

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

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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  <b>VERIZON'S SUR-REPLY BRIEF</b>
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**VERIZON'S SUR-REPLY BRIEF**

Pursuant to the Commission's oral ruling made February 18, 2010, Verizon<sup>1</sup> submits this sur-reply brief. At that time, the Commission denied Verizon's motion to strike portions of OrbitCom's Post-Hearing Reply Memorandum of Law in Support of Its Amended Complaint ("Reply Brief"),<sup>2</sup> but granted Verizon's request to file this sur-reply brief to respond to new arguments and information included in OrbitCom's Reply Brief.<sup>3</sup>

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<sup>1</sup> 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").

<sup>2</sup> All references to OrbitCom's Reply Brief are to the public version filed on February 17, 2010, that has different pagination than the confidential version.

<sup>3</sup> Some of the new arguments in OrbitCom's Reply Brief are based on information that is incorrect, outside the record, or not based on a fair reading of the evidence in the record; however, because those arguments address minor or peripheral issues, or are not relevant to the central issues before the Commission, Verizon does not address all of those arguments in this brief. The fact that Verizon is not formally responding to each of the passages identified in its Motion to Strike as containing improper argument does not indicate that Verizon has abandoned its objections or that it agrees with the substance of those arguments. It does not.

**I. OrbitCom Failed to Prove that It Had Insufficient Call Detail to Determine the Jurisdiction of Access Traffic It Billed Verizon.**

**A. OrbitCom Bears the Burden of Proof on this Issue.**

As a preliminary matter, it bears repeating that OrbitCom has the burden of proving it complied with its tariff. OrbitCom has acknowledged that it “admittedly bears the burden of proof in this matter.” OrbitCom’s Post-Hearing Memorandum of Law in Support of its Complaint, at 10. In its reply brief, however, OrbitCom argues for the first time that Verizon bears the burden of proving that OrbitCom received insufficient information to determine the jurisdiction of the calls traffic in dispute. *See Reply Brief at 2.* That is not so.

Section 3.4 of OrbitCom’s tariff is central to this case. It states:

*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) . . . to those minutes for which the Company does not have sufficient call detail. (Emphasis added)*

Thus, to demonstrate that it complied with its tariff when it applied various PIU factors to Verizon’s access traffic, OrbitCom, not Verizon, has the burden of proving that the call detail information available to OrbitCom was “insufficient to determine the jurisdiction” of calls. Otherwise, OrbitCom was required by the plain language of its tariff to “use that call detail to render bills . . . and . . . not[to] use PIU factors.”<sup>4</sup>

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<sup>4</sup> OrbitCom argues (at page 2 of its Reply Brief) that because Verizon alleged in its affirmative defenses that OrbitCom “failed to evaluate call detail available from the local exchange carrier,” Verizon bears the burden of proof on this issue. But OrbitCom alleged in its Amended Complaint that it had billed “in accordance with the applicable rates set forth in its tariff.” *See Amended Complaint* ¶ 8; *see also id.* ¶ 14 (“OrbitCom has invoiced Verizon pursuant to rates as set forth in its state tariff.”). These allegations were necessary for OrbitCom to recover. *See In re One-time Special Underground Assessment by Northern States Power Co. in Sioux Falls*, 628 N.W. 2d 232, ¶ 15 (S.D. 2001) (utility has “the burden of

In any event, the question of the burden of proof, although an important background principle, does not ultimately make a difference to this case. As set forth in Verizon's previous briefing and below, regardless of who bore the burden, Verizon has handily shown (and OrbitCom's own witnesses have admitted) that the information OrbitCom received from Qwest was sufficient.

**B. OrbitCom Fails to Provide Any Record Evidence in Support of Its New Contention that It Lacks Sufficient Call Detail Information to Determine the Jurisdiction of Access Traffic**

In its Reply Brief, OrbitCom argues for the first time that information "contained in the Category 11-01-01 EMI records furnished to OrbitCom by Qwest for access billing was insufficient to accurately bill by jurisdiction." Reply Brief at 7. Similarly, on page 5, OrbitCom refers to "the fact that the jurisdictional detail present in the EMI record is insufficient to render an accurate bill." OrbitCom reiterates this theme elsewhere in its brief.<sup>5</sup> OrbitCom cites two passages of testimony to support this new claim.

First, on page 4 of its Reply Brief, OrbitCom states:

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

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demonstrating" that assessed charges apply under its tariff). Verizon's pleading that OrbitCom had not complied with its tariff did not somehow relieve OrbitCom from its burden under established law of proving that its charges were in accordance with its tariff.

<sup>5</sup> OrbitCom did not assert, either in its Amended Complaint, its Answer to Verizon's counterclaim, its pre-filed testimony, its initial brief, in the hearing transcript, or in responses to discovery that the call detail information it received from Qwest was not sufficient to allow OrbitCom to determine the jurisdiction of access traffic. There is no statement in the record prior to the Reply Brief to the effect that OrbitCom could not determine the jurisdiction of access calls and bill Verizon appropriately prior to May 2009 because the call detail information it received from Qwest was insufficient for that purpose.

and Verizon refused to pay pursuant to OrbitCom's intrastate tariff (quoting Hearing Exhibit 1 [Powers Direct Testimony], p. 5, lines 17-19).

Contrary to OrbitCom's claim, the testimony it cites does not contain any assertion (much less evidence) that OrbitCom did not have sufficient information to accurately determine the jurisdiction of access traffic it billed Verizon.

The only other reference to the record provided by OrbitCom in support of its new position<sup>6</sup> appears on page 5 of its Reply Brief:

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.

The testimony on which OrbitCom relies says no such thing. In his Supplemental Rebuttal Testimony, Mr. Powers stated:

I believe clarification of this issue is important. EMI records are created by the LEC telephone switches that handle the phone calls transmitted through them. Every switch that the call goes through may contribute something to the same EMI record depending on what the switch is programmed to do. A simple example is the 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. There may be multiple records created for each call, to be combined into one by the LEC data center. In this case the LEC is Qwest. The Qwest data center collects all this information from every switch in its system on a daily basis and assembles it into final EMI records and puts the ones relating to OrbitCom's OCN into an electronic file for our use. The same EMI record may get sent to more than one telephone company, and in fact it is almost guaranteed that it will go to at least two for access billing, the originating LEC or CLEC, and the terminating LEC or CLEC, since they are both entitled to bill for their part in providing access. There are also many "categories" of EMI records,

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<sup>6</sup> On page 5 of its Reply Brief, OrbitCom also cites two of its responses to data requests, but they merely addressed OrbitCom's efforts to implement a new billing process and when. Those responses made no mention of the call records that OrbitCom obtains from Qwest.

depending on what they are intended to be used for. 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. The billing system extracts the pertinent data, rates it, and creates an access bill. As has been pointed out, the EMI record is 210 characters long. It also is divided into dozens of different fields, each field designed to provide certain information. For example, originating phone number, start time, etc. To create a bill for access, or anything else for that matter, only a few of the fields are needed. For the sake of efficiency, the billing system we use was designed to pull the information from the fields it needs, rate that information, and assemble the product into a bill. The system does not create CDR's [sic], that is, call detail reports, when it does the billing. Even for a small company like OrbitCom, the Daily Usage Files contain tens of thousands of records so by not sorting them into CDR's [sic], it saves a lot of processing time and capacity. (Emphasis supplied).

Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 3, lines 18-23; and 4, lines 1-11 and 12-22.

To summarize, the testimony quoted above describes generally what EMI records are and how they are created, and explains the differences between EMI records and CDRs. Mr. Powers also explained that OrbitCom obtains EMI records from Qwest, "extracts the pertinent data" and creates an access bill. There is nothing in his testimony which states that the EMI records provided by Qwest were insufficient to enable OrbitCom to determine the jurisdiction of the traffic or to create an access bill.

**C. The Evidence in the Record Demonstrates that at All Relevant Times OrbitCom Obtained Sufficient Call Detail Information to Determine the Jurisdiction of Access Traffic that It Billed Verizon.**

OrbitCom's argument that the call records OrbitCom obtained from Qwest did not contain sufficient information to determine the jurisdiction of access calls covered by this complaint is contradicted by the record evidence. To begin, it is undisputed that EMI Category 11 records contain information about the originating and terminating telephone

numbers, which are needed to determine the jurisdiction of a call. Hearing Exhibit B (Freet Supplemental Testimony) at 2-3 & Exhibit LF-31; Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 10:21 (“The EMI record ... contains the destination number”); OrbitCom Reply Brief at 17 (“Category 11-01-01 records consist of records for originating and terminating calls.”) OrbitCom’s own witness, Michael Powers, agreed during the hearing that “the EMI records provide OrbitCom or its billing agent with sufficient call detail to know the jurisdiction of long distance calls.” Transcript (hereafter “Tr.”) at 57:6-11. This statement is directly contradictory to OrbitCom’s position in its Reply Brief. OrbitCom does not even acknowledge the contradiction, much less attempt to explain it.

OrbitCom also confirmed on numerous occasions that it obtains EMI records from Qwest. Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 7:13 (“The EMI record is raw data from Qwest. It contains all of the calls.”); *see also* Reply Brief at 6 (“[t]he EMI records are the records OrbitCom received, and continues to receive, from Qwest.”); Tr. at 55:5 – 56:9 (Qwest sends EMI records to a FTP [file transfer protocol] site; “there’s a number of files that come that way. I think we get nine each day.”). OrbitCom also described the purpose of these records: “Qwest furnishes OrbitCom with Category 11-01-01 and 11-01-25 records for access billing.” Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 4:10-11; *see also* Reply Brief at 17 (“Qwest provides this category [11-01-01] of records so that OrbitCom can bill access charges.”) Finally, OrbitCom represented that it uses the EMI records it receives from Qwest to produce access bills. Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 4:12-19 (“OrbitCom takes the EMI records from Qwest and inputs them

into the billing system;” the billing system, in turn “extracts the pertinent data, rates it, and creates an access bill.”); *see also* Reply Brief at 2 (“OrbitCom ... billed Verizon ... using actual EMI call records supplied by Qwest.”).<sup>7</sup> Mr. Powers testified further that when OrbitCom subsequently creates CDRs, its system “pull[s] the actual records used to generate the bills” and that “once the CDR’s [sic] are extracted, they show the underlying detail of the data used to generate an access bill.” Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 5:1-2, 6-7; Tr. at 58:20–59:3. He went on to state that “[a]dded together, the call detail records will verify the number of minutes billed for access and whether they were interstate or intrastate.” *Id.* at 5:7-8.

Thus, the undisputed record evidence shows that OrbitCom obtained sufficient information from Qwest to enable it to determine the jurisdiction of access traffic and to render bills to Verizon. At no time prior to the filing of its Reply Brief did OrbitCom question the sufficiency of the call detail information that it obtained from Qwest. On the contrary, OrbitCom’s own statements confirm that, at all times relevant to this complaint, the EMI records it obtained from Qwest contained sufficient call detail information to enable it to determine jurisdiction and bill the correct corresponding charges.

OrbitCom’s new argument is also internally inconsistent. It claims that it has used Qwest-provided EMI records since May 2009 to “bill by jurisdiction.” But if its criticism that Qwest’s EMI records are “insufficient” were accurate, OrbitCom would not be able to accurately determine the jurisdiction of traffic contained in those records and

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<sup>7</sup> It is undisputed that “a few of [the EMI records] are missing the NPA-NXX or other critical information and cannot be billed.” According to Mr. Powers, after EMI “data is entered into the billing system some calls drop out due to missing information like a missing code or a missing CIC.” He estimated that this occurs on about “0%-4% of the calls.” Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 7:13-19; *see also id.* at CONFIDENTIAL Exhibit MP 3-31 (“the number of ...raw records” that are unbillable “is a very small percentage.”). The parties’ dispute is not about that small proportion of calls. It is about the remaining 96% or more.

apply the proper jurisdictional charges. OrbitCom offers no evidence to demonstrate that Qwest at some point changed or improved the content of its industry-standard EMI records, or that OrbitCom only recently began receiving from Qwest sufficient call detail so that it could bill accurately. On the contrary, all the available evidence establishes that OrbitCom has received the same call records from Qwest during the entire period covered by this dispute. In fact, OrbitCom acknowledges that “[t]he EMI records are the records OrbitCom *received, and continues to receive,* from Qwest.” Reply Brief at 6 (emphasis added).

In short, OrbitCom’s new argument is both unsubstantiated and contains a fatal internal contradiction that it has failed to acknowledge or explain. OrbitCom may not lay the blame for its failure to bill in accordance with its tariff on the “insufficiency” of call detail information that it obtains from Qwest. Such a claim has no basis in the record.

**D. OrbitCom’s New Argument that Verizon’s Own “Analysis” Confirms that the Call Detail Information in the EMI Records OrbitCom Received from Qwest is “Insufficient” is Wrong**

OrbitCom contends for the first time in its Reply Brief that Verizon’s “analysis” of OrbitCom’s EMI records and CDRs supports OrbitCom’s contention that call detail in the EMI record is insufficient to determine the jurisdiction of access usage. Reply Brief at 5-7.<sup>8</sup> It refers to Verizon’s CONFIDENTIAL Exhibits LF-32 and LF-33 in support of this claim.

As an initial matter, OrbitCom mischaracterizes the nature of those exhibits.

They are a summary of information that OrbitCom provided to Verizon, not an

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<sup>8</sup> OrbitCom makes a similar claim that “Verizon’s own exhibits . . . show that Verizon itself actually validated OrbitCom’s PIU.” Reply Brief at 12-13. That argument is also wrong for the same reasons set forth above.



independent “analysis” or representation that OrbitCom’s information was accurate. As Ms. Freet testified, Verizon summarized “the number of calls and amount of usage reflected in” the CDRs and EMI formatted records that OrbitCom had provided to Verizon. Hearing Exhibit B (Freet Supplemental Testimony) at 5:10-11, 17-19. Verizon merely totaled up the information and presented the results of those computations in the two exhibits, without providing any separate analysis.<sup>9</sup> Because the exhibits merely summarize the records that OrbitCom provided, it is incorrect for OrbitCom to argue that Verizon’s reporting of the data somehow validated it.<sup>10</sup> On the contrary, Verizon questioned the completeness of the records that had been provided to it. *Id.* at 5:21 – 6:17; 10:6-13, and 11:3-19. Verizon’s skepticism was confirmed by the independent analysis it conducted using its own network records. *See id.* at 4-14.

Moreover, nowhere in its argument on pages 5-7 of its Reply Brief does OrbitCom explain how CONFIDENTIAL Exhibits LF-32 or LF-33 supposedly demonstrate that the call “detail present in the EMI record is insufficient to render an

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<sup>9</sup> CONFIDENTIAL Exhibits 32 and 33 only contain information relating to calls made on five days in June 2009. As such, there is no factual basis for assuming that the data is probative of traffic patterns during earlier periods, nor can it be used to justify OrbitCom’s practice of arbitrarily applying PIU factors of 5% and 32%, respectively, to Verizon’s access usage in prior years.

<sup>10</sup> In its Reply Brief, OrbitCom also draws on CONFIDENTIAL Exhibit LF-32 in an attempt to extrapolate from the five-day sample of CDRs to a full month of usage to claim that the total number “matches closely with the total MOU billed to Verizon on the account in June of 2009.” Reply Brief at 16. This is not a valid exercise, and does not render a reliable or meaningful result. Usage and traffic patterns can vary widely, depending on the day of the week, the time of month, or season. Simply put, the volume of usage on only three business days may not be representative of a full month’s worth of traffic. It is for this reason that Verizon has consistently throughout this proceeding requested a full month of EMI records so that the call detail can be matched with a full month of usage reflected on a monthly invoice. Tr. at 142:23 – 143:17. Had OrbitCom wanted to prove that its call detail records supported its monthly invoices, it could and should have produced the necessary data. Instead, it steadfastly refused to do so. OrbitCom also argues that if it were to use the call detail information provided by Verizon in CONFIDENTIAL Exhibit LF-34, it would be “entitled to bill” Verizon additional amounts. Reply Brief at 15. It is not appropriate to extrapolate from only a small sample of call records (which contain call detail for only three weekdays) to reach conclusions about an entire month’s usage. There are too many variables to make such a calculation reliable.

accurate bill,” which was the initial premise for the entire discussion that follows. Instead, OrbitCom concludes the discussion by explaining that its billing system was able to use the available information (initially provided by Qwest) to properly (OrbitCom claims) assign calls to the correct jurisdiction: “OrbitCom’s billing system reduced the unknown MOUs ..., reclassifying virtually all of [the] minutes, which number represents the difference in the two categories, from *unknown* to *interstate*.” Reply Brief at 7 (emphasis in original). OrbitCom’s own description of what its billing system could accomplish contradicts its position that Qwest did not give OrbitCom enough information to determine the jurisdiction of the calls that are the subject of the two Verizon exhibits.

**E. OrbitCom Wrongly Seeks to Impose on Verizon the Burden to Prove that OrbitCom Had Sufficient Call Detail**

OrbitCom would have the Commission impose on Verizon the burden of proving that “OrbitCom had available to it sufficient call detail to render an accurate bill.” Reply Brief at 2. It goes on to argue that “Verizon has done nothing to prove that OrbitCom had sufficient call detail to bill jurisdictionally.” *Id.* at 3; *see also id.* at 10 (“Verizon has failed to establish that OrbitCom had sufficient call detail to bill by jurisdiction.”).

OrbitCom is wrong on both counts.

As explained above, OrbitCom bears the burden of proving that it billed Verizon in compliance with the terms of its tariff. This means that, before it could apply PIU factors, OrbitCom had to prove that it had “insufficient” call detail to determine the jurisdiction of Verizon’s access traffic. As shown above, it has failed to prove this crucial fact.

OrbitCom's position is mistaken for other reasons as well. OrbitCom argues that Verizon bears the responsibility of demonstrating the sufficiency of the call records that were *within OrbitCom's possession*. OrbitCom goes so far as to claim that, under the dispute provisions in its tariff, "it was Verizon's obligation to provide CDRs or other call detail information" to substantiate its dispute. *Id.* at 23. In fact, its tariff says no such thing. Section 4.8 of OrbitCom's access tariff states only that "[t]he Customer may dispute a bill only by written notice to the Company." The tariff does not specify what type of information a carrier needs to include in its dispute.<sup>11</sup>

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 2007 through 2009.<sup>12</sup> Hearing Exhibit A (Freet

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<sup>11</sup> OrbitCom claims that "Qwest's tariff provides for a similar [dispute] process." Reply Brief at 23. Ironically, OrbitCom ignores language in Section 2.3.10.B.2.c of Qwest's intrastate access tariff in South Dakota, which states: "In the event that the Company applies the intrastate terminating access rate to calls without sufficient call detail as provided in this tariff, *the customer will have the opportunity to request backup documentation regarding the Company's basis for such application*, and further request that the Company change the application of the intrastate access rate upon a showing of why the intrastate rate should not be applied. (*See also* Section 2.4.1.B.2.c, billing disputes.)" (Emphasis added). It is precisely this type of "backup documentation" that Verizon sought to obtain from OrbitCom in order to validate its billings. A copy of Qwest's tariff page containing this provision is included in Attachment A hereto.

<sup>12</sup> OrbitCom asserts for the first time that "OrbitCom's bills ... themselves provide significant amounts of information regarding the traffic at issue." Reply Brief at 12 n. 6. This is not true. OrbitCom's bills contain *total* usage figures and total charges, but they do not contain any information about individual calls, which is needed to determine jurisdiction. *See, e.g.*, Hearing Exhibit 4. It is for this reason that Verizon requested call detail records so that it could perform that analysis.<sup>13</sup> During the hearing, Mr. Powers explained that Qwest sends EMI 11-01-01 records to a file transfer protocol ("FTP") site where a billing agent or other authorized person can retrieve the records. Tr. at 55:4-24, and 56:10-15. He acknowledged that since June 2007 to the present (October 22, 2009), OrbitCom or its billing agent received or had access to Qwest's EMI records through the FTP site. *Id.* at 56:16 - 57:5. Neither Mr. Powers nor anyone else at OrbitCom has ever explained why OrbitCom did not try to obtain records from Qwest's FTP site in order to provide the call records that Verizon had requested.

Direct Testimony) at 13:16-19. OrbitCom, however, repeatedly refused to provide any call records, which ultimately led to the filing of a Motion to Compel that the Commission granted. At one point, OrbitCom represented that it did not even have the call records, and that its billing agent “purged” them from their systems. *Id.* at LF-Exhibit 9.<sup>13</sup> After this long record of obstruction and delay, it is unreasonable for OrbitCom to contend that Verizon should have done more to prove its claim. And in any event, Verizon has ultimately been able to show in these proceedings that, at all relevant times, OrbitCom obtained EMI records from Qwest that contained sufficient call information to enable it to determine the jurisdiction of access usage for which it billed Verizon.

**F. OrbitCom’s Belated Attack on Verizon’s Analysis of Verizon’s Internal Network Records Is Misplaced.**

During the discovery process, Verizon obtained from OrbitCom’s EMI formatted records the telephone numbers of OrbitCom’s end users. Once it had that information, Verizon was able to examine the records generated by its long distance network switches to identify all interexchange calls that were placed by or delivered to those telephone numbers on the same days for which EMI formatted records had been produced.<sup>14</sup>

Verizon described that analysis in its testimony (Hearing Exhibit B [Freet Supplemental Testimony] at 7:14 - 8:7 and 9:15), and provided a summary of the results in

CONFIDENTIAL Exhibit LF-34. That exhibit summarizes the number of calls, the

amount of usage and the jurisdictional split of calls that Verizon identified as a result of

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<sup>14</sup> The EMI formatted records provided by OrbitCom contain the ANIs, or telephone numbers, assigned to its customers. Verizon searched its network records to identify long distance calls that were originated by or terminated to those phone numbers. Hearing Exhibit B (Freet Supplemental Testimony) at 7:20-8:7 and 9:17-20.

its examination of Verizon's internal network records. *Id.* at 9:12-15.<sup>15</sup> Verizon's analyses involved an evaluation of more than 100,000 call records. It produced all of the supporting call data that it relied upon to prepare CONFIDENTIAL Exhibits LF-34 and LF-35 in CONFIDENTIAL Exhibit LF-37. *Id.* at 11:21-12:3.

Referring to CONFIDENTIAL Exhibit LF-34 in its Reply Brief, OrbitCom asserts that "the injection of these calls into the record by Verizon is wholly inappropriate because they lack foundation." Reply Brief at 14. In addition, OrbitCom contends that Exhibit LF-37 "was not based upon supporting source documents." Reply Brief at 20.

OrbitCom's argument is not only untrue, but is also inconsistent with a stipulation that the parties entered into during the hearing. Mr. Powers initially complained in pre-filed testimony that "Verizon has not produced any source documents" to support Exhibit LF-37. Hearing Exhibit 3 (Powers Supplemental Rebuttal Testimony) at 10:11-12, Tr. at 83:13-25. During the hearing, however, OrbitCom's counsel acknowledged that, after Mr. Powers' testimony was filed, OrbitCom "made a formal discovery request for supplemental source documents or records from Verizon," in particular, "documentation underlying certain exhibits that were attached to Ms. Freet's prefiled rebuttal testimony." Tr. at 90:11-22. OrbitCom's counsel further stipulated that "from the standpoint of the [cross-examination] questions, we are not disputing that Verizon has, in fact, produced documentation in response to our data requests which were partly looking for source documents." Tr. at 90:5- 91:6. Having stipulated that Verizon had, in fact, produced source documents in response to OrbitCom's discovery request, OrbitCom cannot change

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<sup>15</sup> Verizon performed a similar analysis for long distance calls on its network for four days in April and May of 2008, the results of which were summarized in CONFIDENTIAL Exhibit LF 35. *Id.* at 9:17-10:2. CONFIDENTIAL Exhibit LF-36 contained the summary of a comparison of OrbitCom's EMI formatted files with Verizon's own network records. *Id.* at 10:6-16.

position and argue in its Reply Brief that Verizon's CONFIDENTIAL Exhibit LF-37 was "not based upon supporting source documents" and thereby lacks foundation.

Accordingly, the Commission must reject these new claims.

## **II. There Is No Basis in the Record for OrbitCom's New Arguments Relating to Alleged Category 11-01-020 Records.**

In its Reply Brief, OrbitCom makes repeated references to "Category 11-01-20" records. It asserts for the first time that Verizon's CONFIDENTIAL Exhibit LF-37 "clearly contains records which are Category 11-01-20 records" and complains that Verizon "offers no explanation as to what comprises Category 11-01-20 records." Reply Brief at 17, 18. OrbitCom goes on to contend that "Verizon offers no explanation why its 11-01-20 records should be used to compute a PIU" (*id.* at 17) or "why additional 11-01-20 records should be used in this instance." (*id.* at 18).

This line of argument is specious. To begin, there is absolutely no reference in the record to Category 11-01-20 records. The term "Category 11-01-20 records" is used for the first time in OrbitCom's Reply Brief and nothing in the record sheds any light on the issue. The term does not appear anywhere in the hearing transcript, nor does it appear in the pre-filed testimony of either party's witness. OrbitCom never described for the record what Category 11-01-20 records are, let alone explained what their supposed significance might be. Moreover, Verizon's witness Ms. Freet never represented that Verizon's switches generate Category 11-01-20 records or that Exhibit 37 includes such records.<sup>16</sup> Given the total lack of *any* information in the record relating to Category 11-

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<sup>16</sup> Attachment B hereto contains an affidavit of Leslie Freet, in which she states that Verizon's switches do not generate Category 11-01-20 records and that the exhibits to her testimony do not contain Category 11-01-20 records. Thus, there is no basis for OrbitCom's contention that she should have explained "what comprises Category 11-01-20 records."

01-20 records, there is no foundation for any of OrbitCom's assertions and arguments involving such records.

OrbitCom's criticism that Verizon failed to explain "why its Category 11-01-20 records should be used" is disingenuous. OrbitCom fabricates a new argument in its reply brief, and then chastises Verizon for failing to explain a fictitious point that was of OrbitCom's own, belated invention. This entire argument by OrbitCom, including any conclusions it draws therefrom, is baseless and not credible.

### **III. OrbitCom's New Arguments Predicated on Qwest's Invoices for DEOTs Are Without Merit**

Verizon has disputed OrbitCom's charges for "tandem switching" for a number of reasons. *See* Verizon's Initial Post-Hearing Brief at 33-50. After OrbitCom initially questioned Verizon's explanation that it has purchased Direct End Office Trunk ("DEOT") facilities from Qwest to route much of its interexchange traffic in South Dakota, Verizon produced service orders and bills for dozens of those circuits in response to data requests from OrbitCom. *See* Tr. at 91:14 – 93:20. In addition, Ms. Freet included with her testimony summary invoice data that Verizon received from Qwest to provide further proof that, in situations where Verizon purchased DEOTs, "local switching" charges were applied to more than 94 percent of the minutes of use, and "tandem switching" charges represented only about 5 percent of the total billed amount. Hearing Exhibit B (Freet Supplemental Testimony) at 21:1-17 and CONFIDENTIAL Exhibit LF-42.

OrbitCom did not address CONFIDENTIAL Exhibit LF-42 in its Initial Brief.

However, in its Reply Brief, OrbitCom makes two new arguments based on that exhibit.

First, OrbitCom states

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.

Reply Brief at 25.

While the point OrbitCom is attempting to make is not entirely clear, it is obvious that OrbitCom either misunderstands or misconstrues the information contained in CONFIDENTIAL Exhibit LF-42. As Ms. Freet explained, that exhibit contains summary invoice data that Verizon received from Qwest (Hearing Exhibit B [Freet Supplemental Testimony] at 21:1-3), which she further identified as "September 2009 Qwest Billed CABS Data" on the first line of CONFIDENTIAL Exhibit LF-42. Qwest's invoices to Verizon only contain information relating to interexchange calls to or from Qwest's customers; Qwest does not bill Verizon for traffic associated with OrbitCom's end users. Thus, Qwest's provision of access services to Verizon and its practice of billing Verizon its tariff rates in no way conflicts with any contract OrbitCom may have with Qwest. Accordingly, OrbitCom's claim in that respect is incorrect.

The fact that Qwest bills Verizon for access service does not, as OrbitCom now argues, "confirm[] that OrbitCom traffic cannot possibly be traversing these alleged DEOTs." Reply Brief at 25. The invoice data summarized in CONFIDENTIAL Exhibit



LF-42 confirms that when Verizon purchases DEOTs to route its traffic, the overwhelming percentage of traffic is routed directly between its network and the LEC's end offices, and only a tiny amount of traffic is routed via tandem switches. The fact that Qwest *also* bills Verizon separately for access charges associated with Qwest's own customers has nothing to do with whether OrbitCom traffic is also carried over those DEOTs. Because the vast majority of Verizon's interexchange traffic is, in fact, carried over DEOTs in Qwest's service area, it is reasonable to expect (indeed, practically certain) that OrbitCom's traffic is included in the traffic that Qwest routes over those same facilities. This is confirmed by the EMI records that Qwest provides to OrbitCom. The EMI records produced by OrbitCom show that 98.34 percent of the calls were direct routed, and only 1.66 percent were "tandem routed." Hearing Exhibit B (Freet Supplemental Testimony) at 16:4-17:9. There is nothing in CONFIDENTIAL Exhibit LF-42 that is inconsistent with these facts.

The other new argument that OrbitCom raises in connection with Exhibit LF-42 is as follows:

[A]n 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 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 [sic] traffic to its liking – a ruling that would be a dangerous and extremely damaging precedent.

Reply Brief at 29.

This new argument mistakenly confuses two distinct concepts. Because the termination point of an 800 or other toll-free call cannot readily be identified merely by reviewing the called number (e.g., 800-FLOWERS), Qwest's normal practice is to categorize "toll-free" traffic as of "indeterminate jurisdiction," or "jurisdictionally

unknown.” It includes toll-free traffic with other calls for which it cannot readily determine jurisdiction, and applies the appropriate PIU factor(s) to all such traffic, in accordance with its tariffs. Qwest applies a PIU factor only to “unknown” traffic, whether it is routed over a DEOT or over some other facility. For all other traffic, “if the Company [Qwest] has sufficient call details to determine the jurisdiction for the call, the Company will bill the call minutes of use according to that jurisdiction, unless the parties agree on a more accurate methodology.”<sup>17</sup>

Contrary to OrbitCom’s claim, the use of a DEOT has nothing to do with the jurisdiction of calls that are transported over the facility, whether they are toll-free or some other type of call. If a call record contains the originating and terminating numbers, then the call’s jurisdiction can be determined; if pertinent information is missing, it cannot. Transporting a call over a DEOT does not alter the jurisdiction of that call, and OrbitCom fails to explain how that could happen. In fact, OrbitCom’s peculiar theory is contradicted by the data contained in CONFIDENTIAL Exhibit LF-42. The summary of Qwest’s CABS data shown therein sets forth separately intrastate (“ITA”) usage and intrastate charges, and interstate (“ITE”) usage and interstate charges, for “local switching,” “tandem switching” and the other rate elements listed on the spreadsheet. While Qwest may apply a PIU factor to toll-free calls for which it cannot determine jurisdiction, the invoice data in CONFIDENTIAL Exhibit LF-42 shows that Qwest is able to determine the jurisdiction of the vast amount of other traffic that travels over DEOTs and is able to apply the appropriate jurisdictional rates. Further, the EMI records

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<sup>17</sup> Qwest Corporation Access Service Tariff (South Dakota), Section 2.3.10.B.2.c. Section 2.3.10.A of Qwest’s tariff states: “To determine the jurisdiction of a call, the Company compares the originating number information with the terminating number information. Traffic without sufficient call detail shall be that traffic for which the originating number information lacks a valid Charge Party Number (ChPN) or Calling Party Number (CPN).” Copies of these tariff pages are appended hereto in Attachment A.

that Qwest provides to OrbitCom contain information about the originating and terminating telephone numbers that OrbitCom currently uses to determine the calls' jurisdiction – including calls that are being carried over DEOTs. See Hearing Exhibit B (Freet Supplemental Testimony) at 16:4- 17:9, 18:5-11.

In sum, the record shows that the use of DEOTS has no bearing on the jurisdiction of calls that are carried over those facilities. Because there is no factual basis for OrbitCom's speculation and dire predictions, its argument is not credible, and should be disregarded.<sup>18</sup>

#### **IV. OrbitCom's Interstate "Mileage" Charges Are Irrelevant to the Issue of Whether OrbitCom Properly Billed the Rates in Its Intrastate Tariff**

In its opening brief, Verizon pointed out that OrbitCom's invoices to Verizon specify a "composite rate" of \$0.06 per minute that does not appear anywhere in OrbitCom's tariff, and that OrbitCom's invoices do not specify the individual rate elements and associated charges contained in its tariff. Verizon's Initial Post-Hearing Brief at 34. OrbitCom essentially concedes the point because it did not address that specific complaint in its reply brief. Instead, it raises a different argument on pages 7-8.

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 Exhibit 2, p. 3, lines 9-18, MP2-04.0.

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<sup>18</sup> OrbitCom attempts to bolster its argument by referring generally to three tariffs that Qwest filed in states other than South Dakota. Reply Brief at 29 n. 15. OrbitCom did not cite any specific sections in those tariffs, nor did it produce the actual tariff pages. This makes it extremely difficult for Verizon to understand the basis of OrbitCom's argument, let alone provide an informed response. OrbitCom simply cited Qwest's website as the source of this new, extra-record material, but unspecified material on a corporate website is not the type of record of which the Commission may properly take "judicial notice." In any event, OrbitCom's "hypothetical" scenario about what Verizon "could" do under OrbitCom's interpretation of a Qwest tariff is highly speculative, and is incorrect for the reasons explained in the text above.

The material cited by OrbitCom describes Verizon's billing dispute submitted on February 14, 2008, wherein Verizon explained "that OrbitCom's *Interstate* rates are non-compliant." (emphasis added) Likewise, MP2-04.0, which OrbitCom also cites in its Reply Brief, contains a summary of Qwest's rates in "FCC #5," which is its *interstate* access tariff. The dispute over interstate rates referenced by OrbitCom pre-dated Verizon's initial dispute over OrbitCom's intrastate charges by many months. Thus, this argument in OrbitCom's reply brief has no relevance to the dispute over OrbitCom's intrastate charges, and fails to address, let alone rebut, the argument that Verizon did make concerning OrbitCom's billing of a composite rate that does not appear in its tariff.

#### **V. Verizon's Numerous Billing Disputes Are Not Time-Barred**

In its Reply Brief, OrbitCom defends its practice of summarily denying Verizon's billing disputes on the ground that they were "not provided in the 60-day time period outlined by the tariff." Reply Brief at 22; *see also id.* at 8, 9 and 21. OrbitCom contends that the dispute process in its tariff "is in no way unique," claiming that "Qwest's tariff provides for a similar process," and citing "SD QC Access Tariff, p. 38, Section 2, 2.4.1(c)" as support. *Id.* at 23.<sup>19</sup> To the extent OrbitCom is arguing that Verizon's claims are somehow time-barred, it is wrong. OrbitCom acknowledges that Verizon filed numerous disputes over the past two years, many of which have been submitted for the

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<sup>19</sup> OrbitCom's failure to provide the actual tariff provisions creates unnecessary confusion. There is no "Section 2.4.1(c)" on page 38 of the referenced Qwest tariff. On the following page of Qwest's tariff, Section 2.4.1.C states: "Adjustments for the quantities of services established or discontinued in any billing period beyond the minimum period set forth for services in other sections of this Tariff will be prorated to the number of days or major fraction of days based on a 30 day month. The Company will, upon request and if available, furnish such detailed information as may reasonably be required for verification of any bill." That section has no apparent bearing on the argument raised by OrbitCom.

record. See, e.g., Hearing Exhibit A (Freet Direct Testimony) at 16:1-18:12, and Exhibits LF-3, 6, 12, 13, 14, 15; and Hearing Exhibit 8. Each separate dispute covered 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. OrbitCom has unreasonably denied all of Verizon's disputes, even though each one disputes charges billed within the period indicated by the tariff. Verizon, on the other hand, has consistently made reasonable efforts to raise its concerns promptly with OrbitCom, despite the substantial barriers imposed by OrbitCom's refusal to provide the information needed for Verizon to investigate its claims fully.

**VI. OrbitCom's Attempt to Discredit Verizon's Filed PIU Factors is Unwarranted.**

OrbitCom fashions a new argument relating to Verizon's submission of PIU factors, based on the time-stamps on two e-mail messages. Reply Brief at 9-10. Had it raised this issue earlier, Verizon could have explained how particular computers time stamp messages, and that when messages are forwarded to individuals in different time zones (as occurred here so that the information could be printed for inclusion in a hearing exhibit), the recipient computer interprets the timestamp and converts it to local time. Thus, there is no merit to OrbitCom's new claim.

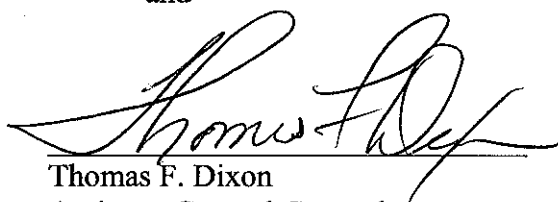
**VII. Conclusion**

The new arguments included in OrbitCom's Reply Brief lack foundation and have no merit. The Commission should reject all of them for the reasons stated above.

Respectfully submitted on February 22, 2010.

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A handwritten signature in black ink, appearing to read "Thomas F. Dixon", written over a horizontal line.

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**Qwest Corporation**  
**Access Service**  
**Tariff**

**SECTION 2**

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Release 4

State of South Dakota  
Issued: 10-31-2008

Effective: 7-14-2009

**2. GENERAL REGULATIONS**

**2.3 OBLIGATIONS OF THE CUSTOMER**

**2.3.10 JURISDICTIONAL REPORT REQUIREMENTS**

B.2. (Cont'd)

c. Terminating FGD Service

When a customer orders terminating FGD, if the Company has sufficient call details to determine the jurisdiction for the call, the Company will bill the call minutes of use according to that jurisdiction, unless the parties agree on a more accurate methodology.

(C)  
(C)

When terminating call details are insufficient to determine the jurisdiction for the call, see A, preceding, the customer may supply the projected PIU factor for a portion of the indeterminate jurisdiction by LATA[1]. The projected PIU factor will be used to apportion the terminating traffic which does not exceed the 7% floor.

(T)  
(C)  
(C)

When terminating call details are insufficient to determine the jurisdiction, and the customer does not supply a projected PIU factor by LATA, calls will be billed using a PIU of 50 (50% interstate – 50% intrastate). The PIU of 50 will be used to apportion the terminating traffic which does not exceed the 7% floor.

(C)  
(C)

In the event that the Company applies the intrastate terminating access rate to calls without sufficient call detail as provided in this tariff, the customer will have the opportunity to request backup documentation regarding the Company's basis for such application, and further request that the Company change the application of the intrastate access rate upon a showing of why the intrastate rate should not be applied. (See also Section 2.4.1.B.2.c, billing disputes.)

(N)  
(N)

[1] When the customer reports a LATA-level PIU factor, the specified percentage applies to all end offices within the LATA.

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Release 4

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**2. GENERAL REGULATIONS**

**2.3 OBLIGATIONS OF THE CUSTOMER**

**2.3.8 CLAIMS AND DEMANDS FOR DAMAGES (CONT'D)**

- C. The customer(s) shall not attempt to hold the Company or the Company's employees, agents, contractors or invitees liable for, and shall hold harmless and indemnify the Company and its employees, agents, contractors or invitees from and against, demands, claims, causes of action, liabilities (including punitive damages), costs or expenses (including reasonable attorneys fees), incurred by customer(s), its employees, agents, contractors, or invitees, arising from any acts, omissions or negligence of customer, its agents employees, contractors, invitees or visitors or any violation or non-performance of any law, ordinance or governmental requirement of any kind; or any injury or damage to person or property of customer, its agents, employees, contractors, invitees or visitors, arising out of the use of Company services or property, where the injury or damage is caused by any reason other than the willful misconduct of Company, its agents, employees or contractors.

Notwithstanding the foregoing, any and all real or personal property damage sustained by an interconnector shall be recovered through the interconnector's own insurance coverage.

**2.3.9 COORDINATION WITH RESPECT TO NETWORK CONTINGENCIES**

The customer shall, in cooperation with the Company, coordinate in planning the actions to be taken to maintain maximum network capability following natural or man-made disasters which affect telecommunications services.

**2.3.10 JURISDICTIONAL REPORT REQUIREMENTS**

A. Jurisdictional Determinant

Pursuant to Federal Communications Commission order F.C.C. 85-145 adopted April 16, 1985, interstate usage is developed as though every call that enters a customer network at a point within the same state as that in which the called station (as designated by the called station number) is situated is an intrastate communication and every call for which the point of entry is in a state other than that where the called station (as designated by the called station number) is situated is an interstate communication.

To determine the jurisdiction of a call, the Company compares the originating number information with the terminating number information. Traffic without sufficient call detail shall be that traffic for which the originating number information lacks a valid Charge Party Number (ChPN) or Calling Party Number (CPN).

(N)

(N)

(M)

(M) Material moved to Page 18.

Attachment A  
Footnote 17  
Section 2.3.10.A  
Page 17



**Qwest Corporation**  
**Access Service**  
**Tariff**

**SECTION 2**

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Release 2

State of South Dakota

Issued: 10-16-2000

Effective: 11-30-2000

**2. GENERAL REGULATIONS**

**2.4 PAYMENT ARRANGEMENTS AND CREDIT ALLOWANCES**

**2.4.1 PAYMENT OF RATES, CHARGES AND DEPOSITS**

**B.2.c. (Cont'd)**

- If the dispute is resolved in favor of the customer and the customer has paid the disputed amount, the customer will receive an interest credit from the Company for the disputed amount times a late factor. The late factor shall be the lesser of:
  - The highest interest rate (in decimal value) which may be levied by law for commercial transactions, compounded daily for the number of days from the date when payment was made or credit claimed in accordance with c., preceding, to and including the payment due date (as set forth in a., preceding) of the bill that reflects the credit for the disputed amount. In the event that the Company agrees to refund a credit by check or wire transfer, interest will be applied up to and including the date of issuance for either the check or wire transfer. (T)
  - 0.000407 per day, compounded daily for the number of days from the date when payment was made or credit claimed in accordance with c., preceding, to and including the payment due date (as set forth in a., preceding) of the bill that reflects the credit for the disputed amount. In the event that the Company agrees to refund a credit by check or wire transfer, interest will be applied up to and including the date of issuance for either the check or wire transfer. (T)
- C. Adjustments for the quantities of services established or discontinued in any billing period beyond the minimum period set forth for services in other sections of this Tariff will be prorated to the number of days or major fraction of days based on a 30 day month. The Company will, upon request and if available, furnish such detailed information as may reasonably be required for verification of any bill.
- D. When a rate as set forth in this Tariff is shown to more than two decimal places, the charges will be determined using the rate shown. The resulting amount will then be rounded to the nearest penny (i.e., rounded to two decimal places).
- E. When more than one copy of a customer bill for services provided under the provisions of this Tariff is furnished to the customer, an additional charge applies for each additional copy of the bill as set forth in 13.3.6, following.

## ATTACHMENT B

### DECLARATION OF LESLIE FREET

I, Leslie Freet, declare as follows:

1. I am employed by Verizon as the Group Manager of the Tulsa Carrier Cost Management department. I have previously testified in this proceeding, Docket TC08-135. I consider myself to still be under oath at this time.
2. I have read "OrbitCom's Post-Hearing Reply Memorandum of Law in Support of Its Complaint," dated January 8, 2010. In particular, I have reviewed its statements concerning "Category 11-01-20 records."
3. In my supplemental testimony, I only discussed "Category 11-01-01 records" that are used to report access minutes of use. In Exhibit LF-31, I provided excerpts from the industry standard published by ATIS that describes Category 11-01-01 records. At no time did I say anything about what OrbitCom now refers to as "Category 11-01-20 records."
4. Contrary to OrbitCom's suggestions, Verizon's long distance network does not generate "Category 11-01-20 records." Verizon obtains call detail records from the switches in its long distance network, and uses that information for billing, cost management and network management purposes. Those records are maintained in a proprietary format.
5. When preparing my testimony, information was pulled from Verizon's network records that I described above. In CONFIDENTIAL Exhibit LF-37, that data was presented in a format that was similar to the format in which OrbitCom's call record information had been presented. This was so that the different sets of information could be readily compared. CONFIDENTIAL Exhibit LF-37 does not contain Category 11-01-20 records.
6. Because I did not look at or produce "Category 11-01-20 records," there was no reason for me to have "explained" them, as OrbitCom now contends.
7. I have read "Verizon's Sur-Reply Brief," and am familiar with the contents thereof. The statements therein are true and accurate to the best of my knowledge and belief.

Dated: February 22, 2010

  
Leslie Freet

**CERTIFICATE OF SERVICE**


I, Thomas F. Dixon, hereby certify that on the 22<sup>nd</sup> 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:

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Thomas F. Dixon