

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

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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

= = = = =
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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Reported By Cheri McComsey Wittler, RPR

PRECISION REPORTING

L I M I T E D

APPEARANCES BY TELEPHONE

Bill Heaston
Brad Moody
Suzan Stewart
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Colleen Sevold
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Dana Palmer
Mark Ayotte
Faye Jandreau
Doug Eidahl
Marcia Huber
Dan Daly
Bruce Biewald
Jerry Reisenauer
Tom Welk
Tim Goodwin

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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.

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

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

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

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

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

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

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

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

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

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

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

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

19 As to Black Hills FiberCom's Complaint and
20 Qwest's Counterclaim, I move that we find in favor
21 with Qwest with respect to intrastate access
22 billings prior to the effective date of the FCC's
23 Order on Remand, which I believe is sometime in
24 June -- or, excuse me, I should say sometime in
25 2001, and that we find for Black Hills Fibercom

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

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

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

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

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

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

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

18 VICE CHAIR HANSON: I agree with the
19 previous comments and concur.
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STATE OF SOUTH DAKOTA)

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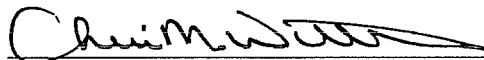
CERTIFICATE

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

Word Index

1	Best [2] 1:17 3:25	[2] 1:13 7:7	Dismiss [3] 3:8 5:7 5:8
10th [1] 8:13	Biewald [1] 2:8	Commissioners [1] 3:13	Done [1] 7:14
2	Bill [3] 2:2 5:12 6:11	Compensation [3] 6:7 6:9 6:20	Doug [1] 2:6
2001 [1] 5:25	Billed [2] 3:19 3:21	Complainant [2] 1:6 3:6	Douglas [1] 1:19
2004 [3] 1:9 2:15 8:11	Billing [2] 5:15 6:14	Complains [1] 7:1	Due [1] 6:21
2005 [1] 8:14	Billings [2] 5:17 5:22	Complaint [4] 1:4 3:2 3:10 5:19	Duly-appointed [1] 8:8
28 [1] 1:9	Black [6] 1:4 3:2 5:12 5:19 5:25 7:4	Concur [1] 7:19	E
28th [2] 2:15 8:10	Bonrud [1] 1:20	Conduct [1] 7:3	East [1] 2:14
4	Bound [2] 3:5 5:9	Consideration [1] 7:10	Effective [5] 5:22 6:2 6:10 6:22 7:1
412 [1] 2:14	Brad [1] 2:2	Consumer [1] 4:1	Eidahl [1] 2:6
5	Brief [1] 3:15	Corporation [2] 1:5 3:4	Elected [1] 5:12
500 [1] 2:14	Bruce [1] 2:8	Corporations [1] 4:2	Evidence [1] 6:15
9	BURG [2] 1:13 7:7	Correct [1] 8:12	Excuse [1] 5:24
9:30 [1] 2:16	C	Counterclaim [2] 3:11 5:20	F
A	Cannot [1] 4:21	Counterclaims [1] 6:24	Far [1] 4:23
A.m. [1] 2:16	Capitol [2] 2:14 2:14	COUNTY [1] 8:3	Farris [1] 1:18
Above-entitled [2] 2:13 8:10	Case [4] 4:1 4:4 4:9 5:1	Court [3] 4:6 4:17 7:6	Favor [1] 5:20
Access [6] 1:6 3:5 5:13 5:15 5:21 6:1	Cases [2] 4:11 4:23	Courts [2] 4:20 6:23	Faye [1] 2:6
Act [1] 4:21	Certain [1] 4:8	Cremer [1] 1:15	FCC [11] 3:18 4:5 4:16 4:20 5:9 6:5 6:8 6:10 6:23 7:5 7:12
Actions [1] 6:25	Certainly [1] 4:15	CT03-154 [2] 1:5 3:1	FCC's [1] 5:22
Additional [2] 3:13 6:20	CERTIFICATE [1] 8:2	D	Federal [2] 6:23 7:6
Additionally [1] 4:25	CERTIFY [1] 8:8	D.C. [1] 4:14	Few [1] 3:15
Agree [2] 6:18 7:18	CHAIR [1] 7:18	Dakota [9] 1:2 1:5 2:13 2:15 3:3 4:13 8:1 8:7 8:13	Fibercom [5] 1:4 3:3 5:12 5:25 7:4
Ailts [1] 1:14	CHAIRMAN [3] 1:12 1:12 3:1	Daly [1] 2:7	Fibercom's [2] 5:19 6:25
Amount [2] 6:15 6:18	Challenging [1] 5:1	Dan [1] 2:7	Filed [2] 1:4 3:2
Amounts [1] 6:4	Charge [1] 3:22	Dana [1] 2:5	Following [1] 6:19
APPEARANCES [1] 2:1	Charged [1] 7:15	Date [5] 5:22 6:2 6:10 6:22 7:1	Forney [1] 1:19
Applied [2] 1:6 3:5	Charges [3] 1:6 3:5 4:18	Dated [1] 8:13	G
Appropriately [1] 4:16	Check [1] 3:12	Dave [1] 1:18	GARY [1] 1:12
Approved [1] 5:16	Cheri [3] 1:24 8:5 8:18	December [3] 1:9 2:15 8:11	General [1] 6:11
Arguments [2] 5:3 5:5	City [2] 1:5 3:3	Decide [2] 4:19 4:22	Goodwin [1] 2:9
Assert [1] 4:22	Claims [3] 1:6 3:6 4:8	Decided [2] 4:12 4:16	Greg [1] 1:16
Attached [1] 8:11	Clear [2] 4:19 7:12	Deciding [1] 4:10	Grounds [1] 6:25
Authority [1] 7:12	Clearly [2] 4:7 5:4	Decisions [2] 3:18 4:6	H
Avenue [1] 2:14	Closest [1] 4:1	Denny [1] 2:3	Hang [1] 4:9
Ayotte [1] 2:5	Colleen [1] 2:4	Deny [2] 5:8 6:24	HANSON [2] 1:12 7:18
B	Commencing [1] 2:16	Determination [2] 6:17 7:2	Hard [1] 5:4
Basis [1] 7:14	Comments [2] 3:15 7:19	Determine [1] 6:15	Harens [1] 1:16
Becomes [1] 3:19	Commission [12] 1:1 1:11 1:14 3:8 3:10 3:11 3:23 4:19 4:22 5:3 5:16 6:17	Directed [1] 6:8	Harlan [1] 1:17
	COMMISSIONER	Discrimination [1] 7:3	

Word Index

Head [2] 4:3 4:3 Heaston [1] 2:2 Heather [1] 1:19 Held [2] 2:12 5:9 HEREBY [1] 8:8 Hills [6] 1:4 3:2 5:12 5:19 5:25 7:4 Huber [1] 2:7 HUGHES [1] 8:3	[2] 3:17 5:2 Letting [1] 4:14 Lines [1] 4:6 LLC [2] 1:4 3:3 Look [1] 5:4	[2] 2:14 8:13 Position [1] 5:11 Possible [2] 3:23 4:13 Possibly [1] 4:23 Precise [2] 6:14 6:18 Present [1] 6:3 Previous [1] 7:19 Proceedings [4] 1:9 2:12 8:9 8:12 Professional [2] 8:6 8:19 Public [4] 1:1 1:11 8:6 8:18 Pursuant [1] 5:15	[1] 1:16 Second [1] 7:7 See [1] 3:12 Seeing [1] 3:15 Senger [1] 1:17 Setting [1] 6:6 Sevold [1] 2:4 Shall [3] 3:7 3:9 3:10 Shorthand [2] 8:9 8:9 Sides [1] 5:6 Smith [1] 1:15 Sometime [2] 5:23 5:24 South [9] 1:2 1:5 2:13 2:15 3:3 4:13 8:1 8:7 8:13 SS [1] 8:2 STAFF [1] 1:14 State [8] 1:2 2:13 3:20 4:13 6:6 6:7 8:1 8:7 Statement [1] 4:20 Stewart [1] 2:3 Strong [2] 5:2 5:5 Subject [1] 3:9 Support [1] 3:18 Suzan [1] 2:3 Switched [3] 1:5 3:4 5:13 System [1] 6:12
I	M	Q	T
Important [5] 3:23 4:9 4:11 4:18 4:21 Improper [1] 5:17 Intercarrier [2] 6:6 6:9 Interstate [10] 1:7 3:6 3:16 4:5 4:15 5:10 5:11 7:4 7:13 7:14 Intrastate [11] 1:5 3:4 3:22 4:8 4:17 5:13 5:15 5:21 6:1 7:11 7:15 Involvement [1] 6:6 ISP [6] 3:5 5:9 5:11 6:7 6:9 7:13 ISP-bound [3] 1:6 3:5 5:9 Issuance [1] 6:19 Issue [2] 6:13 7:5 Issues [2] 4:15 5:15	Mandated [1] 6:11 Marcia [1] 2:7 Mark [1] 2:5 Matter [7] 1:4 2:13 3:2 3:9 6:10 6:23 8:10 Matters [1] 3:24 McComsey [3] 1:24 8:5 8:18 Michele [1] 1:18 Mind [2] 3:22 4:24 Moody [1] 2:2 Motion [6] 3:8 4:24 5:7 5:8 7:8 7:17 Move [3] 5:7 5:20 6:24	Questions [1] 3:13 Qwest [8] 1:5 3:4 5:10 5:12 5:21 6:3 6:21 7:1 Qwest's [5] 3:8 5:7 5:8 5:20 6:24	Talbot [1] 2:4 Tariff [4] 5:13 5:16 5:18 7:11 Tariffs [1] 6:7 TELEPHONE [1] 2:1 Tim [1] 2:9 Tina [1] 1:19 Today [1] 3:7 Tom [1] 2:9 Took [3] 5:11 7:12 8:9 Traffic [8] 3:16 5:9 5:11 6:7 6:9 6:13 7:5 7:13 Transcript [2] 1:9 2:12 Transcription [1] 8:12 True [1] 8:11 Two [1] 4:2 Type [1] 3:24
J	N	R	
Jacobson [1] 1:18 Jandreau [1] 2:6 January [1] 8:14 Jerry [1] 2:8 JIM [1] 1:13 John [1] 1:15 June [1] 5:24 Jurisdiction [5] 3:9 3:24 4:10 4:22 5:14 Jurisdictionally [1] 5:10	Nature [4] 1:7 3:6 3:17 4:6 Needed [1] 7:13 None [1] 3:15 Notary [2] 8:6 8:18 Note [1] 6:20	Rapid [2] 1:4 3:3 Realized [1] 5:5 Refund [2] 5:17 6:3 Refunded [2] 6:16 7:16 Regarding [2] 1:5 3:4 Registered [2] 8:5 8:19 Reisenauer [1] 2:8 Relief [1] 3:25 Remand [7] 5:23 6:2 6:5 6:8 6:22 7:2 7:9 Repeatedly [1] 5:10 Reported [1] 1:24 Reporter [3] 8:6 8:9 8:19 Resolve [1] 4:8 Resolved [1] 4:14 Respect [4] 5:21 6:1 6:13 7:4 Retain [1] 3:23 Rislov [1] 1:16 ROBERT [1] 1:12 Rolayne [1] 1:14 Room [1] 2:14 RPR [1] 1:24 Rule [4] 3:8 3:10 3:11 5:14	
K	O	S	
Karen [1] 1:15 Keep [1] 6:12 Keith [1] 1:17	Obviously [2] 4:2 5:1 Occurred [1] 7:1 Oftentimes [1] 4:3 Opinions [1] 3:17 Opportunity [1] 6:16 Opposed [1] 4:13 Order [11] 5:16 5:23 6:2 6:3 6:5 6:8 6:11 6:19 6:22 7:2 7:8	SAHR [2] 1:12 3:1 Sara	
L	P		
Lack [1] 3:9 Law [2] 2:3 3:20 Least [1] 7:10 Legal	Palmer [1] 2:5 Pam [1] 1:20 Parties [3] 3:14 5:2 6:16 Payments [2] 5:17 6:1 Period [1] 6:21 Permitted [1] 6:6 Petition [1] 6:17 Pierre		

Word Index

Types

[1] 4:23

U

Ultimately

[1] 3:25

Unable

[1] 6:18

Under

[4] 3:19 5:12 5:18 6:7

UTILITIES

[2] 1:1 1:11

V

VICE

[2] 1:12 7:18

View

[1] 3:16

W

Washington

[1] 4:14

Welk

[1] 2:9

Wieczsorek

[1] 2:4

Wiest

[1] 1:14

Wittler

[3] 1:24 8:5 8:18

Wrongful

[1] 7:3