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VIA EMAIL TO PATTY.VANGERPEN@STATE.SD.US

Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: TC08-135

In the Matter of the Complaint of Orbitcom, Inc. Against MCI Communications Services, Inc. d/b/a Verizon Business Services and Teleconnect Long Distance Services & Systems Company for Unpaid Access Charges

Dear Ms. Van Gerpen:

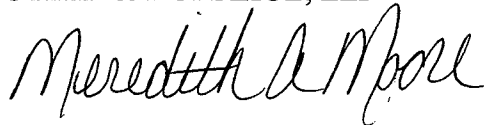
Attached for filing in the above matter, please find OrbitCom's Post-Hearing Memorandum of Law in Support of Its Complaint.

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

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore
For the Firm

MAM/cmc
Attachment
cc: Service List

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

IN THE MATTER OF THE COMPLAINT
OF ORBITCOM, INC. AGAINST MCI
COMMUNICATIONS SERVICES, INC.
D/B/A VERIZON BUSINESS SERVICES
AND TELECONNECT LONG DISTANCE
SERVICES & SYSTEMS COMPANY D/B/A
TELECOM*USA FOR UNPAID ACCESS
CHARGES

TC08-135

**ORBITCOM'S POST-HEARING
MEMORANDUM OF LAW IN SUPPORT
OF ITS COMPLAINT**

This matter came on for hearing before this Commission on October 22, 2009. OrbitCom, Inc. ("OrbitCom") hereby respectfully submits this Memorandum of Law in summary and support of those positions which it advocated at the time of the hearing and which it believes should be appropriately memorialized in the final Order resolving OrbitCom's Complaint against 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").

FACTUAL BACKGROUND

On November 25, 2008, OrbitCom filed with this Commission a Complaint against Verizon for failure to pay validly-billed intrastate access charges. Verizon responded with an Answer and Counterclaim on December 22, 2008. Following numerous discussions between the parties as to what damage amounts were at issue and from which of Verizon's subsidiaries and/or affiliates, the parties agreed to amend their pleadings to add the appropriate parties and identify those accounts on which outstanding amounts are owed. Accordingly, on June 17, OrbitCom filed its Amended Complaint which Verizon answered on July 7, 2009. In the pleadings filed to date, the parties have raised the following issues:

- 1. Issue Statement 1: Whether OrbitCom properly jurisdictionalized the traffic it billed to Verizon.**

OrbitCom's Position:

- **OrbitCom has provided Verizon with switched access services and invoiced it for interstate and intrastate access services.**
- **In the event that the jurisdiction of a call cannot be determined, OrbitCom's tariff requires the application of a percent interstate use factor ("PIU").**
- **OrbitCom's tariff provides that the PIU can be calculated in 1 of 3 ways:**
 - **OrbitCom can use the actual jurisdiction of the traffic or call detail records if such information is available.**
 - **OrbitCom can apply a PIU which it develops.**
 - **OrbitCom can apply a PIU supplied by the customer.**
- **In accordance with the terms of its tariff, OrbitCom used a PIU which it developed and applied to the traffic at issue. This PIU was computed using existing traffic patterns and based on the LPIC or PIC for South Dakota.**
 - **Prior to July, 2007 OrbitCom used a PIU factor of 68% intrastate and 32% interstate.**
 - **From July 2007 through August 2008, OrbitCom used a PIU factor of 95% intrastate and 5% interstate.**
 - **From September 2008 through June 2009, OrbitCom applied a PIU of 68% intrastate and 32% interstate.**
 - **From May 2009 to the present¹, OrbitCom billed and continues to bill jurisdictionally.²**
- **Verizon has failed to pay the amounts associated with each PIU used by OrbitCom.**
- **Verizon offered a PIU for OrbitCom's use in August 2008 several months after it first complained to OrbitCom about the PIU used by OrbitCom; however, Verizon has admitted that its proposed PIU**

¹ OrbitCom began billing Verizon using the actual jurisdiction of calls in May. Because of the time period for which bills are issued, the bill issued by OrbitCom to Verizon in May would have been for April 2009 traffic.

² The July 2009 invoice, which set forth those charges for June traffic, set forth a PIU of 22.43% interstate for originating minutes and 30.18% for terminating calls. For July of 2009 the PIU was 29.21% for originating and 31.86% for terminating. See Exhibit MP2-19. These months were chosen at Verizon's request.

factor was developed using the traffic from a number of other IXCs and LECs. Verizon also demanded that the PIU factor be applied retroactively, which OrbitCom's tariff does not permit.

- To date, Verizon has refused to pay the amounts invoiced to it since August 2008 and has paid sporadically between February 2008 and August, 2008. Verizon continues its refusal to pay past and current amounts due.
- Verizon has failed to file a proper dispute notice as contemplated by OrbitCom's tariff.
- Verizon has admitted it has withheld validly billed intrastate charges for what it has alleged are improperly billed interstate charges.
- Verizon has engaged in improper and illegal self-help.
- To date, Verizon owes OrbitCom \$752,617.55 plus interest as per the tariff at 1.5% per month.

2. **Issue Statement 2: Whether OrbitCom can invoice Verizon for tandem switching.**

OrbitCom's Position:

- OrbitCom is lawfully entitled to bill Verizon the rate it has, which rate includes an element for tandem switching.
- In order to avoid being billed for the tandem switching element, Verizon would need to have direct end office trunks ("DEOTs") in place with OrbitCom.
- A DEOT refers to a specific circuit that carries an IXC's traffic from the local central office switch to the IXC's switch, thereby bypassing the tandem switch.
- Verizon has never ordered any trunks or special circuits directly to OrbitCom.
- Verizon claims that it has DEOTs in place with Qwest.
- A DEOT from Verizon to Qwest is not a DEOT to OrbitCom.
- OrbitCom has a local service platform agreement with Qwest (the "QLSP").
- Under the terms of its QLSP, OrbitCom leases loops and switching facilities which are both tandem and local. The QLSP provides that

Orbit Com shall bill for all switching functions. It further provides that Qwest shall not charge IXCs for the switching functions.

- **Verizon's calls are originated and terminated on OrbitCom's ANIs and OrbitCom is allowed to charge for the switching of these calls.**

ARGUMENT AND ANALYSIS

The issues before this Commission are far simpler than what the testimony filed to date by Verizon makes them out to be. Carrier Access billing is a simple matter of (Rate) X (Minutes). However, Verizon does not recognize this basic equation. When one looks at the totality of the facts and circumstances giving rise to OrbitCom's Complaint, the obvious nature of and purpose behind Verizon's actions are readily apparent. OrbitCom has provided Verizon with access services. Verizon has refused to pay for those services, alleging that OrbitCom has improperly jurisdictionalized the traffic at issue and billed for rate elements which it is not entitled to charge. The pre-filed testimony and exhibits as well as the testimony and evidence introduced at the time of the October 22, 2009 hearing, however, show otherwise, thereby establishing that OrbitCom is entitled to recover those sums, plus applicable interest as provided for in the OrbitCom tariff, owed from Verizon for the relevant time period. Accordingly, OrbitCom requests that this Commission grant a judgment in its favor in the amount of \$854,453.11, and further order the dismissal of Verizon's counterclaims against OrbitCom.

1. Standard of Review.

This Commission's Administrative Rules set forth the burden of proof in a contested case proceeding such as this one. Pursuant to A.R.S.D. 20:10:01:15.01, the complainant, in this case OrbitCom, "has the burden of going forward with presentation of evidence[.]" "[OrbitCom] . . . has the burden of proof as to factual allegations which form the basis of the complaint[.]" Id. Likewise, Verizon as the respondent and counterclaimant has the burden of proof as to any

affirmative defense which it has alleged, as well as those allegations as set forth in its counterclaim, respectively. Id.

2. Whether OrbitCom properly jurisdictionalized the traffic for which it billed Verizon.

The testimony and evidence presented in this case establishes that OrbitCom has a valid intrastate access tariff on file with this Commission. See Hearing Transcript, p. 12, lines 22-25; p. 13, lines 1-4; p. 154, lines 12-18; see also Hearing Exhibit 1, p. 8, lines 5-6. As with any intrastate tariff, OrbitCom's tariff sets forth the applicable rates for intrastate charges, as well as the method by which the jurisdiction of the particular calls at issue is determined. Id. In the instance when the jurisdiction of a call is not readily ascertainable, OrbitCom, pursuant to its tariff, applies a PIU factor to that traffic. Id. OrbitCom's tariff defines the process by which the PIU is set. See Hearing Transcript, p. 14, lines 24-25; p. 15, lines 1-25; p. 16, lines 1-2; see also Hearing Exhibit 1, lines 6-11. Specifically, the PIU may be calculated in one of three ways:

1. OrbitCom can use the actual jurisdiction of the traffic or use call detail records, if such information is available;
2. OrbitCom can apply a PIU which it develops;
3. OrbitCom can apply a PIU supplied by the customer.

Id.; see also Hearing Exhibit 1, p. 6, lines 5-15, Hearing Exhibit 2, MP 2-17, Tariff at Section 3.4.

At the time of the October 22 hearing, Verizon admitted that it was not challenging OrbitCom's tariff, but rather challenging OrbitCom's compliance with its own tariff. See Hearing Transcript, p. 154, lines 22-25; p. 155, lines 1-2. While this distinction has some visceral appeal, when one looks at the whole of the testimony and evidence, Verizon's course of conduct since the inception of this dispute, and Verizon's own evidence, this distinction is one with no difference. In actuality, Verizon is challenging OrbitCom's filed and approved tariff. Such an attack cannot be allowed to stand in the face of the evidence presented by OrbitCom. See Iowa Network Services, Inc. v. Qwest Corp., 385 F.Supp.2d 850, 892 (S.D. Iowa 2005) (holding: "Once a tariff is

effective, it is deemed lawful, indicating no additional approval is needed.”); see also State ex rel. Licata, Inc. v. Pub. Svc. Comm’n of Missouri, 829 S.W.2d 515 (Mo. App. W.D. 1992) (holding that once a tariff is approved, it is not subject to collateral attack in a subsequent proceeding).

As established through the testimony of Michael Powers, both pre-filed and live, OrbitCom billed Verizon in conformance with its tariff for the time period relevant to this dispute, specifically, February 2008 to the present. For the period of July 2007 through July 2008, OrbitCom used a PIU factor which it developed of 5/95%. See Hearing Transcript, p. 18, lines 14-25; p. 19, lines 1-25. For the period of August 2008 through May 2009, OrbitCom used the PIU factor which it developed of 32/68%. Id. at p. 20, lines 18-21. For the period of June 2009 to the present, OrbitCom billed traffic jurisdictionally. Id. at p. 20, lines 22-25, p. 21, lines 1-15. For the entirety of the relevant time period, OrbitCom either utilized a PIU factor which it developed using known traffic patterns or billed pursuant to jurisdiction, both of which are permissible processes according to the terms of the tariff. More importantly, the evidence demonstrates that the PIU factors utilized by OrbitCom are reasonable. In fact, Ms. Freet’s own pre-filed testimony establishes a PIU on terminating traffic of 27% interstate and 73% intrastate for the months of April and May 2008, respectively. Even Verizon’s findings support OrbitCom’s analysis.

As explained by Mr. Powers, the 5/95% PIU was a product of the environment within which OrbitCom operated at the time and continues to operate. See Hearing Transcript, p. 18, lines 14-25; p. 19, lines 1-25; see also Hearing Exhibit 1, p. 7, lines 9-18. By way of explanation, OrbitCom acts as its own long distance carrier or IXC. Id. It not only sells local phone service to small business customers in rural South Dakota, but it also offers packages of long distance services with those same contracts. Id. OrbitCom does so by purchasing services from Qwest which it then re-sells. OrbitCom purchases local services from Qwest through a local services platform

agreement (the “QLSP”). Id.; see also Hearing Exhibit 6. The QLSP requires that OrbitCom select both the PIC and the LPIC³ for the customer. Id. In order to fulfill all customer and contractual obligations, OrbitCom then contracts for wholesale long distance services from various carriers, which it packages and then re-sells to its customers. See Hearing Transcript, p. 18, lines 14-25; p. 19, lines 1-25. This working arrangement results in a situation where OrbitCom often selects one carrier for the PIC and a different carrier for the LPIC in South Dakota. Id. In this instance, the carrier selected as the LPIC will receive almost exclusive intrastate originating traffic from OrbitCom’s end users. Id. Accordingly, a factual and statistical basis for the application of this 5/95 PIU, with one exception as outlined below, exists.

OrbitCom has conceded that it did make an error in application of this PIU. See Hearing Transcript, p. 20, lines 1-17. Specifically, OrbitCom mistakenly applied the 5/95% PIU to originating, terminating and 800 traffic, rather than simply to the originating traffic. Id. at p. 20, lines 1-5. It admitted as such to Verizon immediately when Verizon first addressed the issue and, in fact, offered a credit to Verizon on more than one occasion including the initial conversation in July of 2008 as acknowledged by Ms. Freet in her testimony. See Hearing Transcript, p. 20, lines 11-17; see also Hearing Transcript, p. 158, lines 14-23. However, because the parties were unable to resolve that issue prior to hearing, it remains an open issue although an issue that OrbitCom has been willing to correct all along.⁴

The 32/68% is also supportable in fact. See Hearing Transcript, p. 16, lines 20-25. It was developed by individuals well-versed in the telecommunications industry and well-versed in the nature of their customers. As previously stated, OrbitCom’s customer base is comprised primarily

³ For purposes of this proceeding, the PIC is the interstate long distance carrier and the LPIC is the intrastate long distance carrier.

⁴ As suggested by Mr. Powers in his testimony and in his letter to Verizon’s Counsel Ex. MP3-31, OrbitCom submits that it will revise the previously issued, and as of yet unpaid, bills for the period of July 2007 through July 2008 so that the terminating and 800 traffic reflect the 32% PIU.

of small businesses in rural South Dakota. Id. at p. 17, lines 1-25. On average, these small businesses typically have one to three access lines each and make mostly intrastate calls. Id. The nature of OrbitCom's customer base has not changed since the inception of this action and the actions of Verizon which necessitated it. As illustrated at the time of the hearing, the 32/68% PIU has been borne out in OrbitCom's relationship with other carriers. See Hearing Exhibit F (showing a computation of the PIU for two consecutive months when Global Crossing was OrbitCom's exclusive PIC and LPIC). As such, it is fair to state that OrbitCom's traffic will consist of significantly more intrastate calls than interstate calls. In addition, the validity of OrbitCom's PIU is borne out by the commencement of jurisdictional billing. When OrbitCom began to bill jurisdictionally, it was able to apply the jurisdictional billing analysis to the 5-day sample supplied by OrbitCom to Verizon. The PIU calculated using the sample ranged from a low of 21% interstate to a high of 37% interstate, with an average of 29% interstate. These numbers are entirely consistent with the total Verizon CABs bills from OrbitCom for June and July 2009. See Hearing Exhibit 3, Exhibits MP3-29 and MP3-30.⁵

In June 2009, OrbitCom began billing Verizon jurisdictionally for those calls which contained the necessary information to allow it to do so. OrbitCom has also produced records during this process to verify that it is properly jurisdictionalizing the traffic for this more recent time period. Interestingly, Verizon indicated that it would pay OrbitCom if the traffic were billed on a jurisdictional basis. This, however, has not yet happened.

Throughout the entirety of the time period set forth above, Verizon refused to make payment on OrbitCom's invoices. In doing so, Verizon did not file a dispute as defined by OrbitCom's tariff, but rather engaged in a series of e-mail and phone communications which can only be characterized as evasive. See Hearing Exhibit 1, p. 4, lines 10-23; see also Hearing Transcript, p. 22, lines 19-25;

⁵ The sample records provided to Verizon were for June 24, 25, 27, 28, & 29, 2009. Records for both of Verizon's CICs, 555 and 222, were provided.

p. 23, lines 1-16. When Verizon finally did submit e-mails that can be characterized as a dispute to OrbitCom, they were evolving in nature and every subsequent e-mail or communication between the two companies resulted in the amount which Verizon disputed increasing significantly.⁶ See Hearing Exhibit 2, pp. 9-11. At no time during that process did Verizon produce any evidence that OrbitCom's PIU factors were invalid, unreasonable or in any way arbitrary.

Even more significantly, at the time of the hearing in this matter, Verizon presented no evidence that the PIU factors utilized by OrbitCom were invalid. Rather, Verizon's case hinged upon and continues to hinge upon its interpretation of a 5-day sample of records produced by OrbitCom plus additional calls which both Parties have acknowledged were not contained in the Qwest EMI/DUF records provided to OrbitCom by Qwest. These "Phantom" calls were never billed by OrbitCom to Verizon as they were unknown to OrbitCom. Prior to and leading up to the hearing, Verizon argued that the only way in which it would be able to evaluate OrbitCom's claim was to review EMI or call detail records containing the relevant CIC and ANI. When Verizon presented its analysis of the disclosed records to the Commission, Verizon's analysis contained numerous calls⁷ which were not originally included in the records produced by OrbitCom. These calls lacked the detail, such as the Verizon CIC of 0555 or 0222 and the OCN of OrbitCom, which is critical for carriers to have in order to properly identify, jurisdictionalize and bill traffic. See Hearing Exhibit B, LF 37; see also Hearing Exhibit 3, p. 10, lines 22-23; p. 11, lines 1-7. OrbitCom cannot bill Verizon in connection with calls for which it was not provided information by Qwest. See Hearing Transcript, p. 29, lines 22-25; p. 30, lines 1-3; see also Exhibit 3, p. 13, line 15.

⁶ As demonstrated at the time of the October hearing, one of the dispute spreadsheets which Verizon submitted was several hundred pages long. See Hearing Exhibit 8; see also Hearing Transcript, p. 112, lines 3-16.

⁷ The 5-day sample of calls presented to Verizon by OrbitCom contained call detail for approximately 40,000 calls. See Hearing Transcript, p. 30, lines 23-25, p. 31, line 1. Following Verizon's analysis, there were approximately 20,000 new calls, which were not contained in OrbitCom's records nor were they provided to OrbitCom in the Qwest Daily Usage Files. Id. at p. 167, lines 24-25; p. 168, lines 1-5.

These records were produced despite the fact that Ms. Freet indicated they did not meet the search criteria she had established, that being an OrbitCom ANI and either a CIC of 0555 or 0222. See Hearing Exhibit B, page 8. When asked about why this information was not included within Verizon's records, Ms. Freet's answers were unsatisfactory and seemed to simply convey that "it must be so because Verizon's records say so."

While OrbitCom admittedly bears the burden of proof in this matter, Verizon cannot combat OrbitCom's position with evidence, such as these Phantom calls, which is totally lacking in reliability and cannot and should not be taken seriously. Moreover, Verizon believes it is permissible to use the traffic of other carriers to calculate a PIU that should be used by these parties.⁸ See Hearing Transcript, p. 30, lines 14-25; p. 31, lines 1-7; p. 175, lines 7-24; p. 176, lines

⁸ Ms. Freet admitted the following at the time of the hearing:

- Q. Verizon has used calls from all carriers, not just OrbitCom to develop that PIU; correct?
- A. Yes. In the absence of the call detail records from OrbitCom, we used the traffic going to the end offices that OrbitCom bills Verizon Business for.
- Q. So is it your testimony that you believe it's okay to use calls that OrbitCom has not received from Qwest, OrbitCom does not bill for, or even know about to calculate the PIU?
- A. I believe for dispute purposes, yes, that's appropriate.
- Q. For actual application of the PIU you believe it's okay to use other traffic which OrbitCom can't actually bill for to calculate the PIU?
- A. Well, for the calculation of the PIU dispute yes, I believe it's appropriate.
- Q. Isn't the point of the PIU to be as accurate as possible?
- A. Yes.
- Q. But it's okay to use calls that another carrier has not received in order to develop that?
- MR. DIXON: Objection. It's been asked and answered.
- MR. SMITH: Overruled.
- A. Yes. I believe that the methodology used to calculate the OrbitCom PIU dispute was appropriate and accurate.

See hearing Transcript, p. 175, lines 7-25; p. 176, lines 1-8.

1-8. While Verizon acknowledges that it is important for any PIU to be as accurate as possible, its actions and purported evidentiary submissions belie its words. Id. at p. 175, lines 23-25. Verizon cites to no authority, common practice or industry standard that supports its position that it should be allowed to dilute OrbitCom's PIU by using traffic from other carriers.⁹ To allow Verizon to do so is significant because it ultimately results in a shift in the compensation which OrbitCom is owed. Id. at p. 14, lines 10-23.

Under the facts of this case, OrbitCom respectfully submits that its actions in calculating and applying its PIU factors are consistent with the practices prescribed in its tariffs and that the PIU factors themselves are supportable such to support OrbitCom's claimed damages in this case: \$752,617.55, plus applicable interest of \$101,835.55.

3. Whether OrbitCom properly billed Verizon for tandem switching.

Verizon has also challenged OrbitCom's legal basis to bill it a rate which includes an element for the provision of tandem switching service. As with the initial PIU issue, at first blush this issue seems far more complicated than what it is. However, careful review and consideration of

⁹ As explained by Michael Powers in his Supplemental Pre-Filed Rebuttal Testimony:

Q. Do you have an opinion as to the value and validity of using these records in computing an OrbitCom PIU?

A. Yes, I do. These records simply cannot be used to compute an OrbitCom PIU with Verizon. They are not contained in any billing from OrbitCom to Verizon, and do not include an OCN or any other identifier tying them to OrbitCom. These calls are either fictitious or selected from records belonging to another carrier, such as Qwest. To use these records would not only provide an incorrect PIU, it would be improper as it would be using other companies calls to compute a PIU for your own benefit.

Q. Why can't these records be used to compute an OrbitCom/Verizon PIU?

A. First of all, OrbitCom bills all calls by actual jurisdiction if possible. If jurisdiction is unknown then OrbitCom must use other data to calculate the PIU for unknown traffic. At this point, the easiest method is to use the PIU of the known jurisdiction records and apply it to the unknown. Many of the calls clearly are not OrbitCom customer originated or terminated, but belong to other LECs. Therefore, it would not only be improper but a violation of the tariff and industry standards to use these calls to compute a PIU.

See Hearing Exhibit 3, p. 11, lines 19-23; p. 12, lines 1-10.

the evidence yields the inescapable conclusion that OrbitCom, by law and application of its contract with Qwest, can bill Verizon that portion of the rate associated with tandem switching. As previously established, OrbitCom's tariff defines the rate at which it may bill carriers such as Verizon. Verizon's arguments to the contrary are tantamount to an impermissible attack on OrbitCom's tariff, its contract with Qwest and well-established FCC law and principles. Such an attack cannot stand.

As an initial matter, OrbitCom's contract with Qwest, the QLSP, controls this issue. OrbitCom has effectively leased or purchased a bundle of rights from Qwest which in turn enables it to bill for the services for which it pays. See Hearing Transcript, p. 35, lines 1-6; see also Hearing Exhibit 2, p. 15, lines 2-8. The services leased include the tandem switching function. Id. Specifically, Paragraph 1.1.1 provides in part: "QLSP Services consist of local switching (including the basic switching function, the port, plus the features, functions, and capabilities of the Switch, including all compatible and available vertical features[.]" "Switch" is a defined term under the QLSP and "includes but is not limited to End Office Switches, Tandem Switches, Access Tandem Switches[.]" Even more significantly, the QLSP provides that Qwest will not bill for access on any lines converted to QLSP service by OrbitCom. Id. at p. 39, lines 5-12; see also Exhibit 6, Paragraph 3.7.¹⁰

Under these circumstances, if Verizon seeks to avoid imposition of tandem switching charges it must order a DEOT from OrbitCom, which DEOT would allow it to bypass the tandem switch.¹¹ As evidenced by OrbitCom's tariff, Verizon can purchase a DEOT from OrbitCom. See

¹⁰ Paragraph 3.7 provides, "If an End User Customer is served by CLEC through a QLSP service, Qwest will not charge, assess, or collect Switched Access charges for InterLATA or IntraLATA calls originating or terminating from that End Users phone.

¹¹ At the time of the hearing, Mr. Powers explained why OrbitCom can bill for tandem switching.

Q. In this particular case, is there any reason why OrbitCom cannot then bill Verizon for the tandem switching elements it has?

Hearing Transcript, p. 37, lines 12-16. Verizon, however, has not purchased any DEOTs from OrbitCom. OrbitCom has never received an ASR from Verizon for a DEOT and Verizon admits as much.¹² Id. at p. 37, lines 24-25; p. 38, line 1; p. 176, lines 9-15. Verizon argues that it requested and pays for DEOTs from Qwest. However, a DEOT to Qwest is not the same as a DEOT to OrbitCom. Id. at p. 37, lines 8-10. If Verizon does not have a DEOT to OrbitCom, its calls must go through the tandem and OrbitCom can bill for this element. Id. at p. 38, lines 5-11; p. 102, lines 12-16.

The existence and terms of the QLSP should end the inquiry. If Verizon seeks to establish otherwise, its course of action is to seek a declaratory ruling in the appropriate court. See Spanish Oaks, Inc. v. Hy-Vee, Inc., 265 Neb. 133, 138, 655 N.W.2d 390, 397 (Neb. 2003) (emphasizing: “The general rule is that only a party (actual or alleged) to a contract can challenge its validity.”); see also In re Vic Supply Co., Inc., 227 F.3d 928, 931 (7th Cir. 2000) (holding that “Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.”). It has not done so. Id. at p. 176, lines 19-24.¹³ Moreover,

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- A. No, there's not. Verizon's calls have to get to and from OrbitCom's end users somehow. And if they don't have a DEOT to us, it has to go through the tandem. And I don't think there's any complaints here that they aren't getting their calls originated or terminated.

See Hearing Transcript, at p. 38, lines 2-9.

¹² At the time of the hearing, Ms. Freet testified as follows:

- Q. Ms. Freet, I'd like to turn to the DEOT issue. Does Verizon Business have a DEOT to Orbitcom?
- A. No.
- Q. Has Verizon, to your knowledge, ever submitted an access service request or ASR to OrbitCom for a DEOT?
- A. No. In fact, we've never ordered a DEOT to any UNEP provider.

See Hearing Transcript, p. 176, lines 9-15.

¹³ Ms. Freet admitted during her hearing testimony that Verizon does not challenge the validity of the QLSP:

- Q. Do you dispute the validity of that contract?
- A. No, I do not.
- Q. Have you ever contacted anyone at Qwest during your investigation of this particular matter to inquire about its application?
- A. No, I have not.

See Hearing Transcript, p. 176, lines 19-24.

it has admitted through its witness Leslie Freet that it does not challenge the validity of the contract; nor has it contacted anyone at Qwest to determine the extent of either Qwest's or OrbitCom's rights and obligations thereunder. Id.

Even if this Commission is not persuaded by the existence and terms of the QLSP, FCC precedent establishes that OrbitCom can bill for tandem switching. In the Eighth Report and Order, the FCC stated that “a competitive LEC that provides access to its own end users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate.” See Hearing Exhibit 2, p. 28, lines 7-11; see also Exhibit 2, MP 2-14. Because OrbitCom provides the functional equivalent of all of the access service elements to its own end users, it is allowed to charge all of the elements of the rate for that service. Id.; see also Eighth Report and Order and Fifth Order on Reconsideration, *In the Matter of Access Charge Reform of Access Charges Imposed By Competitive Local Exchange Carriers (“Eighth Report and Order”)*, 19 F.C.C.R. 9108, 9112, ¶9, 19 FCC Rcd 9108, 32 Communications Reg. 533 (stating: “Specifically, we clarify that a competitive LEC is entitled to charge the full benchmark rate if it provides an IXC with access to the competitive LEC's own end-users.”); Eighth Report and Order, 19 F.C.C.R. at 9114, ¶13 (stating: “When a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of those services, even if the call is routed from the competitive LEC to the IXC through an incumbent LEC tandem.”). Verizon has not provided any authority to undermine the FCC's ruling nor has it attempted to combat this precedent in any effective way. As such, OrbitCom submits that this Commission is compelled under either of the above positions to find that OrbitCom is entitled to bill Verizon for the whole of the benchmark rate as outlined in its tariff.

Moreover, the impact of the argument which Verizon poses, whether intended or otherwise, has a profound effect on the compensation scheme at issue in this proceeding. If this Commission accepts Verizon's argument that OrbitCom is not entitled, by both law and contract, to charge for tandem switching, and Verizon's traffic is allowed to travel over the dedicated circuits leased by Verizon from Qwest, OrbitCom's traffic will effectively be rejurisdictionalized. See Hearing Transcript, p. 206, lines 4-18. This rejurisdictionalization will be a direct product of the commingling of Qwest and OrbitCom traffic and the inability because of such commingling to determine the actual jurisdiction of the call, resulting in an increased amount of "unknown traffic". Id. Qwest's PIU for unknown traffic is set at 94% interstate. Application of a 94% interstate PIU to a significant amount of OrbitCom's traffic nullifies any PIU that OrbitCom uses. Id. Consequently, this same rejurisdictionalization has a tremendous impact on what charges can be billed for traffic because traffic that was once intrastate in nature will become de facto interstate. Id. This is a dangerous and inappropriate result.

4. Verizon's resort to self-help is unlawful.

Rather than pay the undisputed portions of OrbitCom's bill, Verizon resorted to unlawful self-help and admitted as much at the time of the hearing. See p. 153, lines 21-25; p. 154, lines 1-5. Verizon did so without filing a complaint with this Commission, even though it acknowledged that it could have done so. Quite simply, Verizon chose to withhold over \$700,000 from OrbitCom in the South Dakota. Id. at p. 176, line 25; p. 177, lines 1-12. There can be no question but that such conduct is prohibited by well-established law. See AT & T Communications of the Midwest v. Iowa Utils. Bd., 687 N.W.2d 554, 562 (Iowa 2004); MGC Comms v. AT&T Corp., 14 FCC Rcd 11647, 11659 (1999) (concluding that withholding access fees under tariff "amounts to impermissible self-help and a violation of" 47 U.S.C. § 201(b)) see also Communique Telecomms., Inc., Declaratory Ruling and Order, 1995 WL 318842, *9, 10 FCC Rcd. 10399,

10405 (1995) (holding that “the law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties” and “Customers who claim that tariff rates are unreasonable may file complaints with the Commission under Section 208 of the Communications Act, but may not automatically withhold payments of legally tariffed charges merely by asserting that the rates are unreasonable.”).

CONCLUSION

Simply stated, Verizon’s resort to impermissible self-help should not be condoned by this Commission. Carriers should not be obligated to continue to provide service to another in the face of a willful and continued refusal to pay. The record evidence in this case clearly establishes that OrbitCom’s bills to Verizon for the period of February 2008 to the present are valid and Verizon should be ordered to pay those unpaid amounts, with applicable interest, immediately. Additionally, for all of the reasons set forth above, Verizon’s claims that it has somehow been overbilled by OrbitCom should be denied.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served electronically on the 4th day of December, 2009, upon the following:

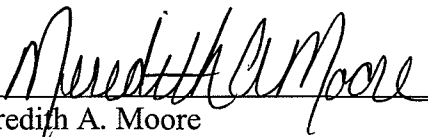
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