

**MARVIN D. TRUHE**  
ATTORNEY AT LAW

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P.O. Box 8112  
Rapid City, South Dakota 57709-8112

Telephone (605) 348-8530

**RECEIVED**

JUN 29 2004

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Email: marvtruhe@aol.com

June 28, 2004

Ms. Pamela Bonrud  
Executive Director  
South Dakota Public Utilities Commission  
Capitol Building, First Floor  
500 E. Capitol Avenue  
Pierre, South Dakota 57501-5070

***Re: Complaint filed by Black Hills FiberCom, L.L.C., Against Qwest Corporation Regarding Intrastate Switched Access Charges Applied to ISP-Bound Calls Which Complainant Claims is Interstate in Nature CT03-154***

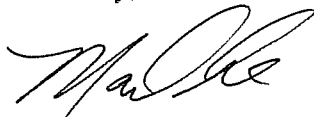
Dear Ms. Bonrud:

Enclosed for filing is the original and ten copies of Black Hills FiberCom's Initial Appellate Brief. I have also enclosed copies of three documents referenced in the Brief: an Oregon Commission decision, a Colorado Commission decision, and a Qwest brief filed in federal court in Colorado. By copy of this letter, and as indicated on the Certificate of Service, opposing counsel has been served.

Please call me if you have any questions.

Thank you.

Sincerely,



Marvin D. Truhe

MDT:skh

Enclosure

cc w/ encl: Thomas Welk  
Tim Goodwin  
Karen Cremer

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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JUN 24 2004

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In the Matter of the Complaint Filed by Black ) CT 03-154  
Hills FiberCom, L.L.C., Rapid City, South ) BLACK HILLS FIBERCOM'S  
Dakota Against Qwest Corporation Regarding ) INITIAL APPELLATE  
Intrastate Switched Access Charges Applied to ) BRIEF  
ISP-Bound Calls Which Complainant Claims is )  
Interstate in Nature )

Black Hills FiberCom, L.L.C. ("BHFC") submits the following Initial Appellate Brief to the South Dakota Public Utilities Commission ("Commission") in this matter.

**INTRODUCTION**

This case is before the Commission because Qwest Corporation ("Qwest") chooses to treat ISP bound traffic as interstate traffic when it is on the paying end of interconnection charges, but refuses to do so when it is on the receiving end of those charges. Specifically, this case calls into question Qwest's imposition of interconnection charges for ISP bound traffic under its intrastate tariff, which charges BHFC contends are improper because the traffic is interstate, and not intrastate.

Any review of interconnection charges necessitates an inquiry as to whether the charges apply to the traffic in question. Thus, whether the charges are invoiced pursuant to an interconnection agreement, an interstate or intrastate tariff, or otherwise, the inquiry is the same, i.e., do the charges apply to the traffic in question?

BHFC submits that all ISP-bound calls, including the calls at issue, are interstate calls. Qwest contends they are intrastate calls. Significantly, on three recent occasions Qwest has taken positions diametrically opposed to its current argument. The Commission is aware of the first of those occasions, when Qwest refused to pay BHFC

reciprocal compensation for ISP traffic, contending that ISP bound traffic was interstate in nature. The second occasion was before the Colorado Public Utilities Commission in 2001, and again on appeal in 2003 before the Federal District Court of Colorado, where Qwest successfully argued that they did not have to pay either reciprocal compensation, or trunk charges, for ISP traffic because the traffic was interstate. The third occasion was before the Oregon Public Utility Commission, where Qwest successfully argued that ISP traffic should be excluded from trunk transport costs because it was interstate traffic. These prior cases are legally indistinguishable from ours, and the Colorado case is virtually identical to ours factually.

#### **DESIGNATION OF RECORD**

The hearing transcript will be referred to by name of witness, transcript page, and line number [e.g., White, Tr. p. 15, lines 22-24]. Depositions will be referred to by name of the deponent, deposition page, and line number [e.g., Linse, Dep. p. 13, lines 12-14]. Exhibits will be referred to by their number [e.g., Exhibit 19].

#### **PROCEDURAL HISTORY**

BHFC filed a Complaint against Qwest with the Commission on October 29, 2003. Qwest filed an Answer and Counterclaim on November 17, 2003. BHFC filed a Reply to the Counterclaim on December 8, 2003. Qwest submitted three sets of Interrogatories, Requests for Admission, and Requests for Production, and BHFC submitted one set of Interrogatories and Requests for Admission. Both parties also took depositions.

On January 20, 2004, the Commission approved a Stipulated Agreement to Scheduling Order. On February 12, 2004, a telephonic pre-hearing conference was held

among the parties and Commission Counsel. On March 19, 2004, the Commission issued an Order for and Notice of Procedural Scheduling and Hearing.

The hearing was held before the Commission on April 27, 2004, in Pierre, South Dakota. The parties stipulated to the foundation of the exhibits, which were presented to the Commission at the outset of the hearing and admitted into evidence. Counsel for each party made opening statements. BHFC presented one witness, Kyle White, and Qwest presented one witness, Philip Linse.

On June 11, 2004, Qwest submitted a Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction.

## **STATEMENT OF FACTS**

### **BHFC's Entrance Into the Telecommunications Market**

1. BHFC entered the telecommunications business as a competitive facilities-based local exchange carrier ("CLEC") in 1998, based in Rapid City, South Dakota, with the stated purpose of serving the Black Hills regional area ("Black Hills").

2. Qwest's predecessor, U.S. West Communications ("U.S. West") was the incumbent LEC ("ILEC") in 1998, controlling a substantial majority of the Black Hills market.

3. BHFC believed that it could offer much improved telecommunications services to Black Hills customers over that offered by U.S. West, including lower prices, higher quality, more reliability, better service, more options, higher speed access, rapid deployment of new services, and expanded local calling for Northern Black Hills residents, all in keeping with the goals of the Telecommunications Act of 1996 and the

Commission.<sup>1</sup>

4. In fulfillment of those goals BHFC has invested approximately \$160 million of capital to date, including the laying of 244 miles of fiber-optic cables, and more than 1,000 miles of cabling of all types throughout the Black Hills.<sup>2</sup> In response to requests by Black Hills residents,<sup>3</sup> BHFC sought Commission approval of an expanded local calling area encompassing four of Qwest's local exchanges in the Northern Black Hills,<sup>4</sup> which the Commission approved in October, 1999 (Docket TC99-056), thus offering for the first time local calling rates throughout the Northern Black Hills.<sup>5</sup>

5. BHFC's entry into the Black Hills telecommunications market soon drove the competitive intrastate telephone rates down to 7.9 cents per minute.<sup>6</sup>

6. BHFC introduced a hybrid fiber coaxial network with the ability to simultaneously deliver audio, video, Internet and data streams, thus packaging together local and long distance telephone, high speed Internet, and cable television at significant value to consumers.<sup>7</sup>

7. BHFC also introduced high speed Internet access through cable modems at significantly higher speeds than was being offered by dial-up Internet providers, all at competitive bundled pricing.<sup>8</sup>

8. BHFC also introduced a high degree of reliability to its services by installing a synchronous optical network (SONET network) through fiberoptics which

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<sup>1</sup> White, Tr. p. 69, line 16, through p. 74, line 2.

<sup>2</sup> White, Tr. p. 75, lines 18-23.

<sup>3</sup> White, Tr. p. 71, lines 20-25; p. 72, lines 1-11; p. 73, lines 14-16.

<sup>4</sup> White, Tr. p. 73, lines 25; p. 74, lines 1-2.

<sup>5</sup> White, Tr. p. 70, lines 22-25; p. 71, lines 1-2.

<sup>6</sup> White, Tr. p. 76, lines 2-5.

<sup>7</sup> White, Tr. p. 74, lines 8-21.

<sup>8</sup> White, Tr. p. 76, lines 13-25; p. 77, lines 1-7.

created a loop that allows interrupted communications to automatically be restored by reversing the direction through the loop.<sup>9</sup> That reliability did not exist previously.<sup>10</sup>

9. At the time that BHFC entered the market the existing dial-up ISPs were purchasing their services (access) from U.S. West, which is now Qwest.<sup>11</sup>

#### **BHFC's Interconnection Agreement with Qwest**

10. In October 1998, BHFC entered into an interconnection agreement (“Interconnection Agreement”) with Qwest’s predecessor, U.S. West,<sup>12</sup> which provided, among other matters, that local calls within the Rapid City calling area would be billed as reciprocal compensation with the originating party paying the terminating party based on the number and length of calls. This Agreement, prepared by U.S. West,<sup>13</sup> was approved by the Commission on January 6, 1999 (Docket TC98-205).<sup>14</sup>

11. BHFC’s understanding of the Interconnection Agreement was that it covered the interconnection of all local traffic between the parties including ISP traffic.<sup>15</sup>

#### **BHFC's Business Plan**

12. BHFC aggressively pursued Internet business and residential customers (“Internet Customers”) and Internet service providers (“ISPs”),<sup>16</sup> by attracting them with competitively priced services including primary rate interface services,<sup>17</sup> and offering

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<sup>9</sup> White, Tr. p. 74, lines 22-25; p. 75, lines 1-14.

<sup>10</sup> White, Tr. p. 71, lines 3-11.

<sup>11</sup> White, Tr. p. 77, lines 11-14.

<sup>12</sup> White, Tr. p. 87, lines 21-25; p. 88, lines 1-3,

<sup>13</sup> White, Tr. p. 88, lines 4-22.

<sup>14</sup> Exhibit 16.

<sup>15</sup> White, Tr. p. 88, lines 23-25; p. 89, lines 1-11.

<sup>16</sup> White, Tr. p. 79, lines 8-19.

<sup>17</sup> White, Tr. p. 78, lines 11-22.

them much improved facilities with fire suppression, security, and battery and generator backup.<sup>18</sup>

13. Since the majority of its ISPs were Rapid City based, BHFC knew that if it could secure a substantial number of ISPs in the Rapid City area vis-à-vis Qwest, it could generate substantial Internet based reciprocal compensation revenue from Qwest pursuant to the Interconnection.<sup>19</sup>

14. BHFC also knew that insofar as it was offering local calling to Northern Black Hills residents it anticipated inter-exchange access charges from its Internet customers located outside of Rapid City calling Qwest ISPs;<sup>20</sup> but BHFC also anticipated those access charges would be less than the net revenue generated from the exchange of reciprocal compensation by both parties under the Interconnection Agreement,<sup>21</sup> and thus BHFC could balance its payments vis-à-vis Qwest.<sup>22</sup>

15. BHFC was very successful in signing up Internet customers and ISPs, consistent with its sound business strategy,<sup>23</sup> and in less than a year began sending out quarterly invoices to Qwest of over \$200,000, the majority of which were associated with ISP traffic originating with Qwest customers who were utilizing BHFC's ISPs. Thus, BHFC's business strategy appeared to be off to a great start.<sup>24</sup>

**Qwest's Refusal to pay BHFC Reciprocal Compensation for ISP Traffic originating with Qwest Customers**

16. In September, 2000, BHFC submitted its first two quarterly invoices to Qwest for reciprocal billing due under their Interconnection Agreement for local calls

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<sup>18</sup> White, Tr. p. 79, lines 20-25; p. 80, lines 1-16.

<sup>19</sup> White, Tr. p. 78, lines 1-10, 25; p. 79, lines 1-7; p. 80, lines 17-, 25; p. 81, lines 1-2.

<sup>20</sup> White, Tr. p. 77, lines 20-25; White, Tr. p. 78, lines 4-10.

<sup>21</sup> White, Tr. p. 78, lines 23-25; Tr. p. 79, lines 1-7; Tr. p. 80, lines 17-23.

<sup>22</sup> White, Tr. p. 78, lines 23-25; Tr. p. 79, lines 1-7.

<sup>23</sup> White, Tr. p. 79, lines 10-19.

<sup>24</sup> White, Tr. p. 93, lines 5-13.

within the Rapid City area. The invoices included calls from Qwest customers in the Rapid City area to BHFC's ISPs in Rapid City. Those invoices totaled \$435,527.59.<sup>25</sup>

17. However, Qwest refused to pay the invoices, or any subsequent invoices, citing as its reason in a letter to BHFC that the ISP traffic (which constituted the substantial majority of the traffic) was not local traffic at all, and thus was not covered by the Interconnection Agreement, but instead was interstate traffic.<sup>26</sup>

18. This obviously created a problem for BHFC as Qwest's refusal to pay BHFC for the ISP traffic struck at the very heart of BHFC's business plan in which BHFC was to receive reciprocal compensation from Qwest for calls from Qwest's customers to BHFC's ISPs.<sup>27</sup>

#### **Qwest's Stated Legal Position - ISP Traffic is Interstate**

19. The legal position of Qwest on this issue was stated in numerous documents, the first being Qwest's November 3, 2000, letter to BHFC in response to BHFC's invoices, which states in pertinent part:

Qwest has determined that the majority of the traffic included on your invoices was delivered to an Internet Service Provider (ISP). Consequently, that traffic does not terminate to a LEC within the same calling area. Instead, the ISP continues the communication to terminate in a distant local calling area at a server that is generally located outside of the calling area in which the call originated. As such, Internet related traffic is predominately interstate in nature, and thus is not subject to local reciprocal compensation charges under our Agreement.<sup>28</sup>

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<sup>25</sup> White, Tr. p. 90, lines 7-21; Tr. p. 92, lines 4-24; Exhibit 2.

<sup>26</sup> White, Tr. p. 94, lines 2-8; Exhibit 2.

<sup>27</sup> White, Tr. p. 94, lines 9-13.

<sup>28</sup> Exhibit 2.



20. The Federal Communications Commission (“FCC”) had previously issued a Declaratory Ruling<sup>29</sup> (“Declaratory Ruling”) in 1999 with similar language, but that was subsequently vacated in 2000 by a federal appellate court.<sup>30</sup> However, in April, 2001, the FCC issued an Order on Remand (“Order on Remand”),<sup>31</sup> wherein it again held that ISP bound traffic was interstate in nature and established a compensation regime for that traffic. The Order on Remand went into effect on June 14, 2001.<sup>32</sup>

21. Neither the above Qwest letter, nor any of its subsequent written statements referred to herein, made any distinction between Internet bound traffic originating within the local exchange, or such traffic originating elsewhere (see discussion, infra). Qwest’s letter also stated that with the Internet traffic removed the remaining traffic between the parties was in balance and therefore, no compensation whatsoever was due BHFC for those ISP calls.<sup>33</sup>

22. In 2001, Qwest posted on its Internet Website an announcement that it was adopting the same practice system wide, i.e., treating Internet traffic as interstate traffic, and was doing so pursuant to the Order on Remand, and that Qwest’s policy would go into effect on June 14, 2001, the effective date of the Order on Remand.<sup>34</sup>

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<sup>29</sup> In the Matter of Implementation of the Local Competition Provision in the Telecommunications Act of 1996 (“Declaratory Ruling”), 14 F.C.C. 3689 (1999); Exhibit 17, ¶ 12.

<sup>30</sup> Bell Atlantic Telephone Company v. F.C.C., 206 F.3d 1 (D.C.Cir.2000)(“Bell Atlantic”).

<sup>31</sup> Implementation of the Local Competition Provisions In the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic, 16 F.C.C. 9151 (2001)(“Order on Remand”); Exhibit 18.

<sup>32</sup> The United States Court of Appeals, District of Columbia Circuit, remanded the Order on Remand in WorldCom, Inc. v. F.C.C., 288 F.3d 429 (D.C.Cir.2003)(“WorldCom”), but did not vacate it.

<sup>33</sup> Exhibit 2; White, Tr. p. 96, lines 6-22.

<sup>34</sup> Exhibit 4.

23. This formal announcement was followed by an August 14, 2001, letter from Qwest to CLECs, including BHFC. The letter again states that its policy was being adopted in accordance with the June 14, 2001, Order on Remand.<sup>35</sup>

24. Qwest sent another letter to BHFC on December 3, 2001, reiterating its position in the November 3, 2000, letter and further stating, “After 6/14/01 Qwest accepts the FCC Order as the controlling document for this issue.”<sup>36</sup> And further, that, “It is Qwest’s position that, with this language, the FCC is effectively stating that if a LEC does not have specific language in their existing Interconnection Agreement which covers compensation for ISP-bound traffic, they do not receive compensation for such traffic after 6/14/01.”<sup>37</sup>

**Amendment of Interconnection Agreement to Reflect FCC Order on Remand**

25. Additionally, Qwest requested the amendment of the Interconnection Agreement to reflect the Order on Remand,<sup>38</sup> and in September, 2001, BHFC and Qwest entered into an “Amendment to the Interconnection Agreement (effective June 14, 2001, the same as the effective date of the Order on Remand).<sup>39</sup>

26. Qwest’s proffered amendment explicitly stated that all ISP-bound traffic between the parties be treated in conformance with the Order on Remand;<sup>40</sup> and further provided, again consistent with the Order on Remand, that a rate cap would apply to compensation for that ISP-bound traffic with the compensation phased out over time.<sup>41</sup>

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<sup>35</sup> Exhibit 5.

<sup>36</sup> Exhibit 7.

<sup>37</sup> Ibid.

<sup>38</sup> Qwest’ Answer to BHFC’s Complaint, ¶ 20; BHFC’s Request for Admission 12, p. 5.

<sup>39</sup> Exhibit 6.

<sup>40</sup> Exhibit 6 at Attachment 2, ¶ 3.1.

<sup>41</sup> Exhibit 6 at Attachment 2, ¶ 3.2.3.

On November 17, 2001, the Commission approved the 2001 Amended Interconnection Agreement (Docket TC01-161).

27. In September, 2002, the parties executed another amendment to the Interconnection Agreement, again at Qwest's request,<sup>42</sup> to incorporate the Order on Remand that traffic ultimately delivered to ISPs is "interstate in nature" and should be exchanged on a bill and keep basis.<sup>43</sup> The Commission approved the 2002 Amended Interconnection Agreement on January 3, 2003 (Docket TC02-131), which amendment states that, "The Parties agree that ISP Bound Traffic, effective April 1, 2002, shall be exchanged as Bill and Keep."<sup>44</sup>

#### **BHFC Response to Qwest's Refusal to Pay**

28. On December 7, 2001, BHFC had filed a Complaint with the Commission to compel payment by Qwest of BHFC's unpaid invoices at which time the amounts owed, and projected to be owed under the Interconnection Agreement, totaled approximately \$1.5 million.<sup>45</sup> That figure was even lower than the amount anticipated under the original Interconnection Agreement, as it reflected the reduced charges under the amendments to the Interconnection Agreement.<sup>46</sup>

29. Qwest countered by filing a Motion to Dismiss, arguing that the matter had to be resolved by arbitration under the parties' Interconnection Agreement,<sup>47</sup> and the Complaint was later voluntarily dismissed.<sup>48</sup>

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<sup>42</sup> Qwest Answer to BHFC's Request for Admission 15, p. 6.

<sup>43</sup> Exhibit 9.

<sup>44</sup> Exhibit 9, ¶ 3.2.3.

<sup>45</sup> White, Tr. p. 108, lines 4-11; BHFC Complaint, Dkt. CT 01-056.

<sup>46</sup> White, Tr. p. 108, lines 12-16.

<sup>47</sup> Qwest Motion to Dismiss, Dkt. CT 01-056

<sup>48</sup> White, Tr. p.107, lines 1-8.

30. As a startup company, BHFC struggled as the months passed without Qwest paying BHFC's monthly invoices, putting BHFC at an increasingly severe financial disadvantage.<sup>49</sup> Ultimately, BHFC entered into a settlement agreement with Qwest on July 29, 2002, with a partial payment by Qwest.<sup>50</sup> Twenty-two months had elapsed from the time BHFC submitted its first invoices to Qwest, and its receipt of the settlement payment.

**Qwest's ISP Charges to BHFC Which are the Subject of this Action**

31. Even as Qwest was refusing to pay BHFC for ISP traffic generated by Qwest's customers, Qwest disregarded its own explicitly stated position and the Order on Remand by refusing to treat ISP traffic generated by BHFC's customers as interstate.

32. Thus, Qwest continues to invoice BHFC at inter-exchange access rates of 5.3 cents per minute under Qwest's intrastate tariff for these Internet calls made by BHFC customers located outside the Rapid City calling area to local Rapid City calling numbers of Qwest's ISP customers.<sup>51</sup>

33. In addition, Qwest's primary ISP customer, AOL, is not even located in South Dakota and has no Point of Presence (POP), in fact no facilities, switches, or any other presence, in South Dakota.<sup>52</sup> All ISP traffic is routed through Qwest or Qwest affiliate facilities in South Dakota, and from South Dakota and beyond, until it first makes contact with AOL in Arlington, Virginia.<sup>53</sup> BHFC has reason to believe that all other ISP customers of Qwest likewise have no POP in South Dakota, even though

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<sup>49</sup> Exhibit 25, ¶ 13; White, Tr. p. 105, lines 17-25, Tr. p. 106, lines 1-10.

<sup>50</sup> Exhibit 22; White, Tr. p. 107, lines 9-25; p. 108, lines 1-11 (the settlement amount is treated as confidential).

<sup>51</sup> Exhibit 22; White, Tr. p. 98, lines 9-25; Tr. p. 99, lines 1-2.

<sup>52</sup> Linse, Dep. Tr. p. 26, lines 6-16; p. 27, lines 21-25; p. 28, lines 1-7; p. 33, lines 22-25.

<sup>53</sup> Linse, Tr. p. 209, lines 16-20; Linse Dep., Tr. p. 28, lines 5-7; p. 33, lines 22-25.

Qwest's expert witness was unable to verify this either at his deposition,<sup>54</sup> or later at the Hearing.<sup>55</sup>

34. From July, 2000 to the present, BHFC has been paying Qwest monthly for those ISP calls (which are legally indistinguishable from the calls Qwest refused to pay for) with over \$1 million having been paid as of March, 2004.<sup>56</sup>

35. During the twenty-two month period when BHFC was receiving no payments from Qwest for ISP calls originating with Qwest customers, it had already paid Qwest over \$900,000 in intrastate access charges for ISP calls originating with BHFC customers.<sup>57</sup>

36. BHFC has several reasons for continuing to make those payments, not the least of which is concern about how Qwest might respond if the payments are not made,<sup>58</sup> given BHFC's dependence on Qwest for interconnection.

37. Thus, Qwest treats as interstate the ISP bound traffic originating in Rapid City (see ¶¶ 16-30, supra), but treats as intrastate the ISP bound traffic originating outside of Rapid City (see ¶¶ 31-36, supra). The two types of calls are factually and legally indistinguishable.

38. Qwest's expert witness testified that Qwest's routing of the above two types of calls are identical.<sup>59</sup>

39. Thus, whether the calls to AOL originate with BHFC's customers outside of, or within, Rapid City, Qwest routes all the calls identically, and none of the calls

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<sup>54</sup> Linse, Dep. Tr. p. 45, lines 15-25; p. 46, lines 1-20.

<sup>55</sup> Linse, Tr. p. 209, lines 21-25; p. 210, lines 1-6.

<sup>56</sup> Exhibit 22; White, Tr. p. 99, lines 3-11.

<sup>57</sup> Exhibit 22.

<sup>58</sup> White, Tr. p. 166, lines 10-14.

<sup>59</sup> Linse, Tr. p. 213, lines 3-9; Linse, Dep. Tr. p. 41, lines 15-21.

terminate in Rapid City, but instead terminate, at their earliest, at an AOL facility in Arlington, Virginia. The only difference is that Qwest charges BHFC intrastate rates for the former calls, but treats the latter calls (which, ironically, have an even shorter distance to travel) as interstate calls.<sup>60</sup>

## **LEGAL ARGUMENT**

### **1999 FCC Declaratory Ruling**

40. Even before the FCC issued its 1999 and 2001 Orders, it was treating ISP traffic as jurisdictionally interstate.<sup>61</sup> Later, in response to intercarrier compensation issues raised regarding that traffic, the FCC took a first step in a 1999 Declaratory Ruling.<sup>62</sup> Although the Declaratory Ruling was vacated by the Atlantic Bell decision in 2000, a summary of it is in order, especially since Qwest has cited language from it in our case.<sup>63</sup>

41. For purposes of its discussion in the Declaratory Ruling the FCC categorized ISP traffic as either interstate traffic (i.e., traffic crossing state boundaries), or intrastate traffic (i.e., all traffic that is not interstate).<sup>64</sup> It pointed out that in a “typical arrangement” an ISP customer dials a number in the same local calling area,<sup>65</sup> but then recognized that the calls “often” terminate at an Internet website located in another

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<sup>60</sup> Thus, even under traditional (i.e., pre-FCC Orders) definitions of what constitutes interstate traffic, the ISP calls do not “terminate” until they reach the ISP’s modem or switching facilities in Virginia, and thus are interstate calls.

<sup>61</sup> “The court opinion underscores a tension between the jurisdictional nature of ISP-bound traffic, which the Commission has long held to be interstate . . .” Order on Remand, ¶ 28.

<sup>62</sup> See, Declaratory Ruling, *infra*, at fn. 3.

<sup>63</sup> See, Qwest’s Conditional Motion to Dismiss, page 5.

<sup>64</sup> See discussion at ¶¶ 100-03, *infra*.

<sup>65</sup> Declaratory Ruling, ¶ 4.

state.<sup>66</sup> This gave rise to the question whether these calls should be treated as intrastate or interstate calls for intercarrier compensation purposes.<sup>67</sup>

### **One Call or Two?**

42. At our hearing, Qwest's expert witness testified in response to the question whether a typical ISP call would be one call or two: "I don't see where it would be two calls."<sup>68</sup> Additionally, as will be discussed, Qwest recently submitted a brief to a Colorado federal court in which it reiterated the FCC's findings that most Internet bound traffic ". . . [i]s indisputably interstate in nature when viewed on an end-to-end basis."<sup>69</sup> Nevertheless, it appears that Qwest is now intending to argue that the ISP traffic in our case is two call traffic, thus entitling them to intrastate compensation for the "first" call.

43. However, the FCC pointed out in its Declaratory Ruling it has traditionally determined the jurisdictional nature of communications using an "end points" analysis, and thus, ". . . [c]onsistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."<sup>70</sup> Further,

. . . [b]oth court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications. . . . The Commission concluded that 'an interstate communication does not end at an intermediate switch' . . .<sup>71</sup>

44. The FCC thus rejected the "two calls" theory, i.e., those attempts to break down ISP calls into an intrastate component and an interstate component,<sup>72</sup> and concluded that the traffic was largely interstate,<sup>73</sup> and thus not subject to the reciprocal

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<sup>66</sup> Declaratory Ruling, ¶ 12.

<sup>67</sup> Declaratory Ruling, ¶ 7.

<sup>68</sup> Linse, Tr. p. 218, lines 17-22.

<sup>69</sup> See, ¶57, *infra*.

<sup>70</sup> Declaratory Ruling, ¶ 10.

<sup>71</sup> Declaratory Ruling, ¶ 11.

<sup>72</sup> Declaratory Ruling, ¶¶ 11-15.

compensation obligations of section 251(b)(5) of the Telecommunications Act of 1996 (“1996 Act”).<sup>74</sup>

45. Pending adoption of an FCC rule to govern intercarrier compensation for those calls, however, the Declaratory Ruling sought public comment on what an appropriate intercarrier compensation mechanism would be.<sup>75</sup> The Declaratory Ruling was vacated by the Atlantic Bell court in 2000 and remanded back to the FCC.<sup>76</sup>

### **2001 FCC Order on Remand**

46. After receiving further public comment, the FCC issued an Order on Remand on April 14, 2001,<sup>77</sup> which reiterated many of the findings of the Declaratory Ruling, including the rejection of the “two calls” theory,<sup>78</sup> and the finding that ISP bound calls were interstate traffic.<sup>79</sup>

For jurisdictional purposes, the Commission views LEC-provided access to enhanced services providers, including ISPs, on the basis of the end points of the communication, rather than intermediate points of switching or exchanges between carriers (or other providers).<sup>80</sup>

. . . [w]e reaffirm our previous conclusion that traffic delivered to an ISP is predominately interstate access traffic  
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<sup>81</sup>

47. The Order on Remand also adopted a new basis for holding that ISP traffic was not subject to reciprocal compensation,<sup>82</sup> and adopted interim rules for intercarrier compensation of that traffic.<sup>83</sup>

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<sup>73</sup> Declaratory Ruling, ¶ 23.

<sup>74</sup> 47 U.S.C.A. §251(b)(5); Telecommunications Act of 1996, Pub.L.No.104-104, 110 Stat. 56 (1996); Order on Remand, ¶ 14.

<sup>75</sup> Declaratory Ruling, ¶ 21.

<sup>76</sup> See, Bell Atlantic, at fn. 32, *infra*.

<sup>77</sup> Exhibit 18.

<sup>78</sup> Order on Remand, ¶¶ 56-63.

<sup>79</sup> Order on Remand, ¶¶ 1, 57, 58.

<sup>80</sup> Order on Remand, ¶ 57.

<sup>81</sup> Order on Remand, ¶ 1.



48. The FCC re-examined the basis for its holding that ISP traffic was different from other traffic for compensation purposes, and found that the service provided by LECs to deliver traffic to an ISP constituted, at a minimum, “information access” under 47 U.S.C. §251(g) and thus was not governed by §251(b)(5).<sup>85</sup>

49. On appeal, the WorldCom court challenged the basis upon which the FCC concluded that ISP traffic was exempt from reciprocal compensation under §251(b)(5)<sup>86</sup> but did not vacate or reverse the Order.<sup>87</sup>

### **The FCC Order on Remand Remains in Effect**

50. Qwest incorrectly stated in its Answer to BHFC’s Complaint that the Order on Remand was “reversed”<sup>88</sup>; implying that it is of questionable validity. However, in an appellate brief Qwest previously submitted to a Colorado federal district court in Level 3 Communications v. Public Utilities Commission of Colorado (“Level 3”),<sup>89</sup> Qwest correctly referred to the WorldCom court’s “remand” of the Order on Remand, and then stated: “Thus, the ISP Remand Order remains the law of the land and . . . compels the Court to uphold the Colorado Commission’s decision in this case.”<sup>90</sup>

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<sup>82</sup> Order on Remand, ¶¶ 31-34, 42-45.

<sup>83</sup> Order on Remand, ¶¶ 77-82.

<sup>85</sup> Order on Remand, ¶ 30.

<sup>86</sup> 47 U.S.C.A. §252(b)(5).

<sup>87</sup> See, WorldCom, at fn. 34, *infra*.

<sup>88</sup> Qwest’s Answer and Counterclaim, ¶18. The court stated, “. . . [w]e simply remand the case to the Commission for further proceedings.” WorldCom, at p. 434.

<sup>89</sup> Level 3 Communications v. Public Utilities Commission of Colorado, 300 F. Supp. 2d 1069 (D. Colo. 2003), Civ. A.01-N-2455 (CBS). Undersigned counsel was advised by the clerk’s office of the above court that this decision, issued December 8, 2003, has not been appealed.

<sup>90</sup> Qwest’s Brief, fn. 5 on page 3.

51. In addition, numerous courts since then have recognized the Order on Remand as valid, including the above referenced court which held, “Since WorldCom, moreover, did not vacate the FCC Remand Order, the FCC Order is still in effect.”<sup>91</sup>

### **The FCC Order Classifies all ISP Bound Traffic as Interstate**

52. In his opening statement, counsel for Qwest stated that the Order on Remand applies only to “locally originated traffic,” presumably meaning traffic in which the end user is in the same local calling area as the ISP’s access number.<sup>92</sup> In what appears to be a related argument, Qwest’s counsel also mentioned the finding that ISP traffic was not subject to reciprocal compensation.<sup>93</sup>

53. Thus, Qwest apparently will contend that ISP traffic is interstate if it originates locally (the end user calling an ISP number in his or her own local exchange), but is not interstate if the same call originates outside the local exchange. Stated another way, Qwest’s argument is that the FCC really found in its Order on Remand that, “ISP bound traffic is interstate traffic so long as it originates locally.”

54. Qwest’s argument is directly contradicted by Qwest’s own prior statements, the language of the FCC’s Order on Remand, and by the court and commission decisions interpreting the Order on Remand. Finally, Qwest’s argument is directly contradicted by the FCC’s broadening of the scope of §251(b)(5) from local traffic to all traffic in conjunction with its Order on Remand.

### **Qwest’s Prior Inconsistent Statements**

55. Until our case, BHFC is unaware of any instance in which Qwest has contended that the “ISP traffic is interstate” finding applied only to locally originating

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<sup>91</sup> Level 3 Decision, p. 1076.

<sup>92</sup> Goodwin, Tr. p. 54, lines 18-24.

<sup>93</sup> Goodwin, Tr. p. 54, lines 15-17.

traffic. For example, Qwest's November 3, 2000, letter states that traffic delivered to an ISP terminates in a distant local calling area located outside of the calling area in which the call originated and as such is "predominately interstate in nature."<sup>94</sup>

56. Without reiterating the earlier arguments, attention is called to Qwest's other prior inconsistent statements on this issue. For example, Qwest's 2001 Internet Website announcement;<sup>95</sup> Qwest's August 14, 2001, letter from to CLECs, including BHFC;<sup>96</sup> and Qwest's letter to BHFC of December 3, 2001.<sup>97</sup>

57. Additionally, the following statement was made by Qwest in its appellate brief in the Level 3 case:

In the ISP Remand Order, the FCC ruled unequivocally that Internet-bound traffic is properly characterized as 'interstate access' traffic. The FCC observed that '[m]ost Internet bound traffic traveling between a LEC's (i.e. Qwest's) subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis.'<sup>98</sup>

Again, no suggestion that the "interstate" finding was limited to locally originating traffic.

58. Thus, Qwest repeatedly invokes the clear language of the Order on Remand when it is to its benefit, but then strains to parse that language when the Order on Remand is invoked against it.

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<sup>94</sup> Exhibit 2, ¶ A.

<sup>95</sup> See, ¶ 22, supra, and Exhibit 4.

<sup>96</sup> See, ¶ 23, supra, and Exhibit 5.

<sup>97</sup> See, ¶ 24, supra, and Exhibit 7.

<sup>98</sup> Defendant Qwest Corporation's Brief in Support of its Cross-Motion for Summary Judgment, p. 17

59. Interestingly, even Qwest's expert witness testified in response to questions by Commissioners that he believed ISP bound traffic which originated outside the Rapid City local calling area was likewise interstate.<sup>99</sup>

### **Language in the Order on Remand**

60. The subtitle of the Order on Remand is "Intercarrier Compensation for ISP Bound Traffic."<sup>100</sup> Given the FCC's stated basis for its holding in the Order on Remand, it is understandable why they did not limit its scope to local traffic.

The Commission concluded in the Declaratory Ruling that the jurisdictional nature of ISP-bound traffic should be determined, consistent with Commission precedent, by the end points of the communication. Applying this "end-to-end" analysis, the Commission determined that Internet communications originate with the ISP's end-user customer and continue beyond the local ISP server to websites or other servers and routers that are often located outside of the state.<sup>101</sup> [Emphasis added.]

61. The opening paragraph of the Order on Remand states:

In this Order we reconsider the proper treatment for purposes of intercarrier compensation of telecommunications traffic delivered to Internet service providers (ISPs). We previously found in the Declaratory Ruling that such traffic is interstate traffic subject to the jurisdiction of the Commission under section 201 of the Act and is not, therefore, subject to the reciprocal compensation provisions of section 251(b)(5).<sup>102</sup> [Emphasis added.]

To repeat, the Order does not state that it will deal only with the proper treatment of "locally originating" ISP traffic, but instead the proper treatment of "telecommunications traffic delivered to Internet service providers (ISPs)."

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<sup>99</sup> Linse, Tr. p. 217, lines 3-25; Tr. p. 218, line 1.

<sup>100</sup> Order on Remand, subtitle.

<sup>101</sup> Order on Remand, ¶ 14.

<sup>102</sup> Order on Remand, ¶ 1.

62. Similar language, and logic, is found throughout the Order on Remand.

Having found, although for different reasons than before, that the provisions of section 251(b)(5) do not extend to ISP-bound traffic, we reaffirm our previous conclusion that traffic delivered to an ISP is predominantly interstate access traffic subject to section 201 of the Act, and we establish an appropriate cost recovery mechanism for the exchange of such traffic.<sup>103</sup>

Most Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis. Users on the Internet are interacting with a global network of connected computers.<sup>104</sup> [Emphasis added.]

### **Policy Reasons Supporting the FCC Orders**

63. Likewise, the following policy reasons addressed by the FCC in the Order on Remand are consistent with the Order applying to all ISP traffic. The Order on Remand recognized that Internet consumers stayed on the network much longer than for other communications, which skewed the traditional assumptions of per minute pricing.<sup>105</sup> Telephone carriers would traditionally interconnect with each other with the originating carrier paying the terminating carrier the costs of using its network, but since the calls would be relatively balanced the compensation regime made sense.<sup>106</sup>

64. However, the FCC recognized that Internet usage distorted those traditional assumptions because traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results. This created incentives for LECs to enter the market intent on serving ISPs exclusively, and not offering viable local telephone competition (as intended under the 1996 Act), and

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<sup>103</sup> Order on Remand, ¶ 1.

<sup>104</sup> Order on Remand, ¶ 58.

<sup>105</sup> Order on Remand, ¶ 19.

<sup>106</sup> Order on Remand, ¶ 20.

even potentially driving up ISP rates to consumers.<sup>107</sup>

65. Accordingly, the FCC rejected the "calling-party's-network-pays" (CPNP) regime which previously governed ISP traffic, and held:

In this Order . . . we adopt an interim compensation mechanism for the delivery of ISP-bound traffic that addresses the regulatory arbitrage opportunities present in the existing carrier-to-carrier payments by limiting carriers' opportunity to recover costs from other carriers and requiring them to recover a greater share of their costs from their ISP customers.<sup>108</sup>

66. Against this policy backdrop, clearly the FCC had no reason to limit the scope of its holdings to ISP traffic that originated locally. Whether an ISP call to a Rapid City ISP number originates in Sturgis or in Rapid City, the concerns addressed by the FCC are the same. In each case LECs could enter the market without providing full services, the traffic and money flow would be one way, and regulatory arbitrage could result, leading to even higher consumer prices. Thus, it is totally illogical that the FCC sought to correct this ISP traffic problem with its Orders, but only if the ISP calls originated locally.

67. In short, neither the language, the logic, nor the stated policy reasons of the Order on Remand limit its "ISP traffic is interstate" holding to locally originating traffic.

#### **Use of the term Reciprocal Compensation in Order on Remand**

68. In his opening statement Qwest's counsel's quoted the Order on Remand holding that ISP traffic is interstate traffic, ". . . [a]nd is not, therefore, subject to the

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<sup>107</sup> Order on Remand, ¶ 21.

<sup>108</sup> Order on Remand, ¶ 67.

reciprocal compensation provisions of section 251(b)(5).”<sup>109</sup> That reference to reciprocal compensation was apparently intended to support Qwest’s argument that the “interstate traffic” holding applied only to locally originating traffic.

69. The Order on Remand’s discussion of reciprocal compensation under §251(b)(5) is made in conjunction with the FCC’s finding that ISP traffic is not subject to that section’s reciprocal compensation obligations. Thus, Qwest’s argument approaches the issue from the backside, i.e., Qwest argues that in stating that ISP traffic is not subject to reciprocal compensation, the FCC was defining the universe of charges that ISP traffic is not subject to.

70. The argument totally misinterprets the Order on Remand, which declared that all ISP traffic was interstate; thus, any billing regime that treats ISP calls as anything but interstate calls, is likewise precluded. This was confirmed in two recent state commission decisions in Colorado and Oregon, and later by a federal court, which held that ISP traffic was exempt from more than just reciprocal compensation.

#### **FCC’s Notice of Proposed Rulemaking**

71. This was also confirmed by the FCC in the accompanying Notice of Proposed Rulemaking (“NPRM”) issued with the Order on Remand.<sup>120</sup> The NPRM

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<sup>109</sup> Goodwin, Tr. p. 54, lines 15-17.

<sup>120</sup> Notice of Proposed Rulemaking, CC Docket No. 01-92, adopted April 19, 2001.

proposes sweeping changes in intercarrier compensation for all telecommunications traffic, not just ISP traffic.<sup>121</sup>

In the companion NPRM, we consider the desirability of adopting a uniform intercarrier compensation mechanism, applicable to all traffic exchanged among telecommunications carriers, and, in that context, we intend to examine the merits of a bill and keep regime for all types of traffic, including ISP-bound traffic. In the meantime, however, we must adopt an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic, pending the outcome of the NPRM.<sup>122</sup> [Emphasis added.]

72. Thus, while the NPRM primarily addresses the broader issue of all telecommunications traffic, one section (§III.B.5) addresses ISP traffic and reiterates the holding of the Order on Remand regarding ISP traffic:

The record developed in the ISP Intercarrier Compensation proceedings strongly suggested that we should consider adopting a bill-and-keep compensation rule for ISP-bound traffic. We now believe that adopting such a rule is the correct policy choice because the exchange of reciprocal compensation payments appears to have distorted the development of competition in the local exchange market. Thus, we propose to adopt a bill-and-keep arrangement for all ISP-bound traffic.<sup>123</sup> [Emphasis added.]

73. This was repeated when the NPRM mentioned reciprocal compensation as just one of the traditional CPNP intercarrier compensation regimes that no longer could be used for ISP traffic.

For these reasons, we believe that the application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets. ISPs do not receive accurate price signals from carriers that compete, not on the basis of the quality and efficiency of the services they provide, but on the basis of

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<sup>121</sup> NPRM, ¶¶66-76.

<sup>122</sup> NPRM, ¶66.

<sup>123</sup> NPRM, ¶ 66, p. 24.



their ability to shift costs to other carriers.<sup>124</sup> [Emphasis added.]

74. Thus, the FCC clearly established that it was addressing all ISP traffic, and further that it was rejecting not just reciprocal compensation, but any CPNP regime, which of course includes intrastate tariffs. In other words, the universe of excluded charges extends beyond charges for local traffic, and intrastate tariffs cannot be imposed on interstate traffic.

75. An interesting issue is raised by Qwest's position herein that the Order on Remand applies only to traffic exchanged within a local calling area. In our case, BHFC's Commission approved local calling area extends throughout the northern Black Hills. Therefore, even if the Order on Remand only applied to local calling areas, which it does not, it would still extend to all of BHFC's local calling area.

#### **Qwest's Colorado Case Involving Trunk Charges for ISP Traffic**

76. Qwest's counsel said in his opening statement that the relief BHFC seeks is "unprecedented in the FCC and the other states."<sup>125</sup> As mentioned, there is precedent for the Order on Remand precluding more than just reciprocal compensation charges, and that precedent was set by Qwest itself, first before the Colorado Public Utilities Commission, and then before a Colorado federal district court just six months ago, in the earlier referenced Level 3 case.

77. The underlying facts at issue were summarized by Qwest in its brief:

Qwest is an ILEC that serves the local exchange market in fourteen mid-western states, including Colorado. As a CLEC operating in Qwest's local exchange region, Level 3 is in the business of transmitting to ISP calls to the Internet placed by consumers and businesses. To access the

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<sup>124</sup> Order on Remand, ¶ 71.

<sup>125</sup> Goodwin, Tr. p. 58, lines 20-23.

Internet, end users (e.g., homes and businesses) who receive telecommunications service from Qwest or other carriers place calls to ISPs served by Level 3. These calls are first transmitted over the Qwest network, and then handed off to Level 3's network, for transport to the ISP.<sup>126</sup>

These calls are then transmitted by Level 3 or another carrier to servers and other facilities that comprise the ISP's network.<sup>128</sup>

If we substitute BHFC for Qwest in the above factual summary, and substitute Qwest for Level 3, we have our case.

78. The case arose due to Qwest's refusal to pay two different types of interconnection charges, reciprocal compensation charges and trunk charges, both associated with ISP-bound traffic originating with Qwest's customers, which traffic was then "terminated" by another LEC, Level 3, which had the ISP as a customer. Qwest's stated basis for not paying? The calls were interstate in nature and thus not subject to the interconnect charges.

79. The Colorado Public Utilities Commission ("CPUC") agreed with Qwest,<sup>130</sup> Level 3 appealed to the Federal District Court for the District of Colorado, and that Court likewise agreed with Qwest.

80. The CPUC had several issues before it, but only two are relevant to our case. "Issue 2" involved reciprocal compensation,<sup>131</sup> and "Issue 6" involved the

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<sup>126</sup> Qwest Brief, pp. 5-6.

<sup>128</sup> Qwest Brief, fn. 16, p. 6.

<sup>130</sup> In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to §252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Qwest Corporation, Dkt. No. 00B-601T, Decision No. C01-312 (Colo. PUC March 30, 2001) and CPUC decision on rehearing, Dkt. No. 00B-601T, Decision No. C01-477 (Colo. PUC May 7, 2001).

<sup>131</sup> CPUC Decision, pp. 6-22.

apportionment of costs of trunks and facilities on the basis of each party's originating traffic.<sup>132</sup> Thus, the first issue involved reciprocal compensation. The second did not. Qwest prevailed on both issues before the CPUC.

### **Qwest's Arguments for Non Payment in Colorado Case**

81. Qwest's arguments for not having to pay Level 3 reciprocal compensation for the above traffic were summarized by the CPUC as follows:

Qwest contends that technical distinctions between the manner in which ISP-bound traffic is routed makes it more analogous to interstate long distance calls than to local calls. Qwest finds three basic distinctions. First, an ISP-bound call does not terminate in the local calling area. The call is connected to a modem at the ISP as an interface and is then delivered by the ISP to a web site specified by the end user. Under this view, the ISP does not terminate the call but is the carrier of the call. Second, for both long distance and ISP-bound calls the switch of the originating carrier does not know the ultimate destination of the call and the originating carrier does not deliver the call to its ultimate destination. The originating provider delivers the call to another carrier, an inter-exchange carrier ("IXC") for interstate calls or a CLEC serving an ISP for ISP-bound calls, and that carrier identifies the network for which the call is destined and delivers the call to that network. Third, for a local call the switch of the originating carrier knows the destination of the call and the originating carrier has a direct path to the final destination. Unlike long distance and ISP-bound calls, the originating carrier does not "hand off" a local call for delivery to the final destination.<sup>133</sup>

82. Again, contrary to the position that Qwest is taking in our action, Qwest's legal brief to the CPUC never suggests that ISP bound traffic is interstate only if it originates locally. Qwest's CPUC argument could not be more explicit, nor more inclusive. Based on Qwest's above arguments, the CPUC ruled that Qwest did not have to pay reciprocal compensation to Level 3 for ISP bound traffic originating with Qwest's

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<sup>132</sup> CPUC Decision, pp. 31-36.

<sup>133</sup> CPUC Decision, ¶ 12, pp. 13-14.

end users.

83. Issue 6 before the CPUC did not involve reciprocal compensation, but instead the costs for interconnecting trunks and facilities. The CPUC stated that:

The parties have generally agreed that the financial responsibility for trunks and facilities used to exchange traffic will be allocated on a “relative use” basis. The cost of trunks and facilities will be apportioned among the parties on the basis of each party’s originating traffic flowing over those trunks. The language proposed by Level 3 to Provisions 7.3.1.1.3.1 and 7.3.2.2 of the Interconnection Agreement would include Internet-related traffic in the relative use calculation. The language proposed by Qwest would not.<sup>134</sup>

84. Qwest likewise prevailed on this issue, with the CPUC holding that:

The logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here. When connecting to an ISP served by a CLEC, the ILEC end-user acts primarily as the customer of the ISP, not as the customer of the ILEC. The end-user should pay the ISP; the ISP should charge the cost-causing end-user. The ISP should compensate both the ILEC (Qwest) and the CLEC (Level 3) for costs incurred in originating and transporting the ISP-bound call. Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport.<sup>135</sup>

85. In summary, the CPUC first held that reciprocal compensation charges do not apply to ISP traffic, and then held that trunked transport charges likewise do not apply to ISP traffic. These holdings flatly contradict Qwest’s assertion that the “ISP traffic is interstate” holding applies only to reciprocal compensation situations.

86. The CPUC’s decision that ISP traffic was immune from trunk charges is significant given that our case likewise involves interconnection charges for traffic flowing through trunks. Qwest’s expert witness testified in our case that the ISP traffic in

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<sup>134</sup> CPUC Decision, ¶ 2, p. 32.

<sup>135</sup> CPUC Decision, ¶ 8, p. 36.

question likewise involved Qwest's trunks.<sup>136</sup>

87. Level 3 appealed the CPUC decision to the Colorado federal district court, and on December 8, 2003, the Court upheld the CPUC decision. The Court pointed out that even though Level 3 initially appealed both issues 2 and 6, "Issue 2 is no longer in dispute, so I need only to address Issue 6."<sup>137</sup> The Court set forth the general proposition that financial responsibility for trunks and facilities should be apportioned between the parties based on each company's originating traffic, but then stated that,

The CPUC has effectively created an exception to this general rule, and that exception has produced this litigation. According to CPUC's determination, a telephone call which originates on Qwest's network but terminates with an internet service provider ("ISP") who is a customer of Level 3 would not be considered in allocating financial responsibility for the trunk. . . .

CPUC, in its initial decision, explained its policy rationale for this conclusion by stating that: [t]he logic underlying our decision on reciprocal compensation for Internet bound traffic dictates a similar result here . . . Therefore, we agree with Qwest that Internet related traffic should be excluded when determining relative use of entrance facilities and direct trunked transport.<sup>138</sup> [Emphasis added.]

### **Qwest's Oregon Case Involving Trunk Charges for ISP Traffic**

88. Qwest advanced the same arguments before the Oregon Public Utility Commission ("OPUC") in 2001,<sup>139</sup> a case also involving Level 3 Communications. In that case, as in Colorado, the issues were whether ISP traffic was subject to reciprocal compensation charges, and whether it was subject to payments for direct trunk transport

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<sup>136</sup> Linse, from Tr. p. 203, line 17-25 to p. 207, line 12; also, Linse, Tr. p. 227, lines 19-23.

<sup>137</sup> Level 3, at p. 1072; Issue 2 was dismissed with prejudice by stipulation of the parties, Level 3, at p. 1074.

<sup>138</sup> Level 3, pp. 1072-73.

<sup>139</sup> In the Matter of the Petition of Level 3 Communications, LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection, Order No. 01-809, Entered September 13, 2001 ("OPUC Decision).

and entrance facilities as determined by each parties' relative use of the facilities, i.e., the amount of traffic that each party originated over the facilities.<sup>140</sup> Qwest, as the originating carrier for ISP traffic bound for Level 3 ISP customers, argued that the Order on Remand exempted ISP traffic from both the reciprocal compensation and trunk transport charges.<sup>141</sup>

89. An arbitrator issued the initial decision which the OPUC subsequently approved. In the interim the reciprocal compensation issue was resolved by the parties so the only remaining issue was the trunk transport charges. The arbitrator found the Order on Remand controlling, and excluded the ISP traffic from the allocation of trunk and facilities costs, holding that:

The overall thrust of the language of the *ISP Remand Order* is clearly directed at removing what the FCC perceives as uneconomic subsidies and false economic signals from the scheme for compensating interconnecting carriers transporting Internet-related traffic. Since the allocation of costs of transport and entrance facilities is based upon relative use of those facilities, ISP-bound traffic is properly excluded when calculating relative use by the originating carrier.<sup>142</sup>

90. Thus, BHFC's position in our case is supported by Qwest's previously stated positions, the Order on Remand, the NPRM, and by state commission and court decisions interpreting the Order on Remand.

### **QWEST'S REMAINING ARGUMENTS**

#### **Qwest's Quote from the 1999 Declaratory Ruling Regarding ESPs**

91. In its recently filed Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction, Qwest quotes paragraph 5 of the 1999 Declaratory Ruling, apparently

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<sup>140</sup> OPUC Decision, p. 12.

<sup>141</sup> OPUC Decision, pp. 12-13.

<sup>142</sup> OPUC Decision, p. 14.

in support of its argument regarding intrastate charges for ISP traffic.<sup>143</sup> The term “apparently” is used because the quoted paragraph merely reiterates what has long been the case, Enhanced Services Providers (“ESPs”), of which ISPs are a subset, get special treatment from the FCC insofar as ISP traffic is concerned. The exception does not apply to LECs such as BHFC.

92. By way of background, since 1983 the FCC has treated ESPs and LECs differently insofar as intercarrier compensation is concerned. Specifically, the FCC carved out a special exception which allows ESPs to be treated as end users for purposes of intercarrier compensation, and thus avoid interstate charges. As the FCC explained in its Order on Remand:

ISPs, one class of enhanced service providers (ESPs), also may utilize LEC services to provide their customers with access to the Internet. In the MTS/WATS Market Structure Order, the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN). Thus, despite the Commission's understanding that ISPs use interstate access services, pursuant to the ESP exemption, the Commission has permitted ISPs to take service under local tariffs.<sup>144</sup>

93. The Order on Remand later addressed the fact that its discussion of this exemption in the 1999 Declaratory Ruling raised questions in the mind of the Atlantic Bell court which later vacated the Declaratory Ruling:

Part of the ambiguity identified by the court appears to arise from the ESP exemption, a long standing Commission

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<sup>143</sup> Qwest Conditional Motion, p. 5.

<sup>144</sup> Order on Remand, ¶ 11.

policy that affords one class of entities using interstate access - - information service providers - - the option of purchasing interstate access services on a flat-rated basis from intrastate local business tariffs, rather than from interstate access services used by IXCs.<sup>145</sup>

Thus, the quoted paragraph addresses how ESPs, not LECs, are treated for purposes of intercarrier compensation. The parts of the Order on Remand relevant to our case, however, are those addressing intercarrier compensation between LECs.

94. Qwest highlighted three different portions of the quoted paragraph. The first highlighted portion simply repeats the above, i.e., ESPs are entitled to avoid interstate tariffs by using intrastate business tariffs.

95. The next highlighted section states that expenses and revenues of “incumbent” LECs (such as Qwest) have “traditionally” been characterized as intrastate for “separations purposes.”<sup>146</sup> If Qwest is thereby arguing that the term “intrastate” in the 1999 Declaratory Ruling is synonymous with the “intrastate” traffic or “intrastate” tariff in our case, that argument is invalid.

96. A reading of paragraphs 3 through 23 of the Declaratory Ruling clearly establishes that the term “intrastate” in the Declaratory Ruling includes everything but interstate traffic (i.e., includes both “intrastate” and “local” traffic). Thus, throughout the Declaratory Ruling, the FCC categorizes all calls as either intrastate calls (those which remain within a single state), or interstate calls (those with cross state boundaries). This is critical in interpreting the Declaratory Ruling and other cited authorities so that references therein to “intrastate” will not be equated with only those calls which cross local exchanges.

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<sup>145</sup> Order on Remand, ¶ 27.

<sup>146</sup> Qwest Motion, p. 5.



97. For example, when discussing ISP bound calls, the Declaratory Ruling states that, “If these calls terminate at the ISP’s local server . . . then they are intrastate calls, and LECs are entitled to reciprocal compensation . . .”<sup>147</sup> Also,

In a conventional circuit-switched network, a call that originates and terminates in a single state is jurisdictionally intrastate, and a call that originates in one state and terminates in a different state (or country) is jurisdictionally interstate.<sup>148</sup>

ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs.<sup>149</sup>

Thus [with regard to ESPs], although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.<sup>150</sup>

98. The last sentence above is found in paragraph 23 of the Declaratory Ruling and is virtually identical to the highlighted sentence in Qwest’s Motion to Dismiss taken from paragraph 5 of the Declaratory Ruling. Thus, whatever else Qwest’s highlighted sentence may stand for, it certainly is not authority for the proposition that CLECs such as BHFC are compelled to pay intrastate tariff charges for interstate calls.

99. The final highlighted sentence in Qwest’s Motion states that the Commission continues to treat ISP bound traffic as though it were local. This is true, but only insofar as ESPs are concerned (the subject of the entire paragraph being ESPs). Certainly Qwest isn’t contending that the Commission is treating ISP traffic as “local” (in the sense of “locally originating”) insofar as LECs are concerned? Such an argument is

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<sup>147</sup> Declaratory Ruling, ¶ 7.

<sup>148</sup> Declaratory Ruling, ¶ 18.

<sup>149</sup> Declaratory Ruling, ¶ 20.

<sup>150</sup> Declaratory Ruling, ¶ 23.

flatly contradicted by the language in the rest of the 1999 ruling, but more importantly, contradicted by the Order on Remand upon which Qwest relied to argue that as an LEC it was not subject to local reciprocal compensation charges under the Qwest/BHFC Interconnection Agreement.

100. Nevertheless, Qwest's lead-in to its quote from the 1999 ruling is:

As noted in opening argument, and as will be explained in more detail in subsequent briefing, the FCC has held since 1983 that even though traffic delivered to enhanced service providers ("ESPs"), including internet service providers ("ISPs"), is jurisdictionally interstate, intrastate tariffs apply to that traffic, as described in the FCC's 1999 ruling . . .<sup>151</sup> [Emphasis added.]

101. Since the quote which follows applies only to ESPs, Qwest's above statement would be true only if the underlined portion read: ". . . [i]ntrastate tariffs apply to that traffic insofar as ESPs are concerned." Without the qualifying language, the statement is wrong. With the qualifying language, it offers no support whatsoever for Qwest's position.

102. In summary, Qwest quotes a paragraph that applies only to ESPs as authority for an argument regarding LECs, without explaining that federal law treats ESPs and LECs differently for intercarrier compensation purposes, and without explaining that the term "intrastate" as used therein encompasses both "intrastate" and "local" calls.

### **Qwest's Intrastate Tariff Language**

103. At the hearing Qwest's counsel cited §2.3.10 of its tariff<sup>152</sup> which is found under section headings of "Obligations of the Customer" and "Jurisdictional Report Requirements," and which provides that a call entered in the same state as the called

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<sup>151</sup> Qwest Motion, pages 4-5.

<sup>152</sup> Goodwin, Tr. p. 51, lines 2-24.

station is an “intrastate” call, otherwise it is an “interstate” call.

104. As just discussed,<sup>153</sup> if Qwest is thereby arguing that the term “intrastate” in its tariff is synonymous with “intrastate” calls in our case, that argument is invalid. A reading of §2.3.10 establishes, again, that the term “intrastate” is used therein to distinguish it from “interstate,” and the term includes both “intrastate calls” and “local calls,” i.e., everything but interstate calls. Thus, that tariff language and use of the “intrastate” term is not relevant to our situation in which “intrastate” refers to calls that are neither local nor interstate.

105. More to the point, however, is that the FCC Orders have dictated ISP traffic to be interstate, and thus, as earlier discussed, not subject to intrastate tariffs, or local traffic interconnection agreements, or, for that matter, trunking or facilities costs. Thus, any interpretation of an intrastate tariff that would render it applicable to interstate traffic (including, ISP traffic), would violate the FCC Orders.

106. Shortly after the Telecommunications Act of 1996 was enacted ILECs and state commissions challenged the scope of FCC jurisdiction under the Act. The United States Supreme Court ultimately held in 1999 that the Telecommunications Act of 1996 gave the FCC jurisdiction over all matters related thereto, including jurisdiction over telecommunications matters previously reserved to the states.<sup>154</sup> Thus, state laws and state regulated tariffs must comply with the 1996 Act, and with regulations and orders issued thereto, to insure that the goals of the Act are not frustrated.<sup>155</sup>

107. The FCC held in its Order on Remand that imposing traditional intercarrier compensation regimes on ISP traffic has discouraged the very competition the Act was intended to address.<sup>156</sup> As our own Supreme Court has held:

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<sup>153</sup> See, ¶¶ 95-97, *supra*.

<sup>154</sup> AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 119 S.Ct. 721, 726, 142 L.Ed.2d 835 (1999).

<sup>155</sup> Thus, at the hearing the undersigned counsel pointed out that the new FCC Orders take precedence over the state tariff; Truhe, Tr. p. 33, lines 5-13.

In the main, the Act creates a framework to encourage swift deployment of new technologies, to open telecommunications markets to competition, and to reduce regulation, so that Americans can enjoy lower prices and higher quality services. To attain these goals, Congress sought to end the previously monopolistic local telephone markets in part by prohibiting states from imposing legal obstacles to impede competition.<sup>157</sup>

108. Finally, since Qwest's tariff does not apply to ISP traffic, and since the FCC Orders only address ISP traffic, those Orders do not vitiate the above cited language in Qwest's tariff, nor necessarily the 1985 Order upon which it relies. That language still applies to whatever traffic is still subject to the tariff, including traditional "intrastate" traffic, but certainly not to ISP traffic by virtue of the FCC Order on Remand. That said, however, it must be cautioned that the cited tariff language utilizes the old "routing" analysis (i.e., calls classified based on the location of intermediate switches, called station numbers, etc.). As previously discussed, the FCC has expressly rejected the routing analysis in favor of an "end points" analysis, concluding that, ". . . [a]n interstate communication does not end at an intermediate switch . . ."<sup>158</sup>

109. With its argument herein, Qwest again wants to have its cake and eat it too. As previously noted, Qwest has on at least three prior occasions<sup>159</sup> successfully argued that the FCC Order on Remand exempted its ISP traffic from its reciprocal compensation and trunking cost obligations since ISP traffic was interstate, i.e., ISP traffic is simply not covered by those agreements. So, too, in our case, the Order on Remand has established that ISP traffic being interstate, it is exempt from intrastate tariffs.

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<sup>156</sup> See, ¶ 64, *supra*, and fn. 21.

<sup>157</sup> *In re GCC License Corp.*, 623 N.W.2d 474 (S.D., 2001)(citing *AT&T Corp. v Iowa Utilities Bd.*).

<sup>158</sup> Declaratory Ruling, ¶ 11.

<sup>159</sup> See earlier references to Colorado, Oregon, and South Dakota cases.

### **Qwest's Tariff Does Not Address ISP Traffic**

110. There is yet another reason why Qwest's intrastate tariff does not govern these calls, and that reason is provided in Qwest's correspondence to BHFC in our case. Qwest has stated that if a document is silent with regard to ISP traffic, i.e., does not specifically mention ISP traffic, then that document cannot be used as authority for billing ISP traffic.

111. Qwest first advanced this argument against BHFC with regard to the parties' Interconnection Agreement, refusing to pay BHFC reciprocal compensation charges for ISP traffic, stating that because the Interconnection Agreement was silent as to ISP traffic it did not govern those calls. In the earlier referenced December 3, 2001, letter from Qwest to BHFC, Qwest stated that:

Because the Interconnection Agreement is silent regarding ISP-bound traffic, and because no other agreement, order, or ruling exists prior to 6/14/01 addressing the issue of ISP bound traffic, Qwest believes that no compensation is due for ISP-bound traffic prior to that date. After 6/14/01 Qwest accepts the FCC Order as the controlling document for this issue.

It is Qwest's position that, with this language, the FCC is effectively stating that if a LEC does not have specific language in their existing Interconnection Agreement which covers compensation for ISP-bound traffic, they do not receive compensation for such traffic after 6/14/01.<sup>160</sup>

112. Thus, Qwest invoked the Order on Remand for its authority that ISP traffic was exempt from any billing authority that did not specifically cover compensation for ISP traffic. Qwest cites no reference to ISP traffic, in any context, in its tariff, either in the cited section or elsewhere (and BHFC has likewise found none). Therefore, quoting Qwest's above letter, "It is Qwest's position that, with this language, the FCC is

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<sup>160</sup> Exhibit 7.

effectively stating that if a LEC does not have specific language in their existing Interconnection Agreement [substitute intrastate tariff in our case] which covers compensation for ISP-bound traffic, they do not receive compensation for such traffic after 6/14/01.”<sup>161</sup>

### **JURISDICTION AND STATUTE OF LIMITATIONS**

113. The Commission has approved Qwest’s intrastate tariff at issue herein in accordance with ARSD 20:10:29, and the Commission has jurisdiction to resolve disputes arising out of intrastate tariffs, including Qwest’s tariff. Qwest has filed a Conditional Motion to Dismiss in which it concedes this issue, but only if the Commission rules in its favor.<sup>162</sup> Qwest argues that if the Commission rules against it, then the FCC, and not the Commission, has jurisdiction. In a related argument, and apparently for the same reason, Qwest contends that a federal two-year statute of limitation (“SOL”) applies. Accordingly, although BHFC’s responsive jurisdictional brief is not yet due, BHFC will begin to address the jurisdictional issue herein because it relates directly to the SOL issue.

114. A critical inquiry regarding the jurisdictional and SOL issues is to determine the basis for the claim. BHFC’s Complaint alleges that Qwest misapplied its intrastate tariff by treating ISP bound traffic as intrastate traffic. Thus, BHFC contends that the invoices it received from Qwest pursuant to that tariff were improper billings, calling into question whether the billing authority (Qwest’s tariff) actually applies to the calls at issue. The basis of BHFC’s claim, therefore, is Qwest’s improper utilization of

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<sup>161</sup> In our case both parties have acknowledged in their pleadings that the ISP traffic at issue is not governed by the parties’ Interconnection Agreement.

<sup>162</sup> Qwest Motion, p. 6.

its tariff for traffic not subject to that tariff. If BHFC is right, the billings are improper and BHFC is entitled to a refund.

115. In Qwest's Conditional Motion to Dismiss, Qwest contends that the FCC, and not the Commission, has jurisdiction over this dispute,<sup>163</sup> because BHFC alleges the ISP traffic is interstate. Stated another way, Qwest contends jurisdiction and the applicable SOL are determined not by the billing authority (intrastate tariff) under which Qwest's invoices were issued, but by the billing authority Qwest should have used if the ISP traffic is indeed interstate (presumably a federal tariff).

116. BHFC submits that both jurisdiction and the applicable SOL are dictated on the basis of the claim at issue, in this case improper billings pursuant to an intrastate tariff, and not by a theoretical basis of claim that would have applied had Qwest otherwise billed the traffic.

117. Interestingly, and significantly, Qwest has already conceded this very point in its pleadings. In its Answer and Counterclaim, Qwest has admitted that if the Interconnection Agreement had provided the basis for BHFC's claim, then an arbitration panel (and not the FCC) would have authority to resolve the dispute:

BHFC's claims are subject to mandatory arbitration pursuant to the current interconnection agreement, which provides that [reference to arbitration clause]. To the extent that this claim arises out of or is related to the current interconnection agreement, this entire dispute must be settled by arbitration.<sup>164</sup> [Emphasis added.]

118. Therefore, Qwest agrees with BHFC that jurisdiction is determined by the billing authority ". . . [t]hat this claim arises out of or is related to . . ." Qwest thus concedes that had the claim arisen under the Interconnection Agreement (i.e., the

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<sup>163</sup> Qwest's Conditional Motion, p. 6 (but only if, again, BHFC prevails on the merits).

<sup>164</sup> Qwest Answer, Defense, p. 8, ¶1.

invoices issued pursuant to it), jurisdiction would lie, not with the FCC, but with an arbitration panel having authority to resolve Interconnection Agreement disputes.

119. Faced with this admission, and the fact that BHFC's claim herein arose out of Qwest's state tariff, and the fact that the Commission has jurisdictional authority over state tariffs, Qwest's claim that the FCC has jurisdiction herein is without merit. As will be discussed, the same argument applies, for the same reasons, to the SOL issue.

120. In an interesting argument, Qwest's Conditional Motion to Dismiss alleges that if Qwest prevails on the merits (i.e., the intrastate tariff applies), then jurisdiction lies with the Commission. However, if BHFC prevails on the merits (i.e., the intrastate tariff does not apply), then the FCC, and not the Commission, has jurisdiction. This is an especially interesting argument because in the latter situation the Commission's ruling is automatically rendered a nullity, i.e., the ruling (issued absent jurisdictional authority) necessarily negates its own validity.

121. That is not the law, of course, as jurisdiction in our case is determined by the Qwest tariff which gave rise to the claim, which the Commission certainly has jurisdiction over, and it can not thereafter lose that jurisdiction based on its decision. In other words, subject matter jurisdiction is not outcome determinative. Either the Commission has it, or it does not.

#### **Prior Qwest Precedents Which Support BHFC's Jurisdictional Argument**

122. Oregon: As discussed, Qwest successfully argued before the Oregon Commission (OPUC) that the Order on Remand exempted Internet traffic from the intercarrier compensation charges at issue, thus Qwest successfully embraced the Order on Remand's finding that ISP traffic was interstate in nature. Using Qwest's logic in our



case, the OPUC should not have had jurisdiction since Qwest was contending the traffic was interstate in nature. However, Qwest acknowledged the jurisdiction of the OPUC throughout. In other words, the OPUC not only had jurisdiction initially, it did not lose jurisdiction by ruling that the ISP traffic was exempt from the charges.

123. Colorado: Qwest repeated this in the Colorado case, this time accepting the jurisdiction of the Colorado Commission (CPUC) even though Qwest contended the calls were interstate in nature and thus exempt from reciprocal compensation and trunk charges. The Level 3 federal court thereafter confirmed the jurisdiction of the CPUC, again, even after the CPUC concluded the ISP traffic was exempt from the charges. In neither of the above cases, therefore, was the jurisdiction of the state commission outcome determinative.

124. Using Qwest's argument herein, both of the above cases should have been determined by the FCC because Qwest successfully contended the calls were interstate. Instead, in both cases Qwest acknowledged state commission jurisdiction, even after the commissions ruled the ISP traffic was exempt from the challenged charges.

125. South Dakota: The reciprocal compensation matter which BHFC settled with Qwest in 2002 involved invoices issued by BHFC to Qwest pursuant to the parties' Interconnection Agreement. As discussed, Qwest refused to pay alleging that the calls were interstate, not local. Using Qwest's argument herein, the only entity with jurisdiction over the matter was the FCC because Qwest alleged the calls were interstate.

126. However, BHFC filed a Complaint with the Commission contending the matter was governed by the Interconnection Agreement.<sup>165</sup> And Qwest did not respond as in the instant case by filing a Motion to Dismiss, contending that since the calls were

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<sup>165</sup> See, BHFC Complaint, Dkt. No. CT 01-056.

interstate, only the FCC had jurisdiction. Instead, Qwest filed a motion in which it agreed that the Interconnection Agreement governed the matter, but alleged the matter was subject to an arbitration process pursuant to the terms of the Interconnection Agreement.<sup>166</sup>

127. Thus, Qwest agreed that, since BHFC's claim arose under the Interconnection Agreement, that agreement dictated the jurisdiction. And, since the agreement required arbitration, an arbitration panel had jurisdiction (and not the FCC even though Qwest alleged the calls were interstate).

128. Our case is exactly the same. Qwest's improper billings were made pursuant to an intrastate tariff; therefore the entity with authority over intrastate tariffs has jurisdiction - in our case, this Commission.

129. Iowa: A recent federal case, Iowa Network Services, Inc. v. Qwest Corporation ("Iowa Network"),<sup>167</sup> is strikingly similar to ours on the jurisdictional issue. In Iowa Network several independent LECs joined together to form INS which charged Qwest access fees to utilize the INS network. The access fees were billed to Qwest for wireless telecommunications pursuant to INS's intrastate tariff filed with the Iowa Utilities Board ("IUB") and also pursuant to INS's interstate tariff filed with the FCC.<sup>168</sup> Qwest paid those charges until 1999,<sup>169</sup> but in 1999 stopped paying, citing a 1996 FCC Local Competition Order which declared that such traffic was local traffic, and thus not subject to access charges.<sup>170</sup>

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<sup>166</sup> See, Qwest Motion to Dismiss, Dkt No. CT 01-506.

<sup>167</sup> No. 4:02-CV-40156, October 9, 2002 (S.D. Iowa, 2002); not reported in F. Supp.2d.

<sup>168</sup> Iowa Network, pp. 2, 6.

<sup>169</sup> Iowa Network, p. 3.

<sup>170</sup> Iowa Network, p. 4.

130. Qwest initiated an action before the Iowa Utilities Board (IUB) seeking a refund of the access and termination charges it had paid INS,<sup>171</sup> and INS responded by challenging the IUB's jurisdiction.<sup>172</sup> The appellate court decision hardly mentions its confirmation of IUB's jurisdiction in the intrastate tariff matter, but addresses in some detail the federal tariff jurisdictional challenge. The court acknowledged that the FCC ordinarily would have exclusive jurisdiction over the federal tariff charges, but in upholding the IUB's jurisdiction pointed out that the IUB has jurisdiction over telecommunications services provided within Iowa, ". . . [as] long as the Board does not act in a manner inconsistent with the Act or FCC regulations."<sup>173</sup>

131. The IUB thus had jurisdiction to decide whether the state intrastate tariff applied to the traffic (our case), as well as jurisdiction to decide whether the federal interstate tariff applied to the traffic:

Although INS correctly maintains that the IUB could not adjudicate rights arising under the FCC tariff . . . that is not what the IUB did, or necessarily had to do. What the IUB did was determine that access charges cannot be applied to the traffic at issue in this case . . .<sup>174</sup>

Thus, Iowa Network is an even stronger case for BHFC's position, holding that the state commission had jurisdiction even when the claim arose under a federal tariff.

132. On the merits, INS argued that despite the recent changes in the federal law, this traffic should continue to be subject to access charges as it was before the enactment of the 1996 Telecommunications Act.<sup>175</sup> The IUB rejected that argument, finding instead, ". . . [t]hat the FCC had previously deemed intraMTA traffic as being

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<sup>171</sup> Iowa Network, p. 6

<sup>172</sup> Iowa Network, p. 6.

<sup>173</sup> Iowa Network, p. 7.

<sup>174</sup> Iowa Network, p. 12

<sup>175</sup> Iowa Network, p. 8

local [pursuant to its 1996 Local Competition Order], and, therefore, access charges could not apply.”<sup>176</sup>

133. The parallels to our case are unmistakable. In Iowa Network Qwest asked the IUB to refund payments it made under an intrastate tariff (and, unlike our case, also under a federal interstate tariff). Qwest successfully argued that an FCC Order established the traffic at issue was local, and thus not subject to access charges under either tariff. Finally, the federal court upheld the jurisdiction of the IUB to make both of those determinations.

134. In our case a state commission likewise is being asked to refund charges made under an intrastate tariff because the traffic at issue was not subject to the tariff (in Iowa Network because the traffic was local, in our case because the traffic is interstate).

#### **Ramifications of Qwest’s Jurisdictional Argument**

135. Since subject matter jurisdiction cannot be conferred, if Qwest is correct in its jurisdictional argument in our case, then the favorable decisions it received in Colorado and Oregon are void, as only the FCC has jurisdiction over the ISP traffic deemed interstate in nature. Likewise, the arbitration panel would have had no jurisdiction in Qwest’s earlier dispute with BHFC.

136. In our case invoices were issued under a state tariff, which tariff charges form the basis for BHFC’s claim, and the Commission has jurisdiction over that tariff.

#### **Statute of Limitations**

137. A statute of limitations (“SOL”) sets the time within which a matter may be brought to insure that parties will not rest on their rights, and that claims will be brought while the evidence is still fresh. As stated by the South Dakota Supreme Court:

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<sup>176</sup> Iowa Network, p. 8.

“The philosophy subtending civil limitation periods, embraced in all systems of enlightened jurisprudence, hold it unjust to leave open indefinitely exposure to outdated lawsuits.”<sup>177</sup>

138. When Qwest issued invoices to BHFC under its tariff, BHFC was obligated to challenge the propriety of those billings within the statutory time frame applicable to those billings. Thus, BHFC contends the SOL governing that tariff and those invoices is the six year SOL of SDCL 15-2-13(1) which addresses, “An action upon a contract, obligation, or liability, express or implied . . .”

139. Qwest concedes that the invoices were issued under its intrastate tariff,<sup>178</sup> and while it did not allege any specific SOL in its Answer,<sup>179</sup> at the hearing it cited “Section 415 of the Telecommunications Act”<sup>180</sup> which refers to a two year SOL governing federal interstate charges.

140. The same arguments that BHFC has made herein regarding jurisdiction apply equally to the SOL issue, i.e., what is the basis for BHFC’s claim? Is it interstate access charges made under Qwest’s federal tariff, or intrastate access charges made under Qwest’s state tariff? Clearly the latter is the basis for BHFC’s claim, and the operative SOL is that which applies to the latter.

141. In Strassburg v. Citizen’s State Bank<sup>181</sup> (which mentioned the Commission, but only incidentally), a challenge was made to a bank’s setoff of funds. Plaintiff alleged the setoff was improper and invoked SDCL 15-2-13 (1), among other subsections of that statute. The Court found that, “The Bank’s setoff of Steffenson’s

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<sup>177</sup> Strassburg v. Citizens State Bank, 581 N.W.2d 510, 514 (S.D. 1998).

<sup>178</sup> Qwest’s Answer, ¶ 7; Qwest’s Answer to BHFC’s Request for Admission 1.

<sup>179</sup> Qwest’s Answer, ¶ 33.

<sup>180</sup> Goodwin, Tr. p. 62, lines 15-23.

<sup>181</sup> See, fn. 170, supra.

account forms the basis for Strassburg's claim and both parties agree that Section 15-2-13 provides the applicable statute of limitations . . . "<sup>182</sup> [Emphasis added.]

142. Likewise in our case, the improper intrastate tariff charges "form the basis" for BHFC's claim. To repeat, as to both the jurisdictional and SOL issues, the relevant inquiry is what forms the basis for the claim.

143. If Qwest had elected to invoice the ISP traffic at issue pursuant to the parties' Interconnection Agreement, the invoiced obligations would have arisen under that agreement (i.e., formed the basis for the claim), and the SOL governing the agreement would have applied. If Qwest had invoiced the calls pursuant to its federal tariff, the invoiced obligations would have arisen under that tariff, and the federal SOL applicable to that tariff would have applied. Qwest did neither, but elected to invoice the traffic under its intrastate tariff.

144. BHFC's claim did not arise because of federal charges or overcharges imposed pursuant to Section 415 of the Telecommunications Act, and the applicable SOL is not dictated by what Qwest could have used as its authority for the billing, but instead what it did use. In our case Qwest's invoiced tariff charges created obligations that BHFC dutifully paid, and the operative SOL is SDCL 15-2-13 (1).<sup>183</sup>

## **QWEST'S COUNTERCLAIM**

### **Factual Background**

145. As previously discussed, when Qwest refused to pay BHFC's invoices for locally exchanged ISP traffic, even as BHFC was continuing to pay Qwest for inter-exchange ISP traffic, BHFC was put in an untenable financial situation that worsened

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<sup>182</sup> Strassburg, supra, p. 514.

<sup>183</sup> The only other arguably relevant SOL is SDCL 15-2-13 (5), which also carries a six year limitation period, for injuries to rights not otherwise specifically enumerated.

substantially each month.<sup>184</sup> Contrary to Qwest's oft-stated position that all ISP traffic was interstate, Qwest refused to recognize that reality when it was on the receiving end of ISP traffic compensation. Finally, BHFC's attempts to resolve the situation through a business arrangement with AOL were summarily rejected by AOL, even to the extent of being threatened with litigation by AOL.<sup>185</sup>

146. As a result, BHFC took a sound business approach to the situation, and decided to start billing its own customers for the Qwest intrastate access charges occasioned by those same customers' utilization of Qwest ISPs.<sup>186</sup> In other words, BHFC chose to have each of its own customers bear the costs of their respective ISP usage. It was a business decision that BHFC made with great reluctance, but a necessary one given the realities of the situation vis-à-vis Qwest.<sup>187</sup>

147. BHFC gave written notice to its customers of the intended additional charge.<sup>188</sup> BHFC ultimately charged its customers 5.9 cents per minute to approximate its incurred access charges.<sup>189</sup> Faced with having to pay long distance rates for each minute of internet usage, BHFC's customers could either reduce their monthly usage (some were leaving their computers connected to the internet 24 hours per day), or switch to an ISP provider that offered them local calling numbers, thus avoiding long distance charges.<sup>190</sup> Most opted for the latter solution, but since the ISPs associated with Qwest, such as AOL,

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<sup>184</sup> White, Tr. p. 105, lines 17-24.

<sup>185</sup> White, Tr. p. 106, lines 11-20; Exhibit 8; Tr. p. 112, lines 17-25; Tr. p. 113, lines 1-17

<sup>186</sup> White, Tr. p. 110, lines 17-25; Tr. p. 111, lines 1-7; Exhibit 10.

<sup>187</sup> White, Tr. p. 111, lines 8-24.

<sup>188</sup> White, Tr. p. 109, lines 20-25; Tr. p. 110, line 1; Attached exhibit 2 to Exhibit 30.

<sup>189</sup> White, Tr. p. 110, line 25; Tr. p. 111, lines 1-7.

<sup>190</sup> Attached exhibit 2 to Exhibit 30.

were not offering them that service (and to BHFC's knowledge still do not, to this day), they elected to utilize the services of other ISPs such as those associated with BHFC.<sup>191</sup>

148. Based on the above facts Qwest has made several allegations against BHFC, which will be dealt with in turn.

149. Qwest alleged that the ISP charge was initiated without Commission approval,<sup>192</sup> stating that BHFC submitted a Petition for a Declaratory Ruling to the Commission to amend its local calling plan, but later withdrew it.<sup>193</sup> In its Reply to the Counterclaim BHFC acknowledged the above,<sup>194</sup> and further indicated that the ISP charge was implemented with full knowledge of the Commission, including via a January 17, 2003, notification letter to the Commission.<sup>195</sup> Contrary to Qwest's assertion, BHFC also pointed out that it withdrew its Petition for the reasons given to the Commission, because the calls being interstate, they fell outside BHFC's local calling plan.<sup>196</sup>

150. In addition, Qwest never challenged BHFC's Petition withdrawal at the time, nor does Qwest now cite any authority for why Commission approval was required.

151. Qwest's Counterclaim made three allegations regarding BHFC's new ISP charge to its own customers: the charge damaged Qwest's ability to attract and retain ISP customers, led to decreased use of Qwest's services, and decreased Qwest's revenues; the charge created improper, anticompetitive incentives for Qwest's customers to migrate to BHFC; and, the charge violated SDCL 49-31-11 as discriminating against Qwest customers.<sup>197</sup>

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<sup>191</sup> White, Tr. p. 154, lines 15-21.

<sup>192</sup> Qwest Counterclaim §2.

<sup>193</sup> Qwest Counterclaim §7.

<sup>194</sup> FiberCom's Reply to Qwest's Counterclaim, §3.

<sup>195</sup> Exhibit 10; FiberCom Reply §3.

<sup>196</sup> Exhibit 10; White, Tr. p. 156, lines 13-19; Qwest Reply §7.

<sup>197</sup> Qwest Counterclaim §§ 9-11.



152. Qwest has offered no evidence in support of these allegations. Qwest's only hearing witness testified about call routing and other technical matters and Qwest offered no evidence regarding loss of ability to attract and retain customers, decreased use of its services, or decreased revenues. Further, it has offered no evidence regarding its other allegations of wrongdoing. Thus, before seeing Qwest's initial brief on this issue, it is difficult to respond.

153. Nevertheless, it goes without saying that, absent any wrongdoing on BHFC's part, Qwest's loss of customers or revenues is not actionable.

154. What exactly did BHFC do? Faced with an impossible situation, it very reluctantly decided to pass on to its own customers the access charges it was incurring by reason of those customers' Internet usage, and, further, gave them other ISP options so they could avoid those additional charges. Simply stated, BHFC was, and is, entitled to pass on its costs of providing service to its own customers, in this case Qwest's access charges.

155. BHFC's customers were no more able to absorb those extra charges than was BHFC so, not surprisingly, they apparently chose an ISP provider that provided a local calling number for Internet access. BHFC's purpose in imposing the ISP charge is simply to recover its costs with respect to this traffic,<sup>198</sup> and the fact that BHFC's customers chose other ISPs does not make the ISP charge illegal, anti-competitive, or otherwise improper. Further, BHFC has not discriminated against Qwest or AOL. It has

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<sup>198</sup> Exhibit 12, ¶ 4; White, Tr. p. 111, lines 3-7; Exhibit 10.

<sup>200</sup> Exhibit 12, paras.5, 7; White, Tr. p. 155, lines 1-5.

applied the charge equally to all of its customers whose Internet use has given rise to access charges.<sup>200</sup>

156. Nothing in the Federal Telecommunications Act of 1934, as amended, requires a CLEC such as BHFC to subsidize an ISP's presence in the local market to the detriment of the CLEC's other customers,<sup>201</sup> which would be the case if Qwest's access charges were not passed on to those customers of BHFC that occasioned the access charges.

157. In fact the Telecommunications Act discourages subsidizing of services, preferring users to pay their own way.<sup>202</sup> The FCC repeatedly reiterated this principle in its Order on Remand:

In the NPRM, we suggest that, given the opportunity carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to obtain competitive advantage . . . a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses.<sup>203</sup>

In sum, our goal in this Order is decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end users.<sup>204</sup>

As a result, the rates paid by ISPs and, consequently, their customers should better reflect the cost of services to which they subscribe.<sup>205</sup>

158. That last FCC statement above is perhaps the single best authority for establishing the propriety of what BFHC has done, i.e., passed on to its own customers

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<sup>201</sup> Exhibit 12, ¶ 5.

<sup>202</sup> Exceptions to that rule, such as the ESP exemption under §251 of the Telecommunications Act, are just that, exceptions. See, FCC Order on Remand, §§11, 26-28.

<sup>203</sup> Remand Order, §4.

<sup>204</sup> Remand Order, §7.

<sup>205</sup> Remand Order, §74.

“... the cost of services to which they subscribe.” Thus, not only are those pass through charges permissible, they are actively encouraged by the FCC.

159. Qwest, as an ILEC, declined to offer an area wide calling area in the Black Hills, and through its customer ISPs declined to offer local ISP calling numbers to its customers, or anyone else’s customers, located outside of Rapid City. BHFC entered the market and immediately created an area wide calling plan, including local calling numbers for its ISP customers. Thereafter, BHFC reluctantly began charging its own customers for the access charges it was incurring from Qwest, causing some of its customers to switch to ISP customers of BHFC.

160. What did Qwest do in response? It could have asked its ISP customers to match BHFC’s actions, and likewise offer local ISP calling numbers outside of the Rapid City area, presumably retaining its customers in the process. Instead, to this day neither Qwest nor its ISP customers have elected to provide local ISP calling numbers outside of Rapid City. As long as Qwest can continue assessing access charges to anyone outside of the Rapid City area who wants to connect to its ISP customers, it has no incentive to do otherwise.

161. Thus, the obvious question is whether BHFC’s challenged actions herein, or Qwest’s actions, best comport with the letter and spirit of the Telecommunications Act which encourages competition, innovation, and lower consumer prices?

162. In summary, while Qwest may no longer be collecting those excessive access charges from BHFC for this traffic, the fact remains that BHFC’s ISP charge was not only a necessary response to the access charges, it was a perfectly legal response, in fact one encouraged by the Telecommunications Act.

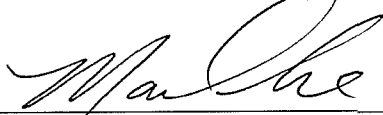
## CONCLUSION

Federal and state telecommunications laws and attendant orders and decisions are replete with language encouraging competition, innovation, and lower consumer prices. The Order on Remand specifically addresses the policy reasons for treating ISP traffic differently for compensation purposes from other traffic. The FCC recognized that if ISP traffic is made subject to traditional intercarrier compensation it will skew the marketplace, inhibit competitive innovation, and actually increase consumer prices.

Qwest has repeatedly, and successfully, invoked the FCC Orders not only in South Dakota, but also in Colorado and Oregon, to avoid paying intercarrier compensation for ISP traffic. Yet Qwest contends herein that BHFC cannot invoke those same Orders to avoid paying intrastate access charges for interstate traffic. Those Orders have established that ISP traffic is interstate in nature, and thus not subject to either local or intrastate charges, without regard to whether those charges are imposed pursuant to reciprocal compensation provisions of interconnection agreements, arise out of trunking and facilities costs, or arise out of access charges under intrastate tariffs. BHFC respectfully submits it is entitled to a refund of payments made to Qwest as addressed herein, plus interest.

Signed this 28<sup>th</sup> day of June, 2004

BLACK HILLS FIBERCOM, LLC

By:   
Marvin D. Truhe  
Its: Attorney


**CERTIFICATE OF SERVICE**

I hereby certify I am one of the counsel representing Black Hills FiberCom, L.L.C. in this matter and that on June 28<sup>th</sup>, 2004 a true and correct copy of the foregoing **Black Hills FiberCom's Initial Appellate Brief** was served electronically and via United States first class mail, postage prepaid, on the following:

Thomas J. Welk (tjwelk@bgpw.com)  
Boyce, Greenfield, Pashby and Welk, L.L.P.  
P.O. Box 5015  
Sioux Falls, SD 57717-5015

Tim Goodwin, Senior Attorney (Tim.Goodwin@qwest.com)  
Qwest Services Corporation  
1801 California Street 47<sup>th</sup> floor  
Denver, CO 80202

Karen Cremer (karen.cremer@state.sd.us)  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

  
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Marvin D. Truhe