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February 16, 2010

VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US
Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: *TC08-135*
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 for Unpaid Access Charges

Dear Ms. Van Gerpen:

Attached for filing in the above matter, please find OrbitCom's Response to Verizon's Motion to Strike, or in the Alternative, a Motion for Leave to File Sur-Reply Brief.

As indicated above, this document has been sent to you via electronic mail in PDF form. If you have any questions or concerns regarding this document, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP

Meredith A. Moore
For the Firm

MAM/cmc
Attachment
cc: Service List

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

RESPONSE TO VERIZON'S MOTION TO STRIKE OR FOR LEAVE TO FILE SUR-REPLY

This matter is before the Commission upon Verizon's Motion to Strike portions of OrbitCom's Post-Hearing Reply Brief. OrbitCom respectfully submits this Response to Verizon's Motion.

BACKGROUND

This matter came on for hearing before this Commission on October 22, 2009. At issue were the causes of action set forth in OrbitCom's Amended Complaint and Verizon's Counterclaim. Following the hearing, the parties submitted simultaneous post-hearing briefs on December 4, 2009, and simultaneous reply briefs on January 8, 2010. Verizon now seeks to strike certain portions of OrbitCom's Post-Hearing Reply Brief or submit a supplemental brief responding to arguments which it claims have been raised for the first time. OrbitCom submits that its Reply Brief contained no improper argument or evidence and should remain intact.

ARGUMENT AND ANALYSIS

Verizon's arguments are three-fold. First, Verizon argues that many of the statements and arguments made in its reply brief have been raised for the first time and should therefore be stricken as they are not appropriate for inclusion in a reply brief. Second, Verizon argues that some of the references to tariffs and categories of call records included in OrbitCom's Reply

Brief are not supported by evidence in the record and should therefore be stricken on that basis. Finally, Verizon has identified certain numbers referenced in OrbitCom's brief as confidential and not properly identified as such. Because the third issue identified by Verizon is the easiest with which to dispense, OrbitCom will begin its analysis with this issue. It will then address the remaining two issues in the order in which they were presented.

1. Confidentiality Concerns.

Undersigned counsel erred in including reference in OrbitCom's Reply Brief in referencing numbers which had previously been identified by Verizon as confidential. There was no untoward intent on OrbitCom's part in including these numbers; it was oversight. Appropriate action will be taken to remove the confidential numbers from the Reply Brief and submit a new public and confidential version of that Brief. However, sanctions, as Verizon has requested, are not appropriate. Sanctions are appropriate when a party intentionally violates or exhibits deliberate disregard of that rule or basic principle. See SDCL § 15-6-11 (a) – (c)[1].

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[1] South Dakota Codified Laws §§ 15-6-11(b) and 15-6-11(c) set forth South Dakota's basic law as it relates to sanctions. The former statute provides:

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,–
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

SDCL § 15-6-11(b). The latter statute provides:

OrbitCom has not done this. Additionally, when one views South Dakota's law regarding sanctions, it requires a separate brief and a statement of how the general rules of pleading set

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If, after notice and a reasonable opportunity to respond, the court determines that § 15-6-11(b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated § 15-6-11(b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate § 15-6-11(b). It shall be served as provided in § 15-6-5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate § 15-6-11(b) and directing an attorney, law firm, or party to show cause why it has not violated § 15-6-11(b) with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of § 15-6-11(b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

SDCL § 15-6-11(c).

forth in South Dakota's Rules of Civil Procedure have been violated. Id. Verizon has not shown that these factors are met. Under these circumstances, appropriate steps have been taken to rectify the disclosure of confidential information and OrbitCom does not believe further sanctions or action is warranted.

2. OrbitCom's Reply Brief included appropriate argument made in direct response to the argument and allegations advanced in Verizon's initial brief.

OrbitCom strongly disagrees with Verizon's characterization of many of its arguments as not appropriate for inclusion in a reply brief. Verizon's Initial Post Hearing Brief was 55-pages long. OrbitCom's Reply Brief was submitted in direct response to the arguments and allegations raised therein.

The purpose of any brief is to argue the facts and the law. At an administrative level, where the hearing process is not conducted in the same manner as a trial, briefs take on the additional role of serving as a party's closing argument, since such arguments are not typically made at the time of any contested case hearing. See A.R.S.D. 20:10:01:25. In this case, there can be no question but that the parties' briefs represent their respective closing arguments in addition to their respective beliefs as to what the evidence shows in this case. The Commission is not bound by any of the statements or arguments made in any party's brief, whether initial or reply, and can give the parties' respective arguments the weight which they believe they deserve. The Commission can ascertain whether they believe a party's statement is in fact supported by the record produced at the time of and prior to hearing.

In the interest of avoiding further allegation that OrbitCom has raised inappropriate argument or that it is using this opportunity to respond to the Motion to Strike for further argument, OrbitCom has created a table identifying the brief section which Verizon seeks to

strike and the section of Verizon's initial brief to which OrbitCom responded.[2] See Exhibit A. OrbitCom firmly believes that each and every argument which it advanced is directly responsive to evidence raised by Verizon or accusations raised by Verizon that OrbitCom failed to meet its burden of proof in this matter.

Even if this Commission determines that OrbitCom's arguments were not directly responsive to Verizon's initial brief, a fact which OrbitCom does not admit, striking sections of its brief are not appropriate. A court or administrative agency possesses "the discretion to consider issues first raised in a reply brief if required in the interests of justice, if the issue is a matter of public importance, or if the failure to raise the issue earlier does not impede review, and it has been suggested that a court may consider such issues if good reason is shown for the failure to present them earlier." See Am.Jur. Appellate, ¶ 518 (citing Norman v. U.S., 429 F.3d 1081 (Fed. Cir. 2005), cert. denied, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2006); Joyce v. Explosives Technologies Intern., Inc., 625 N.E.2d 446 (3d Dist. 1993); Mid State Bank v. 84 Lumber Co., 629 N.E.2d 909 (Ind. Ct. App. 5th Dist. 1994);

With the exception of perhaps the specific identity of the different call records, which is included in Verizon's own exhibits, all of these issues were identified in the pre-filed testimony. Verizon cannot claim unfair surprise or that it was unable to respond to these arguments at the time of the hearing and can still respond to them at the time of oral argument, if it so desires. No new argument has been raised.

3. OrbitCom's arguments are supported by evidence in the record or cite to documents of public record.

In its Motion to Strike, Verizon also claims there are three instances in OrbitCom's Reply Brief where citation is made to evidence not in the record. According to Verizon, these

[2] The table created by OrbitCom does not include reference to each and every citation in Verizon's brief to which OrbitCom responded in its Reply Brief.

references must too be stricken from the record on the basis that this Commission's decision "must be based exclusively on evidence and on matters officially noticed." See Motion to Strike, p. 13. Verizon's argument goes too far.

Verizon first argues that OrbitCom's discussion of the various categories of records on pages 17-19 of its Reply Brief is inappropriate. The discussion of the different categories of records was necessitated by Verizon's claim that its analysis of its own records and the resulting PIU factor was based entirely on the information which it gleaned from one category of call detail record. In conducting its analysis, Verizon, according to its initial brief, used certain categories of records, and the information contained therein, to arrive at its calculation of the PIU. See LF 31. In conducting its analysis, it specifically cited to Exhibit LF-31 to explain the records which it used and why. See Verizon's Post-Hearing Brief, pp. 24-26. However, in its review of Verizon's records, OrbitCom raised the issue that Verizon's own records and exhibits (Exhibit LF-37) contained other categories of records beyond just Category 11-01-01 records. Simply because Verizon did not identify the particular category of record in its own testimony and exhibit does not mean that OrbitCom introduced new evidence or raised new argument. Verizon devoted an extensive portion of its initial brief to analyzing those records contained in its exhibit, but its analysis is only as good as the entirety of its records. Accordingly, OrbitCom was entitled in its reply to raise the issue that Verizon's analysis was, in OrbitCom's opinion, not complete.

Verizon next argues that OrbitCom's references to various tariffs filed by Qwest in South Dakota, as well as other states, is inappropriate because the tariffs themselves were never introduced. This argument is also without merit. The tariffs at issue are public record. The Commission, of its own volition, can take judicial notice of these tariffs should it choose to do

so.[3] More important, the tariffs referenced in OrbitCom's brief were used to illustrate OrbitCom's argument that acceptance of Verizon's position in this case will have a detrimental effect on OrbitCom. Under these circumstances, the Commission can give whatever weight and deference to OrbitCom's arguments that it deems appropriate.

CONCLUSION

OrbitCom's Post-Hearing Reply Brief was submitted in good faith. It contained appropriate rebuttal argument based on pre-filed testimony and evidence. Verizon has not demonstrated that it has somehow been prejudiced by OrbitCom's argument. Accordingly, OrbitCom respectfully requests that Verizon's Motion to Strike or Submit a Sur-Reply be denied.

Dated this 16th day of February, 2010, in Sioux Falls, South Dakota.

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[3] A court or administrative agency can take judicial notice of any fact that is "generally known" or is "capable of accurate and ready determination by resort to source whose accuracy cannot reasonably be questioned." See SDCL § 19-10-2. (Rule 201 (b)) (describing the types of fact which may be judicially noticed.); see also SDCL § 19-10-3 (Rule 201(c)) (establishing the authority of a court or administrative body to take judicial notice upon request or of its own volition).