

December 21, 2007

Trent B. Harkrader  
Deputy Chief  
Investigations and Hearings Division  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

**RECEIVED - FCC****DEC 27 2007**Federal Communications Commission  
Bureau / OfficeRe: Informal Complaint Against OrbitCom, Inc.

Pursuant to Section 1.716 of the rules of the Federal Communications Commission (the "Commission"), Midcontinent Communications ("Midcontinent") hereby files this informal complaint against OrbitCom, Inc. ("OrbitCom").<sup>1</sup> OrbitCom repeatedly has violated the Communications Act (the "Act") and the Commission's rules in at least four ways. First, OrbitCom apparently has placed a blanket preferred local carrier freeze on all of its telephone service accounts, thereby impeding the normal course of the carrier change process in direct violation of the *Slamming Order* and Section 64.1190 of the Commission's rules.<sup>2</sup> Second, OrbitCom refuses to remove carrier freezes or transfer customers unless those customers pay termination fees, in direct violation of two separate Commission orders. Third, OrbitCom has used customer proprietary network information ("CPNI") provided by Midcontinent as part of the carrier-change and number-porting process to engage in retention and win-back activities in violation of Section 222(b) of the Communications Act and the Commission's rules and orders.<sup>3</sup>

The contact at Midcontinent for purposes of this informal complaint is:

Ms. Mary Lohnes  
Midcontinent Communications  
5001 W 41st Street  
Sioux Falls, SD 57106  
Telephone: (605) 357-5459

Please also provide a copy of any response or correspondence regarding this informal complaint to:

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<sup>1</sup> 47 C.F.R. § 1.716.

<sup>2</sup> Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1581-84 (1998) ("*Slamming Order*"); 47 C.F.R. 64.1190.

<sup>3</sup> 47 U.S.C. § 222(b).

J.G. Harrington  
Dow Lohnes PLLC  
1200 New Hampshire Avenue, N.W.  
Suite 800  
Washington, D.C. 20036-6802  
Telephone: (202) 776-2000  
Fax: (202) 776-2222

## I. Background and Introduction

Midcontinent is the Upper Midwest's leading provider of cable television, local and long distance telephone service, high-speed Internet access, and cable advertising services to communities in North and South Dakota, Northern Nebraska, and Western Minnesota. Midcontinent provides cable service in over 200 communities and serves nearly 250,000 customers. Midcontinent also is a certificated competitive telecommunications provider in North Dakota, South Dakota and Minnesota, and it currently provides competitive telephone service to more than 85,000 residential and business customers in its service area.

OrbitCom is a competitive local exchange carrier with its headquarters in Sioux Falls, South Dakota. OrbitCom's service territory overlaps with Midcontinent's in various areas.

Since March 2007, Midcontinent has experienced a series of events involving transfers of OrbitCom customers to Midcontinent. During that time, Midcontinent has been informed that nearly every business customer that wishes to transfer service is subject to a preferred carrier freeze. When Midcontinent has provided OrbitCom with documentation authorizing removal of freezes, OrbitCom nevertheless has delayed the customer transfer for periods ranging from six days to almost a month, and on one occasion informed Midcontinent that it takes a minimum of a week to lift a freeze because OrbitCom has to contact the customer to verify the removal of the freeze.<sup>4</sup>

Each of these actions unlawfully limits the ability of customers to exercise their right to change carriers. However, OrbitCom now is taking its intransigence one step further by refusing to port customer numbers unless customers already have paid termination fees under their customer agreements. While waiting for customers to pay these fees – which are due only *after* service has been terminated – OrbitCom engages in campaigns to convince customers not to change carriers, in direct violation of the Commission's rules and policies. In fact, OrbitCom continues to deny porting for customers who may owe termination fees despite having been informed that the Commission has held on two distinct occasions that such actions are impermissible.

The specific incidents involving customers who wished to change their service from OrbitCom to Midcontinent include the following:

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<sup>4</sup> Declaration of Mary Lohnes, attached hereto as Exhibit 1, ¶ 5.

- On at least seven occasions, beginning at the end of March, 2007 and continuing through September 19, 2007, OrbitCom delayed lifting carrier freezes for periods ranging from six days to almost a month. In most cases, the delays were two weeks or more.
- In two cases, OrbitCom denied a transfer until the customer's contract expired – a period of more than a month – or until the customer paid a termination fee.
- In three cases, OrbitCom has denied a transfer and continues to refuse to permit the change until the customer pays the termination fee. Two of these customers have been waiting to change carriers for more than three months; another has been waiting for more than two months.<sup>5</sup>

So far as Midcontinent has been able to determine, OrbitCom has claimed that every business customer that wishes to switch its service to Midcontinent is the subject of a preferred carrier freeze that must be lifted. However, when asked by Midcontinent, no customer recalls having requested that a freeze be placed on its account. In addition, an OrbitCom representative specifically confirmed to Midcontinent that it is OrbitCom's policy not to release a carrier freeze, to port a number or to permit a carrier change until all charges, including termination fees, are paid in full.<sup>6</sup>

Moreover, even when Midcontinent provides OrbitCom with a written and signed customer request to lift a freeze, OrbitCom insists that it may contact the customer to confirm the request. These "confirmation" calls actually are winback attempts, and OrbitCom persists in calling customers for this purpose even after the customers have confirmed that they do, indeed, wish to lift the freezes. It is, in fact, a consistent OrbitCom practice to call its customers when it is informed that they plan to switch to Midcontinent. Several soon-to-be-former OrbitCom customers have told Midcontinent that they have been contacted by OrbitCom sales representatives following their decisions to switch carriers. In some cases, the customers have been told, among other things, that OrbitCom will not permit them to change service until their accounts are paid in full. One customer received no fewer than four separate calls from a single OrbitCom sales representative after deciding to move to Midcontinent and before the change had taken place.<sup>7</sup> The content of these calls – specific statements relating to the customer's plan to change carriers – demonstrates that they are made for winback purposes.

OrbitCom's actions violate several distinct Commission requirements. First, they are in violation of the Commission policy prohibiting carriers from denying number portability requests when a customer has a long term contract, a policy first elucidated in 2003 and reaffirmed just weeks ago. Second, OrbitCom is not entitled under the Commission's rules to contact customers to "confirm" that they have decided to lift preferred carrier freezes or that those customers wish to change carriers. Third, OrbitCom's repeated winback efforts during the

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<sup>5</sup> *Id.*, ¶ 3 and attachment.

<sup>6</sup> *Id.*, ¶ 5.

<sup>7</sup> *Id.*, ¶ 8.

period when it is unlawfully denying number portability requests violate the Commission's longstanding rule against contact with soon-to-be-former customers.

Midcontinent has attempted to address these issues privately with OrbitCom. First, on September 26, Midcontinent sent a letter to OrbitCom requesting that it cease these activities.<sup>8</sup> When OrbitCom did not respond, Midcontinent's counsel sent a more detailed letter on October 5 to Brad Van Leur, OrbitCom's president, requesting that OrbitCom cease its practice of denying ports while waiting to be paid termination fees and cease winback efforts during the time between the date that Midcontinent provides notice that the customer is changing carriers and the time the carrier change occurs.<sup>9</sup> OrbitCom did not respond to that letter until October 18, and only then to claim that Mr. Van Leur was out of town. OrbitCom provided a substantive response to Midcontinent only after a second request from Midcontinent.<sup>10</sup> That response, while claiming that the Commission's policies governing termination fees did not apply to "commercial agreements," did not deny that OrbitCom was withholding porting authority or that OrbitCom was engaged in winback activity for customers that had not yet been transferred to Midcontinent.

Following the release of the Commission's *November 2007 Number Portability Order*, Midcontinent offered OrbitCom one more opportunity to correct its number porting practices, and provided OrbitCom with the relevant language from the order on the issue of withholding porting when termination fees are due.<sup>11</sup> OrbitCom's only response – sent two days later – was a statement that its counsel could not open the email attachment containing the order. Midcontinent provided a new copy of the order and a link to the order on the Commission's web page less than half an hour after OrbitCom said it could not open the original attachment, but OrbitCom has yet to respond to that message.

## **II. OrbitCom's Refusal to Port Numbers Until Termination Charges Are Paid Violates Commission Rules.**

The rules governing customers' number portability rights are well established. As the Commission has explained, "consumers who wish to change service providers may request service from a new carrier at any time regardless of their standing with their old provider . . . The Commission's rules require carriers to port a number when they receive a valid request and carriers may not refuse to port while attempting to collect fees or settle an account, or for other

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<sup>8</sup> See Letter of Mary Lohnes, Midcontinent, to Brad Van Leur, President, OrbitCom, Sept. 26, 2007, attached hereto as Exhibit 2.

<sup>9</sup> See Letter of J.G. Harrington, counsel to Midcontinent, to Brad Van Leur, President, OrbitCom, Oct. 5, 2007, attached hereto as Exhibit 3.

<sup>10</sup> See Email message of John Quaintance, counsel to OrbitCom, to J.G. Harrington, Oct. 30, 2007. The correspondence between Mr. Harrington and Mr. Quaintance is contained in Exhibit 4. For the Commission's convenience, the individual messages have been separated, but the entire thread will be provided to the Commission on request.

<sup>11</sup> See Email message of J.G. Harrington to John Quaintance, Nov. 12, 2007.

reasons unrelated to validating a customer's identity.”<sup>12</sup> This requirement has been explained repeatedly over the past four years, most recently in the *November 2007 Number Portability Order*:

. . . [W]e observe that the relevant legal analysis in the *Wireless Number Portability Order* does not depend on any unique factual or legal factors arising in the wireless context. For example, in holding in that order that carriers may not impose non-porting related restrictions on the porting process, the Commission based its decision on the definition of number portability under the Act and Commission rules “to mean that consumers must be able to change carriers while keeping their telephone number as easily as they may change carriers without taking their number with them.” . . . [W]e note that when we clarify that carriers may require information necessary to accomplish a port, that does not encompass information necessary to settle a customer’s account or otherwise enforce any provision of the customer’s contract. Of course, as in the wireless-to-wireless LNP context, carriers are free to notify customers of the consequences of terminating service, but may not hold a customer’s number while attempting to do so.<sup>13</sup>

Indeed, this requirement is so well established that it is described in a Commission consumer fact sheet.<sup>14</sup> In this regard, it is noteworthy that the *November 2007 Number Portability Order* is quite specific in stating that it is not describing a new requirement, but merely restating an existing rule.<sup>15</sup>

OrbitCom’s repeated and ongoing refusal to permit ports until it is paid termination fees that customers do not yet owe is a direct violation of this rule. OrbitCom’s excuse – that it did not believe the rule applied to commercial contracts – had no basis in any of the Commission’s prior statements. Moreover, even if OrbitCom held that mistaken belief before the *November 2007 Number Portability Order*, that order plainly contradicts OrbitCom’s claim, and still

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<sup>12</sup> Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, to John T. Scott, President and Deputy General Counsel, Verizon Wireless, 18 FCC Rcd 13110 (2003) (footnote omitted) (citing 47 C.F.R. § 52.23). See also Telephone Number Portability -- Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 (2003) (“*Wireless Portability Clarification Order*”).

<sup>13</sup> Telephone Number Requirements for IP-Enabled Services Providers, *Report and Order and Declaratory Ruling*, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200, rel. Nov. 8, 2007 (“*November 2007 Number Portability Order*”), ¶ 43.

<sup>14</sup> See Keeping Your Telephone Number When You Change Your Service Provider, *FCC Consumer Fact Sheet*, available at <http://www.fcc.gov/cgb/consumerfacts/numbport.html> (“Once you request service from the new company, however, your old company **may not refuse to port your number, even if you owe money** for an outstanding balance or termination fee”) (emphasis supplied).

<sup>15</sup> *November 2007 Number Portability Order*, ¶ 43.

OrbitCom refuses to release customers' numbers for porting. Consequently, OrbitCom is in violation of the Commission's porting rules and should be required to comply.<sup>16</sup>

### **III. OrbitCom Is Violating the Rules Governing Administration of Preferred Carrier Freezes.**

The Commission's rules permit carriers to allow customers to place preferred carrier freezes on their accounts to protect against unauthorized service changes.<sup>17</sup> The Commission has recognized, however, that service providers can abuse carrier freezes by failing to notify the customers of the effect of a freeze or by making the procedures for lifting the freeze so burdensome that they make changing service providers unreasonably difficult for customers.<sup>18</sup> Accordingly, the Commission fashioned rules designed to ensure that "LECs do not use freezes as a tool to gain an unreasonable competitive advantage."<sup>19</sup>

To ensure that preferred carrier freezes do not create unreasonable barriers to customer service changes, the Commission created detailed guidelines governing their use.<sup>20</sup> Under Section 64.1190 of the Commission's rules, carriers may permit customers to institute carrier freezes only if the carrier (1) provides particularized notice to each customer regarding the effect of the freeze and the carrier's procedures for placing and lifting freezes; and (2) obtains affirmative consent from each individual customer before placing a carrier freeze on an account.<sup>21</sup> In other words, the Commission does not permit carriers to implement a blanket carrier freeze for all customers, and it does not permit carriers to impose freezes without a specific customer request.<sup>22</sup>

The Commission also has adopted specific rules governing the process for lifting freezes. Under the rules, a carrier "must accept a subscriber's written or electronically signed

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<sup>16</sup> Midcontinent notes that OrbitCom has not claimed that it lacked any required information for porting and, thus, the only apparent basis for the denial of porting is the termination fee claim.

<sup>17</sup> As defined by the Commission, "[a] preferred carrier freeze . . . prevents a change in a subscriber's preferred carrier selection unless the subscriber gives the carrier from whom the freeze was requested his or her express written or oral consent." *Slamming Order*, 14 FCC Rcd at 1575 n.348.

<sup>18</sup> *Id.* at 1577.

<sup>19</sup> *Id.* at 1580.

<sup>20</sup> *Id.* at 1575-88.

<sup>21</sup> 47 C.F.R. § 64.1190. *See also Slamming Order*, 14 FCC Rcd at 1581-84.

<sup>22</sup> The Commission also explicitly held that its limitations on the use of preferred carrier freezes apply equally to incumbent LECs and competitive LECs like OrbitCom. *Slamming Order*, 14 FCC Rcd at 1580.

authorization stating his or her intent to lift a preferred carrier freeze.”<sup>23</sup> Thus, even if a customer has authorized a freeze, a carrier cannot refuse to lift that freeze once it has been properly supplied with a written customer release. The rules also provide that the only circumstance in which the carrier can verify the customer’s intent to remove a freeze is when the customer removes the freeze orally.<sup>24</sup>

In this case, the evidence strongly supports the conclusion that OrbitCom has violated the rules by imposing a blanket freeze on its customers’ local service choices. As noted above, every single commercial customer that Midcontinent has sought to switch from OrbitCom supposedly has requested a freeze, something that is unlikely in the extreme considering the number of customers involved. Moreover, several of the customers specifically deny that they ever asked for freezes and, as the Commission has observed, “subscribers should know whether or not there is a preferred carrier freeze in place on their carrier selection” when the carrier has followed the proper procedures.<sup>25</sup>

Even if OrbitCom did not impose a blanket freeze, however, there is no basis for any delay in processing a carrier change once a written request to lift a freeze has been received. OrbitCom’s practice of contacting customers to “verify” their intent to lift a freeze – the stated reason for the delays – is contrary to the requirements of the rules, which state that a carrier “must accept” a written authorization from the subscriber, leaving nothing to verify.<sup>26</sup> Indeed, even if the carrier freeze rules were not this specific, OrbitCom would be violating Section 64.1120 by attempting to verify a carrier change when, as here, it is the executing carrier.

Finally, OrbitCom’s supposed desire to verify written freeze withdrawals cannot explain delays of up to a month, and typically of two weeks or more, in porting customers after the customer has signed up with Midcontinent. The only rational explanation is that OrbitCom is hoping that enough delay will give it time to convince the customer not to switch, or simply for the customer to get tired of waiting. These delays are a plain violation of OrbitCom’s obligation, as an executing carrier, to provide “prompt execution, without any unreasonable delay, of changes that have been verified by a submitting carrier.”<sup>27</sup>

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<sup>23</sup> See 47 C.F.R. § 64.1190(e)(1). In addition, OrbitCom is required to accept oral authorization for lifting a carrier freeze and must allow Midcontinent to conduct a three-way conference call in which the customer verbally authorizes a freeze lift. 47 C.F.R. § 64.1190(e)(2).

<sup>24</sup> 47 C.F.R. § 64.1190(e)(2). This is the only exception in the rules to the general principle that an executing carrier may not verify a customer’s carrier change request. 47 C.F.R. 64.1120(a)(2). There is no exception that would permit verification if the request to lift the freeze is in writing, as was the case for all of the requests submitted by Midcontinent.

<sup>25</sup> *Slamming Order*, 14 FCC Rcd 1587-8.

<sup>26</sup> In any event, OrbitCom is not calling its customers to verify anything. Rather, the calls are straightforward attempts to win the customers back.

<sup>27</sup> 47 C.F.R. § 64.1120(a)(2).

**IV. OrbitCom Is Violating Section 222(b) of the Act by Using Change Orders to Conduct Win-Back Activities.**

Under Section 222(b) of the Communications Act, “a telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information *only for such purpose, and shall not use such information for its own marketing efforts.*”<sup>28</sup> In its 1998 *Slamming Order*, the Commission held that this provision directly prohibits carriers from using information obtained through the carrier change process for any purpose other than making the change:

The information contained in a submitting carrier’s change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. Therefore, pursuant to section 222(b), the executing carrier may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber’s carrier, and may not attempt to verify that subscriber’s decision to change carriers.<sup>29</sup>

In its 1999 *CPNI Reconsideration Order*, the Commission clarified that carriers may not engage in any win-back activities, or indeed make any contact at all with their soon-to-be-former customers based on the knowledge, obtained through another carrier’s change order, that customers would be switching carriers:

We conclude that section 222 does not allow carriers to use CPNI to retain soon to be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service. We conclude that competition is harmed if *any* carrier uses carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns, and consequently prohibit such actions accordingly.

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The Commission previously determined that carrier change information is carrier proprietary information under section 222(b). In the *Slamming Order*, the Commission stated that pursuant to section 222(b), the carrier executing a change “is prohibited from using such information to attempt to change the subscriber's decision to switch to another carrier.” Thus, where a carrier exploits advance notice of a customer change by virtue of its status as the underlying network-facilities or service provider to market to that customer, it does so in violation of section 222(b).<sup>30</sup>

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<sup>28</sup> 47 U.S.C. § 222(b) (emphasis added).

<sup>29</sup> *Slamming Order*, 14 FCC Rcd at 1568 (footnote omitted).

<sup>30</sup> Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information, *Order on Reconsideration and Petitions for Forbearance*, 14 FCC Rcd

Thus, the Commission's interpretation of Section 222(b) of the Act makes plain that all win-back marketing activity triggered by notification of a carrier change that takes place before the change is performed is prohibited.<sup>31</sup>

OrbitCom's contacts with soon-to-be-former customers detailed in Section I plainly violate Section 222(b) as interpreted by the Commission. Since none of these customers contacted OrbitCom, the only conceivable way that its marketing agents could have known that the customers had ordered Midcontinent service was through the carrier change process. This fact is confirmed by the content of the calls, which focused on customer retention.<sup>32</sup> Indeed, OrbitCom's repeated efforts to contact soon-to-be-former customers, including four separate calls to a single customer, come close to harassment.<sup>33</sup>

OrbitCom's violations of Section 222(b) are ongoing and widespread. It appears that OrbitCom has determined that it will take any steps necessary to retain customers that it has lost, and Midcontinent's experience suggests that it may be contacting nearly every business customer that it loses to another carrier. OrbitCom therefore appears to be violating Section 222(b) and the Commission's orders both flagrantly and with great frequency. The Commission should require OrbitCom to cease these activities forthwith.

## V. **Prayer for Relief**

As shown herein, OrbitCom's noncompliance with the Commission's rules and Section 222(b) of the Act is manifest, willful and continuing. OrbitCom has ignored repeated requests from Midcontinent that it cease this behavior, and customers who wish to switch to Midcontinent still find themselves waiting for the cutover to occur, in some cases, more than three months after choosing Midcontinent's service. Midcontinent therefore requests that the Commission take

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14409, 14449-50 (1998) ("*CPNI Reconsideration Order*") (footnotes omitted) (emphasis in original).

<sup>31</sup> This includes any attempts to interfere with carrier change or porting requests by customers that take service under long-term contracts. *Wireless Portability Clarification Order*, 18 FCC Rcd at 20973-76.

<sup>32</sup> As noted above, OrbitCom's claim that it calls customers to confirm that they intended to lift carrier freezes does not make these calls permissible, since there is no rule that permits an executing carrier to verify a written directive to lift a freeze.

<sup>33</sup> While the *November 2007 Number Portability Order* contains language suggesting that a carrier may contact a customer to inform that customer that it will be subject to termination liability, OrbitCom's actions stray far from that limited authorization. It is one thing to tell a customer to say that termination liability will apply; it is another to tell the customer that OrbitCom, in violation of Commission rules, will not permit a carrier change until that liability is paid, and it is something else altogether to call a customer repeatedly while holding that customer's telephone number hostage.

action to require OrbitCom to conform its behavior to the Commission's rules and to Section 222(b) as interpreted by the Commission.

Specifically, Midcontinent requests that the Commission:

- Open an investigation into OrbitCom's service-change and customer retention policies to determine the extent of its violations of the number portability, preferred carrier freeze and CPNI rules with respect to Midcontinent and other carriers;
- Order OrbitCom immediately to cease delaying number porting and carrier changes based on the terms of customer contracts;
- Order OrbitCom immediately to lift any preferred carrier freezes that were imposed without specific requests from its customers and to lift freezes immediately upon receipt of a written or electronic customer request, without further confirmation or verification;
- Order OrbitCom to cease using CPNI supplied by Midcontinent to engage in unlawful win-back marketing activities;
- Assess appropriate sanctions against OrbitCom for its willful and repeated misuse of CPNI received from Midcontinent; and
- Order such other relief as the Commission deems appropriate.

Please contact the undersigned if you have any questions regarding this informal complaint.

Respectfully submitted,



J.G. Harrington  
Jason E. Rademacher

Counsel to Midcontinent Communications

cc (via Express Mail): John C. Quaintance  
Counsel to OrbitCom, Inc.

**EXHIBIT 1**

**Declaration of Mary Lohnes**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

Informal Complaint of Midcontinent            )  
Communications Against                        )  
OrbitCom, Inc.                                    )                        File No. \_\_\_\_\_

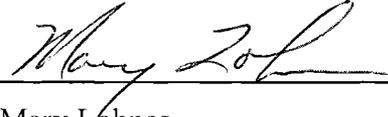
**DECLARATION OF MARY LOHNES**

1. My name is Mary Lohnes and I am Manager, Regulatory Affairs for Midcontinent Communications.
2. I have read the foregoing "Informal Complaint of Midcontinent Communications Against OrbitCom, Inc." (the "Informal Complaint") and I am familiar with the contents thereof.
3. I have attached to this declaration a list of business customers that have attempted to switch their telephone service to Midcontinent. OrbitCom informed Midcontinent that there were preferred carrier freezes on each of the accounts for these customers. The list shows the customer name, the date Midcontinent transmitted the customer's request to lift the freeze and the status of the carrier change as of December 20, 2007.
4. All of the requests to lift freezes from the customers on the list attached to this declaration were made in writing and signed by the customer's authorized representative.
5. On May 23, in connection with the freeze involving M&R Signs, an OrbitCom representative named Jess informed Midcontinent that OrbitCom typically would not release a freeze for at least seven days after it received the customer request to lift the freeze so that it could verify that the customer intended to do so.
6. Midcontinent has queried several of the prospective customers about whether they, in fact, had requested preferred carrier freezes. None of those customers recalled having requested a freeze.
7. On October 23, an OrbitCom representative named Jess informed Midcontinent that it was OrbitCom's policy not to release a carrier freeze, to port a number or to permit a carrier change until all of that customer's charges, including termination fees, are paid in full.
8. Midcontinent has been informed by several customers that OrbitCom sales representatives have called them after they ordered service from Midcontinent. According to these customers, OrbitCom's representatives have informed them that they will not be able to switch carriers until they pay their accounts in full (including termination fees), and have attempted to convince them not to change carriers. One customer, the Prairie Inn Motel, reported being called at least four times by OrbitCom sales representative Don Hartzie.
9. On September 25, 2007, I sent a letter to OrbitCom concerning its behavior when customers wished to switch to Midcontinent. A true and correct copy of that letter is attached to the Informal Complaint as Exhibit 2.

Declaration of May Lohnes

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10. I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in cursive script, appearing to read "Mary Lohnes", is written above a solid horizontal line.

Mary Lohnes  
Manager, Regulatory Affairs  
Midcontinent Communications  
5001 W 41<sup>st</sup> Street  
Sioux Falls, South Dakota 57106

December 21, 2007

### OrbitCom Freeze Status List

Customer	Date of Request to Lift Freeze	Status/Notes
Aventure Staffing	3/26/2007	Freeze removed April 9.
Clinic Carr Chiropractic	3/22/2007	Freeze removed April 2.
Don's Auto	4/25/2007	Freeze removed May 10.
M&R Signs	5/15/2007	OrbitCom advised Midcontinent that it takes seven days to lift freeze so they can contact customer to verify. Freeze removed May 23.
Fair City Foods	7/16/2007	Freeze removed August 15
RSC Financial	9/5/2007	Freeze removed September 27
Walkers N Daughters	9/5/2007	Customer contract with OrbitCom expired on October 12, so Midcontinent held under until that time at customer's request.
Limoges Construction	8/22/2007	Freeze removed September 19.
Prairie Inn Motel	9/10/2007	On September 14, the customer received a letter requesting \$2,257.65 for termination fees. Orbitcom informed the customer that it will not remove freeze without payment of term fees. According to the customer, Orbitcom has contacted them multiple times since our order was placed to discuss account. Freeze still in place as of December 20.
Pros Sports Bar	9/21/2007	Freeze still in place as of December 20.
Dvorak Motors	9/20/2007	OrbitCom sales representative made a visit to the customer on September 21. Freeze removed September 26.
Travel Northland	9/17/2007	On September 27, the customer was contacted by Orbitcom and told they would not remove the freeze until she paid her termination charge. On October 11, the termination fee was paid by the customer. The freeze was removed on October 12.
Harvey Rushmore Hotel	10/5/2007	Freeze was still in place as of December 20. Midcontinent contacted Orbitcom on October 23 to find out why freeze had not been removed. At OrbitCom, Jen said a termination letter had been sent to the customer and they were awaiting payment.

**EXHIBIT 2**

**Letter from Mary Lohnes to Brad Van Leur  
September 26, 2007**

September 26, 2007

Brad VanLeur  
OrbitCom  
1701 N Louise Ave.  
Sioux Falls, SD 57107

RE: Local Service Line Freeze

Dear Brad,

It has been brought to my attention that Midcontinent is once again experiencing unreasonable delays in getting line freezes lifted when porting accounts. Midcontinent has obtained authorization from customers on a Letter of Authorization for Removal of Carrier Freeze form which we have submitted to OrbitCom.

Let me share a few examples with you to look at:

RSC Financial - Form faxed on 9/5/07 and has not been removed...  
Limoges Construction - Form faxed on 8/22/07 and again 9/18/07. Freeze removed 9/19  
Prairie Inn Motel - Form faxed 9/10, freeze still not lifted  
Fair City Foods - Form faxed 7/16, removed 8/15  
SF Builder Exchange - LOA for Freeze removal faxed 5/2, removed 5/15

Brad, under the Telecommunication Rules (Section 64.1190) a freeze can only be placed on an account with the customer's authorization; much in the same manner a customer authorizes carrier of choice for local or long distance service. Procedures for lifting a freeze upon receipt include written authorization, electronic, and verbally including a 3-way call with the carriers involved.

If you, or a representative from your company, would like to discuss this procedure please feel free to contact me.

We appreciate your prompt attention to this matter.

Sincerely,

Mary Lohnes  
Regulatory Affairs Manager  
Midcontinent Communications  
3901 North Louise Avenue  
Sioux Falls, SD 57107  
(605) 357-5459  
mary\_lohnes@mimi.net

**EXHIBIT 3**

**Letter of J.G. Harrington to Brad Van Leur  
October 5, 2007**

October 5, 2007

**VIA UPS OVERNIGHT**

Brad VanLeur  
President  
OrbitCom, Inc.  
1701 N Louise Ave.  
Sioux Falls, SD 57107

Re: Improper Contacts With Soon-To-Be-Former Customers Subscribing To  
Midcontinent Service

Dear Mr. VanLeur:

I am writing on behalf of our client Midcontinent Communications ("Midcontinent"), a certificated competitive local exchange carrier that competes with OrbitCom in North and South Dakota. In recent months, it has come to Midcontinent's attention that OrbitCom has been systematically interfering with customers' efforts to switch their service from OrbitCom to Midcontinent, in clear violation of the rules of the Federal Communications Commission (the "FCC"). OrbitCom's improper practices have thus far included: (1) imposing preferred carrier freezes on customer accounts without properly informing them; (2) refusing to remove those freezes despite specific customer authorization; (3) refusing to change customers' service and port customers' numbers until customers pay outstanding balances; and (4) contacting customers after receiving service change orders to engage in prohibited win-back activities and other customer harassment. These activities violate specific and long-standing FCC rules governing the carrier change process. Consequently, Midcontinent demands that OrbitCom immediately cease each of these activities.

First, OrbitCom is violating the FCC's rules by failing to provide customers with adequate notice before imposing a preferred carrier freeze on their accounts. Midcontinent has repeatedly dealt with prospective customers who are unaware that a carrier freeze has been placed on their accounts. Under the FCC's rules, a carrier freeze may be placed on a customer account only with a customer's specific authorization. 47 C.F.R. § 64.1190(b)(2). Placing a blanket freeze on customer accounts by, for example, including a standard term and condition that imposes such a freeze, violates the FCC's rules and your customers' rights by unlawfully impeding the carrier change process.

To ensure that carrier freezes do not interfere with customers choosing Midcontinent service, earlier this year Midcontinent introduced a streamlined process that includes supplying OrbitCom with a signed customer authorization for the removal of any existing carrier freeze at

Mr. Brad VanLeaur  
October 5, 2007  
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the time the customer orders Midcontinent service. Customers switching service from OrbitCom, however, continue to face delays of more than a month before OrbitCom lifts the account freeze and processing service change orders. Under the FCC's rules, OrbitCom "must accept a subscriber's written or electronically signed authorization stating his or her intent to lift a preferred carrier freeze." See 47 C.F.R. § 64.1190(e)(1).<sup>1</sup> Thus, even if a customer has authorized a freeze, OrbitCom cannot refuse to lift that freeze once it has been properly supplied with the written authorization that Midcontinent routinely provides. OrbitCom's chronic failure to timely process service changes despite specific authorization for carrier freeze lifts clearly violates the FCC's rules.

Moreover, Midcontinent recently has been confronted with OrbitCom's refusal to process service change orders for customers until they pay contractual termination fees. In an ongoing example of this conduct, OrbitCom continues to refuse to process the service change order of Travel Northland in Bismarck, North Dakota until that customer pays an early termination fee. In addition, an OrbitCom representative recently informed Midcontinent that OrbitCom policy is to refuse to release a carrier freeze, port a number, or change service until an account is paid in full, including termination fees. OrbitCom's practices and its stated policy are directly contrary to the FCC's rules.<sup>2</sup> As the FCC has explained, "consumers who wish to change service providers may request service from a new carrier at any time regardless of their standing with their old provider . . . The Commission's rules require carriers to port a number when they receive a valid request and carriers may not refuse to port while attempting to collect fees or settle an account, or for other reasons unrelated to validating a customer's identity."<sup>3</sup> Given the clarity of the FCC's position on this issue, there is no justification for denying or delaying port requests based on amounts owned by its customers. Indeed, it is particularly egregious to deny a port based on non-payment of termination fees that will not accrue until *after* the port is completed.

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<sup>1</sup> In addition, OrbitCom is required to accept oral authorization for lifting a carrier freeze and must allow Midcontinent to conduct a three-way conference call in which the customer verbally authorizes a freeze lift. 47 C.F.R. § 64.1190(e)(2).

<sup>2</sup> See *Keeping Your Telephone Number When You Change Your Service Provider*, FCC Consumer Fact Sheet, available at <http://www.fcc.gov/cgb/consumerfacts/numbport.html> ("Once you request service from the new company, however, your old company **may not refuse to port your number, even if you owe money** for an outstanding balance or termination fee") (emphasis supplied). See also Telephone Number Portability -- Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 (2003).

<sup>3</sup> Letter from John B. Muleta, Chief, Wireless Telecommunications Bureau, to John T. Scott, President and Deputy General Counsel, Verizon Wireless, 18 FCC Rcd 13110 (2003) (footnote omitted) (citing 47 C.F.R. § 52.23).

Mr. Brad VanLeaur

October 5, 2007

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Midcontinent also has been informed that on several occasions, OrbitCom sales representatives have contacted soon-to-be-former customers for various purposes, before switching their service, including to inform them that their service will not be changed until their accounts are paid in full. Indeed, one of OrbitCom's soon-to-be former customers recently described to Midcontinent at least four separate calls received from OrbitCom sales representative Don Hartzie. These contacts with soon-to-be-former customers also violate explicit FCC prohibitions. In its 1998 *Slamming Order*, the FCC held that the statute directly prohibits carriers from using information obtained through the carrier change process for any purpose other than making the change:

The information contained in a submitting carrier's change request is proprietary information because it must submit that information to the executing carrier in order to obtain provisioning of service for a new subscriber. Therefore, pursuant to section 222(b), the executing carrier may only use such information to provide service to the submitting carrier, *i.e.*, changing the subscriber's carrier, and may not attempt to verify that subscriber's decision to change carriers.<sup>4</sup>

As the FCC recognized, a carrier-change order submitted by Midcontinent consists entirely of Midcontinent's proprietary carrier information within the meaning of Section 222 of the Act.

When OrbitCom's sales representatives call soon-to-be-former customers who have signed up with Midcontinent for any reason (other than to verify the customer's identity) prior to executing the carrier change, they violate Section 222(b) of the Act's prohibition on the misuse of Midcontinent's carrier proprietary information. Prior to executing a carrier change order submitted by Midcontinent, OrbitCom may not, without Midcontinent's consent, contact soon-to-be former customers to explain the contractual consequences of the carrier change.<sup>5</sup> Moreover, OrbitCom may not use the notice provided by Midcontinent carrier change orders as the impetus for other inquiries to soon-to-be-former customers, including, but not limited to, winback marketing activities.<sup>6</sup> Indeed, the FCC's rules and orders are so strict on this point that carriers may not even call their soon-to-be-former customers to verify their intent to change

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<sup>4</sup> Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1508, 1568 (1998) (footnote omitted) ("*Slamming Order*").

<sup>5</sup> In the wireless context, the FCC has clarified that carriers may agree amongst themselves to permit one another to contact soon-to-be-former customers for this purpose. Telephone Number Portability -- Carrier Requests for Clarification of Wireless-Wireless Porting Issues, *Memorandum Opinion and Order*, 18 FCC Rcd 20971, 20976 (2003). The FCC has not explicitly created such an exception in the wireline context, but even presuming such an exception exists, OrbitCom and Midcontinent have entered into no such agreement.

<sup>6</sup> *Slamming Order*, 14 FCC Rcd at 1567-68.

Mr. Brad VanLeaur  
October 5, 2007  
Page 4

carriers.<sup>7</sup> Under the prevailing rules therefore, no basis exists for OrbitCom to continue contacting soon-to-be-former customers prior to processing carrier-change orders submitted by Midcontinent.

For these reasons, OrbitCom's conduct described above violates the FCC's rules and policies, and therefore Midcontinent requires that OrbitCom cease these and any similar activities. At a minimum, OrbitCom should: (1) cease placing carrier freezes on customer accounts without specific customer authorization; (2) commence timely processing of customer requests for removal of carrier freezes; (3) cease delaying processing carrier change and number porting requests due to unpaid charges and/or early termination fees; and (4) cease contacting soon-to-be-former customers following receipt of Midcontinent-originated carrier-change orders or number porting requests.

Please confirm to me within ten (10) business days that OrbitCom no longer will engage in these proscribed activities. If OrbitCom's conduct does not change, Midcontinent will seek appropriate regulatory relief.

Please inform me if any questions should arise in connection with this letter.

Sincerely,



J.G. Harrington

Counsel to Midcontinent Communications

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<sup>7</sup> 47 C.F.R. § 64.1120(a)(2); *Slamming Order*, 14 FCC Rcd at 1567-68.

**EXHIBIT 4**

**Email Correspondence**

-----Original Message-----

From: John C. Quaintance [<mailto:q@qlopc.com>]  
Sent: Wednesday, October 17, 2007 6:36 PM  
To: Harrington, J.G.  
Subject: Midcontinent Communications/OrbitCom,Inc.

Ms. or Mr. Harrington: OrbitCom, Inc. has forwarded to me your letter of October 5, 2007. Mr. Van Leur is currently out of his office. We will likely meet next week to discuss your demands.

John C. Quaintance  
Quaintance Law Office P.C.  
P.O. Box 2208  
Sioux Falls, SD 57101-2208

Phone (605) 339-1000  
Fax (605) 336-1000

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**From:** Harrington, J.G.  
**Sent:** Thursday, October 18, 2007 10:49 AM  
**To:** 'John C. Quaintance'  
**Subject:** RE: Midcontinent Communications/OrbitCom,Inc.

This message from the law firm of Dow Lohnes PLLC, may contain confidential or privileged information. If you received this transmission in error, please call us immediately at (202)776-2000 or contact us by E-mail at [admin@dowlohn.com](mailto:admin@dowlohn.com). Disclosure or use of any part of this message by persons other than the intended recipient is prohibited.

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Mr. Quaintance -

Thank you for your message.

While I understand that your client is not currently in his office, I hope that he will attend to this issue promptly upon his return. I am told by my client that his company has continued to refuse to lift preferred carrier freezes since the time my letter was sent, despite receiving appropriate documentation that that freezes are to be lifted. As a consequence, this remains a matter of significant concern to my client.

***J.G. Harrington***

*Counsel to Midcontinent Communications*

*Dow Lohnes PLLC  
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Washington, DC 20036-6802  
T 202-776-2818  
F 202-776-2222  
[jharrington@dowlohn.com](mailto:jharrington@dowlohn.com)*

---

**From:** Harrington, J.G.  
**Sent:** Thursday, October 18, 2007 10:49 AM  
**To:** 'John C. Quaintance'  
**Subject:** RE: Midcontinent Communications/OrbitCom,Iinc.

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Mr. Quaintance -

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**J.G. Harrington**

*Counsel to Midcontinent Communications*

*Dow Lohnes PLLC  
1200 New Hampshire Avenue, NW  
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Washington, DC 20036-6802  
T 202-776-2818  
F 202-776-2222  
[jharrington@dowlohn.com](mailto:jharrington@dowlohn.com)*

---

**From:** John C. Quaintance [mailto:q@qlopc.com]  
**Sent:** Tuesday, October 30, 2007 2:36 PM  
**To:** Harrington, J.G.  
**Cc:** 'Brad VanLeur'  
**Subject:** RE: Midcontinent Communications/OrbitCom,Iinc.

Mr. or Ms. Harrington: OrbitCom's response is that it is using commercial agreements with its customers and that the FCC rules you have cited are more to govern relationships with "casual subscribers". OrbitCom does not view reminding the customer that there is a written contract as "winback activity". In fact, OrbitCom feels an obligation to do so before imposing the contractual liquidated damages. OrbitCom believes that these commercial agreements protect the customer and take precedence over rules applicable to "casual subscribers". OrbitCom understands that the FCC has been reluctant to arbitrate such matters and ordinarily encourages companies to enter into commercial agreements. OrbitCom recognizes your right to involve regulatory authorities, but reminds Midcontinent, in connection with its dealings with parties to OrbitCom commercial agreements, that South Dakota and its neighbors recognize the cause of action of tortious interference with a business relationship. John Quaintance

John C. Quaintance  
Quaintance Law Office P.C.  
P.O. Box 2208  
Sioux Falls, SD 57101-2208

Phone (605) 339-1000  
Fax (605) 336-1000

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**From:** Harrington, J.G. [mailto:JHarrington@dowlohnes.com]  
**Sent:** Monday, November 12, 2007 10:37 AM  
**To:** John C. Quaintance  
**Cc:** Brad VanLeur  
**Subject:** RE: Midcontinent Communications/OrbitCom,Iinc.

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Mr. Quaintance -

I am writing to inform you that the FCC, in the number portability order it released on Thursday, has once again addressed the question of whether a carrier can delay a port while it seeks to enforce any contractual rights it may have as to a porting customer. A copy of the order is attached. I am providing it to you so that your client may have an opportunity to evaluate the impact of this order on its theory that it is not subject to the FCC's requirement that number portability not be hindered or delayed by a carrier's claim of contractual rights against a soon-to-be-former customer.

The relevant portion of the order unequivocally states that such delays are impermissible, and that this is not a new requirement, but one that has been in place since at least 2003. It reads as follows:

". . . [W]e observe that the relevant legal analysis in the *Wireless Number Portability Order* does not depend on any unique factual or legal factors arising in the wireless context. For example, in holding in that order that carriers may not impose non-porting related restrictions on the porting process, the Commission based its decision on the definition of number portability under the Act and Commission rules 'to mean that consumers must be able to change carriers while keeping their telephone number as easily as they may change carriers without taking their number with them.' . . . [W]e note that when we clarify that carriers may require information necessary to accomplish a port, that does not encompass information necessary to settle a customer's account or otherwise enforce any provision of the customer's contract. Of course, as in the wireless-to-wireless LNP context, carriers are free to notify customers of the consequences of terminating service, but may not hold a customer's number while attempting to do so."

Telephone Number Requirements for IP-Enabled Services Providers, *Report and Order, Declaratory Ruling, Order on Remand and Further Notice of Proposed Rulemaking*, WC Docket No. 07-243 *et al.* (rel. Nov. 8, 2007), ¶ 43.

This language eliminates any possible doubt about the applicability of the requirement that carriers not block porting as a way to enforce contractual termination penalty provisions to OrbitCom and other landline carriers. Thus, OrbitCom, as a matter of law, must release its customers' telephone numbers for porting once a valid porting request is received, regardless of its interpretation of the termination liability provisions of its customer agreements. Failure to do so is a direct violation of an FCC order.

In light of this decision, Midcontinent expects OrbitCom to release all pending holds on Midcontinent port requests immediately, and in any event no later than 5:00 pm Central Standard Time on Tuesday, November 13, 2007. Further, Midcontinent demands that your client agree, no later than the close of business on Wednesday, November 14, 2007, that it no longer will place any holds on port requests based on claims of contractual rights. If your client does not take these actions, Midcontinent will pursue appropriate regulatory remedies.

Please inform me if any questions should arise in connection with this message.

*J.G. Harrington*

*Counsel to Midcontinent Communications*

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F 202-776-2222  
[jharrington@dowlohn.com](mailto:jharrington@dowlohn.com)

---

**From:** John C. Quaintance [mailto:q@qlopc.com]  
**Sent:** Wednesday, November 14, 2007 3:21 PM  
**To:** Harrington, J.G.  
**Cc:** 'Brad VanLeur'; 'Michael Powers'  
**Subject:** RE: Midcontinent Communications/OrbitCom,Inc.

The attached copy of the order cannot be opened. Please resend. Thank you.

John C. Quaintance  
Quaintance Law Office P.C.  
P.O. Box 2208  
Sioux Falls, SD 57101-2208

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Fax (605) 336-1000

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**From:** Harrington, J.G.  
**Sent:** Wednesday, November 14, 2007 3:44 PM  
**To:** 'John C. Quaintance'  
**Cc:** 'Brad VanLeur'; 'Michael Powers'  
**Subject:** RE: Midcontinent Communications/OrbitCom,Inc.

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Mr. Quaintance -

My apologies for any difficulty you had with the file attached to my previous message. I have attached another copy, this time in Word format, and you also can download the file from the FCC's web site - <http://www.fcc.gov> - where it is on the front page and at the following link: [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-188A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-188A1.doc)

*J.G. Harrington*

*Counsel to Midcontinent Communications*

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