

JUL 29 2004

**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  
) BLACK HILLS FIBERCOM'S  
) RESPONSIVE BRIEF  
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Black Hills FiberCom, L.L.C. ("BHFC") submits the following response to the legal brief submitted by Qwest Corporation ("Qwest") on June 28, 2004.

**INTRODUCTION**

A review of the initial briefs of BHFC and Qwest verifies what has been obvious from the outset, namely, the salient facts in this case are not in dispute. Instead, the dispute involves the legal interpretation of the 2001 FCC Order on Remand, and, to the extent that it addresses ISP traffic, the FCC's accompanying Notice of Proposed Rule Making ("NPRM"). BHFC's initial brief addressed the Order on Remand in detail because BHFC feels that a proper resolution of this matter requires a full understanding of the FCC holdings in that Order, and the ability to recognize any misstatements of the holdings of either the Order or the NPRM.

BHFC will first state those issues which Qwest no longer seriously contests, then respond to Qwest's initial brief, and finally address any remaining legal issues.

**LEGAL ARGUMENT**

**The FCC's 1999 and 2001 Orders established that all ISP traffic is interstate**

1. Qwest's counsel argued at the hearing that the Order on Remand applied only to "locally originated traffic;"<sup>1</sup> but in its initial brief Qwest never advances that

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<sup>1</sup> BHFC initial brief, ¶ 52.

argument. Instead Qwest now argues that “even if the traffic is jurisdictionally interstate” the intrastate tariff “may well be applicable.”<sup>2</sup> Qwest’s intrastate tariff will be addressed later, but the fact remains that the Orders established that all ISP traffic is interstate, not just that which originates locally.<sup>3</sup> This said, and on this basis alone, it is illogical for Qwest to argue that an intrastate tariff can be applied to interstate traffic.

**The FCC’s 1999 and 2001 Orders have rejected the “two calls” theory**

2. The FCC has consistently rejected any attempts to break down ISP calls into an intrastate component and an interstate component.<sup>4</sup> Qwest’s initial brief likewise does not dispute this argument, but nonetheless contends it is entitled to be paid pursuant to its intrastate tariff for the “first call.”

**The FCC’s 2001 Order on Remand remains in effect**

3. There is no longer any dispute that the Order on Remand governs this action.<sup>5</sup> Although Qwest’s pleadings questioned the validity of the Order on Remand, Qwest’s initial brief does not dispute its validity.

**The Order on Remand mandates the required compensation regime for all ISP traffic.**

4. Despite the fact that the Order on Remand has held all ISP traffic to be interstate,<sup>6</sup> Qwest nonetheless argues, again illogically, that the Order really only dictates the compensation applicable to locally originating traffic, i.e., traffic subject to reciprocal compensation. Thus, Qwest effectively argues that the Commission can ignore the FCC

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<sup>2</sup> Qwest initial brief, p. 11, ¶ 4.

<sup>3</sup> BHFC initial brief ¶¶ 41-46, 52-67.

<sup>4</sup> BHFC initial brief ¶¶ 42-46.

<sup>5</sup> BHFC initial brief ¶¶ 50-51.

<sup>6</sup> BHFC initial brief ¶¶ 68-90.

Order insofar as non-locally originating ISP traffic is concerned, and can ignore the FCC Order insofar as non-reciprocal compensation is concerned.

5. Qwest's arguments are directly contradicted by the following:
  - (a) Qwest's prior inconsistent statements in which Qwest has contended that all ISP traffic is interstate.<sup>7</sup>
  - (b) The Order on Remand stating that it applies to all ISP traffic, regardless of where it originates.<sup>8</sup>
  - (c) The FCC's NPRM stating that the Order on Remand adopted a bill and keep arrangement for all ISP traffic.<sup>9</sup>
  - (d) The Order on Remand stating that it was rejecting all calling-party's-network-pays (CPNP) compensation for ISP traffic, not just reciprocal compensation.<sup>10</sup>
  - (e) The favorable decisions Qwest received from the Oregon and Colorado commissions, as well as the Colorado federal district court, which held that the Order on Remand applied to more than just reciprocal compensation charges.<sup>11</sup>
  - (f) Paragraph 82 of the Order on Remand language as cited in the legal brief submitted by the Commission staff.

Items (a) through (e) above were addressed in BHFC's initial brief, but item (f) was not, so will be addressed herein.

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<sup>7</sup> BHFC initial brief ¶¶ 55-59.

<sup>8</sup> BHFC initial brief ¶¶ 60-67.

<sup>9</sup> BHFC initial brief ¶¶ 71-72.

<sup>10</sup> BHFC initial brief ¶¶ 73.

<sup>11</sup> BHFC initial brief ¶¶ 76-89.

## **Brief of Commission Staff**

6. Attorney Karen Cremer's brief submitted on behalf of the Commission Staff reiterates that the Commission is bound by the Order on Remand regarding the compensation issue for all ISP traffic exchanged after the effective date of that Order. The Staff brief quotes ¶ 82 of the Order on Remand which provides that state commissions have the authority to determine what is the appropriate intercarrier compensation for ISP traffic exchanged prior to the effective date of the Order on Remand. However, as to all ISP traffic exchanged after its effective date, state commissions no longer have that authority,

Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions no longer have authority to address this issue.<sup>12</sup>

7. The Order on Remand could not have been more explicit and BHFC is in complete agreement with the Commission Staff on this issue. From and after its issuance the Order on Remand preempts the entire issue of intercarrier compensation. Despite the above clear holding of the Order, and all the previously cited authorities, Qwest still insists that all the FCC did in the Order on Remand was dictate the appropriate compensation for locally exchanged traffic. Thus, Qwest contends that the Commission can decide that the traffic in dispute is subject to Qwest's intrastate tariff, even though the Order on Remand mandates that all such traffic is subject to bill and keep only.

8. In this regard it is important to distinguish between state commission authority (the term used in ¶82 of the Order on Remand) and state commission jurisdiction. State commissions still retain the jurisdiction to address matters relating to ISP traffic (for example, to provide redress for improper billings), they just no longer

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<sup>12</sup> Order on Remand, ¶ 82.

have the authority to determine the intercarrier compensation for that traffic, as that issue has been preempted by the FCC's Order on Remand.

9. BHFC pointed out two recent examples of this in its initial brief, citing Qwest's successful efforts before state commissions in Oregon and Colorado to have ISP traffic treated as interstate and thus subject to bill and keep. In each case the state commission had jurisdiction to address and correct the improper billings imposed on ISP traffic, but were obligated to follow the Order on Remand which dictated the compensation regime for that traffic (i.e., the commissions had no authority to dictate another compensation regime). In each case the state commissions found, as they were bound, that the ISP traffic was subject to the bill and keep regime mandated by the Order on Remand.

10. Again, despite the above precedent and the clear holding of ¶ 82 of the Order on Remand that dictates a bill and keep regime for all post June 14, 2001, ISP traffic, Qwest nevertheless argues that it is entitled to recover intrastate tariff charges for that traffic.

#### **RESPONSE TO QWEST INITIAL BRIEF**

11. The basis of BHFC's Complaint in this case is the Order on Remand, and even Qwest would have to concede that resolution of this matter depends upon the proper interpretation of that Order. To that end, BHFC's initial brief is replete with specific cites to and quotes from the Order on Remand. In contrast Qwest's initial brief cites the Order only once, and then only in reference to ESPs, not LECs. A pertinent question, therefore, is why Qwest chose not to engage in a discussion of the specific holdings of

the controlling document in this case? BHFC submits it is because the language of the Order on Remand, as cited by BHFC, fully supports BHFC's position herein.

12. Qwest's initial brief lists four primary arguments which will be addressed in the same order as presented.

**Qwest Argument #1:** Qwest's South Dakota Switched Access Tariff Classifies the Disputed Traffic as Intrastate Switched Access.

**BHFC Response:**

13. See, ¶¶ 103-112 of BHFC's initial brief which addresses this argument in detail and establishes that the Order on Remand controls over the language of the tariff. That Order dictates that all ISP traffic is interstate and subject to a bill and keep regime, and further explicitly rejects all CPNP compensation regimes, whether they be reciprocal compensation, trunking charges, or intrastate tariffs.

14. Thus, regardless of how origination and termination of traffic are defined in Qwest's tariff or in ARSD §20:10, or how those documents describe access charges, they are not relevant to ISP traffic following the issuance of the Order on Remand which now defines ISP traffic as interstate and governs how all such traffic must be treated insofar as intercarrier compensation is concerned. As stated previously, state laws and state regulated tariffs must comply with the Telecommunications Act of 1996 and FCC regulations and orders promulgated thereto to insure that the goals of the Act are not frustrated.

15. Qwest mentions that BHFC's Complaint uses the term "application" of the tariff, and then suggests that this shows BHFC originally contended this case depended

upon an interpretation of the tariff.<sup>13</sup> As will be seen, Qwest repeatedly uses this technique of selecting a single word or phrase from a source and then misstating its clearly intended use to further its arguments. Qwest does so with BHFC's Complaint, the testimony of Kyle White, the statements of the undersigned counsel, and with the language of the NPRM.

16. As for the use of the term "application," BHFC's Complaint states that the Commission has approved Qwest's tariff, ". . . [m]aking disputes related to application of the tariffs the appropriate jurisdiction of the Commission."<sup>14</sup> Even a cursory reading of the Complaint clearly establishes that BHFC is using the term in the sense that Qwest improperly applied its intrastate tariff to interstate traffic, i.e., the intrastate tariff does not apply to the traffic in dispute because it is interstate traffic. For example, "The parties disagree on whether inter-carrier switched access services charges apply to ISP-bound calls . . ."<sup>15</sup> [Emphasis added.]

17. In short, BHFC has never alleged or argued that the language of the tariff, or an interpretation of the tariff, has anything to do with resolution of this dispute. Instead, the Complaint clearly establishes that BHFC cites the Order on Remand as its authority, and not some interpretation of the tariff.

18. In similar fashion Qwest cites Kyle White's testimony and a statement by the undersigned counsel in arguing that BHFC has conceded that the tariff language controls this matter.<sup>16</sup> A review of the cited language, taken in context, clearly shows that Kyle White was responding to a specific question about the language of the tariff,

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<sup>13</sup> Qwest initial brief, p. 3.

<sup>14</sup> BHFC Complaint, ¶ 4.

<sup>15</sup> BHFC Complaint, ¶ 7.

<sup>16</sup> Qwest initial brief, p. 5.

and the undersigned counsel merely pointed out that Qwest has a local call station.

Neither person ever suggested that the tariff applied to the traffic in dispute, which would be a total contradiction of BHFC's argument in this case.

19. Once again, the question must be asked why Qwest's initial brief concentrates on statements made at the hearing, taken out of context, rather than upon the proper interpretation of the Order on Remand? This is especially telling in that there are no material facts even at issue in this case, certainly not whether the language of the tariff reads as it does, or whether Qwest has a local call station in Rapid City.

20. Thus, the telecommunications law, and not the misstated testimony of witnesses, governs this matter. If it were otherwise, the Commission would have no need to even review the applicable law, and the mandates of the Order on Remand regarding the treatment of ISP traffic could be thwarted simply by how a witness answered a question.

**Qwest Argument #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 Response:**

21. Again, the resolution of this case depends upon the law applicable to the traffic in dispute, not on what either of the parties "understood" or anticipated in 1998 or 1999 that they would pay each other for the exchange of traffic. In November, 1998, the parties entered into an Interconnection Agreement under which BHFC understood it would receive reciprocal compensation from Qwest for ISP traffic exchanged between the parties. Something changed after that, namely the FCC issued the initial 1999

Declaratory Ruling followed by its Order on Remand in 2001 which changed how ISP traffic would be treated in the future. Whatever BHFC, or for that matter Qwest, understood or anticipated prior to that time has nothing to do with the resolution of this matter.

22. Qwest quotes at length from Exhibit 23 which does discuss access charges but makes no mention of ISP traffic. Further, Qwest fails to mention the most pertinent part of the letter, namely, BHFC's reference to payment of access rates for calls originated by BHFC customers and "terminated in another US West toll area."<sup>17</sup> [Emphasis added.] The Order on Remand holds that ISP traffic doesn't terminate in the other carriers' toll area, or even at the ISP's first POP (Baltimore, in the case of AOL), but instead at the ultimate Internet site being accessed.

23. Finally, and most importantly, it is immaterial what either party anticipated prior to the issuance of the FCC Orders regarding ISP traffic. For example, Qwest entered into the 1998 Interconnection Agreement with BHFC, but immediately after its issuance Qwest invoked the FCC's 1999 FCC Declaratory Order by refusing to pay BHFC reciprocal compensation for ISP traffic under that agreement. Qwest later invoked the 2001 FCC Order on Remand by continuing to refuse to pay those charges, in each case thwarting BHFC's "anticipation" of those revenues.

24. Likewise, Qwest invoked the Orders in avoiding payment of reciprocal compensation or trunk charges to Level 3 in Colorado and Oregon. Thus, the anticipation of receiving revenues, by BHFC, Qwest, or Level 3, has nothing to do with the Commission's obligation to implement the FCC's Order on Remand regarding ISP

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<sup>17</sup> Exhibit 23.

traffic. Qwest has repeatedly, and successfully, invoked the FCC Orders in the past, and BHFC is entitled to invoke those same Orders now.

**Qwest Argument #3:** BHFC charges Qwest and other carriers intrastate switched access rates for interexchange, intrastate Internet-bound traffic.

**BHFC Response:**

25. Kyle White readily conceded this point at the hearing, testifying that while there was very little of that traffic,<sup>18</sup> if the Commission agreed with BHFC's position in this case the traffic ". . . should be rebilled" and at that time ". . . those would be incorrect billings just as Qwest's are."<sup>19</sup> To repeat yet again, this case depends on the proper interpretation of the Order on Remand. Stated another way, if the past billing practices of BHFC, or Qwest for that matter, are accepted as controlling in this case, the legal arguments made herein are meaningless.

**Qwest Argument #4(a):** 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. (a) The ESP Exemption Applies Intrastate Tariffs to ISP Traffic.

**BHFC Response:**

26. See, ¶¶ 91-102 of BHFC's initial brief which addresses this argument in detail and establishes that even though enhanced service providers ("ESPs"), which include ISPs as a subset, are entitled to an exemption insofar as ISP traffic is concerned, this has nothing to do with our case which involves intercarrier compensation and LECs.

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<sup>18</sup> Tr. p. 170, lines 22-24.

<sup>19</sup> Tr. p. 171, line 1; p. 171, line 25 and p. 172, line 1.

27. Further, as stated in BHFC's initial brief, the FCC made specific reference to the ESP exemption in the Order on Remand and then explicitly differentiated the ESP exemption from its ruling that the exchange of ISP traffic between LECs would be subject to bill and keep.

28. In short, ESPs do pay intrastate access tariffs for ISP traffic, but such tariffs are precluded vis-à-vis LECs by virtue of the Order on Remand.

**Qwest Argument #4(b):** The 2001 Intercarrier NPRM demonstrates the FCC's separate treatment of reciprocal compensation and access issues.

**BHFC Response:**

29. BHFC has previously addressed the NPRM in its initial brief at ¶¶ 71-74, but given Qwest's quote from the NPRM which misstates the holding, a further discussion of the NPRM is necessary.

**BHFC Citation of the NPRM in its Initial Brief**

[Corrections to BHFC initial brief: Footnote 122 cites NPRM ¶66, but that should have been Order on Remand ¶66. Likewise, the brief text at ¶ 73 mentions an NPRM quote, but that quote comes from the Order on Remand, as correctly noted in footnote 124.]

30. In its initial brief BHFC pointed out that the NPRM was primarily addressing the broad issue of an appropriate compensation regime for all telecommunications traffic, but in the process the NPRM also made specific reference to the appropriate compensation regime for ISP traffic.<sup>20</sup> The NPRM did so in three consecutive paragraphs (¶¶ 66-68) under Section III.B.5, entitled "Bill and Keep for ISP Bound Traffic." To repeat, only those three NPRM paragraphs addressed the Order on

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<sup>20</sup> BHFC initial brief, ¶¶71-74.

Remand holding regarding ISP bound traffic, while the remainder of the NPRM addressed potential changes in all other traffic.

31. In those three paragraphs the NPRM discussed the FCC's reasons for adopting a bill and keep regime, and explicitly stated that the FCC was proposing that arrangement for ". . . all ISP-bound traffic."<sup>21</sup>

32. This was reiterated in the Order on Remand which stated that in its companion NPRM the FCC was considering adopting a uniform intercarrier compensation mechanism applicable to all traffic exchanged among telecommunications carriers, but that, "In the meantime, however, we must adopt an interim intercarrier compensation rule to govern the exchange of ISP-bound traffic, pending the outcome of the NPRM."<sup>22</sup>

33. Finally the Order on Remand established that the FCC was rejecting all CNPN compensation regimes for ISP traffic.<sup>23</sup>

#### **Qwest's Citation of the NPRM in its Initial Brief**

34. Contrast the above BHFC quotes from the NPRM and the Order on Remand with Qwest's initial brief. Qwest cites two NPRM paragraphs for its argument that the Order on Remand is limited to only precluding reciprocal compensation charges for locally originating traffic.<sup>24</sup> Qwest first quotes ¶ 66 of the NRPM as its "setup" (which paragraph does address ISP traffic), and Qwest then cites ¶ 97 as its "clincher" that the FCC does not intend to implement any changes to its access charge rules.

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<sup>21</sup> BHFC initial brief ¶72, NPRM ¶66.

<sup>22</sup> BHFC initial brief, ¶71, and Order on Remand ¶66.

<sup>23</sup> BHFC initial brief, ¶73, and Order on Remand ¶71.

<sup>24</sup> Qwest initial brief, pp. 14-16.

35. An obvious question is why Qwest fast forwarded thirty one paragraphs (from ¶ 66 to ¶ 97) to find its quote about access charges? The answer is that Qwest again misstates the cited authority, this time citing ¶ 97 in reference to ISP traffic when the NPRM at that point is no longer discussing ISP traffic, but instead is addressing the general subject matter of the NPRM, namely, all other telecommunications traffic.

36. Qwest's technique of taking quotes out of context is further evidenced in its quote of two sentences from ¶ 66 of the NPRM, in support of its argument that the Order on Remand only precludes reciprocal compensation. Significantly, Qwest fails to quote the sentence immediately following which flatly contradicts Qwest's argument. That sentence states, "Thus, we propose to adopt a bill and keep arrangement for all ISP-bound traffic." [Emphasis added.].

37. Qwest also does not explain how its interpretation of the NPRM can square with those sections of the Order on Remand cited by BHFC and the Commission staff, including ¶ 82 which states that the appropriate compensation for all ISP traffic has been determined by the FCC, thus excluding any other compensation finding by state commissions.

38. Accordingly, even though the Order on Remand and the NPRM are lengthy, BHFC requests that the Commission fully review both to verify their holdings, and also to confirm, as stated above, that Qwest has quoted a section of the NPRM regarding access charges (¶ 97) that has nothing to do with ISP traffic.

39. Qwest further argues that the FCC has never even "implied" that its ruling extended beyond "reciprocal compensation."<sup>25</sup> BHFC believes it has shown that the FCC

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<sup>25</sup> Qwest initial brief, p. 15.

has not only implied, it has explicitly stated that the Order on Remand mandates bill and keep for all ISP traffic, and precludes any CPNP regime, including intrastate tariffs.

40. Further, Qwest of all parties should know that the Order on Remand extends to precluding more than just reciprocal compensation. It was Qwest after all that successfully argued before the Oregon state commission, the Colorado state commission, and ultimately a Colorado federal district court, that the Order on Remand precluded not just reciprocal compensation, but also trunking charges.<sup>26</sup>

**Qwest Argument #4(c):** The incomplete relief BHFC seeks reveals the weakness in its jurisdictional argument.

**BHFC Response:**

41. Qwest contends that BHFC has engaged in “somewhat artful pleading” in this case because it has not asked the Commission to determine the appropriate charges for the ISP traffic.<sup>27</sup> It is true BHFC has not asked the Commission to determine the appropriate charges, but instead asks the Commission to determine that the intrastate charges are inappropriate, and thus that BHFC is entitled to a refund. Should BHFC receive that refund, rest assured, BHFC’s relief will be complete. What Qwest is really saying is that its relief won’t be complete unless the Commission addresses the appropriate compensation for the ISP traffic.

42. What BHFC has sought from the beginning is the correction of improper billings by Qwest in which an intrastate switched tariff has been applied to interstate ISP traffic. The argument and authorities cited in BHFC’s initial brief clearly establish that ISP traffic is interstate and thus not subject to that intrastate tariff. Once that issue has

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<sup>26</sup> See, BHFC initial brief, ¶¶ 76-90.

<sup>27</sup> Qwest initial brief, p. 16.

been addressed, BHFC has no objection to Qwest asking the Commission to take the next step and determining what compensation Qwest is entitled to for that traffic,<sup>28</sup> either in conjunction with this action, or at a later date.<sup>29</sup>

43. However, regardless of what Qwest does in that regard, BHFC's jurisdictional argument remains intact, i.e., the Commission has subject matter jurisdiction to determine that Qwest's billings of the ISP traffic was improper.

#### **Precedent for Applying the Order on Remand to Intrastate Charges**

44. Qwest's counsel has stated that the relief BHFC seeks is "unprecedented" and in the opening page of its initial brief even goes so far as to represent that, "No state or federal commission has ever held that interexchange, intrastate Internet-bound traffic is subject to anything other than intrastate switched access rates."<sup>30</sup>

45. This is a remarkably bold assertion. If taken as true it means Qwest has looked at every state and federal telecommunications commission decision in the country, has found every case on point, and can boldly represent to the Commission that every such decision has held that the traffic is subject to intrastate rates. BHFC seriously doubts Qwest has reviewed every commission case in existence, let alone found every case in existence on point, much less found that every such case has ruled in Qwest's favor on this issue. If all the above is true, why didn't Qwest cite a single one of those cases?

46. BHFC readily concedes it has found no other cases precisely on point, regardless of their ultimate holding (i.e., cases in which a challenge was made to

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<sup>28</sup> BHFC's undersigned counsel stated at the hearing that might be subject to either Qwest's interstate tariff or a bill and keep arrangement under the Order on Remand. Tr. p. 24, lines 13-18.

<sup>29</sup> The Colorado and Oregon commission decisions cited by BHFC did take the next step and determined that the ISP traffic was subject to a bill and keep regime.

<sup>30</sup> Qwest initial brief, p. 1.

intrastate tariff charges for ISP traffic in reliance on the Order on Remand). BHFC likewise doubts Qwest has found any such cases either, at least any favorable to Qwest, otherwise it would have cited them.<sup>31</sup>

47. Nevertheless, Qwest presented the above statement as fact. This is the same party that is asserting that the Order on Remand precludes only reciprocal compensation, yet BHFC was able to find two exceptions to that in a limited search of Qwest cases in Colorado, which led to the Colorado and Oregon commission cases, both holding that the Order on Remand precluded not only reciprocal compensation charges, but also trunking charges.

48. BHFC believes that one difficulty in finding a case directly on point is that, as BHFC pointed out at the hearing, we may have a relatively unique factual circumstance.

49. Most Order on Remand cases involve ILECs challenging ISP traffic charges imposed by CLECs, as was true in the above referenced Qwest cases in Oregon and Colorado. Likewise, most of the cases involve situations in which the CLECs are not full service telecommunications carriers, but instead have entered the market for the express purpose of acquiring ISP customers to take advantage of the resulting one way traffic. This means that, unlike in our case, the CLECs do not have their own end user customers that direct Internet traffic to ISP customers of another LEC, and thus do not incur intercarrier charges, toll or otherwise.

50. The additional uniqueness of our case is that BHFC has a calling area larger than that of Qwest, and the Qwest ISP customers do not provide local calling

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<sup>31</sup> Thus, using Qwest's logic, there is no precedent for the Commission ruling in Qwest's favor herein.

numbers outside of Rapid City. Both of these unique factual circumstances also gave rise to the charges in dispute in our case.

51. Thus, a combination of all the above unique factual circumstances may not have a counterpart elsewhere.

52. Finally, even if our factual situation has been duplicated in other places, perhaps the ILECs in those cases have not taken the untenable and contradictory position that Qwest has in our case by invoking the Order on Remand when it is on the paying end of compensation for ISP traffic, but rejecting the clear holding of the Order on Remand when it is on the receiving end. In other words, when ILECs honor the Order on Remand regardless of who is paying the compensation, CLECs would not have to seek redress from state commissions.

53. In any event, whether or not other cases exist directly on point, BHFC is entitled to the relief it seeks based on the clear language of the Order on Remand and the other authorities it has cited.

**The Order on Remand is binding on the Commission as to all ISP traffic exchanged after June 14, 2001.**

54. As previously stated, ¶ 82 of the Order on Remand explicitly provides that state commissions are bound by its holding regarding the treatment of ISP traffic exchanged after its effective date.

55. Without reiterating the prior discussion herein, and the arguments and authorities cited in BHFC's initial brief, the Order on Remand unquestionably applies to all ISP traffic, regardless of origin, finds that all such traffic is interstate, and mandates a bill and keep regime for that traffic that is exchanged after June 14, 2001. In short, the

FCC has established how ISP traffic shall be treated, and the Commission has no authority to find otherwise.

56. Thus, the Colorado and Oregon state commission decisions previously cited held that the ISP traffic was subject to bill and keep,<sup>32</sup> and the Colorado federal court likewise held, “Thus, the ISP Remand Order remains the law of the land and . . . compels the Court to uphold the Colorado Commission’s decision in this case.”<sup>33</sup>

[Emphasis added.]

### **ISP traffic exchanged prior to June 14, 2001**

57. 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 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>34</sup>

58. The FCC subsequently formalized its treatment of ISP traffic in the 1999 Declaratory Order by holding that ISP traffic is jurisdictionally interstate.<sup>35</sup>

59. 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 expressly acknowledged the FCC’s traditional use of an end to end analysis in making that determination.<sup>36</sup>

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<sup>32</sup> BHFC initial brief, ¶¶ 76-90.

<sup>33</sup> Level 3 Communications v. Public Utilities Commission of Colorado (cite)

<sup>34</sup> Order on Remand, ¶ 28.

<sup>35</sup> See, BHFC initial brief, ¶¶ 40-44; Declaratory Order, ¶¶ 7, 10-12, 18, 23; Order on Remand, ¶ 14.

<sup>36</sup> Order on Remand, ¶ 56.

60. Qwest has likewise treated ISP traffic as interstate since at least the year 2000 in all of its dealings with BHFC.<sup>37</sup> As previously noted, 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>38</sup>

61. Qwest likewise argued that ISP traffic was interstate in avoiding reciprocal compensation and trunking charges in the state commission cases previously cited, again making no distinction between traffic exchanged before or after the 2001 Order on Remand.<sup>39</sup>

62. In response to Qwest's arguments, those state commissions adopted the FCC position, and the Colorado public utilities commission (CPUC) did so without reliance on the 2001 Order on Remand. The Level 3 decision<sup>40</sup> by the CPUC was issued shortly after the issuance of the Order on Remand. Since it was dealing with pre-Order ISP traffic, however, the CPUC recognized that it was free to determine how the traffic would be treated<sup>41</sup> and stated Qwest was contending that the ISP traffic was interstate.<sup>42</sup>

63. The CPUC accepted Qwest's argument (and the FCC's 1999 determination regarding ISP traffic), 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>43</sup> Those decisions, along with the Oregon state commission case previously cited, are consistent

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<sup>37</sup> See, Exhibit 2, and BHFC initial brief, ¶ 19.

<sup>38</sup> BHFC initial brief, ¶¶ 16-19.

<sup>39</sup> BHFC initial brief, ¶¶ 76-90.

<sup>40</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).

<sup>41</sup> Level 3 CPUC decision, p. 8, ¶4, and p. 17, ¶18.

<sup>42</sup> Id., p. 6, ¶ 1.

<sup>43</sup> Level 3 CPUC decision, p. 7, ¶3 and footnote 3.

with the FCC's 1999 Declaratory Ruling that ISP traffic is interstate.<sup>44</sup> Thus, BHFC respectfully submits that it should not be required to pay intrastate tariff switched access charges for interstate traffic, regardless of whether the traffic was exchanged prior to, or after, June 14, 2001.

### **Jurisdiction and Statute of Limitations**

64. Qwest makes no arguments in its initial brief regarding jurisdiction and the statute of limitations issue that have not already been addressed by BHFC in its initial brief. However, the following Supreme Court decision also addresses Qwest's argument that if it prevails on the merits the Commission has jurisdiction, otherwise it does not (i.e., the Commission's jurisdiction is outcome determinative).

65. In Steel Company v. Citizens for a Better Environment,<sup>45</sup> the Supreme Court held that:

It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional *power* to adjudicate the case [citations omitted]. . . . The district court has jurisdiction if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another . . . unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'<sup>46</sup>

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<sup>44</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.

<sup>45</sup> 528 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

<sup>46</sup> *Id.*, 528 U.S. at 89.

## **QWEST'S COUNTERCLAIM**

66. BHFC has already responded to Qwest's Counterclaim;<sup>47</sup> however, in view of specific allegations in Qwest's initial brief some additional comments are in order.

67. As stated in its initial brief, BHFC elected to have each of its own customers bear the costs of their respective ISP usage by billing those customers for the Qwest intrastate access charges occasioned by those customers' utilization of Qwest ISPs. If BHFC had done otherwise it would have been subsidizing the services of those customers at the expense of its other customers, which subsidization is strongly discouraged.<sup>48</sup> In addition, the FCC's stated goal in the Order on Remand was decreased reliance by carriers upon carrier-to-carrier payments and an increased reliance upon recovery of costs from end users so that their rates reflect the cost of services to which they subscribe.<sup>49</sup>

### **Qwest's Counterclaim Arguments**

68. Qwest's initial brief merely reiterates the allegations it made at the hearing, again without providing any support for those allegations. As stated, BHFC's primary response to all of Qwest's counterclaim allegations is that, absent any wrongdoing on BHFC's part, Qwest's loss of customers or revenues is not actionable.<sup>50</sup>

### **Alleged Violation of Dialing Parity**

69. In its Counterclaim, Qwest made no allegation of a dialing parity violation, but in a single sentence now alleges that the access charge "... [v]iolates the

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<sup>47</sup> BHFC initial brief, ¶¶ 145-162.

<sup>48</sup> BHFC initial brief, ¶ 157, and fn. 202.

<sup>49</sup> Remand Order, §§ 7 and 74.

<sup>50</sup> BHFC initial brief, ¶ 153.

FCC’s dialing parity requirements” giving no citation to any legal authority, FCC or otherwise, let alone explaining how “dialing parity” has allegedly been violated. Qwest simply states that end users are “charged differently.”<sup>51</sup>

70. The South Dakota Supreme Court has held that failure to cite authority for an argument waives the argument,<sup>52</sup> which failure is dispositive of this issue.

71. In addition, dialing parity has nothing to do with charges, but instead with the dialing required to access a party. The U.S. Supreme Court has held that 47 U.S.C. §251(b)(3), entitled “Dialing Parity,” ensures that end users avoid “unreasonable dialing delays,”<sup>53</sup> and further ensures that “. . . customers can make calls without dialing an access code . . .”<sup>54</sup>

#### **Alleged Violation of CPNI Confidentiality**

72. Qwest alleges that the ISP charge violates BHFC’s obligations regarding its CPNI,<sup>55</sup> but again fails to cite any authority as to how those “obligations” were violated, which failure is again dispositive of this issue.

73. As BHFC’s general counsel previously advised AOL, BHFC did not create a list of ISP customers, but instead utilized its own customer information to determine which of its customers’ calls gave rise to the Qwest access charges, sent them a billing notice regarding those charges, and provided them with their call record details.<sup>56</sup>

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<sup>51</sup> Qwest Initial Brief, p. 21.

<sup>52</sup> Chem-Age Industries, Inc. v. Glover, 652 N.W.2d 756, 767 (S.D., 002).

<sup>53</sup> A.T.& T. Corp. v. Iowa Utilities Board, 525 U.S. 366, 373 (1999).

<sup>54</sup> Id., 525 U.S. 366, 374 at fn. 4.

<sup>55</sup> Qwest initial brief, p. 21.

<sup>56</sup> BHFC Hearing Exhibit 12, pp. 2-3.

### **Allegation that the Access Charge is Discriminatory**

74. Qwest's Counterclaim alleges that the ISP charges unjustly discriminate against Qwest customers,<sup>57</sup> but Qwest's initial brief alleges that the charges discriminate against BHFC's customers, treating them differently depending on who they use as an ISP.<sup>58</sup> BHFC has not discriminated against either its own customers or against Qwest's customers. It has applied the charge equally to all of its customers whose Internet use has given rise to access charges,<sup>59</sup> and thus their rates, in the words of the FCC's Order on Remand, ". . . [r]eflect the cost of services to which they subscribe."<sup>60</sup> As previously stated, to do otherwise would require that BHFC discriminate against its other customers by requiring them to subsidize the end users that have occasioned the charges.<sup>61</sup>

### **Alleged Tortious Interference with Business Relationship**

75. Qwest cites a South Dakota case as its authority for alleging tortious interference, but then just makes conclusory statements regarding the elements of the alleged tort, with no evidence in support of the allegations. Qwest did submit an appendix to its initial brief referencing revenues, but absent a showing of any improper conduct by BHFC, those records merely reflect the changing revenues that any businesses incur in any competitive market.

76. Any marketing strategy of a business may lead to decreased revenues by its competitors, that is after all the purpose of marketing. But, again, absent any proof of wrongdoing on BHFC's part, there is no actionable claim. Tortious interference requires,

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<sup>57</sup> Qwest Counterclaim, ¶ 11.

<sup>58</sup> Qwest Initial Brief, p. 21.

<sup>59</sup> Exhibit 12, paras.5, 7; White, Tr. p. 155, lines 1-5.

<sup>60</sup> Order on Remand, ¶ 74.

<sup>61</sup> Exhibit 12, ¶ 5.

among other elements, “An intentional and unjustified act of interference on the part of the interferer.”<sup>62</sup>

77. 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>63</sup>

78. 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 in this case.

**Allegation that BHFC must mitigate its Damages**

79. Qwest argues that if the BHFC access charge was proper, then BHFC failed to mitigate its damages by not imposing the charge earlier.<sup>64</sup> However, BHFC is not now, nor has it ever sought, damages. It seeks reimbursement of improperly billed access charges. Either the Qwest billings were improper, or they were not. If they were not proper they must be reimbursed to BHFC. In any event, there are no “damages” to mitigate.

80. If a party fails to pay another what is owed them, the cause of action for payment is not an action for damages, it is for the recovery of what is owed on the

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<sup>62</sup> St. Onge Livestock Company, Ltd. v. Curtis, 650 N.W.2d 537, 541 (S.D. 2002).

<sup>63</sup> Id., at 542.

<sup>64</sup> Qwest initial brief, p. 21.

obligation. Likewise, if a party bills another improperly, for whatever product or service, the cause of action is not for damages, it is for recovery of what was improperly paid. In short, ours is not a damages action, and damages mitigation is not applicable, much less required.

**Conclusion regarding Counterclaim**

BHFC respectfully submits that Qwest has wholly failed to meet its burden of establishing its Counterclaim, and requests that the Counterclaim be dismissed, with prejudice.

Signed this 28<sup>th</sup> day of July, 2004

BLACK HILLS FIBERCOM, LLC

By:   
Marvin D. Truhe  
Its: Attorney

**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<sup>th</sup>, 2004 a true and correct copy of the foregoing **Black Hills FiberCom's Responsive Brief** was served electronically and via United States first class mail, postage prepaid, on the following:

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