

MARVIN D. TRUHE
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December 8, 2003

RECEIVED

DEC 09 2003

**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 original and ten copies of FiberCom's Reply to Qwest's Counterclaim in the above entitled matter. A copy has been sent to opposing counsel as indicated on the Certificate of Service.

Please call me if you have any questions.

Thank you.

Sincerely,



Marvin D. Truhe

Enclosure

cc w/ encl: Thomas Welk
Tim Goodwin

RECEIVED

DEC 09 2003

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) CT 03-154
FiberCom, L.L.C., Rapid City, South Dakota) FIBERCOM'S REPLY TO
Against Qwest Corporation Regarding Intrastate) QWEST'S COUNTERCLAIM
Switched Access Charges Applied to ISP-Bound)
Calls Which Complainant Claims is Interstate in)
Nature)

Black Hills FiberCom, L.L.C. ("FiberCom") for its Reply to the Counterclaim of Qwest Corporation ("Qwest") denies each and every allegation, matter, and thing contained in Qwest's Counterclaim except that which is hereinafter specifically admitted or otherwise specifically answered. Each paragraph of FiberCom's following response is numbered to correspond to Qwest's Counterclaim.

Definition

"Traffic in dispute" refers to ISP-bound traffic initiated by FiberCom's customers outside Qwest's Rapid City local calling area using an access number within Qwest's Rapid city local calling area which traffic is delivered to an ISP customer of Qwest and continues through the ISP server and terminates at the remote Internet sites accessed by the FiberCom customers.

COUNT I

1. FiberCom lacks knowledge or information sufficient to form a belief as to the truth of paragraph 1 of the Counterclaim.
2. FiberCom admits that it initiated an additional charge to its customers who reside outside Qwest's Rapid City calling area and who initiate "traffic in dispute" calls, i.e., calls to ISPs served by Qwest within Qwest's Rapid City calling area (the "Qwest ISP charge"). That additional charge was initiated January 22, 2003, as evidenced by a January 3, 2003 letter from FiberCom to some of its customers. [Letter attached as Exhibit 1]

3. FiberCom admits that the Qwest ISP Charge ultimately was implemented without approval of the South Dakota Public Utilities Commission (“Commission”). FiberCom further states that the Qwest ISP Charge was implemented with full knowledge of the Commission, as evidenced, at a minimum, by a January 17, 2003 letter [Attached as Exhibit 2], from FiberCom to the Executive Director of the Commission requesting withdrawal of the Petition in Docket TC02-084, which letter advises the Commission that FiberCom will “. . . begin billing interstate long distance charges to our customers that are making these calls.” [Page 1 of Exhibit 2]

FiberCom admits that it initiated Docket TC02-084 seeking a Declaratory Ruling and, in the alternative, an Amendment to its local calling exchange area (“Petition”) [The Petition is attached as Exhibit C to Qwest’s Counterclaim] with the stated purpose, as set forth in the Petition, to request a Declaratory Ruling “. . . whether FiberCom must seek the approval of the Commission to amend its local calling plan.” [See, page 1 of Petition] and, alternatively, to petition the Commission “. . . for approval of an amendment to its local calling area pursuant to ARSD § 20:10:32:11.” [See, page 2 of Petition]

FiberCom further admits that an additional question raised in FiberCom’s Petition to amend its local calling plan was whether Commission approval was required prior to its implementing the Qwest ISP charge. [See, p. 7, ¶ 3 of the Petition] FiberCom subsequently withdrew its Petition to amend its local calling plan and, thus, the above question was never answered.

4. FiberCom admits that the issue of Commission approval to amend FiberCom’s local calling plan or area was raised at the November 20, 2002 meeting, and that the Commission found that its approval of a change in FiberCom’s local calling area was required.

5. FiberCom admits that the Commission issued an Order on January 13, 2003 [Attached as Exhibit E to Qwest's Counterclaim] but denies that the subject of "prior approval" was the Qwest ISP Charge. The Order expressly states that:

- a. "The issue at the hearing is whether the proposed change to FiberComs' local calling area as set forth on pages 9 and 10 of the Alternative Petition should be approved pursuant to ARSD § 22:10:32:11." [Page 1 of Order]; and,
- b. "As a result of the hearing, the Commission shall determine whether the proposed change to FiberCom's local calling area as set forth on pages 9 and 10 of the Alternative Petition should be approved pursuant to ARSD § 22:10:32:11." [Page 2 of Order]; and,
- c. "ORDERED, that a hearing shall be held at a time and place specified above on the issue of whether the proposed change to FiberCom's local calling area as set forth on pages 9 and 10 of the Alternative Petition should be approved pursuant to ARSD § 22:10:32:11." [Page 2 of Order]

6. FiberCom does not understand who or what is the subject of "clearly concludes" in paragraph 6 of the Counterclaim, and otherwise denies paragraph 6 of the Counterclaim.

7. FiberCom denies that the Commission's vote and Order was the reason it withdrew its Petition. The Petition was withdrawn for the reasons stated in its letter to the Commission requesting withdrawal, namely,

"After reviewing the positions of Qwest and the Federal Communications Commission, it has become apparent to us that calls made by customers to Internet service providers (ISPs) are interstate in nature. As a result, these calls fall outside of the local calling plan we have on file with the Commission." [Page 1 of attached Exhibit 2]

The Federal Communication Commission's (FCC) position referenced in the January 3, 2003 letter is evidenced in part by the FCC's Order on Remand referred to in paragraph 18 of FiberCom's Complaint. The Qwest position referenced in the letter is evidenced in part by Qwest's stated position that "... Internet related traffic is predominately interstate in nature ..." [See, paragraph 27 of FiberCom's Complaint, and Exhibit 2 attached to FiberCom's Complaint]

8. FiberCom admits paragraph 8 of the Counterclaim.

9. FiberCom lacks knowledge or information sufficient to form a belief as to the truth of paragraph 9 of the Counterclaim.

10. FiberCom denies the allegations of paragraph 10 of the Counterclaim.

11. FiberCom denies the allegations of paragraph 11 of the Counterclaim.

COUNT II

12. See, FiberCom's prior responses to the allegations of paragraphs 1 through 11 of the Counterclaim.

13. FiberCom denies the allegations of paragraph 13 of the Counterclaim.

14. FiberCom denies the allegations of paragraph 14 of the Counterclaim.

COUNT III

15. See, FiberCom's prior responses to the allegations of paragraphs 1 through 14 of the Counterclaim.

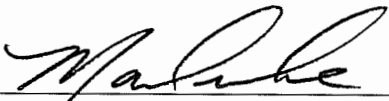
16. FiberCom denies the allegations of paragraph 16 of the Counterclaim.

AFFIRMATIVE DEFENSES

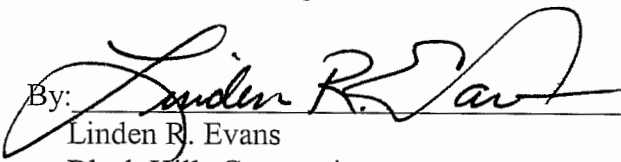
1. Qwest's Counterclaim fails to state a claim upon which relief can be granted.
2. Qwest's claims are barred by estoppel.
3. Qwest's claims are barred by laches.
2. Qwest's claims are barred by waiver.

Respectfully submitted this 8th day of December, 2003.

BLACK HILLS FIBERCOM, L.L.C.

By: 

Marvin D. Truhe, Attorney at Law
P.O. Box 8112
Rapid City, South Dakota 57709
(605) 348-8530
Attorney for Complainant

By: 

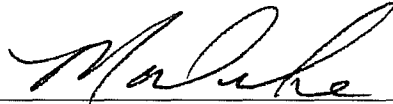
Linden R. Evans
Black Hills Corporation
PO Box 1400
Rapid City, South Dakota 57709-1400
(605) 721-2305
Attorney for Complainant

CERTIFICATE OF SERVICE

I hereby certify that on December 8th, 2003 a true and correct copy of the foregoing
FiberCom Reply to Qwest's Counterclaim with attached Exhibits 1 and 2 was served via United
States first class mail, postage prepaid, on the following:

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 47th floor
Denver, CO 80202



Marvin D. Truhe



Black Hills FiberCom

No One Else Has Our Connections.

P.O. Box 2115 • 809 Deadwood Avenue • Rapid City, SD 57709

ph. (605) 721-2000 • fax (605) 342-1693

www.blackhillsfiber.com

IMPORTANT BILLING NOTICE - DECISION REQUIRED

January 3, 2003

Dear Customer:

Thank you for choosing Black Hills FiberCom as your communications service provider. As a result of your commitment to us, you have made us the dominant provider in our market area.

This letter is direct to you as it concerns certain new charges that you may incur as a result of your Internet Service Provider ("ISP"). Given that on June 14, 2001, the Federal Communications Commission ("FCC") decreed Internet traffic to be Interstate in nature and the fact that we are subject to long distance charges for terminating this traffic to other carriers, is causing us to make a policy change that will regrettably constitute a billing change to your account if left unattended. In the future, data traffic to customers off of our network (including calls to ISPs) will no longer be free when the call is made between Qwest local exchanges. Effective January 22, 2003, we will begin billing for "off-net Internet and data traffic" that is not served by our network. Specifically dial-up Internet activity directed to another non-local ISP will incur a long distance charge. The problem is almost exclusively with America On-Line ("AOL"). We have attempted to establish services directly with AOL to avoid these costs, but have been unsuccessful and have little or no hope for future resolution.

You have several options to avoid these charges including moving to one of our on-net ISPs, those operating on our network (i.e., RapidNet, E-Net, Mato, BlackHills.com, Rushmore On-Line, Inttec/Visionary Computing) or any other ISP located in your community. Should you choose to have us be your Internet Service Provider, we will connect you to our high-speed Internet service without any installation charges.

This in no way affects the free telephone (voice) calling area that we have established throughout the Northern Black Hills and Rapid City. We are committed and proud to provide all of our customers with the best service and best value.

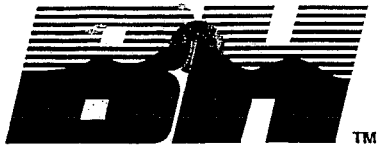
Sincerely,

Ronald Schaible
Sr. VP & General Mgr.

RS:leb

Atch.

EXHIBIT 1



Black Hills Corporation

Kyle D. White

Vice President

Corporate Affairs

E-mail: kwhite@bh-corp.com

625 Ninth Street • P.O. Box 1400

Rapid City, SD 57709-1400

P (605) 721-2313

F (605) 721-2599

January 17, 2003

VIA FACSIMILE

Ms. Pam Bonrud, Executive Director
South Dakota Public Utilities Commission
500 east Capitol
Pierre, South Dakota 57501

Dear Ms. Bonrud:

Subject: Request to Withdraw the Petition of Black Hills FiberCom, L.L.C., for a Declaratory Ruling Regarding ARSD 20:10:32:11 and Alternative Petition for Approval of An Amendment to Black Hills FiberCom, L.L.C.'s Local Calling Area Pursuant to ARSD 20:10:32:11 (Docket TC02-084)

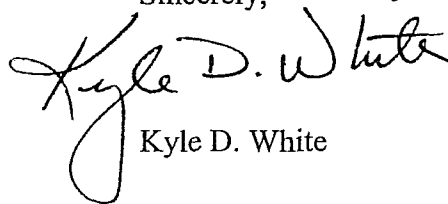
Black Hills FiberCom respectfully requests that the Commission allow it to withdraw its petition under Docket TC02-084. Black Hills FiberCom has reviewed the circumstances that led to its filing of the petition with the Commission and has determined that the petition is not the appropriate course of action for remedying the situation described in the petition.

After reviewing the positions of Qwest and the Federal Communications Commission, it has become apparent to us that calls made by customers to Internet service providers (ISPs) are interstate in nature. As a result, these calls fall outside of the local calling plan we have on file with the Commission. After much effort to remedy the situation of our Northern Hills customers calling off-network ISPs served by Qwest (specifically America On-line), Black Hills FiberCom finds it has no other reasonable alternative than to begin billing interstate long distance charges to our customers that are making these calls. Typically, we charge residential customers 7.9 cents per minute for intrastate and interstate long distance. For these calls we are establishing a new interstate long distance classification and a rate of just 5.9 cents per minute. The rate is similar to our current cost of providing this service for our customers. Black Hills FiberCom customers will begin seeing charges for these calls with their bills issued beginning on January 22, 2003. As is always our practice during service transition periods, we intend to be flexible in responding to customers and in helping them find alternatives to these new long distance charges. This change will affect less than 275 customers and materially affect probably less than 100.

Black Hills FiberCom appreciates the attention provided by Staff and Commissioners thus far to our petition, including the scheduling of a hearing. We believe that the outcome of this approach 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. With our withdrawal of the petitions, the hearing on January 24, 2003, will no longer be necessary. Instead we request that in its place, I have the opportunity to meet with Commissioners and Staff to explain the position taken and answer any questions or concerns.

If you have any questions regarding our request to withdraw the petitions, please contact me or Linn Evans.

Sincerely,

A handwritten signature in black ink that reads "Kyle D. White". The signature is written in a cursive style with a large, looping initial "K".

Kyle D. White

KDW:MJH

c: Ron Schaible, Black Hills FiberCom General Manager
Linn Evans, Black Hills Corporation Associate Counsel
Rolayne Ailts Wiest, SD Public Utilities Commission
Rich Coit, SDITC