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December 29, 2003

Pam Bonrud, Executive Director  
South Dakota Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

**VIA UPS OVERNIGHT**

Re: In the Matter of the Complaint Filed by Black Hills FiberCom, L.L.C., Rapid City, South Dakota Against Qwest Corporation Regarding Intrastate Switched Access Charges Applied to ISP-Bound Calls Which Complainant Claims is Interstate in Nature  
TC03-154 (Our File No. 2104.129)

Dear Ms. Bonrud:

Please find enclosed for filing the original and ten (10) copies of Qwest's Objections, Answers to Requests for Admissions and Answer to Interrogatories (First Set) and Certificate of Service in this matter.

Sincerely yours,

BOYCE, GREENFIELD, PASHBY & WELK, L.L.P.



Thomas J. Welk

TJW/vjj  
Enclosure

cc: Linden Evans  
Marvin Truhe  
Tim Goodwin  
Larry Toll  
Jon Lehner

**RECEIVED**  
DEC 30 2003  
SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

In the Matter of the Complaint Filed by  
Black Hills FiberCom, L.L.C., Rapid City,  
South Dakota Against Qwest Corporation  
Regarding Intrastate Switched Access  
Charges Applied to ISP-Bound Calls Which  
Complainant Claims is Interstate in Nature

CT 03-154

QWEST'S OBJECTIONS, ANSWERS  
TO REQUESTS FOR ADMISSIONS AND  
ANSWERS TO INTERROGATORIES  
(FIRST SET)

Qwest Corporation ("Qwest") for its Objections, Answers to Requests for Admissions and Answers to Interrogatories (First Set) dated November 26, 2003 of Black Hills FiberCom, L.L.C. ("BHFC" or "FiberCom"), state as follows:

**Request for Admissions**

**Request for Admission 1:**

Admit that the traffic in dispute was, and is, being billed by Qwest pursuant to Qwest's intrastate switched access service tariffs that were approved by the Commission. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** Admitted.

**Request for Admission 2:**

Admit that the Commission has the jurisdictional authority to determine whether the traffic in dispute that Qwest is billing as intrastate traffic, is in fact intrastate traffic. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this Request because it seeks to force Qwest to make concessions as to subject matter jurisdiction in this case. Regardless of Qwest's responses to such requests, whether or not the Public Utilities Commission of the State of South Dakota ("Commission") has subject matter jurisdiction to provide the relief BHFC seeks is an open question even on appeal, and can be raised by any party, the Commission, or any court before which this proceeding is held, at any time, even for the first time on appeal. Subject matter jurisdiction cannot be conferred by the consent of the parties.

**ANSWER:** Subject to and without waiving any objections, Denied. Although the disputed traffic is and has been properly billed pursuant to Qwest's intrastate switched access tariffs, BHFC's complaint seeks the application of interstate tariffs, or in the alternative, rules from the FCC's *Order on Remand 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 (April 17, 2001) (“ISP Remand Order”) to this traffic. See BHFC response to Qwest’s Request for Admission 3. Moreover, the FCC has permitted ISPs to purchase access to the public switched telephone network through intrastate tariffs,<sup>1</sup> and the FCC has established a reciprocal compensation scheme for locally-originating ISP-bound traffic subject to interconnection agreements,<sup>2</sup> and through these acts has expressly indicated its intent to exercise exclusive jurisdiction over ISP-bound traffic regardless of whether it originates locally or crosses exchange boundaries, and regardless of whether the traffic is subject to interstate tariffs or intrastate tariffs.

**Request for Admission 3:**

Admit that the Commission has the jurisdictional authority to determine whether the traffic in dispute is in fact interstate, rather than intrastate, traffic. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** See Qwest’s answer and objection to Request for Admission 2.

**Request for Admission 4:**

Admit that the Commission has the jurisdictional authority to determine if the traffic in dispute is properly subject to the Commission approved intrastate switched access service tariffs of Qwest. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** See Qwest’s objection and answer to Request for Admission 2.

**Request for Admission 5:**

Admit that if it is determined that the traffic in dispute was improperly billed by Qwest pursuant to the Commission approved intrastate switched access service tariffs of Qwest, the Commission has jurisdictional authority to order Qwest to reimburse FiberCom for

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<sup>1</sup> See, e.g., *MTS and WATS Market Structure*, CC Docket No. 78-72, *Memorandum Opinion and Order*, 97 FCC 2d 682 (1983) (*MTS/WATS Market Structure Order*); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, *Order*, 3 FCC Rcd 2631 (1988) (*ESP Exemption Order*); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, *Order*, 2 FCC Rcd 4305, 4306 (1987); *Declaratory Ruling 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 (February 26, 1999) (the “1999 ISP Declaratory Order”) (“Pursuant to [the ESP 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.”)

<sup>2</sup> See, e.g., *ISP Remand Order*, ¶ 82 (“[W]e now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic . . . state commissions will no longer have authority to address this issue.”)

the improperly billed charges. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** See Qwest's objection and answer to Request for Admission 2.

**Request for Admission 6:**

Admit that the traffic in dispute is not subject to any reciprocal compensation arrangement or inter-carrier compensation contained in the current interconnection agreement. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the reference to "intercarrier compensation" is vague and unclear. It appears perhaps a word such as "obligation" or "arrangement" was inadvertently omitted from the request.

**ANSWER:** Subject to and without waiving any objections, Admitted.

**Request for Admission 7:**

Admit that the traffic in dispute is not addressed in the current interconnection agreement. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** Admitted.

**Request for Admission 8:**

If the traffic in dispute is not intrastate traffic, admit that the traffic in dispute should have been billed by Qwest pursuant to Qwest's interstate switched access service tariffs and rates as approved by the FCC. If you do not admit this request, state the reason why such admission cannot be made.

**ANSWER:** Denied. The premise of this Request is erroneous; the traffic in dispute is subject to Qwest's intrastate tariffs.

**Request for Admission 9:**

If the traffic in dispute is not intrastate traffic, admit that the traffic in dispute should have been billed by Qwest pursuant to the billing regime set forth in the FCC Order on Remand. If you do not admit this request, state the reason why such admission cannot be made,

**ANSWER:** Denied. The premise of this Request is erroneous; the traffic in dispute is subject to Qwest's intrastate tariffs. Moreover, the FCC Order on Remand (or ISP Remand Order) did not address toll or interexchange traffic, but

only locally originated traffic and the responsibilities of carriers to pay reciprocal compensation for such traffic under interconnection agreements. The FCC Order on Remand did not establish any billing regime for interexchange ISP-bound traffic.

**Request for Admission 10:**

Admit that in September, 2001 Qwest and FiberCom executed an amendment to the current interconnection agreement entitled Amendment to the Interconnection Agreement between Qwest Corporation and Black Hills FiberCom, L.L.C. for the State of South Dakota for Agreement Term, Existing Rules and Internet Service Provider ("ISP") Bound ("September, 2001, ISP Amendment") which states in pertinent part in Attachment 2, section 3.1 that: "Qwest and Black Hills elect to exchange ISP-bound traffic at the FCC ordered rates pursuant to the FCC ISP Order, effective June 14, 2001. ." If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. See BHFC's responses to Qwest's Request for Admission 7 and Interrogatory 1. The traffic in dispute in this case is not subject to the September 2001 ISP Amendment.

Qwest further objects to the request because the phrase "pertinent part" is vague, ambiguous and unclear. Qwest further objects to this request because the referenced contract speaks for itself, and because the request misleadingly isolates one sentence from an amendment that is properly read in the context of the entire amendment and the entire interconnection agreement, as amended.

**ANSWER:** Subject to and without waiving any objections, Qwest admits that the parties executed the referenced amendment, and that the referenced amendment contains the referenced language.

**Request for Admission 11:**

Admit that the "FCC ISP Order" referenced in the September, 2001, ISP Amendment is the same as the "FCC Order on Remand" as defined herein. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2001 ISP Amendment.

**ANSWER:** Subject to and without waiving any objections, Admitted.

**Request for Admission 12:**

Admit that Qwest requested the September, 2001, ISP Amendment. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2001 ISP Amendment. Moreover, the term "requested" is vague, ambiguous, and unclear.

**ANSWER:** Subject to and without waiving any objections, Qwest admits that it initiated communications concerning the September 2001 ISP Amendment, but because both BHFC and Qwest executed the amendment, both assented to its terms and ostensibly both "requested" the Amendment.

**Request for Admission 13:**

Admit that one reason Qwest requested the September, 2001 Amendment is that Qwest contended that ISP-bound traffic should be treated as predominantly interstate in nature for billing purposes. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2001 ISP Amendment.

Qwest also objects to the request because its use of the term "ISP-bound traffic" is misleading because it does not differentiate between locally-originated ISP-bound traffic and ISP-bound traffic that crosses exchange boundaries.

Qwest also incorporates its objections to Requests Nos. 12 and 15 herein.

**ANSWER:** Subject to and without waiving any objections, Denied. The treatment of ISP-bound that is delivered to ISPs in the same local calling area that traffic originates in is markedly different than the treatment of traffic that originates in a different local calling area than the calling area in which it is delivered to ISPs.

#### **Request for Admission 14:**

Admit that in September, 2002 Qwest and FiberCom executed an amendment to the current interconnection agreement entitled Amendment to the Interconnection Agreement between Qwest Corporation and Black Hills FiberCom, L.L.C. for the State of South Dakota for Agreement Term, Existing Rules and Internet Service Provider (“ISP”) Bound (“September, 2002, ISP Amendment”) which states in pertinent part in Section 3.2.3 on page 1 that: “The Parties agree that ISP Bound Traffic, effective April 1, 2002, shall be exchanged as bill and keep.”

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. See BHFC’s responses to Qwest’s Request for Admission 7 and Interrogatory 1. The traffic in dispute in this case is not subject to the September 2002 ISP Amendment.

Qwest further objects to the request because the phrase “pertinent part” is vague, ambiguous and unclear. Qwest further objects to this request because the referenced contract speaks for itself, and because the request misleadingly isolates one sentence from an amendment that is properly read in the context of the entire amendment and the entire interconnection agreement, as amended.

**ANSWER:** Subject to and without waiving any objections, Qwest admits that the parties executed the referenced amendment, and that the referenced amendment contains the referenced language.

#### **Request for Admission 15:**

Admit that Qwest requested the September, 2002, ISP Amendment. If you do not admit this request, state the reason why such admission cannot be made,

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute.

**ANSWER:** The traffic in dispute in this case is not subject to the September 2002 ISP Amendment, nor was the traffic the subject of any discussions or negotiations leading up to the execution of the September 2002 ISP Amendment. Moreover, the term “requested” is vague, ambiguous, and unclear. Subject to and without waiving any objections, Qwest admits that it initiated communications concerning the September 2002 ISP Amendment, but because both BHFC and Qwest executed the amendment, both assented to its terms and ostensibly both “requested” the Amendment.

### **Request for Admission 16:**

Admit that one reason Qwest requested the September, 2002 Amendment is that Qwest contended that ISP-bound traffic should be treated as predominantly interstate in nature for billing purposes. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2002 ISP Amendment.

Qwest also objects to the request because its use of the term "ISP-bound traffic" is misleading because it does not differentiate between locally-originated ISP-bound traffic and ISP-bound traffic that crosses exchange boundaries.

Qwest also incorporates any objections to Requests 12 and 15.

**ANSWER:** Subject to and without waiving the objection, Denied. The treatment of ISP-bound traffic that is delivered to ISPs in the same local calling area that traffic originates in is markedly different than the treatment of traffic that originates in a different local calling area than the calling area in which it is delivered to ISPs.

### **Request for Admission 17:**

Admit that if the ISP-bound traffic referred to in the current interconnection agreement is treated as interstate in nature for billing purposes, then ISP-bound traffic between local calling areas within the State of South Dakota should likewise be treated as interstate in nature for billing purposes. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2002 ISP Amendment.

**ANSWER:** Subject to and without waiving its objection, denied. The interconnection agreement between Qwest and BHFC has no bearing as to the appropriate access charges for the disputed traffic. The rationales for reciprocal compensation charges for locally originating ISP-bound traffic under an interconnection agreement and for switched access charges for ISP-bound traffic that crosses exchange boundaries before delivery to ISPs are completely

different and are based on different regulatory, network and business facts.

**Request for Admission 18:**

Admit that for the time period between at least November, 2000 to July, 2002 Qwest refused to pay reciprocal compensation charges billed to them by FiberCon for ISP-bound traffic initiated by Qwest's customers within Qwest's Rapid City local calling area using an access number within that local calling area which traffic was delivered to an ISP customer of FiberCom and which traffic continued through the ISP server and terminated at the remote internet sites accessed by the Qwest customers. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2002 ISP Amendment, nor was the traffic the subject of any discussions or negotiations leading up to the execution of the September 2002 ISP Amendment.

**ANSWER:** Subject to and without waiving any objections, Denied. See answer to Request 19. Qwest cannot comment further because of confidentiality obligations.

**Request for Admission 19:**

Admit that one of the stated reasons that Qwest refused to pay the charges referred to in Request for Admission 18 is that Qwest contended that the ISP-bound traffic was interstate in nature and thus not subject to reciprocal compensation charges. If you do not admit this request, state the reason why such admission cannot be made.

**OBJECTION:** Qwest objects to this request because the interconnection agreement between the parties is not relevant to this dispute. The traffic in dispute in this case is not subject to the September 2002 ISP Amendment, nor was the traffic the subject of any discussions or negotiations leading up to the execution of the September 2002 ISP Amendment.

Qwest further objects to the request because it potentially misleadingly characterizes a letter written to BHFC in connection with a dispute under the parties' interconnection agreement.

**ANSWER:** Subject to and without waiving any objections, Qwest admits that it stated that it would not pay the charges referred to in Request for Admissions 18 in part because "The Interconnection Agreement between BHFC and Qwest defines local traffic as ' . . . traffic

originated on the network of an LEC in a LATA and completed directly between that LEC's network and the network of another LEC in that same LATA, within the same local calling area as is provided by the incumbent LEC for local calls in that LATA.' Qwest has determined that the majority of the traffic included on your invoices does not terminate to a LEC within the same local calling area. Instead, the ISP continues the communication to terminate it 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."

## INTERROGATORIES

### Interrogatory 1:

#4 of Qwest's Answer to the Complaint states in pertinent part that, "Qwest admits the South Dakota Public Utilities Commission ("Commission") has approved intrastate tariffs for both Qwest and BHFC, but denies that this dispute is solely or primarily related to such tariffs, and denies that this dispute is subject to the jurisdiction of this Commission. Rather, although the Complaint is not clear as to the legal theories underlying the relief it seeks, the tenor of the Complaint and the relief BHFC seeks indicates their claim arises at least in part under the interconnection agreement between the parties, which is subject to mandatory arbitration."

- a. What is this dispute "solely or primarily related to," if not to the tariffs?
- b. Does Qwest contend that the relief sought "arises in least in part under the interconnection agreement"?
- c. If your answer to sub-paragraph (b) is in the affirmative, what is the legal basis for that contention?
- d. If the current dispute is not subject to the jurisdiction of the Commission as alleged by Qwest, what entity does Qwest contend has jurisdiction over the dispute?
- e. What, if any, other entities does Qwest contend have jurisdiction over the current dispute (in addition to the entity listed in answer to sub-paragraph (d) above)?

**Responses:**

- a. **OBJECTION:** Qwest objects to this interrogatory because it calls for Qwest to speculate about BHFC's motivations and strategies in bringing this complaint.

**ANSWER:** Qwest's statement intends to characterize how BHFC has postured the allegations of its complaint.

- b. **OBJECTION:** Qwest objects to this interrogatory because it calls for Qwest to speculate about BHFC's motivations and strategies in bringing this complaint.

**ANSWER:** Subject to and without waiving any objections: No. Some language in the complaint - for example, BHFC's contention that no compensation is due for the traffic in dispute - indicates that BHFC may be seeking relief under the interconnection agreement, despite the fact that the traffic in dispute is toll traffic and is not subject to the interconnection agreement between the parties.

- c. **ANSWER:** Not applicable. See response to subpart (b)

- d. **ANSWER:** The FCC has exclusive jurisdiction over BHFC's claims that interstate tariffs or FCC rules should govern the compensation for this traffic as to the applicability of Qwest's intrastate switched access tariff to interexchange, intrastate, ISP-bound traffic on a going-forward basis. However, Qwest believes that the traffic is and has been appropriately charged under Qwest's intrastate tariffs.

- e. **ANSWER:** To the extent that BHFC seeks relief under the terms of the interconnection agreement between the parties, the parties have contractually agreed that this dispute is subject to arbitration.

**Interrogatory 2:**

Does Qwest contend that the Commission has jurisdiction over the claims raised in its Counterclaim?

**ANSWER:** Yes.

**Interrogatory 3:**

If your answer to Interrogatory 2 is in the negative, state why Qwest contends the Commission does not have jurisdiction.

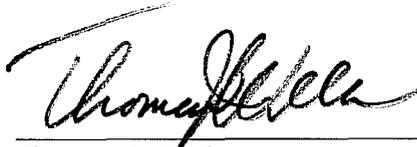
**ANSWER:** Not applicable. See response to Interrogatory 2.

**Interrogatory 4:**

Please identify all persons, with titles, who either assisted or were consulted during the preparation of your responses to these Requests for Admissions and Interrogatories, identifying such person or persons for each of your responses.

**ANSWER:** The following persons assisted or were consulted during the preparation of each response to these Requests and Interrogatories: Tom Welk (outside counsel); Tim Goodwin (Qwest SD attorney); Larry Toll (Qwest SD President); Colleen Sevold (Qwest SD Regulatory Director); Jon Lehner (Qwest Consultant); Dan Hult (Senior Director - - Legal Issues); Lisa Hensley-Eckert (Director – Public Policy).

Dated: December 29, 2003



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Thomas J. Welk  
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Sioux Falls, SD 57117-5015  
Telephone: (605) 336-2424

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1801 California Street 47<sup>th</sup> floor  
Denver, CO 80202

*ATTORNEYS FOR QWEST CORPORATION*



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Thomas J. Welk

As to Objections:

**CERTIFICATE OF SERVICE**

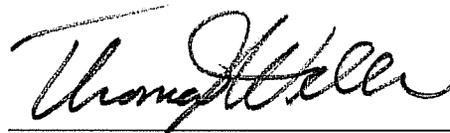
I, Thomas J. Welk, do hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P., and on the 29<sup>th</sup> day of December, 2003, true and correct copies of Qwest's Objections, Answers to Requests for Admissions and Answers to Interrogatories (First Set) were served electronically and by first class mail on the following:

Linden R. Evans  
Black Hills Corporation  
P.O. Box 1400  
Rapid City, SD 57709

Kelly Frazier  
Public Utilities Commission  
500 East Capitol  
Pierre, SD 57501

and by United States first class mail, postage prepaid to the following:

Marvin D. Truhe  
P.O. Box 8112  
Rapid City, SD 57709



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Thomas J. Welk