

**MARVIN D. TRUHE**  
**ATTORNEY AT LAW**

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

Telephone (605) 348-8530

Email: marvtruhe@aol.com

July 28, 2004

**RECEIVED**

JUL 29 2004

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

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***

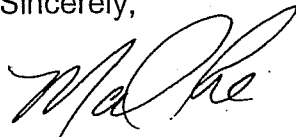
Dear Ms. Bonrud:

Enclosed for filing are the originals and ten copies of Black Hills FiberCom's Responsive Brief and Proposed Findings of Fact and Conclusions of Law in the above matter. By copy of this letter, and as indicated on the Certificates of Service, opposing counsel have been served.

Please call me if you have any questions.

Thank you.

Sincerely,



Marvin D. Truhe

MDT:skh

Enclosures

cc w/ encl: Thomas Welk  
Tim Goodwin  
Karen Cremer

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UTILITIES COMMISSION**

Email: marvtruhe@aol.com

July 28, 2004

**Via Electronic Mail and U.S. Mail**

Thomas J. Welk  
Boyce, Greenfield, Pashby and Welk, L.L.P.  
P.O. Box 5015  
Sioux Falls, SD 57717-5015

Tim Goodwin, Senior Attorney  
Qwest Services Corporation  
1801 California Street 47<sup>th</sup> floor  
Denver, CO 80202

**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 Counsel:

Enclosed are FiberCom's Responsive Brief and Proposed Findings of Fact and Conclusions of Law in the above matter. These pleadings were also emailed to you earlier today.

Sincerely,



Marvin D. Truhe

MDT:skh

Enclosures ✓

Cc w/ encl: Karen Cremer

**RECEIVED**

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

**JUL 29 2004**

**SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION**

<b>In the Matter of the Complaint Filed by Black )</b>	<b>CT 03-154</b>
<b>Hills FiberCom, L.L.C., Rapid City, South )</b>	<b>BHFC's PROPOSED</b>
<b>Dakota Against Qwest Corporation Regarding )</b>	<b>FINDINGS OF FACT</b>
<b>Intrastate Switched Access Charges Applied to )</b>	<b>AND CONCLUSIONS</b>
<b>ISP-Bound Calls Which Complainant Claims is )</b>	<b>OF LAW</b>
<b>Interstate in Nature )</b>	

**STATEMENT OF CASE**

This matter comes before South Dakota Public Utilities Commission ("Commission") to consider whether certain Internet bound calls are subject to intercarrier intrastate switched access tariff charges. Black Hills FiberCom, L.L.C. ("BHFC") brought this action against Qwest Corporation ("Qwest") challenging Qwest's imposition of interconnection charges for Internet Service Provider ("ISP") bound traffic under its intrastate tariff. BHFC contends the charges are improper pursuant to an Order on Remand issued by the Federal Communications Commission ("FCC") in 2001 pursuant to its authority under the Telecommunications Act of 1996.<sup>1</sup> The Order on Remand held that ISP bound traffic was interstate in nature and addressed the intercarrier compensation regime for ISP bound traffic. The resolution of this matter depends on the proper interpretation of that Order on Remand.

BHFC is represented by attorney Marvin Truhe of Rapid City, South Dakota; Qwest is represented by attorney Thomas Welk of Sioux Falls, South Dakota, and by attorney Timothy Goodwin of Denver, Colorado; and the Commission Staff is represented by attorney Karen Cremer, of Pierre, South Dakota.

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<sup>1</sup> Telecommunications Act of 1996, Pub.L.No.104-104, 110 Stat. 56 (1996).

Qwest contends that the Order on Remand only precludes imposition of reciprocal compensation charges for ISP traffic, and leaves it free to impose any other intercarrier charges against BHFC, including the disputed intrastate tariff charges.

BHFC contends that from and after the effective date of the Order on Remand June 14, 2001, the Order mandates that all ISP traffic is subject to a bill and keep regime which precludes any other intercarrier compensation charges. BHFC contends that for ISP traffic exchanged prior to June 14, 2001, the FCC has a long established policy of treating ISP traffic as interstate, which policy was formalized in its 1999 Declaratory Order, and that, as such, the traffic should not be subject to intrastate tariff charges. Thus, BHFC seeks a refund from Qwest of the disputed intrastate tariff charges, plus interest.

Qwest filed a counterclaim for monetary damages alleging that BHFC acted improperly in imposing an additional charge on BHFC's customers whose Internet usage gave rise to Qwest's intrastate tariff. Qwest also challenges, conditionally, the Commission's subject matter jurisdiction in this action, alleging that the Commission has jurisdiction if it rules in favor of Qwest, but has no jurisdiction if it rules against Qwest.

Finally, the Commission is being asked to determine what statute of limitations applies to this action.

### **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. The parties thereafter engaged in discovery, including the taking of 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.

An evidentiary 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. Following the hearing the Commission issued a briefing schedule.

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

On June 28, 2004, both parties, as well as the Commission Staff, simultaneously submitted initial post-hearing briefs. On July 28, 2004, both parties simultaneously submitted responsive post-hearing briefs as well as proposed Findings of Fact and Conclusions of Law. The Commission thereafter heard oral argument on

\_\_\_\_\_. Based on the entire record in this proceeding, the Commission hereby adopts the following Findings of Fact and Conclusions of Law.

### **COMPLAINT OF BHFC**

#### **Findings of Fact**

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's goal was to 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.

4. 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. In response to requests by Black Hills residents, BHFC sought Commission approval of an expanded local calling area encompassing four of Qwest's local exchanges in the Northern Black Hills, which the Commission approved in October, 1999 (Docket TC99-056), thus offering for the first time local calling rates throughout the Northern Black Hills.

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

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.

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.

8. BHFC also introduced a high degree of reliability to its services by installing a synchronous optical network (SONET) through fiberoptics which created a loop that allows interrupted communications to automatically be restored by reversing the direction through the loop. That reliability did not exist previously.

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.

10. In October 1998, BHFC entered into an interconnection agreement (“Interconnection Agreement”) with Qwest’s predecessor, U.S. West, 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, was approved by the Commission on January 6, 1999 (Docket TC98-205).

11. BHFC aggressively pursued Internet business and residential customers (“Internet customers”) and Internet service providers (“ISPs”), by attracting them with competitively priced services including primary rate interface services, and offering them much improved facilities with fire suppression, security, and battery and generator backup.

12. Since the majority of its ISPs were Rapid City based, BHFC’s intended goal was to secure a substantial number of ISPs in the Rapid City area vis-à-vis Qwest,

thereby generating substantial Internet based reciprocal compensation revenue from Qwest pursuant to the Interconnection Agreement.

13. Because BHFC was offering local calling to Northern Black Hills residents it anticipated it would incur inter-exchange access charges from its Internet customers located outside of Rapid City calling Qwest ISPs. However; 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, and thus BHFC could balance its payments vis-à-vis Qwest.

14. BHFC was very successful in signing up Internet customers and ISPs, 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.

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

16. 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.

17. Qwest's refusal to pay BHFC for the ISP traffic was very detrimental financially to BHFC which had put great reliance on receiving reciprocal compensation from Qwest for calls from Qwest's customers to BHFC's ISPs.



18. The legal position of Qwest on this issue was stated in numerous Qwest documents, including the following statement by Qwest in a November 3, 2000, letter to BHFC in response to BHFC's invoices:

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>2</sup>

19. The Federal Communications Commission ("FCC") had previously issued a Declaratory Ruling<sup>3</sup> ("Declaratory Ruling") in 1999 stating that ISP bound traffic was interstate in nature. The Declaratory Ruling was subsequently vacated in 2000 by a federal court, but in April, 2001, the FCC issued an Order on Remand ("Order on Remand") wherein it again held that ISP bound traffic was interstate in nature and established a bill and keep regime for that traffic.<sup>4</sup> The Order on Remand went into effect on June 14, 2001.

20. Qwest's November 3, 2000, letter made no distinction between Internet bound traffic originating within the local exchange, or such traffic originating elsewhere. Qwest's letter also stated that with the Internet traffic removed the remaining traffic

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<sup>2</sup> Exhibit 2.

<sup>3</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).

<sup>4</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).

between the parties was in balance and therefore, no compensation whatsoever was due BHFC for those ISP calls.<sup>5</sup>

21. 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>6</sup>

22. This formal announcement was followed by an August 14, 2001, letter from Qwest to CLECs, including BHFC. The letter again stated that Qwest's policy was being adopted in accordance with the June 14, 2001, Order on Remand.<sup>7</sup>

23. Qwest also requested the amendment of the Interconnection Agreement to reflect the Order on Remand, 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>8</sup>

24. Qwest's proffered amendment stated that all ISP-bound traffic between the parties be treated in conformance with the Order on Remand; 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. On November 17, 2001, the Commission approved the 2001 Amended Interconnection Agreement (Docket TC01-161).

25. In September, 2002, the parties executed another amendment to the

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<sup>5</sup> Exhibit 2.

<sup>6</sup> Exhibit 4.

<sup>7</sup> Exhibit 5.

<sup>8</sup> Exhibit 6.

Interconnection Agreement, again at Qwest's request, 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. The Commission approved the 2002 Amended Interconnection Agreement on January 3, 2003 (Docket TC02-131).<sup>9</sup>

26. On December 7, 2001, BHFC 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. 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.

27. Qwest responded by filing a Motion to Dismiss, arguing that the matter had to be resolved by arbitration under the parties' Interconnection Agreement, and the Complaint was later voluntarily dismissed.

28. Ultimately, BHFC entered into a settlement agreement with Qwest on July 29, 2002, with a partial payment by Qwest, twenty-two months after BHFC submitted its first invoices to Qwest.

29. During that same period of time, and continuing to the present, Qwest has invoiced 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.

30. Qwest's primary ISP customer, AOL, is not located in South Dakota and has no Point of Presence (POP), nor any facilities, switches, or other presence in South Dakota. All ISP traffic is routed through Qwest or Qwest affiliate facilities in South

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<sup>9</sup> Exhibit 9.

Dakota, and from South Dakota and beyond, until it first makes contact with AOL in Arlington, Virginia.

31. From July, 2000 to the present, BHFC has been paying Qwest monthly for those ISP calls with over \$1 million having been paid as of March, 2004.

32. Thus, Qwest has been treating as interstate the ISP bound traffic originating in Rapid City, but treating as intrastate the ISP bound traffic originating outside of Rapid City.

33. Qwest's expert witness testified that Qwest's routing of the above two types of calls are identical. 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 terminate in Rapid City, but instead terminate, at their earliest, at an AOL facility in Arlington, Virginia.

### **Conclusions of Law**

1. In 1999 the FCC issued a Declaratory Ruling which held that the FCC has traditionally determined the jurisdictional nature of communications using an end points analysis,<sup>10</sup> and thus has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers, thereby concluding that an interstate communication does not end at an intermediate switch.<sup>11</sup>

2. The FCC thus rejected the "two calls" theory, that is, those attempts to break down ISP calls into an intrastate component and an interstate component, and found ISP bound traffic to be jurisdictionally interstate.<sup>12</sup>

3. The Declaratory Ruling was vacated and remanded by a federal court.<sup>13</sup>

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

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

<sup>12</sup> Declaratory Ruling, ¶¶ 11-15.

However, on April 14, 2001, the FCC issued an Order on Remand, which again rejected the two calls theory,<sup>14</sup> again held that ISP bound traffic was interstate,<sup>15</sup> and adopted interim rules for intercarrier compensation of that traffic.<sup>16</sup>

4. A subsequent federal court decision,<sup>17</sup> challenged the basis for some of the FCC's Order on Remand, but did not vacate or reverse it. Thus the Order on Remand remains in effect and governs this action.

5. The Order on Remand applies to all ISP bound traffic. Thus, it is not limited to addressing ISP bound traffic that originates locally, but applies to all ISP bound traffic regardless of where it originates.<sup>18</sup>

6. The Order on Remand also rejected the "calling-party's-network-pays" (CPNP) regime which previously governed ISP traffic, and instead adopted a compensation regime for that traffic requiring carriers to recover a greater share of their costs from their ISP customers.<sup>19</sup>

7. The Order on Remand adopted a bill-and-keep regime for all ISP-bound traffic exchanged from and after its effective date of June 14, 2001, and this Commission is bound by that determination.<sup>20</sup>

8. The Order on Remand is not limited to precluding reciprocal compensation for ISP bound traffic, but precludes all traditional CPNP intercarrier compensation regimes, including the intrastate tariff charges at issue herein.

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<sup>13</sup> Bell Atlantic Telephone Company v. F.C.C., 206 F.3d 1 (D.C.Cir.2000).

<sup>14</sup> Order on Remand, ¶¶ 56-63.

<sup>15</sup> Order on Remand, ¶¶ 1, 57, 58.

<sup>16</sup> Order on Remand, ¶¶ 77-82.

<sup>17</sup> WorldCom, Inc. v. F.C.C., 288 F.3d 429 (D.C.Cir.2003).

<sup>18</sup> See, e.g., Order on Remand ¶¶ 1, 14, 58, 66, and 67; and the Notice of Proposed Rulemaking (NPRM), CC Docket No. 01-92, adopted April 19, 2001, ¶66.

<sup>19</sup> See, e.g., Order on Remand, ¶ 71

<sup>20</sup> See, e.g., NPRM, ¶ 66; and Order on Remand, ¶¶ 66 and 82.

9. Enhanced Service Providers (“ESPs”), such as ISPs, are treated differently from LECs insofar as ISP bound traffic is concerned. ESPs are exempt from certain interstate access charges but are subject to local tariffs, including intrastate access charges for ISP traffic.<sup>21</sup> However, this treatment of ESPs has no relevance to our case which involves intercarrier compensation between LECs.

10. We reject Qwest’s argument that its intrastate tariff (defining intrastate traffic, e.g.) and ARSD § 20:10:29:06 (defining origination and termination of calls), control the outcome of this case. The Commission is bound by the Telecommunications Act of 1934, as amended, and by all rules, regulations, and orders issued thereto, including the Order on Remand.<sup>22</sup>

11. We find that the ISP traffic in dispute herein exchanged after June 14, 2001, is interstate in nature and not subject to Qwest’s intrastate tariff charges, and BHFC is entitled to a refund from Qwest of all intrastate tariff charges it has paid to Qwest for ISP traffic exchanged after June 14, 2001, plus statutory interest at the rate of ten percent per annum.

12. As to the ISP traffic exchanged prior to June 14, 2001, we are not bound by the holding of the Order on Remand regarding the issue of compensation.<sup>23</sup> However, we find the following persuasive.

13. Even though the bill and keep regime for ISP traffic was not formally adopted until the issuance of the Order on Remand, the FCC was treating ISP traffic as jurisdictionally interstate even before the FCC issued its 1999 and 2001 Orders. As the

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<sup>21</sup> Order on Remand, ¶¶ 11 and 27.

<sup>22</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>23</sup> Order on Remand, ¶ 82.

FCC stated in the Order on Remand (in referring to the federal court decision vacating the 1999 Declaratory Order),

The court opinion underscores a tension between the jurisdictional nature of ISP-bound traffic, which the Commission has long held to be interstate . . .”<sup>24</sup>

14. The FCC subsequently formalized its treatment of ISP traffic in the 1999 Declaratory Order by holding that ISP traffic is jurisdictionally interstate.<sup>25</sup>

15. Further, as stated in the Order on Remand, that court decision remanding the 1999 Order did not reject the Order’s “interstate” finding; in fact the court had expressly acknowledged the FCC’s traditional use of an end to end analysis in making that determination.<sup>26</sup>

16. Qwest has likewise treated ISP traffic as interstate since at least the year 2000 in all of its dealings with BHFC.<sup>27</sup> From the outset Qwest refused to pay BHFC reciprocal compensation for ISP traffic, making no distinction between traffic exchanged before or after the 2001 Order on Remand.<sup>28</sup>

17. Qwest likewise successfully argued that ISP traffic was interstate in avoiding reciprocal compensation and trunking charges in two state public utilities commission cases in Oregon and Colorado, again making no distinction between traffic exchanged before or after the 2001 Order on Remand.<sup>29</sup>

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<sup>24</sup> Order on Remand, ¶ 28.

<sup>25</sup> See, BHFC initial brief, ¶¶ 40-44; Declaratory Order, ¶¶ 7, 10-12, 18, 23; Order on Remand, ¶ 14.

<sup>26</sup> Order on Remand, ¶ 56.

<sup>27</sup> See, Findings of Fact ¶¶ 21-13, supra.

<sup>28</sup> Id.

<sup>29</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).; 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”).

18. The Level 3 decision by the Colorado public utilities commission (CPUC) was issued shortly after the issuance of the Order on Remand. Qwest contended in that action that ISP traffic was interstate.<sup>30</sup> The CPUC accepted Qwest's argument in holding that ISP traffic was subject to bill and keep, and stated it had likewise done so on two prior occasions in 2000.<sup>31</sup>

19. That CPUC decision was subsequently upheld on appeal to a Colorado federal district court.<sup>32</sup>

20. The Colorado and Oregon commission decisions, and the Colorado federal district court ruling, are consistent with the FCC's 1999 Declaratory Ruling that ISP traffic is interstate.<sup>33</sup>

21. We find that the ISP traffic in dispute herein exchanged prior to June 14, 2001, is interstate in nature and not subject to Qwest's intrastate tariff charges, and BHFC is entitled to a refund from Qwest of all intrastate tariff charges it has paid to Qwest for ISP traffic exchanged prior to June 14, 2001, plus statutory interest at the rate of ten percent per annum.

### **JURISDICTION**

1. BHFC's Complaint alleges that the Qwest misapplied its intrastate tariff by treating ISP bound traffic as intrastate traffic rather than as interstate traffic and . 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)

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<sup>30</sup> Level 3 CPUC decision, p. 6, ¶ 1.

<sup>31</sup> Level 3 CPUC decision, p. 7, ¶3 and footnote 3.

<sup>32</sup> Level 3 Communications v. Public Utilities Commission of Colorado, 300 F. Supp. 2d 1069 (D. Colo. 2003), Civ. A.01-N-2455 (CBS).

<sup>33</sup> The Colorado federal district court likewise stated that the CPUC's policy rationale conformed to the FCC's holding regarding ISP traffic. Level 3 federal court decision, p. 1081.



applies to the calls at issue. The basis of BHFC's claim, therefore, is Qwest's improper utilization of its tariff for traffic not subject to that tariff, and Qwest's alleged improper billings by Qwest pursuant to its intrastate tariff.

2. The Commission has subject matter jurisdiction to resolve disputes arising out of intrastate tariffs, including Qwest's intrastate tariff in this case.

3. The Commission further rejects Qwest's argument that the Commission only has jurisdiction if it rules in favor of Qwest, and thus finds that the Commission's jurisdiction in this case is not outcome determinative.<sup>34</sup>

4. The Commission likewise rejects Qwest's argument that if the Commission rules against Qwest only the FCC has jurisdiction. Subject matter jurisdiction in this case is determined by the billing authority under which Qwest imposed the charges at issue, namely, its intrastate tariff, and not by the billing authority under which it could have imposed the charges, such as its interstate tariff.

5. The Commission finds precedent for this jurisdictional finding in the above referenced Colorado and Oregon state commission cases, both involving Qwest, which commissions assumed jurisdiction in cases legally indistinguishable from ours.

6. The Commission also finds precedent for this jurisdictional finding in the federal district court decisions of Level 3 Communications v. Public Utilities Commission of Colorado<sup>35</sup> and Iowa Network Services, Inc. v. Qwest Corporation,<sup>36</sup> both cases also involving Qwest.

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<sup>34</sup> Steel Company v. Citizens for a Better Environment, 528 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

<sup>35</sup> 300 F. Supp. 2d 1069 (D. Colo. 2003), Civ. A.01-N-2455 (CBS).

<sup>36</sup> No. 4:02-CV-40156, October 9, 2002 (S.D. Iowa, 2002).

7. The Commission also notes that in addition to the above cases, Qwest previously invoked the jurisdiction of an arbitration panel pursuant to the Interconnection agreement between the parties, all of which are contrary to Qwest's assertion herein that only the FCC has jurisdiction.

### **STATUTE OF LIMITATIONS**

1. Qwest issued invoices to BHFC for the ISP traffic in dispute pursuant to its intrastate tariff. BHFC challenged those invoices as improper billings, citing the Order on Remand holding that ISP traffic was interstate, and thus not subject to intrastate tariffs. Thus, Qwest's invoices and Qwest's intrastate tariff form the basis for BHFC's claim.

2. Accordingly, we find that the six year statute of limitations under SDCL 15-2-13(1) governs this action.

3. We reject Qwest's argument that the two year statute of limitations of Section 415 of the Telecommunications Act governs this action. BHFC's claim did not arise out of alleged charges or overcharges made pursuant to Qwest's federal interstate tariff.

### **COUNTERCLAIM OF QWEST**

#### **Findings of Fact**

1. Qwest's failure to pay BHFC's invoices for locally exchanged ISP traffic, even as BHFC was continuing to pay Qwest for inter-exchange ISP traffic, placed BHFC in an untenable financial situation that worsened substantially each month.

2. BHFC first attempted to resolve the situation with Qwest, but those attempts were unsuccessful. BHFC also attempted to resolve the situation through a business arrangement with AOL, but its efforts were likewise rejected by AOL.

3. Faced with the alternative of continuing to pay Qwest intrastate access charges without receiving any offsetting revenue from its own customers, BHFC elected to pass on to its own customers the access charges it was incurring by reason of those customers' Internet usage.

4. Thus, BHFC elected to start billing its own customers in response to the intrastate access charges occasioned by those customers' utilization of Qwest ISPs, thereby requiring its own customers to bear the costs of their respective ISP usage which was substantial if they remained connected to the Internet for extended periods.

5. BHFC utilized its own customer information to determine which of its customers' calls gave rise to the Qwest access charges, then gave written notice to those customers of the intended additional charge, and ultimately charged its customers 5.9 cents per minute to approximate its incurred access charges. BHFC also offered those customers other ISP options that would avoid the additional charge.

6. Faced with having to pay long distance rates for each minute of internet usage, BHFC's customers could either reduce their monthly usage, or switch to an ISP provider that offered them local calling numbers, thus avoiding the additional charge. Since the ISPs associated with Qwest, such as AOL, were not offering local calling numbers for those residing outside Qwest's Rapid City local calling area, many of BHFC's customers understandably elected to utilize the services of ISPs associated with BHFC that did offer local calling numbers.

7. Among other allegations, Qwest alleged in its Counterclaim that BHFC's new ISP charge to BHFC's own customers damaged Qwest's ability to attract and retain ISP customers, created improper, anticompetitive incentives for Qwest's customers to migrate to BHFC, unjustly discriminated against Qwest customers, and interfered with Qwest's contractual relations.

8. However, Qwest offered virtually no evidence in support of these allegations, relying primarily upon a one page appendix attached to its initial brief showing a decrease in access revenue. Qwest's only hearing witness offered no testimony whatsoever on this issue.

### **Conclusions of Law**

1. BHFC's purpose in imposing the ISP charge was simply to recover its costs with respect to this traffic, and the fact that BHFC's customers chose other ISPs does not make the ISP charge illegal, anti-competitive, or otherwise improper.

2. BHFC was, and is, entitled to pass on its costs of providing service to its own customers, in this case Qwest's access charges.

3. Nothing in the Federal Telecommunications Act 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, which would be the case if Qwest's access charges were not passed on to those customers of BHFC that occasioned the access charges.

4. The Telecommunications Act discourages subsidizing of services, preferring end users to pay their own way. The FCC reiterated this principle in its Order on Remand as follows, "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. As a result, the rates paid by ISPs and, consequently, their customers should better reflect the cost of services to which they subscribe.”<sup>37</sup>

5. We find that BHFC’s ISP charge for this interstate traffic was entirely consistent with the Telecommunications Act and the FCC’s Order on Remand.

6. We reject Qwest’s allegation that the ISP charge violates dialing parity. Qwest cites no legal authority in support of its allegation, which failure alone is dispositive of this issue, but Qwest also failed to offer any evidence in support of the allegation other than to state that BHFC’s end users are charged differently. We find that BHFC has not violated the FCC’s dialing parity requirements.

7. We reject Qwest’s allegation that the ISP charge violates confidentiality obligations regarding BHFC’s customer proprietary network information (CPNI). BHFC merely utilized its own customer information to determine which of its customers’ calls gave rise to the Qwest access charges, then gave written notice to those customers of the intended additional charge. In addition, Qwest offered no persuasive evidence as to how the alleged obligations were violated, nor did it cite any legal authority in support of its allegation, which failure alone is, again, dispositive of this issue. We find that BHFC’s use of its own customer records in this regard did not violate its CPNI.

8. Qwest’s Counterclaim alleges that the ISP charge unjustly discriminates against Qwest customers in violation of SDCL 49-31-11, but Qwest’s initial brief alleges that the charge discriminates against BHFC’s customers, treating them differently depending on which ISP they use. We find that BHFC has not discriminated against either its own customers, against Qwest’s customers, or against anyone else’s customers. BHFC has applied the charge equally to all of its customers whose Internet use has given

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<sup>37</sup> Order on Remand, §74

rise to access charges, and thus their rates, consistent with FCC's Order on Remand, reflect the cost of services to which they subscribe, and also avoid subsidization by BHFC's other customers.

9. We reject Qwest's allegation of tortious interference by BHFC. Qwest has failed to offer any persuasive evidence in support of several of the elements of this tort. Qwest offered no persuasive evidence of any improper conduct by BHFC. While it did submit an appendix to its brief referencing Qwest revenues, those records merely show the changing revenues that any business might incur in any competitive market.

10. Tortious interference requires, among other elements, "An intentional and unjustified act of interference on the part of the interferer,"<sup>38</sup> and Qwest has failed to offer any persuasive evidence in support of this element.

11. The South Dakota Supreme Court has held that the factors relevant to a finding of unjustified interference include, among others, the nature of the actor's conduct, the actor's motive, the interests sought to be advanced by the actor, and the social interests in protecting the freedom of action of the actor.<sup>39</sup>

12. We find that BHFC's motive was to pass on to its own customers the access charges it was incurring from Qwest, conduct actively encouraged by the Telecommunications Act and the Order on Remand. Thus, the nature of BHFC's conduct (contacting its own customers), its motive and interests sought to be advanced (secure reimbursement for incurred access costs), and the social interests involved (the Act's goals of encouraging competition and the passing on of costs to end users), are entirely inconsistent with a finding that BHFC improperly interfered with Qwest in this case.

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<sup>38</sup> St. Onge Livestock Company, Ltd. v. Curtis, 650 N.W.2d 537, 541 (S.D. 2002).

<sup>39</sup> Chem-Age Industries, Inc. v. Glover, 652 N.W.2d 756, 767 (S.D., 002).

13. We find that Qwest has failed to establish the elements of tortious interference, and find that BHFC has not tortiously interfered with Qwest's existing or potential contractual or business relationships.

14. We reject Qwest's allegation that BHFC failed to mitigate its damages by not imposing the ISP charge earlier. This is not a damages case and there are no damages to mitigate. BHFC has not sought damages, but instead seeks reimbursement of what it alleges are improperly billed access charges.

15. We likewise reject Qwest's remaining allegations and arguments of its Counterclaim, find that Qwest has failed to meet its burden of proof with regard to the Counterclaim, and we hereby dismiss the Counterclaim, with prejudice.

Dated at Pierre, South Dakota, this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

BY ORDER OF THE COMMISSION:

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ROBERT K. SAHR, Chairman

\_\_\_\_\_  
GARY HANSON, Commissioner

\_\_\_\_\_  
JAMES A. BURG, Commissioner


**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 July 28, 2004 a true and correct copy of the foregoing **Black Hills FiberCom's Proposed Findings of Fact and Conclusions of Law** 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