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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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June 28, 2004

Pamela Bonrud
Executive Director
Public Utilities Commission of the State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501

VIA OVERNIGHT UPS

Re: Docket CT03-154

Dear Ms. Bonrud:

I attach the original and ten copies of Qwest's Post-Hearing Brief in this docket.

I am also sending a copy of this filing to you by email. I am also serving copies on staff, counsel for the Commission, and opposing counsel via email and hard copy.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Goodwin". The signature is stylized and cursive.

Timothy J. Goodwin

enclosures

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

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

BLACK HILLS FIBERCOM, LLC,

Complainant,

v.

QWEST CORPORATION,

Respondent.

TC 03-154

Qwest's Post-Hearing Brief

Qwest Corporation ("Qwest") submits the following Post-Hearing Brief, subject to its conditional motion to dismiss for lack of subject matter jurisdiction the Complaint of Black Hills FiberCom, LLC ("BHFC"), as amended:

Introduction

BHFC asks this Commission to enter an unprecedented order at odds with Qwest's South Dakota intrastate switched access tariff (the "Tariff"), state law, FCC precedent, and importantly, BHFC's own billing conduct. No state or federal commission has ever held that interexchange, intrastate Internet-bound traffic is subject to anything other than intrastate switched access rates. This Commission should not be the first, particularly in light of BHFC's own conduct in billing Qwest and other carriers for intrastate, interexchange Internet-bound traffic at intrastate switched access rates.

There are four key reasons this Commission should conclude that interexchange, intrastate Internet-bound traffic – the Disputed Traffic¹ in this case – is properly subject to Qwest’s intrastate switched access tariffs:

- 1. The Disputed Traffic falls squarely within the Tariff’s definition of intrastate traffic;**
- 2. BHFC understood it would have to pay intrastate switched access rates on the Disputed Traffic in 1999, and agreed that access charges would be determined by exchange numbers, or NXX;**
- 3. BHFC charges Qwest and other carriers intrastate switched access rates for interexchange, intrastate Internet-bound traffic; and**
- 4. Even if the Disputed Traffic were *jurisdictionally* interstate, the FCC has consistently applied intrastate switched access tariffs to Internet-bound traffic and would likely do so in this case.**

Each of these reasons will be addressed in turn.

However, the resolution of these four issues does not complete the case.

Perhaps frustrated by the representations it had made in 1999, and the plain application of Qwest’s Tariff, BHFC implemented a discriminatory, improper charge against its customers who used Qwest-served internet service providers (“ISPs”), after it withdrew its request for the Commission to approve the charges. Even discussion of the possibility of the charge drove customers away from Qwest ISPs, and has cost Qwest – by BHFC’s own measurement – approximately \$47,000 per month in access charges in the 26 months from June 2002 through the present. This Commission should not let

¹ 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.

this conduct be rewarded or ignored. Rather, the Commission should reject BHFC's claims and award Qwest its lost access revenue of approximately \$1,222,000.

1. *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." During the hearing, BHFC's witness Kyle White testified that the Disputed Traffic was billed as "an intrastate billing under an intrastate tariff approved by this Commission, and this Commission should have the authority to review and determine what traffic is covered by that tariff."² However, it became clear during the course of the proceedings that BHFC does not truly seek application of the Tariff, but rather asks the Commission to ignore the Tariff.

The Tariff controls this dispute. The Commission has previously held, as a matter of law, that "[t]ariffs approved by a regulatory agency are not mere contracts but are considered to have the force and effect of law" and are controlling in disputes. See, e.g., *Matter Of The Complaint Filed By Judy Raker, Rapid City South Dakota, Against U.S. West Communications, Inc. Regarding Delayed Service*, Findings of Fact and Conclusions of Law, Conclusion of Law 3, CT99-026. Applied to this case, the Tariff contains an explicit, easy-to-follow methodology for determining, as a matter of law, whether traffic is interstate, and not subject to the Tariff, or intrastate, and subject to its terms (emphasis added):

² A party is bound by that party's own testimony and may not claim a version of the facts more favorable than the party's testimony. See *Guthmiller v. South Dakota Dept. of Transp.*, 502 NW2d 586, 589 (SD 1993); *Trammell v. Prairie States Ins. Co.*, 473 NW2d 460, 463 (SD 1991); *State v. Jacobson*, 491 NW2d 455 (SD 1992); *Waddell v. Dewey County Bank*, 471 NW2d 591, 595 n.3 (SD 1991); *Lalley v. Safway Steel Scaffolds, Inc.*, 364 NW2d 139, 141 (SD 1985); *Myers v. Lennox Co-op Ass'n*, 307 NW2d 863 (SD 1981); *Swee v. Myrl & Roy's Paving, Inc.*, 283 NW2d 570 (SD 1979); *Petersen v. Sioux Valley Hosp. Ass'n*, 486 NW2d 516, 519 (SD 1992).

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.

Not surprisingly, BHFC has gone to great lengths to argue that the Commission should **not** apply this portion of the tariff.³ 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.***

³ 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. As discussed in section 4 below, 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.

In opening statement, BHFC's counsel also admitted⁴ that the "called station" for the Disputed Traffic was in Rapid City. Transcript, page 32, lines 15-25.⁵ 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?

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.⁶

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 represents a completely different approach than 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

⁴ "[A]n attorney can make an admission . . . that is binding upon his client and relieves the opposing party of the duty to present evidence on that issue." *Zahn v. Musick*, 2000 SD 26, ¶ 27, 605 NW2d 823 (citing *Rosen's Inc. v. Juhnke*, 513 NW2d 575, 577 (SD 1994))

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

⁶ Tr., 117:9 – 118:4.

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.

Other portions of the Tariff support the billing of the Disputed Traffic at intrastate rates. Section 2.3.10(B) of the Tariff provides carriers like BHFC a remedy if they believe some of the traffic they deliver to Qwest is interstate, not intrastate: the percentage of interstate use, or PIU, declaration. BHFC never provided Qwest with any PIU declaration to claim that any of the Disputed Traffic was or would be interstate under this section of the Tariff.⁷ BHFC cannot now ask the Commission to retroactively apply a PIU declaration BHFC consciously failed to make throughout the last five years.

BHFC's arguments all hinge on its contention that the Disputed Traffic "terminates" on the internet, rather than at the Qwest switch. This argument conflicts with the definitions of the Tariff. Section 2.6 of the Tariff, which is the definitional section, defines "Point Of Termination (POT)" as follows:

The term "Point of Termination" denotes a point at or near a Customer designated premises at which the Company's responsibility for the provision of Access Service ends.

This distinction is important. BHFC argues that the point of termination of Internet-bound traffic is at a distant website, as opposed to the called station number. To make this argument, BHFC borrows advocacy from FCC rulings on reciprocal compensation for locally-exchanged traffic, and the prior dispute between BHFC and Qwest as to whether that traffic was local. As an initial matter, the FCC's rulings on reciprocal

⁷ Exhibit 29, Response to Request for Production No. 1; Tr. 147:21 – 149:11.

compensation have little if any bearing on the resolution of this dispute, as the compensation regimes for locally exchanged traffic and interexchange traffic are separate, are regulated separately, and have evolved under different regulatory, technical, and legal contexts.⁸ For example, switched access payments have been part of the intercarrier compensation scheme for multiple decades, while reciprocal compensation is a creature of the 1996 Telecommunications Act.

Regardless, Qwest's position in this case is consistent with its prior positions; BHFC's position is in conflict even with its current conduct. In the interconnection context, BHFC and Qwest had a dispute concerning whether or not Internet-bound traffic terminated locally. The interconnection agreement between the parties did not have a provision like section 2.3.10(A) of the Tariff that defined inter- or intra-state traffic, and did not define the term "termination." The Tariff expressly resolves what in the interconnection agreement was an ambiguity. The Tariff defines "point of termination" as the point near BHFC's premises at which Qwest's responsibility for the traffic ends. Qwest's responsibility for the Disputed Traffic ends at its Rapid City switch, when the traffic is handed to its customer, Qwest Communications Corporation ("QCC"), which is the same point section 2.3.10 of the Tariff uses to distinguish between interstate and intrastate traffic – the called station number for the PRI⁹ in Rapid City.

Even outside the tariff, the Commission's administrative rules and regulations classify the Disputed Traffic as intrastate. ARSD § 20:10:29:06 defines origination and termination of an access service, and provides: "The origination of a service that is

⁸ See also Section 6, *infra*.

⁹ Generally Primary Rate Interface, although the product is described in the Tariff as Primary Rate Service.

switched in a class 4 switch or an interexchange switch that performs an equivalent function ends when the transmission enters the switch. Termination of the service begins when the transmission leaves the switch.”¹⁰ Consistent with the definitions in the Tariff, South Dakota law declares that for purposes of assessing access charges, the Disputed Traffic terminates at Qwest’s switch – not on the internet as BHFC claims.

This conclusion makes practical sense, as well. Several businesses buy local lines, but also buy, from some interexchange provider, services that direct and transport calls coming into those lines to distant customer service centers or call centers. These calls, viewed on an end-to-end basis, do not “terminate” in South Dakota, because the communication would be between, say, a DirecTV customer in Sturgis and a DirecTV sales representative in New York, even though the DirecTV customer in Sturgis dialed a Rapid City number to reach DirecTV. If BHFC’s logic were accepted, QC would be required to charge BHFC interstate switched access, but unless QC sold DirecTV the transport to New York (which it cannot due to LATA restrictions), it would be almost impossible for QC to know whether calls placed to DirecTV’s Rapid City number end up in Rapid City, some other South Dakota location, or in another state.

Similarly, if a QC long distance customer in Pierre called a Rapid City ISP behind BHFC’s switch, under BHFC’s logic, BHFC could only collect interstate rates for the call. But QC could not know without conducting a significant amount of market intelligence on all ISPs across South Dakota whether its Pierre customer was placing a voice call or an ISP call to the Rapid City number. These practical difficulties in implementing BHFC’s requested relief, among others, underscore the logic behind the Tariff’s express

¹⁰ Administrative rules have the force of law and are presumed valid. *Feltrop v. Dept. of Social Svcs.*, 559 N.W.2d 883, 884 (SD 1997). Furthermore, an administrative agency is bound by its own rules. See *Mulder v. Dept. of Social Svcs.*, 675 N.W.2d 212, 216 (SD 2004).

reliance on called station numbers and the location of the switches to determine whether traffic is subject to intrastate rates or interstate rates.

2. BHFC Understood It Would Have To Pay Intrastate Switched Access Rates On The Disputed Traffic In 1999, And Agreed That Access Charges Would Be Determined By Exchange Numbers, Or NXX.

BHFC admitted during the hearing that it believed, understood, and knew in 1999, before it even started operations, that it would have to pay intrastate rates on the Disputed Traffic. Mr. White testified:

Q: . . . [Y]our understanding, it's true, isn't it, that going into this application for the expanded calling area back in 1999 you knew that Black Hills FiberCom would have to pay intrastate switched access for ISP-bound calls that crossed Qwest's exchange boundaries; right?

A We assumed that ISP calls were intrastate calls, yes.

Q And you assumed that you would have to pay intrastate switched access on those calls.

A On those calls, and we would pay reciprocal compensation on the other calls exchanged within the exchange, yes.¹¹

BHFC did not protest or complain that the Disputed Traffic would be subject to intrastate switched access rates in 1999 when it obtained its certificate and its large calling area, and there has been no relevant change in Qwest's Tariff since that time. Had BHFC raised their current complaint in 1999, the results of their request to serve a larger calling area may well have been different. Certainly Qwest would have made different arguments. Instead, BHFC represented to Qwest and to this Commission that it understood it would have to pay intrastate switched access rates on all interexchange

¹¹ Tr. 125:4-14.

traffic within the BHFC calling area, and agreed with Qwest on a method to determine how these interexchange calls would be billed.

Exhibit 23 is a letter BHFC wrote to Qwest, and on which Qwest relied and did not object to the larger calling area BHFC sought. In that letter, BHFC agreed to associate access charges and originating and terminating points according to the dialed NXX, or exchange number:¹²

The association of a specific NXX to a specific rate center will allow call handling between our companies to be free of charge within each of these US WEST [calling] areas and apply access rates when crossing the US WEST toll area. **BHFC will pay US WEST the tariff access rate for calls originated by BHFC customers and terminated within another US WEST toll area.** . . . Although we recognize that there are many originating/terminating call scenarios between the four (4) toll areas. **We believe the allocation of an NXX per toll area will clarify the understanding of how each of these particular call originating or terminating scenarios will be handled in the future.**¹³

If BHFC is to be held to its word expressed in this letter, the language of BHFC's agreement dooms its complaint here. BHFC recognized in 1999 "that there are many originating [and] terminating call scenarios between the four (4) toll areas," and agreed to define origination and termination of all calls according to the dialed NXX or exchange number – precisely as the Tariff delineates between intrastate and interstate switched access charges. BHFC understood "as a result of all of these negotiations . . . that Black Hills FiberCom would have to pay intrastate switched access for ISP-bound calls that crossed Qwest's exchange boundaries." Tr. 125:3-9. It would be patently unfair for the Commission to issue any order contrary to BHFC's agreement and understanding in 1999 simply because BHFC now regrets the bargain it struck.

¹² Mr. White testified that NXX and exchange number are interchangeable. Tr. 124:16-17.

¹³ Exhibit 23.

3. BHFC Charges Qwest And Other Carriers Intrastate Switched Access Rates For Interexchange, Intrastate Internet-Bound Traffic.

Perhaps the most striking evidence that the Disputed Traffic should be subject to intrastate switched access charges comes from BHFC's own conduct. **BHFC charges Qwest and other carriers intrastate switched access rates for intrastate, interexchange Internet-bound traffic.** At the hearing, BHFC admitted in response to a series of hypothetical questions that it charges Qwest and various interexchange carriers intrastate switched access rates for the identical traffic it claims Qwest has improperly billed BHFC. Tr. 130:13 – 134:10. This exchange summarizes that testimony:

Q:: And, in fact, as you testified earlier, Black Hills FiberCom is indeed billing Qwest intrastate switched access for ISP-bound calls that cross exchange boundaries in the Black Hills area, right?

A: Yes. . . .¹⁴

BHFC's advocacy is belied by their conduct. For BHFC to seek damages from Qwest for the very acts they condemn is the height of hubris, and should not be rewarded.

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

a. The ESP Exemption Applies Intrastate Tariffs to ISP Traffic.

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

¹⁴ Tr. 145:25 – 146:4.

noted in opening argument, 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 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.***¹⁵

Contrary to BHFC’s arguments, the FCC’s ISP reciprocal compensation orders embrace the treatment of Internet-bound traffic as subject to intrastate tariffs in certain instances, even at the same time those same orders concluded Internet-bound traffic should not be subject to reciprocal compensation obligations of interconnection agreements. And the FCC’s treatment of ISPs’ access to the PSTN as subject to

¹⁵ *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).

intrastate tariffs is not confined to its ISP reciprocal compensation rulings. For example, in the 1997 Access Reform Order,¹⁶ the FCC held in relevant part:

343. In [the notice of proposed rulemaking preceding this order], we tentatively concluded that ISPs should not be required to pay interstate access charges as currently constituted. We explained that the existing access charge system includes non-cost-based rates and inefficient rate structures. We stated that there is no reason to extend such a system to an additional class of customers, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry. **We explained that ISPs should not be subjected to an interstate regulatory system designed for circuit-switched interexchange voice telephony solely because ISPs use incumbent LEC networks to receive calls from their customers.** We solicited comment on the narrow issue of whether to permit incumbent LECs to assess interstate access charges on ISPs. In the companion Notice of Inquiry (NOI), we sought comment on broader issues concerning the development of information services and Internet access.

2. Discussion

344. **We conclude that the existing pricing structure for ISPs should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges on ISPs.** We think it possible that had access rates applied to ISPs over the last 14 years, the pace of development of the Internet and other services may not have been so rapid. Maintaining the existing pricing structure for these services avoids disrupting the still-evolving information services industry and advances the goals of the 1996 Act to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."

345. **We decide here that ISPs should not be subject to interstate access charges.** The access charge system contains non-cost-based rates and inefficient rate structures, and this Order goes only part of the way to remove rate inefficiencies. **Moreover, given the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established.** As commenters point out, many of the characteristics of ISP traffic (such as large numbers of incoming calls to Internet

¹⁶ *In the Matter of Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket No. 96-262; CC Docket No. 94-1; CC Docket No. 91-213; CC Docket No. 95-72; 12 FCC Rcd 15982; 1997 FCC LEXIS 2591; 7 Comm. Reg. (P & F) 1209; Release Number FCC 97-158 (May 16, 1997 Released; Adopted May 7, 1997).

service providers) may be shared by other classes of business customers.¹⁷

In view of these authorities, it would strain logic for either the FCC or this Commission to conclude that even though Qwest's ISP customers purchase access to the PSTN out of intrastate tariffs, the traffic those ISP customers receive is subject to interstate tariffs.

b. The 2001 Intercarrier Compensation NPRM Demonstrates the FCC's Separate Treatment of Reciprocal Compensation and Access Issues.

In 2001, the FCC again revisited the issue of whether locally exchanged Internet-bound traffic should be subject to reciprocal compensation provisions of interconnection agreements, and again observed the long-standing ESP exemption from access charges.¹⁸ That same day, in a separate order, the FCC initiated a docket (which still has not concluded) to address all intercarrier compensation issues.¹⁹ In that Intercarrier Compensation NPRM, the FCC suggested a dramatic overhaul of the reciprocal compensation scheme for locally exchanged ISP traffic :

The record developed in the *ISP Intercarrier Compensation* proceeding 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

¹⁷ Access Reform Order, ¶¶ 343-345 (footnotes omitted) (emphasis added).

¹⁸ *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, ¶ 11 (April 17, 2001) (the "2001 ISP Remand Order") ("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.") (emphasis in original).

¹⁹ *In The Matter Of Developing A Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610; 2001 FCC LEXIS 2339, Release Number FCC 01-132 (April 27, 2001 Released; Adopted April 19, 2001) ("Intercarrier Compensation NPRM")

appears to have distorted the development of competition in the local exchange market.²⁰

At the same time the FCC was advocating changing the treatment of ISP traffic for reciprocal compensation purposes, however, it advocated no major changes in the access charge regime:

The long-term goal of this NPRM is to develop a uniform regime for all forms of intercarrier compensation, including interstate access. ***We do not, however, anticipate implementing major changes to our access charge rules*** in the initial phase of this proceeding.²¹

As such, the Intercarrier Compensation NPRM demonstrates that BHFC's reliance on the FCC's two ISP orders as persuasive authority in this case is misplaced. The FCC clearly recognizes that the compensation regimes for access and reciprocal compensation are different and demand different legal treatment. The FCC has never even ***implied*** that its rulings on reciprocal compensation should or could impact how access charges should be assessed on Internet-bound traffic that originates in a different calling area from the calling area in which the called station/NXX/exchange number resides.

In fact, the FCC's NPRM shows the opposite – that its attempts to resolve reciprocal compensation issues do not and should not affect the access charge regime. This is important for another argument BHFC advances. BHFC claims that the Commission should ignore the Tariff, because section 2.3.10 refers to FCC Order 85-145, and 85-145 was invalidated by the FCC's two ISP orders. That analysis is flat wrong. Neither of the two FCC ISP orders even ***mentions*** order 85-145, and for good

²⁰ Intercarrier Compensation NPRM, ¶ 66. As a side note, Mr. White admitted Qwest's charging intrastate switched access rates does not present an opportunity for regulatory arbitrage. Tr. 128:17 – 130.8.

²¹ Intercarrier Compensation NPRM, ¶ 97.

reason. Order 85-145 dealt with the access regime, not reciprocal compensation.

Order 85-145 provides in relevant part:

We are, therefore, of the view that interstate usage generally ought to be estimated as though every call that enters [an interexchange carrier's] network at a point within the same state as that in which the station designated by dialing is situated were an intrastate communication and every call for which the point of entry is in a state other than that where the called station is situated were an interstate communication.²²

These principles are echoed in the Qwest Tariff, and show that even FCC precedent classifies the Disputed Traffic as subject to intrastate switched access. But even assuming *arguendo* that one or both of the FCC's ISP orders *implicitly* reversed order 85-145, the South Dakota Commission has not invalidated the Tariff or its definitions. Moreover, the Tariff only mentions 85-145 as a reference point for determination of intrastate usage – the definitions in the Tariff stand alone even if order 85-145 were excised and still operate to classify the Disputed Traffic as subject to intrastate switched access.

c. The Incomplete Relief BHFC Seeks Reveals the Weakness in its Jurisdictional Arguments.

BHFC has engaged in somewhat artful pleading in this case in order to manipulate jurisdiction. BHFC carefully sidesteps the issue of what charges should lawfully apply to the Disputed Traffic, instead seeking essentially incomplete relief from this Commission. Even though BHFC clearly owes **some** compensation to Qwest for

²² *In the Matter of MCI Telecommunications Corporation; Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service; 1985 FCC LEXIS 3500; 57 Rad. Reg. 2d (P & F) 1573; RELEASE-NUMBER: FCC 85-145 (April 16, 1985 Released; Adopted March 28, 1985).*

the termination of the Disputed Traffic, BHFC asks this Commission for a refund of all charges, saying at the hearing:

Qwest would have a responsibility to reissue billings, and we believe that to the extent that the traffic is compensable under FCC orders we would pay somethingWe would get a complete refund of the charges, Qwest would issue new bills, and then the parties would work to understand the billings and their relevance.²³

The relief BHFC seeks would not fully resolve the controversies between the parties. BHFC has only asked the Commission to determine that the Tariff does not apply – BHFC has not asked for any resolution as to what charges or rates actually *do* apply to the Disputed Traffic. BHFC could still contest which interstate charges would apply to the Disputed Traffic even if this Commission granted all the relief requested in their Complaint. Those disputes would unquestionably fall under FCC jurisdiction, and it would then be up to the FCC to grant final relief.

In reality, as Mr. White admitted at the hearing, BHFC’s complaint is that FCC-imposed charges, not state charges, should be applied to the Disputed Traffic.

Q:: And your position in this case is that the charges -- ***intrastate switched access charges that Qwest has imposed on this traffic mean charges for services in excess of those applicable thereto under whatever schedule of charges might apply to that on an interstate basis***; right, and that's interstate basis?

A That's correct.²⁴

This testimony places BHFC’s claim squarely within the definition of an FCC action for overcharges under 47 USC § 415. 47 USC § 415(g) defines an FCC action for overcharges as an action to recover “charges for services in excess of those

²³ Tr. 175:15 – 176:2.

²⁴ Tr. 183:10-16.

applicable thereto under the schedules of charges lawfully on file with the Commissioner.” BHFC’s action is clearly an action for overcharges that should be filed with the FCC, consistent with 47 USC § 415(b) and (c).

Ultimately, however, 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. The Disputed Traffic is subject to intrastate rates whether the Tariff is applied, or whether FCC precedent is used. The only issue to which the jurisdictional classification of the Disputed Traffic is relevant is whether the Commission has the authority to resolve the case.

5. *The Qwest ISP Charge BHFC Imposed Is Anti-Competitive, Discriminatory, and Has Cost Qwest \$1,200,000 in Lost Access Revenue.*

Eventually, BHFC instituted a plan of its own to remedy the problems with their business plan and the Tariff. In May 2002, they began telling their customers that they would have to pay an extra charge – the Qwest ISP Charge – if they wanted to dial ISPs on the Qwest network.²⁵ Later in 2002, they filed a petition with this Commission asking its approval of this charge in docket TC02-084.²⁶ But even though the minutes of the Commission meetings show that the Commission concluded it did need to approve this charge,²⁷ BHFC withdrew its petition.

²⁵ Tr. 151:8-20.

²⁶ Exhibit 30.

²⁷ Exhibits 32, 31, and 33.

As it withdrew its petition, BHFC made an assertion that stands in contrast to their advocacy today: they claimed the Disputed Traffic was a federal issue, not a state regulatory issue:

We believe that the outcome of this approach [withdrawing the petition] will be better for all of us now that we understand that this is a federal issue and not a state regulatory issue as we had originally assumed.²⁸

In opening statements, BHFC's counsel echoed this thought, characterizing the statement: "FiberCom said since these are interstate calls, they've accepted the argument that Qwest made earlier that all ISP traffic is interstate, since those are interstate calls, then . . . the Commission does not have jurisdiction over those calls but the FCC does."²⁹ These statements belie BHFC's current appeal to the Commission's jurisdiction, but also show BHFC's deliberate action to deny the Commission's authority over the Disputed Traffic and engage in self-help remedies.

The self-help Qwest ISP Charge, and the threat of it, had the desired effect: BHFC's customers changed their behavior, and the access revenues Qwest received from BHFC dried up from almost \$50,000 per month to about \$700 per month. Mr. White even testified that most of BHFC's customers made the decision to switch away from Qwest ISPs soon after BHFC sent its May 31, 2002 letter³⁰ indicating in bold print "Important Billing Decision Required:"

Q Even as you started to discuss the possibility and Black Hills' intent to institute the Qwest ISP charge with your customers, even before the charge was instituted, those discussions had the effect of reducing the access that you were paying to Qwest;?

²⁸ Exhibit 10, page 2.

²⁹ Tr. 44:3-8.

³⁰ This letter is part of Exhibit 30, and is identified as Exhibit 2 to that petition.

A Our customers were not ready to pay bills that may be several hundred or even \$1,000 or more for their access to America On Line.

Q So when you told them billing -- you know, important billing matter, decision required, they made the decisions to switch ISPs?

A Most of them did.³¹

This testimony conclusively establishes the causative link between the Qwest ISP Charge and Qwest's lost access revenue. BHFC admits that its conduct had the desired effect -- it reduced the amount of BHFC customers that called Qwest ISPs. Even a cursory examination of Exhibit 13, which BHFC presented as a measure of its damages, confirms the truth of Mr. White's testimony. Some more detailed analysis is provided in Appendix A, which analyzes the amounts of access BHFC paid to Qwest. As shown in Appendix A, during the six months prior to May 2002, when BHFC began telling its customers of its plans to impose the Qwest ISP Charge, Qwest's average access revenue from BHFC exceeded \$48,000 per month. By the time the hearing on this matter took place, access revenue had declined to an average of \$769 per month. Over the 26 months since May 2002, the imposition of the Qwest ISP Charge has benefited BHFC and cost Qwest approximately \$1,222,000.

The precipitous decline of access revenue after BHFC began informing its customers of intent to impose the charge demonstrates another key fact. If the Commission decides that the Qwest ISP Charge is proper, its effect demonstrates that BHFC had a ready remedy it could have imposed at any time³² and made itself whole, but elected not to do so. There are only two alternatives: ***either the Qwest ISP Charge***

³¹ Tr. 154:9-21.

³² Tr. 164: 8-11.

was improper and Qwest should be awarded damages, or the Qwest ISP Charge was proper and available at any time, and BHFC failed to mitigate its damages.

However, Qwest believes this charge is wrong, and not just because the Commission didn't approve it. Qwest agrees with the criticisms AOL's attorneys had of the Qwest ISP Charge as expressed in Exhibit 11. First, the charge is discriminatory. It treats Black Hills FiberCom customers differently based on whether they have a Qwest ISP or a Black Hills ISP.³³ It limits their choice. If BHFC customers choose a Black Hills ISP, there is no charge, but if they choose a Qwest ISP, they have to pay extra. As such, the Qwest ISP Charge violates SDCL § 49-31-11.

Also, the Qwest ISP Charge violates the FCC's dialing parity requirements. In other words, BHFC customers are charged differently for calls in the 605 area code depending on whether the ISP's number those customers dial is behind the Qwest switch or the BHFC switch.

The charge also violated Black Hills FiberCom's obligations to keep their customer proprietary network information ("CPNI") confidential. BHFC determined from the calling patterns and from market intelligence that they had conducted which of their customers were using AOL or were using another ISP that was served by Qwest.³⁴ BHFC targeted a mailing³⁵ to those customers. That mailing told BHFC customers to stop using Qwest and use a BHFC-served ISP. BHFC even provided free installation and offered to pay the customers' last month of AOL charges, provide free installation,

³³ Kyle White Deposition, Exhibit 43, page 59, lines 6-9.

³⁴ Tr. 155:1-10.

³⁵ The letter is part of Exhibit 30, and is identified as Exhibit 2 to that petition.

and provide free hardware if they switched to BHFC's affiliate ISP.³⁶ As such, BHFC marketed ISP services using the calling patterns of their customers. That violated their CPNI.

Finally, in addition to all these failures, the Qwest ISP Charge imposes an unfair competitive disadvantage on Qwest and interferes with Qwest's business relationships with its customers, including AOL and Qwest's long distance affiliate QCC, which is the actual direct purchaser of the Primary Rate Service (PRI or PRS) to which the AOL access numbers are assigned. The elements of the offense of interference with business relations are:

- (1) the existence of a valid business relationship or expectancy;
- (2) knowledge by the interfere of the relationship or expectancy;
- (3) an intentional and unjustified act of interference on the part of the interferer;
- (4) proof that the interference caused the harm sustained; and
- (5) damage to the party whose relationship or expectancy was disrupted.³⁷

All these elements are present in this case. QC has a valid business relationship with its existing and prospective ISP customers, including QCC and AOL. QC benefits from this relationship not only through revenue derived from QCC and AOL for the services they purchase from QC, but also from intercarrier compensation, including reciprocal compensation and switched access charges, collected from other carriers for

³⁶ Tr. 155:25 – 156:8.

³⁷ *Setliff v. Akins*, 616 N.W.2d 878, 889 (SD 2000). "One is liable for commission of this tort [if he] interferes with business relations of another, *both existing and prospective*, by inducing a third person not to enter into or continue a business relation with another or by preventing a third person from continuing a business relation with another." *St. Onge Livestock Co. Ltd. v. Curtis*, 650 N.W.2d 537, 543 (SD 2002)(emphasis in original).

calls QC delivers to its ISP customers. BHFC knew about this relationship, as evidenced by the specifically targeted charge and letters to its customers. BHFC's acts in communicating and eventually implementing the Qwest ISP Charge were certainly intentional. BHFC admits the charge had the desired effect of moving customers away from Qwest-served ISPs to BHFC-served ISPs, which is confirmed by the dramatic decline in access revenue beginning at the time when BHFC first communicated its intent to impose the Qwest ISP Charge to its customers. That decline in revenue constitutes damage to Qwest in its existing and prospective relationships.

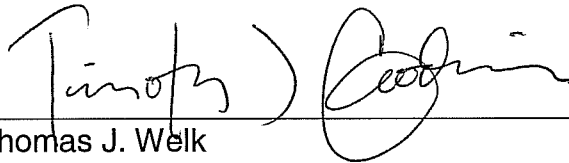
All the elements for tortious interference are satisfied with undisputed facts. The only decision for the Commission to make is whether or not the Qwest ISP Charge was justified or unjustified – a part of the third element listed above. As set forth above, there are a myriad of reasons why the Qwest ISP Charge was wrongful and unjustified, which the Commission should not ignore. BHFC should make Qwest whole by paying the access charges Qwest lost.

Conclusion

The Tariff plainly, and in several places, includes the Disputed Traffic as subject to intrastate switched access charges. The Tariff's conclusion as to the termination point for determining access charges is consistent with the South Dakota Administrative Rules governing access, and with FCC precedent. Most egregiously, charging intrastate switched access for the Disputed Traffic is consistent with BHFC's own practice. As a result, the Commission should either reject BHFC's claims outright, or at a minimum dismiss BHFC's claims in favor of the FCC's jurisdiction. In doing so,

however, the Commission should not ignore the discriminatory and anticompetitive effects of the Qwest ISP Charge, and should award Qwest its damages of \$1,222,000.

Dated: June 28, 2004



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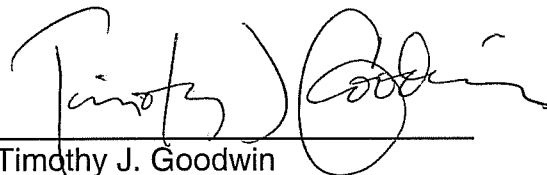
ATTORNEYS FOR QWEST CORPORATION

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 Monday, June 28, 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:

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