due billing statements to that date and then demanded the PIU it supplied be used going forward. However, this was not the only questionable practice undertaken by Verizon. Through its protestations that it never intended for the PIU to be applied retroactively, Verizon further brought into question when it supplied its proposed PIU factor to OrbitCom. The e-mail containing the factor was sent on August 21, 2008, at 10:32 a.m. See Hearing Exhibit B, p. 42, LE-26; see also Hearing Exhibit 2, MP 2-21. After receipt of that e-mail, at 1:29 p.m. on August 21, 2008, OrbitCom representative Penny Peterson replied, requesting any information in Verizon's possession which supported the proposed PIU factors. As evidenced by Mr. Powers' pre-filed testimony, neither he nor Ms.

A. I would agree. I certainly think we need to provide the detail that supports our dispute and always be willing to go over those spreadsheets and explain any questions that a carrier might have. Certainly.

See Hearing Transcript, p. 150, lines 24-25; p. 151, lines 1-6.

[3] Section 4.8 of OrbitCom's Switched Access Tariff provides:

The Customer may dispute a bill only by written notice to the Company. Written dispute must be received by the company within 60 days of the payment due date. If a written dispute is not received by the Company within 60 days of the payment date, the bill statement shall be deemed to be correct and considered due and payable in full by Customer.

The Company, 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, i.e., resolved in favor of the Customer or resolved in favor of the Company. The Company will resolve the dispute and assess credits or penalties to the customer[.]

~~Peterson, nor Mr. VanLeur, have any record of a responsive e-mail ever being sent by Verizon. See Hearing Exhibit 2, p. 21, lines 17-23; p. 22, lines 1-5. However, Verizon produced a responsive e-mail in its own pre-filed testimony in this case. See Hearing Exhibit B, p. 42, LF 26. It is interesting to note that the response which came from Verizon representative, Mr. Robin Fishbein, whose office is in Chicago on CST (the same time zone as OrbitCom's Sioux Falls office where Ms. Peterson works), emailed his response at 11:45 a.m. on August 21, 2008, almost 2 full hours *prior to* the question being posed. Id. Verizon's efforts to avoid application of OrbitCom's Tariff and to dodge responsibility for payment of OrbitCom's bills is well documented in this record.~~

~~Verizon has failed to establish that OrbitCom had sufficient call detail to bill by jurisdiction.~~ The simple fact remains that OrbitCom's tariff allowed for it to utilize a PIU under the facts and circumstances of this case and OrbitCom, as demonstrated below, did so appropriately.

b. The jurisdictional factors used by OrbitCom are reasonable and sustainable.

Verizon argues that OrbitCom failed to support the PIU factors it used for the time period relevant to this dispute. Quite audaciously, Verizon argued that it is the only party which produced evidence to establish a PIU. Specifically, Verizon posited that it "was the only party to submit any evidence based on actual call records." It further argues that OrbitCom failed to produce any records "either prior to or during hearing." See Verizon Post Hearing Brief, p. 19. These statements are beyond brazen. They are categorically false.

As an initial matter, it is helpful to remember the process that brought the parties to this point. In August 2008, Verizon ceased making payments of all disputed and undisputed portions of OrbitCom's bills. When OrbitCom initiated conversations with Verizon in order to determine

how the billing dispute could be resolved, Verizon demanded CDRs. However, Verizon requested call detail records from OrbitCom in a format that did not exist, a fact that was repeatedly explained to Verizon. See Hearing Exhibit 3, p. 4, lines 12-22; p. 5 lines 1-2. Moreover, it did so without providing a detailed dispute so that OrbitCom could determine the validity of that dispute. See Exhibit 2, p. 9, lines 19-23; p. 10, lines 1-5.[4]

Once a complaint process was commenced in this matter, and discovery begun, Verizon served the following request for production:

> **Verizon 048**: For each month that OrbitCom has been billing Verizon jurisdictionally, provide a five-day sample of Call Detail Records or other call detail information that demonstrates that OrbitCom correctly determined the jurisdiction of the calls covered by the invoices and that OrbitCom applied the correct jurisdictional rate (i.e., interstate or intrastate) for all of the calls. This request is limited to Call Detail Records or other call detail associated with switched access traffic that OrbitCom billed Verizon in South Dakota. Provide the information separately for BAN 8080SD0555 and BAN 8080SD0222.

OrbitCom initially objected to this request because of concerns about ~~Verizon's documented violations of the FCC's CPNI rules concerning use and mis-use of customer proprietary information,~~ but offered to work with Verizon to identify documents which would assist Verizon in determining the accuracy of OrbitCom's bills. See Hearing Exhibit 2, MP3-28. After the production of several hundred pages of call detail information, Verizon indicated that the information provided was insufficient, arguing that the information was not provided in a usable format, failed to contain CDRs for a weekend, and that it did not contain the automatic number identifiers ("ANIs"). Verizon thereafter filed a Motion to Compel with this Commission, which the Commission granted[5], ordering OrbitCom to disclose CDRs with ANIs.

[4] Verizon stopped paying OrbitCom's bills in August 2007; however, it did not provide any written notice until February 14, 2008. The spreadsheet at that time did little to help with an analysis of Verizon's claimed disputed as it did not contain a breakdown by BAN and billing element. See Hearing Exhibit 2, p. 9, lines 19-23; p. 10, lines 1-5.

[5] Specifically, the Commission ordered the following:

See September 15, 2009 Commission Order. OrbitCom complied with the Commission's Order and provided CDR records. In addition, OrbitCom voluntarily provided additional records in the form of EMI records for the same 5-day period for Verizon's analysis.[6] This amounted to hundreds of pages of call detail. It was off this data which Verizon based its own PIU calculations.

~~Interestingly, when one looks at those allegations outlined in Verizon's Answer and Counterclaim, Verizon pointedly accuses OrbitCom of failing to properly calculate the PIU. See Answer to Amended Complaint, ¶1, ¶9.[7] However, one need only look to Verizon's own exhibits to show that Verizon itself actually validated OrbitCom's PIU. See Hearing Exhibit B,~~

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that the Motion to Compel is granted in part to the extent that it relates to the provisions of ANI information, with five days worth of data, giving Verizon information on the full 10 digit telephone number, and that the data must be transmitted in Excel or some other format that is easily manipulated.

See September 15, 2009 Commission Order, p. 1.

[6] At this point during the Complaint process, Verizon had in its possession hundreds of pages of OrbitCom's bills ~~which themselves provide significant amounts of information regarding the traffic at issue.~~ It also had hundreds of pages of call detail, without ANIs, and then OrbitCom volunteered to produce additional documentation to Verizon in the form of the EMI records. See Hearing Exhibit 3, Exhibit MP3-28.

~~[7] Paragraph 1 of Verizon's Answer to Amended Complaint states: "Verizon asserts that OrbitCom has inaccurately and improperly classified certain interstate calls as intrastate calls, and has failed to bill Verizon the correct rates for those calls."~~

Paragraph 9 of Verizon's Answer to Amended Complaint states in relevant part: "Verizon asserts further that OrbitCom has inaccurately and improperly classified interstate switched access traffic as intrastate traffic, and has not billed the correct rates for such calls."

The Third Affirmative Defense raised by Verizon states as follows:

> OrbitCom has inaccurately classified interstate calls as intrastate calls and improperly assessed intrastate charges on such interstate calls. The Commission lacks jurisdiction to grant any relief with respect to such interstate calls and to require payment for such calls.

See Verizon's Answer to Amended Complaint, p. 6.

Paragraph 1 of Verizon's Counterclaim provides: "During the period July 12, 2007 through June 12, 2009, OrbitCom failed to properly determine the jurisdiction of certain switched access calls for which it billed Verizon."

Exhibits LF 32- 35. In its analysis, Verizon utilized the CDR and EMI records provided by OrbitCom for the 5-day period in June 2009. Using the CDR records, Verizon's own exhibit illustrates that the applicable PIU for the 5-day sample of calls is 31.1% for originating calls and 28.99% for terminating calls, for a combined PIU of 30.61% for all calls. Id. at LF 32. Using the EMI records, Verizon's exhibit shows a PIU of 13.11% for originating calls and 28.13% for terminating calls, for a total PIU of 17.18%. Id. at Exhibit 33; see also p. 6 infra for further explanation. Using the EMI records, the PIU calculated by OrbitCom for each of the 5 days in the sample was 22%, 21%, 25%, 34%, and 21%. Use of the CDRs yielded factors of 25%, 23%, 27%, 37%, and 23%. See Hearing Exhibit 3, p. 7, lines 6-10. See Also Exhibits MP3-29 and MP3-30 (detailing the number of calls used in the sample and the breakdown of those calls into 800, interstate, and intrastate MOUs). In looking at the PIU factors generated using the 5-day sample, it is clear that OrbitCom's default PIU factor of 32% was and is more generous and accurate than that which Verizon's own numbers show.[8]

It was not until Verizon injected a significant number of calls, which were not included in OrbitCom's CDR or EMI records that the PIU changed, and changed dramatically – to a 72% factor.[9] See Hearing Exhibit B, Exhibit LF 34. Verizon's analysis of these records contained in excess of [redacted] calls over a 5-day period, which calls were not contained in the records

[8] OrbitCom also used a PIU factor of 95% intrastate and 5% interstate from July 2007 through August 2008. See Hearing Transcript, p. 18, lines 14-25; p. 19, lines 1-25; see also Hearing Exhibit 1, p. 7, lines 9-18. Verizon takes issue with the use of this factor as well. It specifically attempts to twist Mr. Powers' testimony regarding Verizon's designation as both a PIC and an LPIC. See Verizon's Post Hearing Brief, p. 12. Just because Verizon has always been *considered* a PIC does not mean it *is* one. As has been referenced on numerous occasions, OrbitCom has offered to Verizon a credit for the error it made in regard to the billing of all types of traffic using that PIU factor. See Hearing Transcript, p. 20, lines 11-17; see also Hearing Transcript, p. 158, lines 14-23; see also Hearing Exhibit 3, Exhibit MP3-31. Despite such offers, Verizon never responded, thereby leaving this an open issue for the Commission to resolve.

[9] It should also be noted that during the parties' discussions prior to the initiation of the current action, Verizon demanded that OrbitCom utilize a PIU of 91%. See Hearing Exhibit 2, p. 20, line 13; Exhibit MP2-21. Even Verizon's fictional PIU analysis outlined above and in Exhibits LF 32-25 does not support a PIU of 91%. No where in Verizon's own records is a factual basis provided for a 91% PIU factor.

OrbitCom received from Qwest, but which Verizon claims are associated with OrbitCom. Id. at LF 34. By way of comparison, Verizon's Exhibit 34, which is titled "VZB Data-CIC 555 - 2009 Data," shows an increase in total MOUs from OrbitCom's [redacted] to [redacted] Id. Interestingly, Verizon claims that these phantom calls are a necessary part of this case because the records produced by OrbitCom are not complete. However, Verizon states that it in no way disputes the quality of OrbitCom's records. See Hearing Transcript, p. 179, lines 18-23.[10] ~~The injection of these calls into the record by Verizon is wholly inappropriate because they lack foundation~~ and in fact, were not even responsive to the search criteria defined by Ms. Freet in her own testimony. See Exhibit B, p. 10. Moreover, because these calls were not included in those records received by OrbitCom from Qwest, OrbitCom was unable to bill for them – a fact which neither party disputes. See Hearing Exhibit 3, p. 9, lines 19-21. Verizon's purported "detailed analysis", which was based upon OrbitCom's EMI and CDR records, casts doubt upon Verizon's credibility.

~~An examination and comparison of Ms. Freet's analysis presented in Confidential Exhibit LF 34 (containing the additional phantom calls added by Verizon) with LF-32 (containing Verizon's analysis of the actual CDRs OrbitCom used to bill for these same five days) is crucial to understanding why Verizon's analysis simply does not work. Using the totals at the bottom of the far right columns, one can see that Ms. Freet's calculations show a total of [redacted] MOU in the unknown column of the actual CDRs LF-32. By way of comparison, Ms. Freet's calculations~~

[10] In response to questioning from Staff, Verizon's witness, Leslie Freet, unequivocally stated that Verizon was not challenging the accuracy of quality of OrbitCom's records.

> Verizon Business has not disputed the quality of OrbitCom's records. We disputed the completeness. I think that in - that OrbitCom has appeared to have disputed the quality of Verizon Business records. But I can certainly say we have not disputed the quality, only the completeness of OrbitCom's records.

See Hearing Transcript, p. 179, lines 18-23.

shows [redacted] MOU for the unknown minutes in LF-34, resulting in a difference of [redacted] additional unknown minutes on LF-34. For the interstate minutes category, Ms. Freet's exhibit shows [redacted] on LF-32 and [redacted] on LF-34, resulting in a difference of [redacted] additional interstate minutes on LF-34. For the intrastate minutes category, Ms. Freet's calculations show [redacted] minutes on LF-32 and [redacted] on LF 34, resulting in a difference of [redacted] additional intrastate minutes on LF-34.

The bottom line is compelling: LF-32 shows a total PIU of 30.61 and LF-34 shows a PIU 57.8 %. Through the addition of the phantom calls, Verizon created a PIU factor which is far more favorable to it than what the actual records do and should show.

Verizon's attempts to obtain a far more favorable PIU factor do not stop here. Using the numbers in LF-34, OrbitCom would be entitled to bill an additional [redacted] interstate minutes at .6 cents per minute for a total of $[redacted] in additional billing for the same five days covered in LF-32. OrbitCom would also be entitled to bill [redacted] additional intrastate minutes at approximately six cents per minute for the additional amount of [redacted]. Using those same exhibits, there are still an additional [redacted] minutes for which jurisdiction remains unknown. Through application of Verizon's newly created 57.8% PIU, [redacted] of the formerly unknown minutes become interstate in nature, and therefore billable at $0.006 cents per minute for a total of [redacted] in additional billing to Verizon, plus an additional [redacted] intrastate minutes at six cents per minute for another [redacted] in billings to Verizon. The addition of the phantom traffic results in a total of [redacted] in new charges to Verizon for the five-day sample at issue. Through extrapolation of these numbers, Verizon would owe OrbitCom [redacted] in additional charges over a 30-day period.

~~Additionally, Verizon's LF-32, which represents Verizon's analysis of the actual CDRs, includes three week days which have a combined total of [redacted] minutes of use or [redacted] MOU per week day. When this number is multiplied by the 22 weekdays in June of 2009, it yields [redacted] MOU. Adding [redacted] MOU (the total for the two weekend days in LF 32) for each of the four weekends in June would result in a monthly billing of [redacted] MOU, a number which matches closely with the total MOU billed to Verizon on this account in June of 2009. See Exhibit MP3-31. Exhibit LF-34, which shows the additional of the phantom calls to the legitimate and billed calls, has the same three week days in June with [redacted] minutes of use, or [redacted] per day.~~

In Exhibit LF-35, Verizon applies its newly created PIU to calls supposedly gleaned from the same Verizon switches using the same OrbitCom ANIs to four weekdays in June of 2008. Using the newly created PIU, the total MOUs gleaned by the same method for four weekdays returns to [redacted] or [redacted] per day. Again, Verizon uses only one-half of the equation. It uses a PIU it created and applies it retroactively (despite numerous statements that it has never asked for retroactive application of a PIU in its various filings with this Commission) but fails to come up with the other part of the equation: the additional calls from the industry standard Category 11-01-20 records as discussed below.

Verizon claims that its detailed call record analysis was and is unchallenged, but this, too, is not the case. See Verizon Post Hearing Brief, p. 14. To the contrary, as pointed out in pre-filed testimony and at the time of the hearing, Verizon's analysis does not wash. See Hearing Exhibit 3, p. 10, lines 16-23; pp. 11-14. In its pre-filed and hearing testimony, OrbitCom explained that the phantom traffic offered by Verizon could not possibly be viewed as reliable because it contained neither of the identifiers deemed by Verizon itself to be imperative to the

appropriate identification of traffic: the OCN and the CIC. Ms. Freet explained in her testimony, that the absence of such identifying information is easily explainable and, in this case, insignificant.

Broken down further, when one views the information provided by Ms. Freet, LF 37, which represents Verizon's PIU calculation, it clearly contains records which are Category 11-01-20 records. Category 11 EMI records contain many different types of records designated by the last four digits. Category 11-01-01 records are Carrier Access Usage for North American Originating and Terminating call records. See Exhibit LF-31. Category 11-01-25 records are Toll Free Carrier Access Records. These Category 11-01-01 and 11-01-25 records are the only records OrbitCom receives from Qwest to bill access and represent the industry standard for billing Carrier Access charges. Verizon offers no explanation why its 11-01-20 records should be used to compute a PIU (and not used for billing) and offers no explanation as to what comprises Category 11-01-20 records. Significantly, Category 11 records contain an OCN and a CIC according to page 5 of LF-31. A simple review and comparison of OrbitCom's EMI and CDR records shows as such. If an EMI record does not identify a CIC, it cannot be billed.

The specific numbers associated with the records most commonly used to bill are 11-01-01 and 11-01-25 records. Verizon's own Exhibit LF 32 explains that Category 11-01-01 records consist of records for are originating and terminating calls. See Hearing Exhibit B, LF 32, p. 5. Qwest provides this category of records to OrbitCom so that OrbitCom can bill access charges. Category 11-01-25 records consist of records for toll free calls. This is the only other category of record provided to OrbitCom by Qwest for access billing as per industry standards. A review of the records used by OrbitCom to bill Verizon shows that the categories of records used to bill Verizon were and still are 11-01-01 and 11-01-25. See Hearing Exhibit 5. Interestingly and

tellingly, LF 37, Columns C, D, and E, contain Category 11-01-20 records. This is significant because the Category 11-01-20 records furnished by Verizon contain no reference to the OCN which is necessary in order to issue bills. These were and still are not records supplied by Qwest to OrbitCom and not used by OrbitCom to bill access. Even if these records were provided to OrbitCom by Qwest, OrbitCom could not bill them because of the absence of necessary identifying information. See Hearing Exhibit 3, p. 11, lines 19-23; p. 12, lines 1-3. Also significant is the absence of a OCN code. Verizon cannot bill any company for wholesale long distance services without an OCN which identifies that company. Verizon offers no explanation as to why additional 11-01-20 records should be used in this instance.

In response to OrbitCom's criticism that the phantom traffic introduced by Verizon failed to contain the requisite CIC or OCN identifiers, Verizon indicated that fact is of no concern. Verizon argued that the carrier that hands calls off to Verizon did not populate the CIC in the call record. See Hearing Transcript, p. 168, lines 3-13. Verizon argues that no one, including Verizon, need put the CIC on the record because Verizon knows that the call traversed Verizon's network and there is no need to do more than say as much. Id. But again, if there is no CIC, OrbitCom, or any other carrier for that matter, cannot bill Carrier Access for it because the CIC code is the identifier that the OrbitCom billing system uses to identify the carrier to which owes access. See Hearing Transcript, p. 30, lines 14-25; p. 31, line 1. Traversing Verizon's 555 network is not the equivalent of that traffic containing the 555 CIC code. Numerous other carriers use Verizon's network. See Hearing Transcript, p. 203, lines 13-15.[11] To that end,

[11] As explained by Mr. Powers in his pre-filed testimony, a significant number of the calls shown in LF 37 are not OrbitCom calls. Specifically, he provided testimony that:

> In fact, some of these calls do not even have an OrbitCom ANI associated with the originating or terminating number! Some of these calls are indicated by an OCN believed to belong to PrairieWave/Knology (OCN 4256), Cellco Partnership d/b/a Verizon Wireless (OCN 6006), PrairieWave/Knology (OCN 7024), Midcontinent (OCN 7076), McLeod (OCN 7393), AT&T

examination of the first part of LF 37 reveals a total of 5,925 Category 11-01-20 records. Of these, 3,999 records have no CIC code whatsoever, 220 have the CIC of 0555, and the balance of these records are spread over 28 different CICs. Had OrbitCom received these records, it could not have billed any records lacking a CIC code. It would have billed the remainder to Verizon and the 28 other IXC whose CIC codes are actually identified. Under these circumstances, Verizon cannot state with any justifiable certainty that it can discern OrbitCom's traffic from that of any other carriers whose traffic traverses Verizon's network.

Verizon also attempts to negate the argument that an OCN is a necessary component of any call detail record. As set out its in Post Hearing Brief, Verizon argues that OrbitCom's OCN would likely not be contained on anyone's network record anywhere. See Verizon's Post Hearing Brief, p. 29-30. Again, Verizon's argument is contrary to the record evidence. In fact, according to Verizon's own exhibits, which are industry standard records, an OCN will appear on every record that leaves the Qwest switch. See Hearing Exhibit B, Exhibit LF 32, p. 5. LF 32 explains that a ULEC's OCN (such as OrbitCom's) should appear on Category 11-01-01 records. Verizon's analysis simply does not work. In his pre-filed testimony, Mr. Powers explained why this is the case:

> The less fields a switch has to look at, the more efficiently it operates. According to the instructions issued by ATIS Alliance for Telecommunications Industry Solutions) and detailed out on page 5 of Exhibit LF-32, the appropriate Qwest switch puts the OCN of the ULEC (OrbitCom) on the Category 11-01-01 EMI record in the originating or terminating field. Examination of the EMI records sent to OrbitCom by Qwest shows that OrbitCom's OCN of 8080 is always included in the record in the proper place. The records sent with Ms. Freet's supplemental testimony show mostly the Qwest OCN of 9631 as the terminating

(OCN 7421), and Qwest (OCN 9631). Most of these non-matched records are not tied to OrbitCom by OCN or ANI. Again, none of these non-matched records were provided to OrbitCom by Qwest on the EMI/DUF files. For the most part, why should they be? They are not OrbitCom's records.

See Hearing Exhibit 3, p. 11, lines 10-18.

> or originating OCN. OrbitCom's OCN of 8080 is not shown on any of these records. So now Verizon wants to calculate a PIU using a method where OrbitCom calls are mixed with Qwest calls, when in fact all calls show up as Qwest's OCN or some other company's OCN and OrbitCom's OCN doesn't show up at all.

See Hearing Exhibit 3, p. 10, lines 22-23; p. 11, lines 2-10. Further examination of the CDRs OrbitCom provided to Verizon and the Commission shows the OrbitCom OCN is in the proper location. Verizon makes several arguments about the OCN and it not being present in the call records. This argument is not only incorrect, but is directly contrary to Verizon's own Exhibit LF-31, as well as the evidence illustrated by OrbitCom's EMI and CDR records.

In this case, the evidence reflects that OrbitCom applied an appropriate PIU factor to the traffic which it billed to Verizon. While Verizon attempts to argue that OrbitCom has not proven its case because the CDRs and EMI records which OrbitCom produced to Verizon were not specifically admitted at the time of the hearing, this argument fails on its face. OrbitCom provided testimony and documentary evidence through its witness, Mr. Powers, to substantiate its analysis of its CDR and EMI records. See Hearing Exhibit 3, p. 5, lines 18-22; MP3-29 and MP3-38; p. 9, lines 1-14. The testimony and evidence clearly explains the field indicators used, the records relied upon, the analysis employed, and the ultimate result of the same. Id. Verizon made no objection as to the foundation for any of Mr. Powers' testimony or exhibits. In the event that this Commission thinks the actual CDRs upon which the parties' analysis and conclusions are based are necessary to its own decision-making process, OrbitCom requests an opportunity to supplement the record with the same.

Moreover, if the testimony and exhibits which OrbitCom offered at the time of the hearing are unsubstantiated, then neither are Verizon's, as Verizon's own analysis is based on OrbitCom's CDR and EMI records. ~~Even more significantly, LF 37, a spreadsheet forming the primary basis of Verizon's entire case, was not based upon supporting source documents~~ or the

testimony of the Verizon employee who actually pulled the records from Verizon's switch. See Hearing Transcript, p. 155, lines 13-19. Verizon offered no direct evidence of OrbitCom calls contained within its Exhibit LF 37, but merely relied and continues to rely upon a broad statement from Ms. Freet that the exhibit does in fact contain OrbitCom calls, but without pointing to any reference or supporting documentation for those calls. Again, Verizon must be careful of that for which it wishes.

Ultimately, Verizon is attempting to hold OrbitCom accountable for records it never received and never billed. To require OrbitCom to use calls it never received, had no knowledge of, and for which it cannot bill, in its PIU calculation is patently unfair and contrary to industry standard. The introduction of new phantom calls into evidence only illustrates the desperation of Verizon's attempts to exonerate itself from what it knows to be illegal self-help.

c. The alleged non-disclosure of CDRs by OrbitCom is a red herring.

~~If Verizon seeks nothing but strict application of OrbitCom's tariff, then it cannot escape the fact that it failed to provide a proper dispute of OrbitCom's bills within the 60 day dispute period outlined in the tariff. See OrbitCom Switched Access Tariff, § 4.8. Rather than admit to its failure to comply with the tariff,~~ Verizon attempts to cast blame upon OrbitCom by devoting significant argument to OrbitCom's alleged failure to provide CDRs to Verizon after Verizon ceased paying OrbitCom's bills in August 2007. Verizon seemingly suggests that it is entitled to a presumption that OrbitCom never could prove its case because it did not provide Verizon with the CDRs which it requested. While it does not come right out and say so, Verizon's argument is tantamount to a spoliation argument. Verizon did not make a direct accusation, but rather alludes to it because it knows that its argument misses the mark.

As a general matter, spoliation is "[t]he *intentional* destruction of evidence, sometimes discussed as a form of obstruction of justice, is usually referred to as spoliation." State v. Langlet, 283 N.W.2d 330, 333 (Iowa 1979) (emphasis added). When spoliation is established, the finder of fact may infer that the evidence destroyed was unfavorable to the party responsible for its spoliation. See Burke v. Butte County, 2002 S.D. 17, ¶15, n.4, 640 N.W.2d 473, 478 (quoting Wuest ex rel. Carver v. McKennan Hosp., 2000 S.D. 151, ¶10, 619 N.W.2d 682, 686). Significantly, however, spoliation involves more than destruction of evidence. Id.; see also Langlet, 283 N.W.2d at 333. In order for the concept to apply, an intentional act of destruction is required. Id. "Only intentional destruction supports the rationale of the rule that the destruction amounts to an admission by conduct of the weakness of one's case." Id. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case. Id. Further, the drawing of an adverse inference is not warranted if the disappearance of the evidence is due to mere negligence, or if the evidence was destroyed during a routine procedure. Phillips v. Covenant Clinic, 625 N.W.2d 714, 719 (Iowa 2001) (citations omitted).

As set forth above, OrbitCom did not possess records in the format as requested by Verizon. See p. 6, *infra*. Moreover, OrbitCom was under no obligation to produce such records. Verizon turns the process outlined by OrbitCom's tariff on its head. ~~As explained in pre-filed testimony, Verizon's purported dispute notice was not provided in the 60-day time period outlined by the tariff,~~ was not sufficiently detailed so as to ascertain the basis for the dispute and changed every time OrbitCom made efforts to ascertain the basis for Verizon's purported dispute. ~~It was because of Verizon's failure to provide an adequate written notice of dispute in a timely matter, and even thereafter, that Verizon's dispute was denied.~~ Verizon did nothing to appeal the denial of its dispute nor did it file a complaint with this Commission. Rather, it

simply stopped paying all together and demanded CDRs from OrbitCom. Again, as explained from the inception of the parties' discussions, both prior to and during this litigation, OrbitCom could not produce the documents as requested. There was no intent to deceive, sandbag or engage in other nefarious purposes.

Moreover, Verizon has done much to make it seem as if it had unassailable right to CDRs. This is not a process described in OrbitCom's Tariff. Following the denial of its dispute, it was Verizon's obligation to provide CDRs or other call detail information. See OrbitCom Switched Access Tariff, ¶ 4.8. OrbitCom's Tariff, not Verizon personnel, dictates the process to be followed in the event of a dispute. ~~OrbitCom's Tariff is in no way unique. Qwest's tariff provides for a similar process. See http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_sd_a_t.htm, SD QC Access Tariff, p. 38, Section 2, 2.4.1(c).~~ It is abundantly evident that Verizon seeks to distract this Commission's focus from its own self-help by accusing OrbitCom of destroying evidence. Accordingly, Verizon's complaints regarding the production of CDRs should be given no weight.

2. OrbitCom Has Met Its Burden of Proof with Regard to Its Right to Bill Verizon for Tandem Switching.

As with the PIU dispute, the dispute regarding the validity of OrbitCom's tandem switching charges is far simpler than what Verizon made of it. OrbitCom has a contract with Qwest, through which it has paid for the rights to bill for that service. The issue of the validity of OrbitCom's charges for tandem switching remains a contract issue. The existence of this contract, absent a direct challenge to it, which challenge Verizon has not undertaken, ends the inquiry.

a. OrbitCom's QLSP with Qwest permits the billing of the tandem switching element.

Verizon attempts an end run around the terms of the contract by blurring the distinction between its network and Qwest's network. Its first argument is that OrbitCom's interpretation of the QLSP is contrary to the very provisions of the contract. At the time of the hearing, OrbitCom explained that Verizon cannot avoid responsibility for tandem switching because it has not ordered DEOTs to OrbitCom. See Hearing Transcript, p. 37, lines 8-25. Verizon now argues that OrbitCom's very simple and factually accurate statement was actually intended to mean that any DEOTs to OrbitCom "can be used to re-direct long distance traffic over Qwest's network[.]" See Verizon Post-Hearing Brief, p. 45. In support of its argument, Verizon cites to the following provision from the QLSP:

> CLEC traffic will be carried on the same transmission facilities between end-office Switches, between end-office Switches and tandem Switches, and between tandem Switches in its network facilities that Qwest uses for its own traffic, [and]
>
> Shared Transport uses the existing routing tables resident in Qwest Switches to carry the End User Customer's originating and terminating local/extended area service ("EAS") interoffice traffic on the Qwest interoffice message trunk network.

See Verizon Post Hearing Brief, p. 46 (citing Hearing Exhibit 6, Attachment 2, § 1.5.1). Reliance upon this provision is misplaced as it produces a nonsensical result. The above-referenced provision is taken from the definitional section of the QLSP. It describes a local calling scenario. In such a scenario, no IXC is involved. Once an IXC is involved and employs the use of a DEOT, that traffic is no longer local and it is no longer on the same network. Verizon traffic is not Qwest traffic. Once a call is handed off to a DEOT, it has left the Qwest network. Again, because Verizon has not ordered a DEOT from OrbitCom it cannot avoid the

tandem and cannot avoid the charge for its traffic traversing the same. See Hearing Transcript, p. 38, lines 2-9.[12]

b. Verizon's argument defies common logic.

Even if one were to give some credence to the language cited by Verizon, it in no way negates the plain language and plain meaning of the contract, which clearly specifies that Qwest will not bill for access on any lines converted to QLSP service by OrbitCom. Id. at p. 39, lines 5-12; see also Exhibit 6, Paragraph 3.7.[13] Regardless of whether one draws a distinction between networks, there is clearly a distinction between which party has the contractual *right* to bill for that traffic and that right clearly belongs to OrbitCom. This point was also recognized and made by Mr. Rislov in his questioning of Ms. Freet. See Hearing Transcript, p. 189-190, lines 17-25 and 1-7. Verizon's own exhibits also prove this point. An examination of Verizon's Exhibit LF-42, which represents bills for the alleged DEOTs which Verizon claims it has with Qwest, evidences bills for Colorado, Oregon, Hill City, South Dakota, and Sioux Falls, South Dakota. A review of the Sioux Falls bills establishes that Qwest is billing Verizon for Local Switching, Data Base Inquiry, and Transport charges, all of which are components of access charges. This confirms that OrbitCom traffic cannot possibly be traversing these alleged DEOTs, as this bill would represent a clear violation of the QLSP Agreement by Qwest.

[12] Mr. Powers testified:

> Verizon's calls have to get to and from OrbitCom's end users somehow. And if they don't have a DEOT to us, it has to go through the tandem. And I don't think there's any complaints here that they aren't getting their calls originated or terminated.

See Hearing Transcript, p. 38, lines 5-9.

[13] Paragraph 3.7 provides, "If an End User Customer is served by CLEC through a QLSP service, Qwest will not charge, assess, or collect Switched Access charges for InterLATA or IntraLATA calls originating or terminating from that End Users phone.

Interestingly, Verizon also complains about the inefficiency of purchasing separate trunks to the same switch; however, according to Verizon's own exhibits, it already does so. See Hearing Exhibit 2, Exhibit MP2-04.01. Verizon also seemingly argues that OrbitCom should be required to combine its traffic with Qwest. However, Verizon has done nothing to combine its 555 and 222 traffic. Verizon cannot argue one thing, but refuse to take such steps itself. Moreover, if Verizon takes issue with the contractual arrangements which OrbitCom has in place with Qwest, Verizon's remedy was to involve Qwest in this dispute or to challenge the validity of the terms of the QLSP. Verizon should not be allowed to render OrbitCom's contractual relationship with Qwest a nullity.

Verizon also makes much of the host/remote relationship as it relates to the validity of the tandem switching charges. It goes so far as to argue that Mr. Powers conceded that Verizon has a DEOT. This is by no means the case. Mr. Powers conceded that there are most certainly host and remote offices. He did not concede that Verizon has a DEOT to OrbitCom because of its network structure. While Verizon may have a DEOT to Qwest, OrbitCom's traffic does not travel that path. See Verizon Post Hearing Brief, pp. 40-41.

Ultimately, when one looks to the way in which Verizon itself operates, the disingenuousness of its argument becomes readily apparent. Verizon's tariff makes clear that another carrier can order a DEOT from it, just as Verizon may order a DEOT from OrbitCom. See Hearing Exhibit 2, Exhibit MP2-16 (MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services, Tariff No. 2). OrbitCom's tariff is no way unique in this regard. Verizon also clearly knows that its tariff is similar to that of OrbitCom's. In a May 2008 filing with this Commission, Verizon sought an exemption from the specific requirement of developing a cost study. See TC 08-42, *In the Matter of the Filing by MCImetro Access Transmission*

Services LLC d/b/a Verizon Access Transmission Services for Approval of its Access Services Tariff, ¶9. In its pleading, Verizon referred to OrbitCom as a carrier similarly situated to it.[14] Id. This otherwise innocuous reference proves two points: (1) Verizon's initial claims that it did not know OrbitCom had a tariff are wholly disingenuous and (2) Verizon operates in a similar, if not identical, manner to OrbitCom, thereby making it quite curious as to why Verizon now voices objections to OrbitCom's tariff and the billing and dispute processes outlined therein.

3. Verizon's Request for Further Delay of This Proceeding so That it Can Obtain Thirty Days of CDR Records from Verizon Should be Denied.

At the time of the hearing and in its Post-Hearing Brief, Verizon requested a delay in this proceeding so that it might obtain 30 days of CDRs from OrbitCom in order to better analyze whether OrbitCom determined the proper jurisdiction for the traffic at issue. This request is purely a delay tactic and one which benefits only Verizon. One must also question the need for such a request. For the first time since it received OrbitCom's records in September 2009, Verizon now challenges whether the 5-day sample provided by OrbitCom was in fact a representative sample. At no time following production of these CDRs did Verizon object to these requests or request further records. Verizon did not seek a continuance in order to obtain additional records. Instead, Verizon used the 5-day sample provided by OrbitCom in its analysis never raising the need for additional records until the time of the hearing.

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[14] In its Petition, Verizon made the following statement:

> In addition, OrbitCom, Inc., a CLEC, was granted a waiver of the requirement to prepare cost studies by agreeing to set its intrastate switched access rates at the rates set by Qwest. The Commission granted OrbitCom's waiver request on almost identical grounds set forth here: namely, OrbitCom obtained all of its switched access elements from Qwest, and thus asserted that its costs for switched access service elements were at least as much as Qwest's costs for those elements. The Commission also accepted OrbitCom's argument, similar to that made here by MCImetro, that applying ARSD 20: 10: 27: 12 should not required, particularly since it would result in much higher switched access rates than were being proposed.

See TC 08-42, *In the Matter of the Filing by MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services for Approval of its Access Services Tariff*, ¶9.

Moreover, the information which Verizon deemed most significant at the time of hearing of its Motion to Compel was the disclosure of OrbitCom's ANIs. See Verizon's Brief in Support of Motion to Compel, p. 4, ¶¶8-10. Those ANIs can be easily extrapolated into a 30-day sample. As testified to by Michael Powers, OrbitCom's customer base is comprised primarily of small businesses and has remained primarily the same. Verizon has the total MOUs at issue for all months involved in the parties' ongoing dispute and can use the existing ANIs to obtain its own 30-day sample should it choose or have chosen to do so. And again, as previously set forth, Verizon's analysis was virtually identical to that of OrbitCom's until it injected thousands of additional, unsubstantiated and unbilled calls into its analysis. One can only imagine what Verizon's numbers will be if it is given 30 days of call records. Verizon continues to refuse to pay OrbitCom. Delay will only give Verizon an even greater competitive advantage.

Finally, as evidenced at the time of the hearing, Verizon has no answer to the question of what should be done if it is dissatisfied with the results yielded by an analysis of 30 days of OrbitCom's CDRs. See Hearing Transcript, p.159, lines 24-25, p. 160, lines 1-18. As recognized by Commission Staff, 30 days of records constitute a significant and unusually large sample. To foist this burden upon OrbitCom at this time is neither reasonable nor proper.

4. The Consequences of Verizon's Position on Both the PIU and Tandem Switching Issues are Far-Reaching and Damaging.

The dispute between these two parties is finite in time. It involves the time period of February 2008 to the present. Because Verizon demanded and OrbitCom has now begun to bill jurisdictionally, the Commission need only consider what amount of money is currently due and owing OrbitCom for the relevant period. However, Verizon's arguments and the result of accepting the same takes on paramount significance. With the position it has advanced, Verizon seeks a competitive advantage by changing the jurisdiction of OrbitCom's intrastate traffic to

interstate and avoiding the imposition of the tandem switching charge, thereby lowering the applicable access rate and achieving lower costs than that of its competitors. By way of example, an examination of LF-42 (Verizon's alleged DEOT and facilities bills) shows that the 94% PIU filed by Verizon in this case is being applied to all [redacted] minutes of 800 traffic. If Verizon is successful in claiming any CLEC or RLEC bound traffic travels over its DEOTs to Qwest, it will effectively rejurisdictionalize that carriers traffic to its liking – a ruling that would be a dangerous and extremely damaging precedent.

The effect of Verizon's argument is violative of nearly every established tariff, contract and industry practice in not only South Dakota, but in all jurisdictions. Its argument changes generally accepted billing practices, modifies rates, and nullifies established contractual relationships. Through its argument and request for relief, Verizon seeks relief that is detrimental to almost every CLEC and RLEC in South Dakota.[15]

[15] By way of example, one need look no further than the Qwest tariff which has been filed in other states in order to see the harm inflicted by the necessary result of Verizon's position. Qwest's tariff, specifically the jurisdictional reporting requirement provisions, provides as follows:

> For EF and DTT facilities, the customer has the following jurisdiction options; 1) allow the Company [Qwest] to develop the projected LATA-level PIU factor using a mechanized program as set forth in a., following or 2) provide the Company with a projected LATA-level PIU favor via a quarterly jurisdictional report as set forth in b., following[.]

The options set forth in the respective Qwest tariffs effectively allow the *Customer, which in this case would be Verizon*, not Qwest, to dictate in advance the jurisdiction of the traffic at issue. No matter what the actual traffic, Verizon could dictate a 90% PIU on its DEOT. Even if 100% of the traffic on that DEOT were intrastate, Qwest would be required under its tariff to use the Customer provided PIU which, in this hypothetical, would be 90% interstate, thus rejurisdictionalizing calls without once challenging any LECs tariffs before the Commission. A simple review of Verizon's Exhibit LF-26 (Hearing Exhibit B) will show Verizon dictating a PIU of 83% to 96% on any DEOTs ordered.

See Qwest Intrastate Switched Access Tariff for Minnesota, MN QC Access Service Tariff, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_mn_a_t.htm; ND QC Access Service Price Schedule, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_nd_a_ps.htm; WY QC Access Service Price Schedule No. 2, http://tariffs.qwest.com:8000/idc/groups/public/documents/tariff/htmltoc_wy_a_ps_no_2.htm

CONCLUSION

Bluff and bluster should have little way in this forum. Verizon's allegations that OrbitCom failed to comply with the terms of its tariff in billing the PIU which it used to bill Verizon are sweeping and conclusory. The record evidence in this case clearly establishes that OrbitCom's bills to Verizon for the period of February 2008 to the present are valid, from both the PIU factor and rate element standpoint, and Verizon should be ordered to pay those unpaid amounts, with applicable interest, immediately. To date, those amounts total $782,982.04 plus interest $135,793.11, for a total of $918,775.15 through November 2009.

Dated this 8th day of January, 2010, in Sioux Falls, South Dakota.

CUTLER & DONAHOE, LLP
Attorneys at Law

Meredith A. Moore
100 North Phillips Avenue, 9th Floor
Sioux Falls, SD 57104-6725
Telephone: (605) 335-4950
meredithm@cutlerfirm.com

CERTIFICATE OF SERVICE

I, Thomas F. Dixon, hereby certify that on the 4th day of February 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:

Patricia Van Gerpen
Executive Director
South Dakota Public Utilities Commission
patty.vangerpen@state.sd.us

Karen E. Cremer
Staff Attorney
South Dakota Public Utilities Commission
karen.cremer@state.sd.us

Terri Labrie Baker
Staff Analyst
South Dakota Public Utilities Commission
terri.labriebaker@state.sd.us

Meredith A. Moore
Cutler & Donahoe
meredithm@cutlerlawfirm.com

Thomas F. Dixon