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 **PRE-FILED TESTIMONY**

DIRECT TESTIMONY OF LESLIE FREET

ON BEHALF OF
MCI COMMUNICATIONS SERVICES, INC.
D/B/A VERIZON BUSINESS SERVICES AND
TELECONNECT LONG DISTANCE SERVICES & SYSTEMS COMPANY
D/B/A TELECOM*USA

(CERTAIN EXHIBITS TO THIS TESTIMONY HAVE BEEN FILED AS CONFIDENTIAL, BUT NONE OF THE TESTIMONY IS CONFIDENTIAL)

August 7, 2009

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I. IDENTIFICATION OF WITNESS

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is Leslie Freet. My business address is 6929 N. Lakewood Ave, Tulsa Oklahoma, 74177.

Q. BY WHOM ARE YOU EMPLOYED?

A. I am employed by Verizon Business, one of the three major operating units of Verizon. Verizon Business provides various communications services to commercial and government entities through several operating companies. These include MCI Communications Services, Inc. d/b/a Verizon Business Services; and Teleconnect Long Distance Services & Systems Company d/b/a Telecom*USA, the two respondents in this proceeding. Both companies are interexchange carriers. For simplicity, I will refer to them collectively as "Verizon Business" or "Verizon."

Q. WHAT IS YOUR CURRENT POSITION?

A. I am the Group Manager of the Tulsa Carrier Cost Management department. My organization receives bills that other communication service providers send to Verizon Business for providing interexchange access services and originating and terminating other types of telecommunications traffic. My group is responsible for reviewing, processing, auditing and paying those invoices, and for disputing bills when appropriate, and attempting to resolve such disputes. Because Verizon

Business operates nationwide, my group handles bills from more than 500 different service providers.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND.

A. I hold a Bachelor of Science Degree in Hotel and Restaurant Administration with a Minor in Business Administration from Oklahoma State University.

Q. PLEASE DESCRIBE YOUR RELEVANT TELECOMMUNICATIONS WORK EXPERIENCE.

A. I began my career at Verizon Business (formerly MCI) in March of 1996 as a Specialist in the Carrier Cost department. During my 13 years at Verizon Business I have held a variety of positions with numerous responsibilities, generally relating to "Telco Cost," which refers to the costs Verizon Business incurs for various access and other communication services that other local exchange carriers provide to and charge Verizon Business. My responsibilities have included the payment and reconciliation of invoices submitted by other communication companies, system requirement and audit development, financial planning and analysis of Telco Cost, and financial reporting. In my current position as the Group Manager of the Tulsa Carrier Cost department, I manage the audit, payment and financial analysis for the domestic Telco Line Costs expense stream covering more than 500 individual vendors nationwide. In addition, I negotiate and resolve billing disputes and lead the technical analysis of major incumbent local exchange carrier ("ILEC") tariff filings and pricing proposals.

Q. HAVE YOU PARTICIPATED IN PROCEEDINGS BEFORE ANY STATE REGULATORY COMMISSION?

A. I recently participated in a mediation process at the California Public Utilities Commission.

II. SUMMARY OF POSITION

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

The purpose of my testimony is to urge the Commission to dismiss the complaint filed by OrbitCom, Inc. ("OrbitCom") against Verizon Business and grant the counterclaim filed by Verizon Business against OrbitCom. In support of that, I will respond to the claim of OrbitCom that Verizon Business owes it certain amounts for intrastate switched access services provided by OrbitCom in South Dakota. I will explain that OrbitCom has not billed Verizon in accordance with its intrastate tariff. In particular, I will explain that OrbitCom has inaccurately classified many interstate calls as intrastate calls and, as a result, did not bill Verizon the correct rates for those calls. To put this in perspective, the rate that OrbitCom bills Verizon for intrastate "local switching" in South Dakota (approximately $0.06 per minute) is roughly ten times higher than the amount OrbitCom currently bills Verizon for interstate local switching (approximately ($0.006 per minute). Accordingly, an inaccurate determination of a call's jurisdiction has enormous financial implications. OrbitCom's invoices also include charges for a "tandem switching" service that OrbitCom does not actually provide to Verizon. It is improper and unreasonable for OrbitCom to demand payment for a service that it does not provide.

I will discuss the background of Verizon's billing disputes, Verizon's repeated efforts to obtain information that would validate the accuracy of OrbitCom's invoices, and OrbitCom's persistent failure or refusal to provide any documentation to justify or to validate its invoices. Because OrbitCom billed Verizon for rates that were jurisdictionally inapplicable, it has overcharged Verizon substantial amounts.[1] I will explain that Verizon has paid OrbitCom more than it was entitled to. As of June 2009, OrbitCom owes Verizon Business at least $197,263.17 that it improperly billed Verizon due to its improper jurisdictionalization of traffic. I will also show that OrbitCom's invoices do not specify charges by individual rate elements. For this reason, it is not possible to determine the amount of overcharges that resulted from OrbitCom's inclusion of charges for "tandem switching" in the line item identified only as "local switching." Once the Commission requires OrbitCom to issue corrected bills that remove inappropriate charges for "tandem switching," the amount of overcharges for this rate element can be determined fairly easily. As I discuss these matters, I will also respond to some of the points made by OrbitCom's witness, Mr. Powers, in his direct testimony.

[1] Verizon Business has separate claims that the charges OrbitCom has invoiced for purportedly interstate switched access services in South Dakota have been improper. Those claims are not at issue in this proceeding. Verizon has instead raised them in a federal court action that OrbitCom recently initiated. When I discuss OrbitCom's invoiced charges for interstate service in this proceeding, I am not conceding that those charges were proper. Instead, I am merely reporting the amount of those charges to show that *even if* OrbitCom's interstate charges were proper, OrbitCom would still have overcharged Verizon a substantial amount by invoicing intrastate charges on traffic that was not jurisdictionally intrastate.

III. PARTIES AND SERVICES INVOLVED

Q. WHAT SERVICES DOES VERIZON BUSINESS PROVIDE IN SOUTH DAKOTA?

A. The two Verizon entities that are parties to this proceeding are interexchange carriers that provide various long distance communication services. These companies transport interexchange calls over the Verizon long distance network to and from end users located in South Dakota. Interexchange calls that originate in South Dakota are typically delivered to Verizon's network from the local exchange carrier's network that serves the end user. For calls in the opposite direction, Verizon routes interexchange traffic from its long distance network to the local exchange carrier that serves the end user.

Q. PLEASE DESCRIBE SWITCHED ACCESS SERVICE.

A. In most instances, Verizon Business does not own facilities between its long distance network and the physical premises of end users in South Dakota that make long distance calls using Verizon's long distance network or that receive calls from a calling party who is using Verizon's long distance network. Rather, interexchange calls are typically originated or terminated by the local exchange carrier that serves the end user, whether a residential or business customer. An interexchange carrier that carries the call between local calling areas generally pays "originating" switched access charges to the local exchange carrier that originated the call, and it pays "terminating" switched access charges to the local exchange carrier that terminates the call. While there may be some exceptions, telephone calls that originate in one state and terminate in another are generally classified as interstate, and are subject to regulation by the Federal Communications Commission ("FCC"). Calls that originate and terminate within the same state are usually considered intrastate, and are generally subject to regulation by the appropriate state agency, in this instance, the state Public Utilities Commission.

Q. DOES ORBITCOM SEND VERIZON BUSINESS BILLS FOR SWITCHED ACCESS SERVICE?

A. Yes. OrbitCom is a competitive local exchange carrier, or "CLEC." To the best of my knowledge, OrbitCom does not own or operate its own facilities. Instead, it purchases telecommunications services from Qwest Corporation ("Qwest"), the incumbent local exchange carrier, or "ILEC," in the areas in which OrbitCom provides local exchange service, and resells those services to its end users. OrbitCom has entered into an interconnection agreement with Qwest (referred to by Qwest as a "SGAT," or Statement of Generally Available Terms) and a Qwest Local Services Platform Agreement ("QLSP"), through which OrbitCom leases network elements on an unbundled basis, commonly referred to as "UNE-P," or the unbundled network element platform. As a UNE-P provider, OrbitCom may charge interexchange carriers for switched access service that is provided by OrbitCom, in accordance with applicable rules.

IV. <u>BACKGROUND OF BILLING DISPUTES</u>

Q. HAS VERIZON BUSINESS OBJECTED TO ANY OF ORBITCOM'S ACCESS CHARGES?

A. Yes. Before explaining our specific objections to OrbitCom's billing practices and invoices, I would like to describe the efforts Verizon took to evaluate and resolve our concerns with the invoices that OrbitCom sent to us. In 2007, my group began auditing OrbitCom's switched access bills, both in and outside of South Dakota. This proved to be a very difficult and, ultimately, unsatisfactory process. One of the first steps Verizon takes in conducting an audit is to obtain the carrier's applicable tariffs.

Q. DOES ORBITCOM HAVE A SWITCHED ACCESS TARIFF IN SOUTH DAKOTA?

A. This has been difficult to confirm. In March 2007, a member of my audit staff, Jaque Moore, asked OrbitCom for information regarding its interstate access tariff. After receiving no response, Mr. Moore sent a follow-up e-mail message on April 3, 2007, asking: "Does OrbitCom have an Interstate tariff filed with the FCC governing switched access? If so, can you provide a copy or a link?" He also asked whether OrbitCom had filed intrastate tariffs with the appropriate state PUCs governing switched access. OrbitCom avoided Mr. Moore's inquires about an interstate tariff. Rather than provide the information requested about its intrastate tariffs, OrbitCom's representative, Ms. Penny Petersen, merely replied that "All of our tariffs are filed in each state at the PUC's office. You can obtain copies of them there." *See* Exhibit LF-1.

Verizon subsequently attempted through other means to obtain a copy of a tariff in the name of OrbitCom, but was unable to do so. This is because, as we subsequently learned, the tariff that OrbitCom claims it operates under states on the cover page:

"Schedule of Rates, Rules and Regulations
Governing Access Services
Provided in the State of South Dakota

OFFERED BY

VP TELECOM, INC."

See Exhibit LF-2. The cover page also contains the following statement: "This tariff contains the descriptions, regulations, and rates applicable to furnishing of Service and facilities for access Services within the State of South Dakota by VP Telecom, Inc. This tariff is on file with the South Dakota Public Utilities Commission." The tariff is designated "VP Telecom, Inc. Tariff No. 1." In Section 1 of the tariff (Definition of Terms), "Company" is identified as "VP Telecom, Inc., the issuer of this Tariff."

Verizon has since learned that, after filing its tariff, VP Telecom, Inc. changed its name to OrbitCom. However, I have not seen any documents showing that OrbitCom has filed a tariff in its name with the Commission, that VP Telecom Tariff No. 1 was amended to state explicitly that OrbitCom was now the

"Company" offering service under the tariff, or that OrbitCom requested approval to offer service under VP Telecom's tariff. During discovery in this proceeding, OrbitCom explained that it had notified the Commission of its name change. However, during our initial review of OrbitCom's invoices, and in response to our specific requests to OrbitCom for copies of its state tariffs, OrbitCom failed to make mention of the name of the tariff it purported to operate under. *See* Exhibit LF-1.

During the same period, Verizon also attempted to obtain a copy of OrbitCom's interstate access tariff, but we were similarly unsuccessful in these efforts. Accordingly, on February 19, 2008, a member of my staff sent a follow-up e-mail message to OrbitCom, stating: "I have not even been able to find a filed copy of OrbitCom's Switched Access Interstate Tariff. If you have a copy of a filed Interstate tariff or a link, please provide one." *See* Exhibit LF-3. OrbitCom did not respond to this request either. The reason for this became clear much later: OrbitCom did not even file an interstate switched access tariff with the FCC until a year later (and not until after it filed its initial complaint in this case); that tariff became effective on February 9, 2009. Due to OrbitCom's lack of cooperation and candor with respect to its purported interstate and intrastate tariffs, Verizon has been uncertain as to the status and sufficiency of the tariffs that OrbitCom relies on to support its access charge billings.

Q. DID VERIZON BUSINESS ATTEMPT TO RESOLVE ITS CONCERNS WITH ORBITCOM'S BILLINGS IN AN INFORMAL MANNER?

A. Yes. Verizon Business routinely performs billing audits, and if we have questions or concerns, we try to resolve those concerns on an informal basis. A standard procedure in any such review is to ask the carrier for documentation to verify that the charges included in its bills are valid and accurate. The information that is commonly requested and is generally the most useful for this purpose is call detail records, or CDRs. Among other things, these records provide information about the origination and termination of calls. This permits one to verify the proper jurisdiction of the traffic. This is crucial information because local exchange carriers often charge different rates for intrastate and interstate access services. This is certainly true with respect to OrbitCom, which invoices charges for intrastate switched access in South Dakota that are much higher than the charges it bills for interstate access service.[2] One of the principal disputes between Verizon and OrbitCom has been the manner in which OrbitCom determined the jurisdiction of switched access calls. Accordingly, Verizon requested information that would confirm whether or not OrbitCom was properly identifying the jurisdiction of access traffic and billing the correct rates, that is, assessing intrastate charges only on intrastate access traffic.

[2] *See* Exhibit LF-4. These excerpts from OrbitCom's August 12, 2008 invoice show the widely disparate rates that OrbitCom bills Verizon for intrastate "local switching" service (both originating and terminating) and interstate local switching (both originating and terminating). Actual usage figures are confidential, and are redacted in the exhibit.

To assist in our analysis of OrbitCom's bills, Verizon Business asked OrbitCom on numerous occasions to provide us with CDRs. These requests were made both orally and in writing. For example, on February 14, 2008, Verizon asked OrbitCom to provide CDRs that supported the invoices it had issued on December 12, 2007. We reiterated this request on February 19, 2008. *See* Exhibit LF-3. On that same day, Verizon asked OrbitCom to explain a shift in the jurisdictional mix of traffic that had appeared for the first time on OrbitCom's July 7, 2007 invoice. On March 4, 2008, Verizon asked OrbitCom to report on the status of its response to Verizon's prior request that OrbitCom provide it with CDRs that supported earlier invoices. *See* Exhibit LF-5. The two companies held several conference calls in July and August 2008, during which I renewed Verizon's request for CDRs. I told OrbitCom's personnel that if they produced CDRs that alleviated Verizon's concerns and demonstrated that its billings were accurate, Verizon would pay any outstanding amounts owed. Following one such discussion on July 11, 2008, I sent OrbitCom an e-mail message, asking for a 3-day sample of call detail records that supported OrbitCom's June 2008 invoices. I explained that this data would enable Verizon to determine if OrbitCom was billing the jurisdiction accurately. *See* Exhibit LF-6. When I received no response, Verizon reiterated its request for CDRs on July 15, 2008 (*see* Exhibit LF-7), and again during conference calls with OrbitCom on July 30 and August 21 of last year.

Despite these numerous requests, OrbitCom refused and has failed -- even to this day -- to provide any call detail records to demonstrate that it was correctly identifying the jurisdiction of switched access calls and applying the correct jurisdictional rates.[3]

Q. DOES ORBITCOM HAVE THE CALL DETAIL INFORMATION THAT VERIZON REQUESTED?

A. Yes. As a UNE-P provider, OrbitCom obtains from Qwest call detail information on a daily basis. In its response to one of Verizon's data requests, OrbitCom admitted that it obtains call data, referred to as "EMI records" (or Electronic Message Interface records), from its switching company. *See* Exhibit LF-8. In South Dakota, that company is Qwest. These EMI records are sometimes referred to also as "Daily Usage Feeds." Qwest provides CLECs with this usage information pursuant to its Local Services Platform Agreement (Attachment 2, §§ 2.3.1 – 2.3.4). Verizon Business's own CLEC, MCImetro Access Transmission Services LLC, is also a UNE-P provider and customer of Qwest, and obtains EMI records through its similar contractual arrangements with Qwest. Based on its experience, Verizon knows that these call records contain the type of information that we need to verify the accuracy of another carrier's invoices.

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[3] Two days ago, on August 5, as I was completing my testimony, OrbitCom forwarded to Verizon, not CDRs in standard industry format, but several spreadsheets prepared by OrbitCom employees that purport to contain "a sampling of call detail information from three days in June 2009." Verizon has not had an opportunity to review this material. I reserve the right to supplement my testimony once we are able to do so.

Q. DID ORBITCOM PROVIDE ANY REASONABLE EXPLANATION FOR ITS REPEATED REFUSALS TO PROVIDE THE INFORMATION REQUESTED?

A. No, it did not. On some occasions, OrbitCom's personnel simply ignored our requests. At other times, OrbitCom's excuses for not providing the requested information varied. Verizon's requests for supporting documentation have been limited and narrow in scope, and thus should not be considered "burdensome." As I have stated, we requested call detail information that was fairly current, and that would support recent invoices. For example, in July 2008, we specifically limited our request to a 3-day sample of CDRs. Because EMI records are provided in a standard electronic format, furnishing the data should be fairly easy. In my experience, a number of local exchange carriers have provided Verizon Business with this type of CDR information in order to resolve questions about their bills.

Initially, OrbitCom's representative, Ms. Penny Petersen, stated that the company does not get call records. Rather, OrbitCom stated, "They are sent directly to our third party billing vendor and then purged from their system." *See* Exhibit LF-9. Assuming that this statement is accurate, a business practice of immediately deleting billing records would be highly unusual. Carriers are often required to maintain billing data for a lengthier period of time, in order to be able to respond to billing inquiries, audits or questions from regulatory agencies or, perhaps, tax authorities. For example, the FCC requires carriers to retain for a period of 18 months all records necessary to provide billing information associated with a call, including the name, address and telephone number of the caller; the telephone number called; and the date, time and length of the call. *See* 47 C.F.R. § 42.6. Data needed to support reports to the FCC on completed payphone calls must be maintained by carriers for a much longer period. In addition, as I will discuss later, the VP Telecom No. 1 tariff under which OrbitCom claims to have provided the disputed service requires OrbitCom to investigate the merits of billing disputes and, as this case shows, to do so can be difficult or impossible without appropriate billing records. Due to the existence of such record-retention requirements, I am surprised by Ms. Petersen's statement that OrbitCom kept no records itself and permitted its billing agent to destroy records so quickly.

OrbitCom has told Verizon that it ceased using its third party billing company in March 2009, and that it implemented a new process for determining the jurisdiction of access traffic. *See* Exhibit LF-10. So, to verify the accuracy of recent invoices, Verizon asked OrbitCom in discovery to "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" issued during the previous two months. As before, this request was narrow and focused, and provided OrbitCom with some flexibility in terms of the information it could produce. Nevertheless, OrbitCom declined to provide any of the information. For the first time, it objected that the request was "vague" and that the "records do not exist in the format Verizon has requested." *See* Exhibit

LF-11. These contentions seemed disingenuous, in light of our prior discussions about Verizon's desire to obtain CDRs and because EMI records, CDRs and DUF records are produced by Qwest using a common industry format, and the terminology used to describe the records provided by Qwest have a common understanding within the industry.

On other occasions, OrbitCom has balked at providing Verizon with CDRs on the theory that they are "proprietary." While I am not an attorney, I would point out that, while there are some restrictions imposed on the disclosure of Customer Proprietary Network Information, Section 222 (b) of the federal Telecommunications Act provides an exception to such rules to permit the exchange of information between communications carriers. Carriers often exchange CDRs when there are valid business reasons for doing so, and we do so without violating a carrier's "proprietary" rights or a customer's legitimate privacy rights. My auditing group is not involved in the marketing of Verizon Business services nor do we share any carrier's billing information with individuals employed in a marketing or sales organization. In addition, because the traffic at issue includes long distance calls placed by individuals that are directly or indirectly customers of Verizon Business's long distance services, there is even less of an argument that providing CDRs to Verizon would somehow breach a customer's legitimate expectation of privacy.

Q. HAS VERIZON BUSINESS DISPUTED ORBITCOM'S ACCESS CHARGE BILLS?

A. Yes. As I have explained, Verizon Business attempted on numerous occasions to obtain the information we need to verify the accuracy of OrbitCom's invoices. Obviously, if some of the access traffic was, in fact, interstate, those calls should not have been billed at intrastate rates. As I have also explained, OrbitCom was not cooperative in this regard, and did not provide the information needed to demonstrate that it had properly billed Verizon. Verizon prefers to resolve any billing disputes in an informal manner, but because we were frustrated in our efforts to resolve our concerns with OrbitCom's bills in an informal, non-adversarial manner, Verizon was compelled to begin disputing OrbitCom's invoices.

Verizon submitted its first formal dispute of OrbitCom's invoices for interstate access services on February 14, 2008. *See* Exhibit LF-12. Verizon updated its dispute on February 19 and again on May 8, 2008. *See* Exhibits LF-3 and LF-13. During the first nine months of 2008, we met with and continued to request from OrbitCom information that would validate its charges and the manner in which it determined the jurisdiction of traffic. On July 11, 2008, I followed up on one such discussion by explaining in an e-mail message that Verizon had issues with both OrbitCom's interstate access charges and the PIU (percentage of interstate use) factors reflected in its bills. *See* Exhibit LF-6. This latter concern was potentially significant: OrbitCom's invoices during prior periods reflected a 5%

PIU, which meant that OrbitCom was billing 95% of the access traffic as "intrastate" and charging Verizon its higher intrastate rates. This had the effect of inflating the charges we were billed. This practice also appeared suspect because the jurisdictional mix applied to our bills by OrbitCom was way out of line with Verizon's experience and the nature of our long distance traffic in South Dakota. This was a primary reason why Verizon wanted to examine the underlying traffic data and why we asked OrbitCom to provide it.

Because we continued to have no success in resolving our concerns, Verizon notified OrbitCom's executives on September 12, 2008, that Verizon was disputing OrbitCom's bills, citing the fact that OrbitCom had billed a "PIU of [only] 5% from the 7/12/07 invoice cycle through the 8/12/08 invoice cycle." See CONFIDENTIAL Exhibit LF-14. In that communication, we explained the basis for our dispute and specified the amounts at issue. To support our claim, we provided several spreadsheets that showed how Verizon had calculated the amounts that should have been billed had OrbitCom properly assigned traffic to the correct jurisdiction; for interstate traffic, Verizon applied the FCC's benchmark rate for CLEC switched access service provided pursuant to a valid tariff. We included all of the key assumptions used in our analysis. In addition, the various amounts were stated separately for each month covered by the dispute.

Since then, Verizon has reiterated and updated its billing disputes with OrbitCom on a periodic basis. For example, on April 9, 2009, Verizon provided OrbitCom with an updated dispute report, including amounts at issue through the March 2009 billing cycle. At OrbitCom's request, Verizon supplemented that dispute report by revising the spreadsheets, clarifying certain details (such as column headings) and breaking out disputed amounts by individual billing account number ("BAN"), jurisdiction and issue. This information was furnished to OrbitCom on April 22, and a further updated dispute report was provided on June 16, 2009.[4] Those reports also set forth the methodology Verizon used to calculate the disputed amounts, as well as the amounts Verizon believes should have been charged had OrbitCom assigned the correct jurisdiction to the traffic. While Verizon's billing disputes with OrbitCom cover a range of issues, including some that do not involve intrastate switched access services in South Dakota, Verizon's disputes in South Dakota are detailed and specific.

Q. HAS ORBITCOM SERIOUSLY CONSIDERED VERIZON'S DISPUTES?

A. No. On the contrary, OrbitCom has summarily rejected each of Verizon's disputes without addressing the substance or merits of our position. For example, within 24 hours after Verizon submitted a detailed dispute of several months of OrbitCom's charges on September 12, 2008, OrbitCom denied the dispute. Without addressing the specifics or merits of Verizon's submission, OrbitCom's employee, Penny Petersen, stated in an e-mail:

"This dispute is denied for the following reason.

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[4] *See* Exhibit LF-15. The spreadsheets provided as part of Verizon's dispute reports are not included in this exhibit because they also address disputes involving interstate charges and billing issues in other states, that are not at issue in this proceeding. However, the detailed spreadsheets were provided to OrbitCom on the dates indicated.

Please see page 30 of Orbitcom, Inc's. Intrastate Tariff.

Section 4.8 Disputed Bills
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 the Customer."

See Exhibit LF-16. On September 17, 2008, Verizon issued a response, rejecting OrbitCom's denial of our earlier dispute, and explaining further why OrbitCom's billing procedures were not in compliance with its tariff. *See* Exhibit LF-17. OrbitCom again denied the dispute, solely on the basis that it was "outside of the allowable dispute timeframe." *See* Exhibit LF-18. OrbitCom's reaction to these formal dispute reports was similar to its practice of summarily rejecting Verizon's earlier disputes of OrbitCom's charges for interstate access service. For example, on February 15, 2008, Ms. Petersen of OrbitCom dismissed Verizon's dispute letter issued the previous day, stating simply that "we can not accept disputes that are outside of the 90 day window." *See* Exhibit LF-19. This excuse for ignoring our dispute was particularly puzzling. OrbitCom did not explain the source of this so-called "90-day window," or provide any justification for its policy. At the time, OrbitCom did not have an interstate tariff that governed its provision of interstate access service. (As I mentioned earlier, OrbitCom did not even file an interstate tariff with the FCC until the following year.) Thus, there was not any legal or other foundation for OrbitCom's arbitrary business practice of simply cutting off disputes on the theory of untimeliness without giving the disputes any consideration whatsoever.

In his direct testimony, Mr. Powers echoes the sole reason given by OrbitCom for failing to consider the substance of Verizon's disputes regarding OrbitCom's intrastate access charges. At page 3 of his direct testimony (line 18), Mr. Powers alludes to the fact that Verizon's disputes included a recalculation of the amounts that Verizon believed should have been billed based on its analysis of OrbitCom's invoices (although he characterizes this as "retroactively adjusted billings"), but he does not address the substance or merits of Verizon's objections to OrbitCom's billing practices. Instead, Mr. Powers simply states that Verizon's position "was contrary to OrbitCom's tariff." He refers to Section 4.8 of VP Telecom Tariff No. 1, "where", he says, "it says disputes must be filed with [sic] 60 days of a due date and after that 60 days, the bill is deemed correct and considered due and payable in full." Powers Direct Testimony at 3 (lines 20-22).

Q. WAS ORBITCOM'S REFUSAL TO ADDRESS THE MERITS OF VERIZON'S COMPLAINTS ABOUT ORBITCOM'S CHARGES AND BILLING PRACTICES REASONABLE?

A. For a number of reasons, no. In the first place, OrbitCom's current insistence on rigid adherence to "its" tariff should be evaluated against the backdrop of OrbitCom's lack of cooperation in making its tariffs available at a time when Verizon first sought to obtain them. Having declined to make its tariffs available when asked, it is not reasonable or fair for OrbitCom to insist that Verizon be forced to comply with tariff provisions that are associated with another carrier's name, and that OrbitCom failed to disclose to Verizon.

In addition, OrbitCom's position – that access customers should invoke formal dispute processes early on -- is contrary to the approach taken by a number of carriers and preferred by many regulators, namely, that companies should try to resolve issues informally before invoking formal dispute escalation processes and pursuing litigation. Inter-carrier bills are lengthy and often complex. Reviewing and auditing bills and researching issues can be a time-consuming process. Carriers often have questions, and they try to get them answered and resolved through business-to-business discussions, which may take time. If, as OrbitCom suggests, a carrier must file a formal dispute and invoke formal dispute resolution procedures within 60 days after an invoice is due in order to preserve its rights, carriers will be compelled -- before they even begin to examine the bills -- to routinely file disputes and initiate a formal review process, rather than try to work through any issues in the orderly course of business. Once formal dispute processes commence and potential litigation is looming, parties often become less flexible, their positions harden and cooperation diminishes. In my opinion, forcing carriers to initiate disputes is not an efficient or appropriate means of addressing and resolving billing issues which, in reality, are not uncommon in the communications industry.

While OrbitCom has invoked the dispute provision in VP Telecom Tariff No. 1 as an excuse for not considering Verizon's billing disputes, OrbitCom itself did not follow the terms of that tariff. Section 4.2.1 of VP Telecom Tariff No. 1 states that charges are due and payable 30 days after the date an invoice is mailed to the customer. Section 4.8 of the tariff states that "Written dispute must be received by the company within 60 days of the payment due date." Verizon's objections to OrbitCom's bills were explained through e-mail exchanges as well as telephone calls, and each such e-mail message constitutes a "written" dispute. In his testimony, Mr. Powers acknowledged the on-going nature of the billing disputes, as indicated by his reference to Verizon's submission of PIU factors in August of 2008 "after the disputes were filed." Powers direct testimony at 6 (line 14). To the extent the tariff provisions referenced above apply to each individual dispute notification provided by Verizon, a dispute filed within 90 days after an invoice is mailed is timely. Each of Verizon's periodic dispute reports encompassed, among other things, all invoices that were issued within the preceding 90 days. Accordingly, it was inappropriate, and inconsistent with "its" tariff, for OrbitCom to completely disregard Verizon's disputes on the grounds of untimeliness, because Verizon's disputes, at a minimum, encompassed all invoices issued within the previous 90 days, and were also relevant to any future invoices that OrbitCom planned to send.

OrbitCom also ignored another provision of the tariff it purports to rely on. The second paragraph of section 4.8 states that

> "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."

It is apparent from the timing and substance of OrbitCom's communications denying Verizon's disputes that it failed to conduct any meaningful investigation of the merits of Verizon's contentions. Our dispute issued on February 14, 2008, was denied the following day in a terse, two-sentence message. *See* Exhibit LF-19. Verizon's dispute of OrbitCom's intrastate charges issued on September 12, 2008, was rejected the very same day, solely on grounds of timeliness. *See* Exhibit LF-16. OrbitCom's subsequent denial of Verizon's appeal of this rejection again cited only the timeliness issue. *See* Exhibit LF-18. In none of these instances could it be said that OrbitCom fairly and fully "investigate[d] the merits of the dispute." OrbitCom provided no indication that it had reviewed the substance of Verizon's claims, including the financial and other details provided in the spreadsheets that accompanied the disputes. Even after OrbitCom filed its complaint, Verizon continued to dispute charges that it believed were billed improperly. OrbitCom did not respond to the dispute issued by Verizon on April 22. Verizon provided an updated dispute report on June 16, 2009. OrbitCom denied the dispute the same day, citing two reasons: "We are billing jurisdictionally" and "[y]our spreadsheets ... are completely devoid of relevant material." Verizon responded to each of the points the following day, but OrbitCom denied the dispute again in a one-line message that contained no substantive explanation. Thus, in neither instance did OrbitCom "investigate the merits of the dispute [and u]pon completion of its investigation, ... provide written notice to the customer regarding the disposition of the claim."

Mr. Powers states at page 4 of his direct testimony (at lines 6-7) that a carrier must follow the dispute procedures outlined in the billing carrier's tariff. I assume he would agree that the billing carrier must also follow its own tariff. However, as I have explained, OrbitCom has not followed those procedures with respect to its handling of Verizon's billing disputes.

Q. IF AN INTEREXCHANGE CARRIER HAS A BILLING DISPUTE WITH ORBITCOM, MAY THE CARRIER WITHHOLD PAYMENT?

A. Yes. An interexchange carrier is not prohibited from withholding payment if there is a legitimate billing dispute. Section 4.8 of VP Telecom Tariff No. 1 specifically addresses circumstances in which a customer has withheld payments of disputed amounts. The third bulleted paragraph of that section states that "If the dispute is resolved in favor of the customer and the customer has withheld the disputed amount, no credits or penalties will apply." In addition, the preceding paragraph addresses the applicability of late payment charges when a dispute is resolved in favor of the Company "and the customer has withheld the disputed amount." Presumably, the carrier would not have included language in its tariff that addresses the withholding of disputed amounts if an access customer is forbidden from withholding disputed amounts.

Q. MR. POWERS STATES THAT "WE WERE TOLD WE WOULD NEED TO DISCUSS NEGOTIATING A CONTRACT WITH ANOTHER VERIZON REPRESENTATIVE ... BEFORE VERIZON WOULD AGREE TO PAY ITS INVOICES FROM ORBITCOM." (Powers Direct Testimony at 5, lines 2-4). PLEASE RESPOND.

A. Mr. Powers is wrong, and he offers no evidence to substantiate his claim. At no time did Verizon tie a commitment to pay outstanding invoices to the negotiation of a contract for switched access service. In fact, it was OrbitCom, not Verizon Business, that interjected the subject of a potential contract into our discussions. Last year, two OrbitCom employees (other than Mr. Powers) initiated requests to enter into a switched access agreement with Verizon. On March 4, 2008, Ms. Penny Petersen stated in an e-mail "I would like to setup a switched access agreement between Verizon and Orbitcom so that we can avoid further disputes." Mr. Moore responded for Verizon by stating "I do not handle contracts/agreements. I will have to look into this." *See* Exhibit LF-20. In a letter to me dated June 16, 2008, Ms. Petersen stated: "Orbitcom requests that Verizon contact it for purposes of establishing a contract for services so that we can formally establish the terms of the relationship between Orbitcom and Verizon." Similarly, Mr. Brad VanLeur sent me an e-mail on July 7, 2008, in which he stated "We would like to have an Agreement with Verizon in regards to Switched Access Charges. Is there someone you could give us as a contact to negotiate a Switched Access Agreement?" I responded to Mr. VanLeur the same day, informing him that "Mike Maxwell would be your contact to negotiate a

Switched Access Agreement with Verizon Business," and providing him with contact information for Mr. Maxwell. *See* Exhibit LF-21. The following week, Ms. Petersen sent me an e-mail reiterating that "Orbitcom would like to extend an offer to Verizon to negotiate a switched access agreement." I responded on July 15, by informing her that "I have previously provided a Verizon Business contact for negotiating a switched access agreement."

While I know that such a discussion later took place, I am confident that no one within Verizon Business ever stated that we would not resolve the billing issues unless the companies negotiated an agreement for the provision of switched access services. My group is responsible for handling billing issues, not contract negotiations, and we merely directed OrbitCom to the individual who has that responsibility. There is no reason we would have threatened to link our efforts to resolve a billing dispute to a separate matter in which we had no role or involvement. Mr. Powers is completely misinformed about what actually transpired.

V. VERIZON'S SPECIFIC OBJECTIONS TO ORBITCOM'S BILLS FOR SWITCHED ACCESS SERVICE IN SOUTH DAKOTA

Q. PLEASE SUMMARIZE VERIZON'S COMPLAINTS REGARDING ORBITCOM'S CHARGES FOR SWITCHED ACCESS SERVICE IN SOUTH DAKOTA.

A. OrbitCom's billing practices and the content and presentation of its invoices have changed over time. However, Verizon has two principal objections to the amounts it has been charged. OrbitCom does not bill in accordance with VP Telecom Tariff No. 1 in two key respects. First, OrbitCom does not properly identify the jurisdiction of switched access traffic. Rather than follow the procedures set forth in that tariff, OrbitCom arbitrarily categorizes an unreasonably high percentage of the traffic to be "intrastate" and assesses its higher intrastate access charges on those calls. As a result, it is not billing Verizon the correct rates.

Second, OrbitCom is charging Verizon for a "tandem switching" service that it does not provide. This problem is less easy to identify because, since April 2008, OrbitCom's invoices typically include only a single rate element, labeled "local switching." The rate for "local switching" shown on the invoices is higher than the rate specified in VP Telecom Tariff No. 1. This is because OrbitCom appears to be consolidating charges for all access rate elements into the single charge for "local switching," including a charge for "tandem switching" that it does not provide to Verizon. Its bills are improperly inflated for this reason, as well.

A. OrbitCom's Failure to Accurately Determine the Jurisdiction of Switched Access Traffic and Charge the Correct Jurisdictional Rates

Q. WHAT DOES THE VP TELECOM TARIFF STATE ABOUT THE MANNER IN WHICH THE JURISDICTION OF SWITCHED ACCESS TRAFFIC IS TO BE DETERMINED?

A. Mr. Powers characterizes the applicable tariff provision at a very high level (Powers direct testimony at 6, lines 5-6; and 8, lines 6-11) and, as a result, glosses over critical requirements. To provide a basis for my discussion, I will quote the entire language of section 3.4 of VP Telecom Tariff No. 1:

> 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).

There are several other related provisions in the tariff. For example, section 3.4.1.4 states: "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."

Q. HAS ORBITCOM COMPLIED WITH THESE TARIFF REQUIREMENTS?

A. No, it has not. The key principle is in the first sentence: "*When the Company receives sufficient call detail to determine the jurisdiction... the Company will use that call detail to render bills* for those MOU and will not use PIU factors." (Emphasis added.) As I explained earlier, as a UNE-P provider, OrbitCom receives electronic call detail records from Qwest in standard EMI format. These records provide the information necessary to determine the jurisdiction of most originating and terminating switched access traffic that is handled by Qwest's switches. For whatever reason, however, neither OrbitCom nor its billing agent used the call detail records in their possession to determine the jurisdiction of access traffic and render bills to Verizon. Thus, OrbitCom has not complied with the core provision of this tariff. As I have explained, Verizon has repeatedly sought to obtain the relevant call records from OrbitCom to verify the accuracy of its bills, but OrbitCom has repeatedly refused to provide that information.

Q. HOW DO ORBITCOM'S INVOICES ALLOCATE TRAFFIC BETWEEN THE INTRASTATE AND INTERSTATE JURISDICTIONS?

A. OrbitCom's invoices do not on their face state how the company allocates traffic between jurisdictions. However, Verizon was able to determine the jurisdictional split by analyzing the bills and reviewing the amounts of traffic that were billed either at the interstate or intrastate rates that OrbitCom appeared to be applying. Verizon attached to its April 9, 2009 dispute letter a spreadsheet that set forth the percentages of traffic volumes (minutes of use) that OrbitCom classified and billed as "interstate" on the invoices it issued to Verizon from June 2007 through March 2009. *See* CONFIDENTIAL Exhibit LF-22. The June 2007 invoice allocated 33.95% of the switched access traffic to the interstate jurisdiction, and billed the remaining traffic as intrastate. Between July 12, 2007 and July 12, 2008, OrbitCom's invoices treated between 5.04% and 5.25% of the traffic as interstate, meaning that it charged Verizon intrastate access rates on between 94 – 95% of the traffic each month over that 13-month period. Beginning with invoices issued in August 2008, OrbitCom began billing approximately 32% of the traffic at apparently interstate rates, and the remainder at intrastate rates.

Q. DID MR. POWERS PROVIDE A REASONABLE JUSTIFICATION FOR THIS ALLOCATION OF TRAFFIC?

A. No. Mr. Powers addresses this issue on pages 6 and 8 of his direct testimony. He states that OrbitCom "can use actual jurisdiction if possible," and describes three options that he says OrbitCom may "choose from" to determine the jurisdiction of access traffic. His analysis is overly-simplistic, and mis-states the applicable tariff language I quoted above. The tariff states that "When the Company receives sufficient call detail" it "will use" that information to render a bill. This is not merely an "option" that OrbitCom is free to disregard. Mr. Powers ignores the fact that OrbitCom actually receives call detail records from Qwest but did not use that data to identify the actual jurisdiction of the traffic and render bills accordingly. Thus, Mr. Powers' statement about what "options" OrbitCom may "choose from" "when the jurisdiction of a call *cannot* be determined" (direct testimony at 8, lines 6-8) (emphasis added) misses the point. OrbitCom must use the call detail that is available to determine jurisdiction; only if that call detail is "insufficient" may the company resort to alternative means.

Mr. Powers asserts that OrbitCom "used a PIU that it calculated that best represented the actual traffic pattern." Powers direct testimony at 6, lines 7-8. However, the methodology described by Mr. Powers does not conform to the procedure that VP Telecom Tariff No. 1 sets forth for developing a PIU factor. Section 3.4.1.1 explains that for Feature Group D switched access service, "where the Company can determine jurisdiction by its call detail, the projected PIU will be developed by the Company on a quarterly basis *by dividing the measured interstate originating minutes by the total Originating Access Minutes*." (Emphasis added.)[5] Mr. Powers' explanation does not indicate that OrbitCom followed this procedure by including "measured" traffic in the numerator and performing the specific calculation described in the tariff. OrbitCom has not provided any documentation to support its calculation of the PIU factor it selected – especially one as low as 5%. Nor has it provided any documentation to demonstrate that the factor was, in fact, based on "existing traffic patterns," as he claims.

[5] Mr. Powers also does not state that OrbitCom performed this calculation on a quarterly basis, as the tariff requires. Because Verizon has been challenging OrbitCom's bills and requesting call detail since early 2008, OrbitCom has been on notice that the jurisdictional nature of "measured originating minutes" was at issue. Accordingly, OrbitCom should have been retaining the relevant call detail, both to be able to respond to Verizon's dispute, as well as to support any quarterly calculation of a PIU that it made.

Even if it were correct that OrbitCom developed PIU factors based on its customers' calling patterns (a fact that OrbitCom has not proven), that would not have any bearing on the jurisdiction of interexchange traffic that is delivered to OrbitCom's end users and for which OrbitCom bills Verizon terminating switched access rates. Such long distance traffic can be originated by an end user anywhere in the country (or world), and is transported by the long distance carrier that is selected by the calling party. The calling patterns of OrbitCom's customers have nothing to do with the jurisdiction of calls they receive (i.e., terminating traffic). Nevertheless, OrbitCom assigned the same low percentage of interstate usage, about 5%, to all terminating access traffic it billed Verizon from July 2007 through July 2008. There was no reasonable basis for this billing practice, and it cannot be justified based on the only rationale that OrbitCom has presented.

The fact that all of OrbitCom's invoices issued between August 12, 2008 and March 2009 reflected a jurisdictional split of roughly 32 percent interstate and 68 percent intrastate (*see* CONFIDENTIAL Exhibit LF-22) suggests that OrbitCom simply applied the "default" PIU factor (referenced in section 3.4.1.4 of VP Telecom Tariff No. 1) to all of the traffic, as opposed to relying on actual call detail or a calculation that "was computed using existing traffic patterns," as claimed by Mr. Powers. During discovery, OrbitCom admitted that "where a carrier such as Verizon is used for both the PIC and the LPIC, OrbitCom applies a default 32/68 PIU – 32 interstate 68 intrastate – to these calls..." *See* OrbitCom's responses to Verizon Data Requests 52 (k) and 47 (g).

Q. WAS IT APPROPRIATE FOR ORBITCOM TO APPLY A DEFAULT "PIU FACTOR" TO VERIZON'S TRAFFIC?

A. No. Section 3.4 of VP Telecom Tariff No. 1 states that PIU factors will be applied "[w]hen the Company receives insufficient call detail to determine the jurisdiction" of originating or terminating traffic. As a UNE-P provider, OrbitCom receives sufficient information from Qwest to enable it to determine the jurisdiction of most originating and terminating switched access traffic. Accordingly, it was not necessary for OrbitCom to rely on PIU factors, even if it could demonstrate that the factors it chose to use are reliable and verifiable. Based on my experience reviewing numerous carrier access bills, most local exchange carriers do not usually apply PIU factors to traffic that can be measured and for which jurisdiction can be identified. Thus, OrbitCom's approach is very unusual.

Q. WHY DOES VERIZON OBJECT TO THE JURISDICTIONAL MIX OF TRAFFIC REFLECTED ON ORBITCOM'S INVOICES?

A. Our primary objection is that OrbitCom did not assign jurisdiction and bill traffic based on actual call detail records. That information is the best determinant of a call's jurisdiction, and it is the information that is supposed to be used in the first instance, according to VP Telecom Tariff No. 1. OrbitCom did not use that information, however, when preparing invoices, and it has refused to provide Verizon with any call detail records to verify the accuracy of its bills. In addition, the jurisdictional split reflected on OrbitCom's invoices varied over time in an inconsistent and seemingly arbitrary manner. Finally, the allocation of traffic to the interstate and intrastate jurisdictions reflected on OrbitCom's bills to Verizon was suspect in light of Verizon's experience and the nature of our long distance traffic in South Dakota.

Q. PLEASE EXPLAIN WHY VERIZON BELIEVES THE JURISDICTIONAL ASSIGNMENT OF TRAFFIC SHOULD HAVE BEEN DIFFERENT THAN THE JURISDICTIONAL MIX ORBITCOM USED FOR BILLING PURPOSES.

A. As part of its long distance operations, Verizon Business terminates traffic in South Dakota to local end office switches that are identified in the LERG (the industry's Local Exchange Carrier Routing Guide) as belonging to Qwest. In addition, interexchange traffic is delivered to Verizon from those same Qwest end offices. As a UNE-P provider, all of OrbitCom's traffic is routed through Qwest's local exchange switches in South Dakota. From Verizon's perspective as an interexchange service provider, OrbitCom's UNE-P traffic is not distinguishable from other interexchange traffic that originates from or is terminated to Qwest end office switches through which OrbitCom's end users are served. OrbitCom has not provided Verizon with any information to specifically identify its end users, so Verizon has no basis for presuming that the long distance calling patterns of OrbitCom's end users vary dramatically from that of other local customers served by Qwest's switches.[6]

During my group's audit of OrbitCom's invoices, we discovered that, over a 13-month period, OrbitCom billed 95% of the switched access traffic as "intrastate," and only 5% as interstate. This was remarkably different than the traffic patterns that Verizon normally experiences in our long distance network. So, as part of our investigation, we attempted to compare the jurisdictional mix reflected on OrbitCom's invoices with Verizon's own records. Verizon periodically analyzes the jurisdiction of its switched access traffic in order to develop PIU factors that it provides to local exchange carriers. When doing so, we use all traffic for a Bell Operating Company in a state, which in South Dakota is Qwest, as a proxy when calculating PIU factors for UNE-P traffic. This is because, as I have stated, OrbitCom's traffic is not distinguishable from other interexchange traffic carried over Qwest's end office switches.

Based on the information available to him, Jaque Moore of my staff determined that, at the time he was initially auditing OrbitCom's invoices, approximately 77% of Verizon's interexchange traffic in South Dakota was interstate, and only 23% was intrastate. Verizon used this figure in the various dispute reports that we

[6] Mr. Powers states that "[d]uring discussions, Verizon employees indicated verbally that they tracked OrbitCom only calls." Powers direct testimony at 8, lines 19-21, and 9, lines 1-2. This is not correct. Neither I nor anyone in my group made such a statement, nor is there anything in Verizon's dispute notices that supports such an inference. In fact, it is precisely because Verizon does not have any visibility into, and cannot identify, OrbitCom-specific traffic that we have been so interested in obtaining call detail records that contain the information that would enable Verizon to audit the accuracy of OrbitCom's invoices.

presented to OrbitCom. Because OrbitCom had not provided any call detail records to verify the accuracy of its own jurisdictional allocation of traffic, Verizon disputed OrbitCom's bills, and asserted that the traffic should be re-rated in a manner that was more closely aligned with the actual jurisdiction of traffic, as Verizon understood it to be based on our own traffic records. Verizon's dispute reports contained calculations that applied OrbitCom's intrastate rates to the amount of traffic that Verizon believed to be properly intrastate, and applied OrbitCom's apparent interstate rates to the amount of traffic that Verizon believed was properly interstate. Rather than try to refute the accuracy of Verizon's calculations, OrbitCom has merely objected to the fact that we performed them using the assumptions we provided.

Verizon has prepared a more detailed analysis of the jurisdiction of its switched access traffic in South Dakota during 2007, 2008 and 2009, and presented it to OrbitCom during the discovery process. *See* Verizon's response to OrbitCom Interrogatory 13. CONFIDENTIAL Exhibit LF-23 contains a chart that was included as part of that response. That analysis was based on a review of data for Feature Group D originating and terminating traffic that passed between Qwest's local switches in South Dakota and Verizon's long distance network. The results indicate the percentages of interstate traffic that Verizon would have shown at the time based on all originating traffic and all terminating traffic. The information presented in that document confirms the reasonableness of the 77 percent jurisdictional allocator that Verizon has used in its discussions and dispute notifications.

In my opinion, the methodology Verizon has proposed to resolve the billing dispute is more reasonable than OrbitCom's practice, which appears to be to discard EMI records rather than use them to generate bills, and to use instead PIU factors that are not based on measured minutes. I have told OrbitCom officials that if they produce call detail records to verify the accuracy of their invoices, Verizon will pay the billed amounts. As an alternative, Verizon has proposed to resolve the billing dispute in the manner I described to determine the correct jurisdiction of the switched access traffic, as well as any amounts owed, or credits due. OrbitCom has refused to pursue either approach.

Q. MR. POWERS SUGGESTS, AT PAGE 7 OF HIS DIRECT TESTIMONY, THAT ORBITCOM'S USE OF A 5% PIU FACTOR WAS JUSTIFIED BECAUSE ORBITCOM CHOOSES THE PIC AND LPIC FOR ITS END USERS. HOW DO YOU RESPOND?

A. The point he is trying to make is difficult to follow. OrbitCom apparently selects, on behalf of its end users, one or more long distance companies to carry its customers' interLATA and intraLATA interexchange traffic. It refers to the first as a primary interexchange carrier (or "PIC"), and to the latter as an IntraLATA Primary Interexchange Carrier (or "LPIC"). Because of this, OrbitCom claims to know the jurisdictional nature of the traffic that it sends to these carriers. It has not, however, provided any evidence to support this.

In discovery, OrbitCom stated that since July 1, 2002, "MCI [Verizon] has been considered as a PIC and LPIC each and every month in South Dakota." However, OrbitCom declined to state in which months it actually selected Verizon as a PIC or LPIC, or both, and in which months it directed its customers' interexchange traffic to Verizon's long distance network.[7] Accordingly, there is no evidentiary basis for OrbitCom's apparent claim that its application of a 5% PIU factor to all of Verizon's traffic during the period July 2007 through July 2008 was justified based on its choice of interexchange carriers. (This is separate from the point I have already made that OrbitCom failed to use actual call detail to determine the jurisdiction of access traffic.) If OrbitCom selected Verizon as both the PIC and LPIC in a given month, as its statement quoted above implies, the 5% PIU it used obviously understated the amount of interstate traffic that was delivered to Verizon. Rather, the jurisdictional mix should have been closer to the 77%/23% interstate/intrastate split that is representative of Verizon's interexchange traffic in South Dakota, and that formed the basis of Verizon's dispute. On the other hand, if OrbitCom selected different interexchange carriers as the PIC and LPIC over time, then the "PIU factor" should have varied over time, as well. OrbitCom's approach also does not take into account normal fluctuations in usage patterns,

[7] *See* OrbitCom Response to Verizon Data Request 52 (d). On page 8, lines 11-12 of his testimony, Mr. Powers suggests that "if Verizon is chosen as the LPIC only, virtually 100% of the traffic will be intrastate." Because OrbitCom did not provide the information requested by Verizon in discovery, there is no basis for evaluating, or crediting, this claim. In any event, his statement would only apply to a portion of the overall switched access traffic.

which are common in the communications industry. Instead, OrbitCom applied the same 5% PIU factor for 13 months in a row, after which it used a constant 32% PIU factor for at least the next eight 8 months.

There is another fundamental problem with OrbitCom's stated rationale. Regardless of which interexchange carrier or carriers are chosen by OrbitCom or its end users to transport interexchange calls that are originated by OrbitCom's end users, that decision has no bearing on interexchange calls that are terminated to those same end users. OrbitCom has no role in deciding how, or by which carrier, interexchange calls are terminated to its customers. OrbitCom, however, applied the same 5% PIU factor to terminating, as well as originating traffic. It had no reasonable basis for doing so, and the rationale presented by Mr. Powers does not justify this billing practice as it relates to terminating traffic. Similarly, OrbitCom applied the same 5% PIU factor to toll-free traffic, such as 800-type calls, even though the 800 service provider, and not the originating local exchange carrier, selects the interexchange carrier that handles the long distance portion of a toll-free call. *See* Exhibit LF-24. Consequently, OrbitCom's choice of a PIC or LPIC is irrelevant to the jurisdictional nature of all of the toll-free calls placed by its end user customers. Accordingly, there was no justification for OrbitCom's practice of applying a 5% PIU factor to toll-free traffic either.

Q. DOES VP TELECOM TARIFF 1 ALLOW AN ACCESS CUSTOMER TO SUBMIT PIU FACTORS FOR USE BY THE BILLING CARRIER?

A. Yes. I have explained that, under VP Telecom Tariff No. 1, when the billing carrier has sufficient call detail, it is to use that information to determine the jurisdiction of traffic and render a bill. Only when the company does not receive sufficient call detail may it use, as a fall-back, PIU factors. Section 3.4 of the tariff states that, in that situation, "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."

Mr. Powers testifies (at 8, lines 16-17) that OrbitCom "only uses a Customer provided PIU when that Customer provided PIU is documented as to its accuracy and then only going forward." However, that policy is not consistent with the language of VP Telecom Tariff No. 1, section 3.4.5. That section states that "if a billing dispute arises or the Commission questions the project [PIU] factor, the Customer will provide the data used to determine the projected PIU factor." It does not state, as Mr. Powers suggests, that an interexchange carrier must first provide documentation to validate the accuracy of its reported PIU factors before it will be used by the billing carrier for purposes of assigning jurisdiction to traffic that cannot be measured or identified.

Q. DID ORBITCOM REFUSE TO APPLY PIU FACTORS PROVIDED BY VERIZON?

A. Yes. On August 21, 2008, Verizon provided OrbitCom PIU factors that were to be applied for all of Verizon Business's interexchange carrier affiliates. *See* CONFIDENTIAL Exhibit LF-25.[8] The PIUs were to be applied to all traffic for which OrbitCom was unable to determine the jurisdiction based on the call information itself. Consistent with standard industry practice (and with VP Telecom Tariff No. 1), the PIU factors were intended for use only on unmeasurable or unidentifiable traffic in South Dakota. Because Verizon knew that OrbitCom obtained the necessary EMI records from Qwest to determine the jurisdiction of most access traffic, Verizon's expectation was that the PIU factors would only be applied to a subset of traffic for which such information was not available. The factors that Verizon provided were the same that Verizon had on file with Qwest for South Dakota during the same time period.

Although VP Telecom Tariff No. 1 provides for the use of customer-provided PIU factors when sufficient call detail is not available, OrbitCom has not, to this date, applied the PIU factors that Verizon furnished. Nor did OrbitCom follow the procedures in section 3.4.5 of VP Telecom Tariff to the extent it had concerns about Verizon's filed factors. On August 21, 2008, Penny Petersen asked Verizon's representative, Mr. Robin Fishbein, in a one-sentence message to

[8] Mr. Powers' statement that Verizon "refused to provide ... even the name of the person who came up with the PIU" (direct testimony at 8, lines 21-22) makes no sense. As shown in CONFIDENTIAL Exhibit LF-25, Mr. Robin Fishbein provided the PIU factors directly to OrbitCom, and he did not do so in an anonymous manner.

explain how the PIU factors were determined. Mr. Fishbein responded immediately in an e-mail message, asking for clarification: "I'm not sure in what direction you'd like me to focus my response. Could you please elaborate? Is it that you are asking how we determine PIU factors for a UNE-P provider?" *See* Exhibit LF-26. Verizon did not receive any follow-up communication from Ms. Petersen regarding this issue.[9] Nevertheless, we do know that OrbitCom has not applied the PIU factors that Verizon provided.

B. The "Tandem Switching" Issue

Q. PLEASE DESCRIBE VERIZON'S COMPLAINT RELATING TO ORBITCOM'S BILLING OF CHARGES FOR "TANDEM SWITCHING."

A. Mr. Powers states that "OrbitCom is entitled to charge and be paid for tandem switching." Powers direct testimony, at 10 (line13). This is incorrect for several reasons, most notably because OrbitCom does not provide Verizon a tandem switching service. Moreover, with minor exception, since April 2008, OrbitCom has not billed Verizon discrete charges for tandem switching. Instead, it lumps all of its rate elements together, and bills Verizon $0.06 per minute under a single bill line item called "local switching."

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[9] Mr. Powers makes several vague references to discussions, Verizon's provision of "several different PIUs" "on several occasions," and verbal representations about Verizon's "track[ing] of … calls" (direct testimony at 8, line 18 through page 9, line 2). These statements are so cryptic and non-specific that I am not able to respond more completely than I have in my testimony. Moreover, I am not aware that Mr. Powers was directly involved in any communications relating to Verizon's submission of PIU factors. This issue is, in any event, of minor importance because, as I have explained, PIU factors were only to be used in those limited circumstances in which OrbitCom lacks sufficient call detail to determine the jurisdiction of originating and terminating switched access traffic.

Q. PLEASE EXPLAIN HOW INTEREXCHANGE TRAFFIC IS ROUTED TO OR FROM VERIZON'S LONG DISTANCE NETWORK IN SOUTH DAKOTA?

A. Verizon receives and sends large amounts of interexchange traffic to and from Qwest in South Dakota. Although I am not involved in network engineering, my understanding is that Verizon configures its network and access arrangements based, in part, on the volumes of traffic that originate from or terminate to different local exchanges. One service that is available to Verizon from Qwest is tandem-switched transport. When Verizon uses tandem-switched transport, Verizon can deliver traffic to, or receive traffic from, a Qwest tandem switch that serves multiple end office switches. The traffic then also passes over a tandem-switched communications facility, which is a high-capacity communications line, between the tandem switch and the end office.

Another service that Qwest offers to Verizon and other interexchange carriers is direct end-office trunking. When Verizon uses direct end-office trunking, Verizon can deliver traffic to, or receive traffic from, a Qwest end office directly. Traffic originated or terminated through a direct end-office trunking arrangement is never switched by a tandem switch or routed over any tandem-switched facility. When traffic volumes warrant, Verizon often orders direct end-office trunks (or "DEOTs") between its network and specific end offices. Doing so avoids the higher costs that many local exchange carriers often charge for tandem switching, and there may be certain efficiencies, because the traffic passes through one less switch.

From Verizon's perspective as an interexchange carrier, traffic that originates or terminates from Qwest's end users is indistinguishable from traffic that originates or terminates from OrbitCom's end users because OrbitCom provides service using Qwest's network equipment, rather than its own. Accordingly, Verizon configures its access arrangements in the manner I described based on the characteristics of traffic that passes through Qwest's local network facilities. In South Dakota, Verizon has direct end-office connections into most end offices that originate or terminate traffic for which OrbitCom bills Verizon. Exhibit LF-27 contains a list, by industry Common Language Location Identifier ("CLLI") code, of those end offices to which Verizon is connected via DEOTs.[10] Verizon ordered those DEOTs directly from Qwest, which installed them, so there was no need for Verizon to separately order redundant facilities from OrbitCom, even if OrbitCom had the legal authority to direct how an interexchange carrier connects to Qwest's network.

By comparing usage data included in OrbitCom's invoices for July 2008 with information provided by Verizon's traffic engineering organization, my group confirmed that in some of these end offices 100% of the traffic is carried over

[10] Mr. Powers makes vague accusations about Verizon's inability or refusal to provide this type of information. Powers direct testimony at 9, lines 16-18. I am not aware of any request, including through interrogatories issued in this proceeding, that OrbitCom has made for this data and, in any event, Verizon is presenting the information here.

DEOTs. In many other end offices, all but a small fraction of the traffic was routed over DEOTs. Overall, my group determined that 88 percent of the traffic billed by OrbitCom in South Dakota had been routed over direct end-office trunks between Qwest's network and Verizon's. Only the small remaining amount was routed through a Qwest tandem switch. *See* CONFIDENTIAL Exhibit LF-28. My understanding is that the EMI records that a UNE-P provider, such as OrbitCom, receives from Qwest on a daily basis indicate whether a call was switched through the tandem. Had OrbitCom produced the call detail records requested by Verizon, these would have confirmed the relatively small amounts of tandem-switched traffic and the corollary fact that most of the access traffic was routed directly to or from Qwest's end offices via DEOTs. OrbitCom should not be able to impose charges for tandem switching when it refuses to provide the call detail records that would show whether or not the calls were tandem-switched.

Q. WHAT DOES VP TELECOM TARIFF NO. 1 STATE ABOUT TANDEM SWITCHING SERVICE?

A. Section 14.2.3.3 of that tariff describes a capability defined as "Tandem Connect." According to that provision, "Tandem Connect consists of circuits from the point of interconnection with Customer's tandem provider to the Company's Local Switching Center. This Tandem Connect rate category is comprised of a Minutes of Use (MOU) based End-Office switching and tandem switched transport charges." Section 14.2.3.1 of VP Telecom Tariff No. 1 states, in pertinent part, that "Tandem Connect Service is provided in conjunction with the tandem provider serving the area."

It appears to me that this tariff description is similar to the definition of "tandem-switched transport" in the Commission's rules. As I read the definition contained in South Dakota Administrative Rule 20:10:29:01 (37), tandem switched transport involves traffic "that is switched at a tandem switch" between the serving wire center and the end office or between a carrier's office that contains the tandem switching equipment and provides the tandem switching functionality. As I further understand the Commission's rules, "tandem switching" is one of the two rate elements that make up the charge for tandem-switched transport. *See* South Dakota Administrative Rule 20:10:29:16.03.

Q. DOES ORBITCOM PROVIDE TANDEM CONNECT SERVICE, AS DEFINED IN VP TELECOM TARIFF NO. 1?

A. No. In some end offices, 100 percent of the traffic that OrbitCom has billed Verizon is carried over DEOTs. Overall, about 88% of the traffic billed by OrbitCom in South Dakota is routed over DEOTs between Qwest's end offices and Verizon's interexchange network. None of that traffic is routed over "circuits from the point of interconnection with [Verizon's] tandem provider to the Company's Local Switching Center." The traffic that travels over direct end-office trunks is not tandem switched. There is no "tandem provider" involved in handling that traffic. OrbitCom does not perform tandem switching, either in fact or as described in the tariff.

Q. HAS MR. POWERS JUSTIFIED ORBITCOM'S PRACTICE OF BILLING VERIZON TANDEM SWITCHING CHARGES?

A. No, he has not. On page 10 of his testimony (lines 1-7), Mr. Powers offers an analogy to a truck lease, and argues that because OrbitCom leases certain facilities under its commercial agreements with Qwest, "I can charge customers for the use" of those facilities. The basic flaw with this argument is that OrbitCom is not using tandem-switching facilities or providing any tandem switching functionality in connection with the vast majority of traffic for which it has imposed tandem switching charges on Verizon. It is not reasonable to charge customers for "the use" of tandem switching facilities that the company does not, in fact, use to provide service. To use Mr. Powers' analogy, OrbitCom may have leased several trucks (called "local switching," "loop" and "tandem switching") from a third party, but it did not use the "tandem switching" vehicle to carry Verizon's traffic. Accordingly, it should not be permitted to charge Verizon for the service it did not provide.

Mr. Powers claims (at 9, lines 18-23) that, as a UNE-P provider, OrbitCom has the right to direct Qwest how to handle and route traffic through its network, but he does not provide any documentation to support these assertions. Regardless of what those commercial agreements might show, OrbitCom has not demonstrated that it actually provides a tandem switching service to Verizon for which it is entitled to be compensated. Mr. Powers' suggestion that OrbitCom has the authority to direct Qwest how to route traffic to and from Verizon's network assumes that Qwest would actually implement different, multiple routing arrangements for similar traffic carried between its switching facilities and an interexchange carrier's network. His suggestion also seems presumptuous, as it implies that OrbitCom might dictate routing arrangements that are less efficient or unnecessarily more costly than the DEOT facilities that Verizon currently has in place.

Q. WHAT HAS ORBITCOM CHARGED VERIZON FOR TANDEM SWITCHING?

A. This is difficult to say with precision because, with minor exceptions,[11] beginning with the April 2008 invoices, OrbitCom has not included a discrete line item for "tandem switching" on its bills. Instead, the sections of its invoices that purport to contain charges for intrastate switched access service contain a single rate element labeled "Local Switching." Separate charges are applied to "originating" and "terminating" traffic, but the rate shown for each is the same, $0.06 per minute. *See* Exhibit LF-4.

This rate is different than the rate for "local switching" shown in the rate tables of VP Telecom Tariff No. 1. Section 15.1.3.4.1 of that tariff contains the rates for "Local Switching Feature Groups B & D." The local switching rates for "originating" and "terminating" traffic are the same, $0.008610 per access minute of use. Thus, the rate for "local switching" shown on OrbitCom's invoices is

[11] OrbitCom has continued to include charges for tandem switching on some of the invoices it periodically issues to Telecom*USA, one of the two Verizon entities that is a party to this proceeding. However, those amounts are small and of minor importance.

almost seven times higher than the rate specified in the tariff. The rates for "Tandem Switching" and "Tandem Transport" are set forth in section 15.1.3.4.3 of the tariff. The charge for "Tandem Switching" is $0.007700 for both originating and terminating traffic. "Tandem Transport" rates include a usage and mileage component. The tariff also includes rates for Carrier Common Line service.

It appears that, for billing purposes, OrbitCom has combined several rate elements together and billed Verizon a single rate for "local switching." OrbitCom's invoices do not break out and identify separately the individual rate elements for which it is demanding payment. Nor do the invoices show that OrbitCom charged the specific rates for individual rate elements that are contained in the tariff. These are additional reasons why it is challenging to audit OrbitCom's invoices. It may be possible to "back in" to the amounts that OrbitCom included for tandem switching on its bills, but OrbitCom has not provided sufficient detail to allow my group to make those calculations.

Q. HOW SHOULD THE COMMISSION RESOLVE THIS ISSUE?

A. OrbitCom is not entitled to bill Verizon for "tandem switching" on the overwhelming majority of traffic at issue. However, OrbitCom's invoices to Verizon have included, and continue to contain, charges for tandem switching, even if they are not clearly stated. Before Verizon became aware that OrbitCom's invoices included charges for a purported tandem-switching service that

OrbitCom did not provide, Verizon paid some of those invoiced charges. Accordingly, the Commission should direct OrbitCom to provide Verizon with refunds or credits for the amounts that Verizon did not owe and that it improperly paid. To calculate these amounts will require OrbitCom to provide more accurate billing statements that align the charges for individual rate elements with those contained in its tariff. The Commission should also direct OrbitCom to cease imposing tandem switching charges prospectively, unless OrbitCom actually provides Verizon with tandem switching service, as defined in VP Telecom Tariff No. 1.

V1. <u>CONCLUSION</u>

Q. IN PARAGRAPH 9 OF ITS AMENDED COMPLAINT, ORBITCOM ALLEGES THAT VERIZON HAS REFUSED TO PAY ORBITCOM'S INVOICES SINCE FEBRUARY 2008. IS THIS CORRECT?

A. No. Between April 9, 2008 and January 2, 2009, Verizon issued OrbitCom seven separate checks for payment of multiple invoices rendered by OrbitCom in South Dakota. OrbitCom cashed each of these checks. The total amount of those payments was $214,271.78. Exhibit LF-29 contains copies of those checks. Even if its complaint were meritorious (which it is not), OrbitCom would not be entitled to recover these amounts that it has already been paid.

Q. WHAT SHOULD THIS COMMISSION DO?

A. As I have explained, OrbitCom has not complied with VP Telecom Tariff No. 1 in several respects. OrbitCom has not properly determined the jurisdiction of switched access traffic. As a result, it has not billed Verizon the correct jurisdictional rates. OrbitCom's failure to use call detail (EMI) records that it receives to determine the correct jurisdiction of traffic, and its use instead of arbitrary, unsupportable PIU factors, are unreasonable practices. Because OrbitCom's intrastate switched access rates are about ten times higher than the rates it bills for interstate switched access service, OrbitCom has billed Verizon excessive amounts on all traffic that should properly have been classified as interstate, but for which OrbitCom imposed intrastate rates. OrbitCom should not be rewarded for failing to comply with its tariff, for failing to render accurate bills and for engaging in unreasonable billing practices.

Through June 2009, Verizon has disputed $749,716.68 in charges invoiced to Verizon Business by OrbitCom. Verizon is willing to pay amounts that are properly billed and owed, but OrbitCom has refused to adjust its bills, apply the correct jurisdictional charges, and issue refunds or credits for amounts that Verizon has overpaid. Because of OrbitCom's improper jurisdictionalization and billing of access traffic, Verizon has demanded a refund for the disputed amounts paid, and has refused to pay $552,452.71 of OrbitCom's invoiced charges. Taking into account the amounts that Verizon has not paid through June 2009, OrbitCom owes Verizon at least $197,263.97 that OrbitCom has improperly billed, collected, and refused to refund or credit.

OrbitCom has not demonstrated it is entitled to any relief through its complaint. Accordingly, the Commission should deny its complaint. Instead, the Commission should order OrbitCom to pay Verizon the amounts described above. In addition, the Commission should order OrbitCom to provide Verizon with refunds or credits for the amounts that Verizon did not owe for a "tandem switching" service that OrbitCom did not provide, and for which Verizon improperly and unwittingly paid.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes.