THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE COMPLAINT FILED BY BLACK HILLS FIBERCOM, LLC, RAPID CITY, SOUTH DAKOTA, AGAINST QWEST CORPORATION REGARDING INTRASTATE SWITCHED ACCESS CHARGES APPLIED TO ISP-BOUND CALLS WHICH COMPLAINANT CLAIMS IS INTERSTATE IN NATURE

CT03-154

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Transcript of Proceedings
December 28, 2004

ORIGINAL

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BEFORE THE PUBLIC UTILITIES COMMISSION,
ROBERT SAHR, CHAIRMAN
GARY HANSON, VICE CHAIRMAN
JIM BURG, COMMISSIONER

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TRANSCRIPT OF PROCEEDINGS, held in the above-entitled matter, at the South Dakota State Capitol, Room 412, 500 East Capitol Avenue, Pierre, South Dakota, on the 28th day of December 2004, commencing at 9:30 a.m.

CHAIRMAN SAHR: CT03-154, In the matter of the Complaint filed by Black Hills Fibercom LLC, Rapid City, South Dakota, against Qwest Corporation regarding intrastate switched access charges applied to ISP-bound calls which Complainant claims is interstate in nature.

And the question today is how shall the Commission rule on Qwest's Motion to Dismiss for lack of subject matter jurisdiction, and how shall the Commission rule on the Complaint, and how shall the Commission rule on the Counterclaim?

And at this time I would just check and see if the Commissioners have any additional questions or anything they want to ask of the parties.

Seeing none, I will make a few brief comments. In my view this is traffic that is interstate in nature, and I think the legal opinions and decisions of the FCC support that. But then the question becomes how should this be billed under state law?

And we have something that has been billed as an intrastate charge, and in my mind as much as possible it's important that this Commission retain jurisdiction of these type of matters because I think ultimately the best relief is that that's

closest to the consumer. And in this case we obviously have, you know, two corporations who are going head to head, but oftentimes that's not the case.

And the FCC while saying this is interstate in nature and the court decisions along those lines I don't think have clearly stated, though, that we could not resolve certain intrastate claims. And in this case I think it's important that we do hang onto that jurisdiction that we are deciding these cases because they are important, and I also think it is something that should be decided as much as possible in the State of South Dakota as opposed to letting it be resolved in Washington, D.C.

And certainly some of the interstate issues may be appropriately decided by the FCC or by a court. But I think the question of the intrastate charges is something that are important for this Commission to decide. And until we have a clear statement from the FCC or from the courts that we cannot act, I think it's important that this Commission assert jurisdiction and decide these types of cases as far as it possibly can.

With that in mind, I have a Motion that I would like to make. And I will say additionally,

though, this is obviously a challenging case and I think both parties come in with strong legal arguments and it's something where the Commission clearly has taken a good, hard look at it and realized that there are strong arguments made on both sides.

So as to Qwest's Motion to Dismiss, I move that we deny Qwest's Motion to Dismiss. Although the FCC has held that ISP-bound traffic is jurisdictionally interstate and Qwest repeatedly took the position that ISP traffic is interstate, Qwest elected to bill Black Hills FiberCom under its intrastate switched access tariff.

I believe that we have jurisdiction to rule on billing issues pursuant to an intrastate access tariff approved by this Commission and to order refund of payments made against improper billings under that tariff.

As to Black Hills FiberCom's Complaint and Qwest's Counterclaim, I move that we find in favor with Qwest with respect to intrastate access billings prior to the effective date of the FCC's Order on Remand, which I believe is sometime in June -- or, excuse me, I should say sometime in 2001, and that we find for Black Hills Fibercom

with respect to intrastate access payments it made from the effective date of the Order on Remand to the present and that we order Qwest to refund these amounts.

Prior to the Order on Remand the FCC had permitted state involvement in setting intercarrier compensation for ISP traffic under state tariffs. In the Order on Remand I think the FCC directed that all intercarrier compensation from ISP traffic was an FCC matter from and after the effective date of the order. In general they mandated a bill and keep system, but I don't think that's our call to make with respect to traffic at issue here.

I don't think we have precise enough billing evidence before us to determine the amount to be refunded. The parties should have an opportunity to petition the Commission for determination of the precise amount if they are unable to agree following issuance of our order.

Also I want to note additional compensation may be due to Qwest for a period after the effective date of the Order on Remand, but that is a matter for the FCC and Federal Courts.

I further move we deny Qwest's Counterclaims on the grounds that Fibercom's actions of which

Qwest complains occurred after the effective date of the Order on Remand and that any determination of discrimination or other wrongful conduct by Black Hills Fibercom with respect to the interstate traffic at issue should be made by the FCC or Federal Court.

COMMISSIONER BURG: I will second that Motion. I feel that prior to the Order on Remand we had the -- or there was some consideration at least that we can use the intrastate tariff. But after that I think it's very clear that the FCC took the authority for all ISP traffic to be interstate and it needed to be done on the interstate basis, and, thus, anything that was charged on the intrastate after that time should be refunded and I believe that's what we're doing with this Motion.

VICE CHAIR HANSON: I agree with the previous comments and concur.

STATE OF SOUTH DAKOTA)

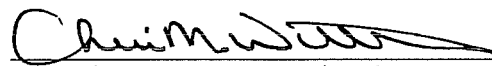
:SS CERTIFICATE

COUNTY OF HUGHES)

I, CHERI MCCOMSEY WITTLER, a Registered Professional Reporter and Notary Public in and for the State of South Dakota:

DO HEREBY CERTIFY that as the duly-appointed shorthand reporter, I took in shorthand the proceedings had in the above-entitled matter on the 28th day of December 2004, and that the attached is a true and correct transcription of the proceedings so taken.

Dated at Pierre, South Dakota this 10th day of January 2005.



Cheri McComsey Wittler,
Notary Public and
Registered Professional Reporter