

Qwest Corporation  
125 South Dakota Avenue  
Sioux Falls, SD 57194



June 10, 2004

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JUN 14 2004

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

Ms. Pam Bonrud, Executive Director  
Public Utilities Commission  
State Capitol Building  
Pierre, South Dakota 57501

RE: TC03-154

Dear Ms. Bonrud:

Please find enclosed one original and ten copies of Qwest's Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction in the above docket.

If you have any questions, please call Tim Goodwin at 303-896-9874.

Sincerely,

A handwritten signature in cursive script, appearing to read "Colleen E. Sevold", written in dark ink.

Colleen E. Sevold  
Manager-Policy & Law

Enclosures

JUN 14 2004

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTASOUTH DAKOTA PUBL  
UTILITIES COMMISSIC

BLACK HILLS FIBERCOM, LLC,  Complainant,  v.  QWEST CORPORATION,  Respondent	TC 03-154  Qwest's Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction
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Qwest Corporation ("Qwest") conditionally moves to dismiss for lack of subject matter jurisdiction the Complaint of Black Hills FiberCom, LLC ("BHFC"), as amended, as set forth below.

***Introduction***

Ultimately, Qwest believes the Commission has sufficient jurisdiction to resolve this claim in Qwest's favor, but not in favor of BHFC. BHFC asks this Commission to hold that FCC precedent renders all Internet-bound traffic as interstate for jurisdictional purposes, even if that traffic is toll traffic that both enters and leaves the telecommunications networks at phone numbers assigned to exchanges within South Dakota.

Such a conclusion would require the Commission to cede to the FCC the authority to decide whether or not interexchange, intrastate Internet-bound traffic – the Disputed Traffic<sup>1</sup> in this case – is properly subject to interstate or intrastate switched

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<sup>1</sup> For ease of reference and to minimize definitional disputes, Qwest will refer to the Disputed Traffic using the definition Kyle White provided at the hearing: "a Black Hills FiberCom customer calling a Qwest-served ISP in a separate Qwest exchange through a phone number identified in that exchange." Tr. 117:20-23.

access tariffs. Thus, if the Commission decides that all Internet-bound traffic is *jurisdictionally* interstate, the Commission cannot decide the merits of this case and must dismiss BHFC's Complaint,<sup>2</sup> consistent with South Dakota law.<sup>3</sup>

### ***Qwest's South Dakota Switched Access Tariff Classifies the Disputed Traffic as Intrastate Switched Access.***

In its Complaint, BHFC sought to invoke jurisdiction by claiming "application of the tariffs" was "the appropriate jurisdiction of the Commission." However, it became clear during the course of the proceedings that BHFC does not seek application of Qwest's South Dakota Switched Access Tariff (the "Tariff"), but rather asks the Commission to ignore the Tariff. The Tariff contains an explicit, easy-to-follow methodology for determining whether traffic is interstate, and not subject to the Tariff, or intrastate, and subject to its terms (emphasis added):

#### **2.3.10 JURISDICTIONAL REPORT REQUIREMENTS**

##### **A. Jurisdictional Determinant**

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

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<sup>2</sup> The jurisdiction of the Commission to resolve Qwest's Counterclaim has never been questioned. Accordingly, regardless of the Commission's decision on this Conditional Motion to Dismiss, the Commission must resolve the issues presented in that Counterclaim.

<sup>3</sup> See, e.g., *O'Toole v Board of Trustees*, 648 N.W.2d 342 (SD 2002), 2002 SD 77 ("An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction."); *Application of Koch*, 387 N.W.2d 530 (SD 1986) ("Subject matter jurisdiction is conferred solely by constitutional or statutory provisions. [citation omitted]. Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ.")

Not surprisingly, BHFC has gone to great lengths to argue that the Commission should **not** apply this portion of the tariff.<sup>4</sup> BHFC essentially admitted the Tariff would classify the Disputed Traffic as subject to intrastate switched access rates when it admitted the following in response to a request for admission (emphasis added):

### **BHFC's Response to Request for Admission 1 (Third Set)**

#### Request for Admission 1:

Admit that the traffic in dispute enters BHFC's customer network at a point within the same state as that in which the called station is situated.

#### Response to Request for Admission 1:

Without a definition of "the called station" this Request cannot be answered. ***If the term "the called station" is synonymous with "a Rapid City, South Dakota, access phone number," then BHFC admits this request.***

In opening statement, BHFC's counsel also admitted that the "called station" for the Disputed Traffic was in Rapid City. Transcript, page 32, lines 15-25.<sup>5</sup> On examination, BHFC's witness Kyle White admitted:

Q. Would you agree with me that the traffic in dispute is a call from a Black Hills FiberCom customer that enters Black Hills FiberCom's network in South Dakota but not in the Rapid City local calling area of Qwest and then is delivered to a called station as designated by the called station number in Rapid City that's dedicated to a Qwest ISP?

...

A. The traffic in dispute in this case is a Black Hills FiberCom customer calling a Qwest-served ISP in a separate Qwest exchange through a phone number identified in that exchange.

Q. And so the answer to my question is yes, the definition I gave you is fair?

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<sup>4</sup> BHFC's only attempt at the hearing to avoid the application of section 2.3.10(A) of the tariff was to note that the tariff notes a 1985 FCC decision as its source, and claiming that the FCC's decisions on whether or not Internet-bound traffic is subject to reciprocal compensation under interconnection agreements in 199 and 2001 have overruled FCC order 85-145. Those orders do not even **mention** Order 85-145. In fact, the orders do not mention access charges or the access charge scheme in any way. Order 85-145 is still the valid, standing law. Moreover, even a determination as to whether or not order 85-145 is still valid would be a matter within the jurisdiction of the FCC, and not this Commission.

<sup>5</sup> Future references to the transcript shall be in the format "Tr., page:line."

A. Probably fits.

Q. So the called station number for a Qwest-served ISP in Rapid City is in Rapid City; correct?

A. I believe so.<sup>6</sup>

BHFC's intent to avoid the Tariff was made quite clear in its opening statement. BHFC never argued that the language of the Tariff classified the Disputed Traffic as interstate and therefore not subject to intrastate switched access rates. Instead, BHFC argued how FCC precedent would classify the traffic as interstate. This approach contrasts somewhat with BHFC's complaint, which asserted that "resolution of this dispute requires the application of Qwest's intrastate switched access service tariff." BHFC Complaint, ¶ 6. However, even BHFC's complaint fails to mention any portion of any Qwest tariff or how the application of any portion of the Tariff would yield a result that the Disputed Traffic is not subject to intrastate switched access, instead citing federal and FCC authority (from reciprocal compensation cases, not access cases) to support their claims.

***Even If the Disputed Traffic is Jurisdictionally Interstate, The FCC Will Likely Conclude That the Traffic is Subject to Intrastate Switched Access Charges.***

It is important for the Commission to remember that the intrastate Tariff may well be applicable to the Disputed Traffic even if the traffic is *jurisdictionally* interstate and not subject to categorization through application of the Qwest South Dakota tariff. 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

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<sup>6</sup> Tr., 117:9 – 118:4.

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 on reciprocal compensation for Internet-bound traffic:

Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and ***the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs.*** Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to local exchange company central offices. ***In addition, incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes.*** ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the Access Charge Reform Order, the Commission decided to maintain the existing pricing structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. ***Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local.***<sup>7</sup>

Thus, the designation of Internet-bound traffic as jurisdictionally interstate or jurisdictionally intrastate is not dispositive of, and ultimately is irrelevant to, the determination of whether the Disputed Traffic is subject to Qwest's intrastate tariff.

## ***Conclusion***

This motion to dismiss is conditional, in that Qwest believes that application of the terms of the Tariff under which BHFC brings its Complaint necessarily yields a conclusion that the traffic in dispute is subject to intrastate switched access charges. If

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<sup>7</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98; CC Docket No. 99-68, 14 FCC Rcd 3689; 1999 FCC LEXIS 821; 15 Comm. Reg. (P & F) 201, RELEASE-NUMBER: FCC 99-38 (February 26, 1999) (the "ISP Declaratory Order") ("ISP Declaratory Order") (vacated and remanded by *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, (DC Cir. 2001) (emphasis added) (footnotes omitted).

the Commission makes that determination, as Qwest believes it should, then the Commission correctly and completely exercises its jurisdiction, and the only issues that remain in the case are those asserted in Qwest's Counterclaim. The Commission also would have the jurisdiction to decide that the application of the terms within the "four corners" of Qwest's Tariff yields a conclusion that the Disputed Traffic is interstate (though no language supports such a conclusion, as even BHFC appears to concede by lack of any argument or testimony concerning any such language).

However, this Commission does not have the jurisdiction to conclude that the FCC's orders relating to reciprocal compensation for locally exchanged traffic trump Qwest's South Dakota tariffs, regardless of the language used. If the Commission rejects Qwest's analysis and adopts BHFC's approach in this regard, the Commission must simply conclude that it is the FCC, and not the South Dakota Public Utilities, that has the jurisdiction to determine whether the Disputed Traffic is subject to intrastate or interstate switched access tariffs, dismiss BHFC's Complaint, direct BHFC to seek redress from the FCC, retain jurisdiction over Qwest's Counterclaim, and resolve the issues presented in that Counterclaim.

Dated: June 10, 2004

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**ATTORNEYS FOR QWEST CORPORATION**

**CERTIFICATE OF SERVICE**

I, Timothy J. Goodwin, do hereby certify that I am a Senior Attorney for Qwest Services Corporation, attorneys for Qwest Corporation in this cause, and on Thursday, June 10, 2004, true and correct copies of Qwest's Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction were served, by email, and also by United States first class mail, postage prepaid, on the following:

Karen Cremer  
South Dakota Public Utilities Commission  
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Pierre, SD 57501  
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Timothy J. Goodwin