

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

IN THE MATTER OF THE COMPLAINT FILED)	FINAL DECISION AND
BY BLACK HILLS FIBERCOM, L.L.C., RAPID)	ORDER; NOTICE OF ENTRY
CITY, SOUTH DAKOTA, AGAINST QWEST)	
CORPORATION REGARDING INTRASTATE)	CT03-154
SWITCHED ACCESS CHARGES APPLIED TO)	
ISP-BOUND CALLS WHICH COMPLAINANT)	
CLAIMS ARE INTERSTATE IN NATURE)	

PROCEDURAL HISTORY

On October 29, 2003, the Public Utilities Commission (Commission) received a complaint filed by Black Hills FiberCom, L.L.C., Rapid City, South Dakota (FiberCom), against Qwest Corporation (Qwest) regarding intrastate switched access charges applied to ISP-Bound calls which Complainant claims are interstate in nature. On November 18, 2003, the Commission received an Answer and Counterclaim from Qwest. On December 9, 2003, the Commission received a Reply to Qwest's Counterclaim from FiberCom. On January 16, 2004, the Commission received a Stipulated Agreement to Scheduling Order from the parties. On January 20, 2004, the Commission voted to approve the Stipulated Agreement to Scheduling Order subject to Staff confirmation of the availability of hearing dates. On February 12, 2004, a telephonic pre-hearing conference was held among the parties and the Commission's Counsel. On March 19, 2004, the Commission issued an Order for and Notice of Procedural Scheduling and Hearing. On April 19, 2004, the Commission received a Motion to Amend Complaint from FiberCom. The hearing was held as scheduled on April 27, 2004.

On June 14, 2004, the Commission received a Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction from Qwest. FiberCom responded to Qwest's Conditional Motion to Dismiss in its Initial Appellate Brief filed on June 29, 2004. On July 29, 2004, the Commission received a Motion to Permit Post-Hearing Affidavit from Qwest and Proposed Findings of Fact and Conclusions of Law from both parties. On August 10, 2004, the Commission received a Response to Motion to Permit Post-Hearing Affidavit from FiberCom. On August 16, 2004, the Commission received a Reply in Support of Motion to Permit Post-Hearing Affidavit from Qwest. On August 17, 2004, at its regular meeting, the Commission voted to deny Qwest's Motion to Permit Post-Hearing Affidavit. Post-Hearing Briefs were submitted by both parties, and on August 31, 2004, the Commission heard oral argument. The Commission deferred rendering a decision to enable the parties to address an additional case not cited by the parties. Following oral argument, additional supplemental briefs were submitted by the parties to address the U.S. District Court's decision in *Global NAPS v. Verizon New England Inc.*, 2004 WL 1682973 (D.Vt.), the Texas Public Utility Commission's decision in *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for "FX-Type" Traffic Against Southwestern Bell Telephone Company*, Docket No. 24015 (Rel. Aug. 16, 2004), and the FCC's decision in *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, Order, WC Docket 03-171, FCC 04-241 (Rel. Oct. 18, 2004).

The Conditional Motion to Dismiss, Complaint and Counterclaim were scheduled for decision on December 14, 2004, but were deferred for decision until December 28, 2004, at the Commission's regular meeting. On December 28, 2004, the Commission voted unanimously to deny Qwest's Conditional Motion to Dismiss, to find for Qwest in part and for FiberCom in part on FiberCom's Amended Complaint and to deny Qwest's Counterclaim.

Having considered the evidence in the record, the briefs and arguments of the parties and applicable law, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

"TR" refers to the Transcript of Proceedings of the hearing held on April 27, 2004. References are to TR and page number(s).

Preliminary Procedural Findings

1. On October 29, 2003, FiberCom filed the Complaint and served it on Qwest through its registered agent. On October 29, 2003, the complaint was faxed to Qwest, and pursuant to ARSD 20:10:01:09, Qwest was notified that it must satisfy the complaint or file an answer in writing with the Commission by November 18, 2003. On October 30, 2003, the Commission electronically transmitted notice of the filing to interested parties. On November 18, 2003, Qwest filed an Answer and Counterclaim and served them upon FiberCom and its attorney of record. On December 9, 2003, the Commission received a Reply to Qwest's Counterclaim from FiberCom. No person petitioned to intervene in the docket. On April 19, 2004, the Commission received a Motion to Amend Complaint from FiberCom.

2. On January 16, 2004, the Commission received a Stipulated Agreement to Scheduling Order from the parties. On January 20, 2004, the Commission approved the Stipulated Agreement to Scheduling Order subject to Staff confirmation of the availability of hearing dates. On February 12, 2004, a telephonic pre-hearing conference was held among the parties and the Commission's counsel. The parties agreed that issue of jurisdiction should be decided after full hearing and briefing, and that the statement of issues could be general, except that jurisdiction should be specifically mentioned. On March 19, 2004, the Commission issued an Order for and Notice of Procedural Scheduling and Hearing setting the matter for hearing on April 27, 2004. The hearing was held as scheduled with all parties present and represented by counsel. At the hearing, Qwest stated on the record that it had no objection to FiberCom's substitution of the Amended Complaint provided Qwest was not required to file a responsive pleading thereto and that its original Answer would be deemed a general denial applicable to the Amended Complaint.

3. On June 14, 2004, Qwest filed a Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction. In its post-hearing brief entitled Black Hills FiberCom's Initial Appellate Brief filed on June 29, 2004, FiberCom replied to Qwest's Motion to Dismiss.

4. On July 29, 2004, both FiberCom and Qwest filed Proposed Findings of Fact and Conclusions of Law.

5. The Commission finds that FiberCom's Complaint, Qwest's Counterclaim and Qwest's Motion to Dismiss were duly and timely filed, that responsive pleadings were duly and timely filed by the other party, joining the issues raised in each of these pleadings and motions and that the hearing in this matter was held upon due and proper notice.

Qwest's Motion to Permit Post-Hearing Affidavit

6. On July 29, 2004, Qwest filed a Motion to Permit Post-Hearing Affidavit. In the Motion, Qwest requested leave to supplement the evidentiary record with an affidavit to respond to references, in FiberCom's initial post-hearing brief, to arguments Qwest had made in briefs filed in § 252(b) arbitration proceedings before the Colorado and Oregon commissions. *In the Matter of 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, Docket No. 00B-601T, Decision No. C01-312 (Colo. PUC, March 16, 2001), affirmed by the United States District Court for the District of Colorado in *Level 3 Communications, LLC v. Public Utilities Commission of Colorado*, 300 F.Supp.2d 1069, 2003 WL 23198662 (D.Colo. 2003); *In the Matter of the Petition of Level 3 Communications LLC for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, With Qwest Corporation Regarding Rates, Terms, and Conditions for Interconnection*, Docket No. ARB 332, Order No. 01-809 (Or. PUC, Sept. 13, 2001). On August 10, 2004, FiberCom filed a Response to the motion. On August 17, 2004, at its regular meeting, the Commission considered Qwest's Motion and voted unanimously to deny the Motion.

7. South Dakota law permits the pleading and presentation of inconsistent claims and defenses, even in the same proceeding, and Qwest's assertion of an inconsistent legal theory in proceedings in another state, whether true or not, has no legal or factual significance in this case. SDCL 15-6-8(e)(2); *U.S. v. State*, 598 N.W.2d 208 (S.D., 1999).

8. The Commission finds that the Motion to Permit Post-Hearing Affidavit was properly denied. Decisions of the commissions of other states and of the federal courts may be considered by the Commission as legal authorities to inform its judgment on the law applicable to this case. Qwest thoroughly presented its arguments to factually distinguish the above-cited cases in its Post-Hearing Reply Brief and its motion and argument. The Commission is capable of construing these decisions, determining their applicability to the facts of this case and affording them the authority as legal precedents that they merit. The Commission further finds, however, that neither the above-cited commission and court decisions nor Qwest's positions asserted therein are evidence in this proceeding, and in rendering its decision herein, the Commission affords no evidentiary significance to them.

General Findings

9. This case involves Qwest's billings to FiberCom under its South Dakota intrastate Access Service Tariff for certain calls made from FiberCom's customers to Internet service provider (ISP) customers of Qwest (Qwest ISPs). The particular FiberCom calls at issue are those made by FiberCom's customers located outside Qwest's Rapid City local calling area to Qwest ISPs having Rapid City local calling area numbers (FiberCom ISP-Bound Traffic).

10. The substantive facts of this case are not in dispute in any material respect. Rather, the outcome of this case hinges primarily on the interpretation and application of two decisions of the Federal Communications Commission (FCC) in the context of the particular facts of this case. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (Rel. Feb. 26, 1999) (*Declaratory Ruling*), vacated, *Bell Atlantic Telephone Co. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (*Bell Atlantic*); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 F.C.C. Rcd 9151 (Rel. Apr. 27, 2001) (*Order on Remand*), reversed in part but not vacated, *Worldcom Inc. v. F.C.C.*, 288 F.3d 429 (D.C. Cir. 2003) (*Worldcom*). Ex 17-18.

11. Complainant, FiberCom, is a telecommunications company headquartered in Rapid City, South Dakota. FiberCom is an affiliate of Black Hills Corporation. TR 67-70.

12. Qwest is a regional bell operating company formerly known as US West Communications, Inc. 47 U.S.C. §153(4). Throughout the period of the events at issue in this case, Qwest has served

as the incumbent local exchange carrier in the area served by FiberCom. TR 73; Ex 29; SDCL 49-31-1(9).

13. On August 5, 1998, Black Hills FiberCom, Inc. f/k/a Black Hills Fiber Systems, Inc. was granted a certificate of authority from the Commission in Docket TC98-101 to provide local exchange services in the areas of South Dakota where Qwest is the incumbent local exchange carrier and to provide interexchange services throughout South Dakota. On May 5, 1999, in Docket TC 99-026, the Commission approved the transfer of the certificate of authority from Black Hills FiberCom, Inc. to FiberCom. Ex 29.

14. In response to expressions of demand by Black Hills residents, FiberCom sought Commission approval pursuant to ARSD 20:10:32:11, of an expanded local calling area encompassing four Qwest local exchanges in the Northern Black Hills. The Commission approved FiberCom's expanded local calling area on October 29, 1999, in Docket TC99-056. This order authorized FiberCom to offer local toll-free calling throughout the northern Black Hills. TR 70-75. Following receipt of its certificate of authority, FiberCom began actually providing telecommunications service in October 1999. Ex 42 at 21; Ex 43 at 43. At the time of its entry as a competitive carrier, FiberCom provided service in Rapid City, Sturgis, Belle Fourche, Spearfish, Lead and Deadwood. Ex 42 at 21. Prior to FiberCom's initiating its expanded local calling area service, telephone service between northern Black Hills communities was long distance toll service between at least four different Qwest local exchange areas. TR 70-74.

15. FiberCom has invested approximately \$160 million of capital to date, including the laying of 244 miles of fiber-optic cables, and more than 1,000 miles of cabling of all types throughout the Black Hills. TR 75. FiberCom introduced innovative facilities based services into its service area including a hybrid fiber coaxial network with the ability to simultaneously deliver voice, video, Internet and data streams, bundled local and long distance telephone, cable television and high speed Internet at competitive pricing and a synchronous optical network (SONET) fiber optic loop to provide a level of system reliability that did not exist previously in the area. TR 74-76.

16. The Commission finds that FiberCom's entry as a competitive carrier into the northern Black Hills market has provided genuine facilities-based competition in the region that has made beneficial alternative service choices and state of the art technology options available to consumers within FiberCom's service area.

17. In October 1998, FiberCom entered into an interconnection agreement ("Interconnection Agreement") with Qwest's predecessor, U S West, which provided, among other matters, that local calls within the Rapid City calling area would be billed as reciprocal compensation with the originating party paying the terminating party based on the number and length of calls. This Agreement, prepared by U S West, was approved by the Commission on January 6, 1999, in Docket TC98-205. TR 87-88; Ex 16.

18. Because FiberCom needed to get to the market rapidly, FiberCom felt compelled to opt into the provisions of an existing U S West Interconnection Agreement with CommChoice. FiberCom was not able to change any terms or language other than the name of the company and signatories. TR 88. TR 162,165-166, 203- 211; Ex 34-40, 47, 49.

19. FiberCom's understanding of the Interconnection Agreement was that it covered the interconnection of all local traffic between the parties including ISP traffic. TR 88-89. The language of the original Interconnection Agreement does not expressly address ISP traffic. Ex 16. FiberCom aggressively pursued ISP business in furtherance of an intended objective of its business plan, which was to secure a substantial number of ISPs in the Rapid City area in order to generate

substantial ISP-based reciprocal compensation revenue from Qwest under the Interconnection Agreement. TR 78-79.

20. FiberCom anticipated that its expanded local calling area would result in the incurrence of intrastate interexchange access charges as a result of its customers located outside of Rapid City calling Qwest-served ISPs. FiberCom also anticipated, however, that those access charges would be offset by reciprocal compensation it received for terminating Qwest originated ISP traffic under the Interconnection Agreement, allowing FiberCom to balance its payments to and from Qwest. TR 78-79; Ex 23; Ex 43 at 44-45, 55.

21. FiberCom was successful in signing up ISPs (FiberCom ISPs) and in September 2000, FiberCom submitted its first two quarterly reciprocal compensation invoices to Qwest under the Interconnection Agreement. Those invoices totaled \$435,527.59, the substantial majority of which was for calls originated by Qwest customers to FiberCom ISPs. TR 93. All of the ISPs served by FiberCom are physically collocated in FiberCom's central office or are located in the Black Hills. TR 81-82.

22. Qwest refused to pay FiberCom's reciprocal compensation invoices. Qwest's reason for not paying the FiberCom reciprocal compensation invoices was based upon its legal position stated in numerous Qwest documents, including the following statement by Qwest in a November 3, 2000, letter to FiberCom in response to FiberCom's invoices:

Qwest has determined that the majority of the traffic included on your invoices was delivered to an Internet Service Provider (ISP). Consequently, that traffic does not terminate to a LEC within the same calling area. Instead, the ISP continues the communication to terminate in a distant local calling area at a server that is generally located outside of the calling area in which the call originated. As such, Internet related traffic is predominately interstate in nature, and thus is not subject to local reciprocal compensation charges under our Agreement. Ex 2.

Qwest's refusal to pay FiberCom for the ISP traffic was detrimental financially to FiberCom which had put great reliance on receiving reciprocal compensation from Qwest for calls from Qwest's customers to FiberCom ISPs, in part to offset access charges that FiberCom would have to pay to Qwest. TR 94.

23. In 2001, Qwest posted on its Internet website an announcement that it was adopting the same practice system-wide, i.e., treating Internet traffic as interstate traffic, and was doing so pursuant to the *Order on Remand*, and that Qwest's policy would go into effect on June 14, 2001, the effective date of the *Order on Remand*. TR 99; Ex 4. Qwest sent another letter to FiberCom on December 3, 2001, reiterating its position in the November 3, 2000, letter and further stating, "After 6/14/01 Qwest accepts the FCC Order as the controlling document for this issue." The letter further stated, "It is Qwest's position that, with this language, the FCC is effectively stating that if a LEC does not have specific language in their existing Interconnection Agreement which covers compensation for ISP-bound traffic, they do not receive compensation for such traffic after 6/14/01." Ex 7.

24. Qwest also requested amendment of the Interconnection Agreement to reflect the *Order on Remand*, and in September, 2001, FiberCom and Qwest entered into an "Amendment to the Interconnection Agreement," to become effective June 14, 2001, the same as the effective date of the *Order on Remand*. Qwest's requested amendment stated that all ISP-bound traffic between the parties be treated in conformance with the *Order on Remand*; and further provided, again consistent with the *Order on Remand*, that a rate cap would apply to compensation for that ISP-bound traffic with the compensation phased out over time. On December 5, 2001, the Commission approved

the 2001 Amended Interconnection Agreement in Docket TC01-161. Ex 6; Ex 19, p 5, Req # 12. In September 2002, the parties executed another amendment to the Interconnection Agreement, again at Qwest's request, to incorporate the *Order on Remand's* holding that traffic ultimately delivered to ISPs is "interstate in nature" and should be exchanged on a bill and keep basis. The Commission approved the 2002 Amended Interconnection Agreement on January 3, 2003, in Docket TC02-131. Ex 9; Ex 19, p 6, Req # 15.

25. On December 7, 2001, FiberCom filed a Complaint with the Commission to compel payment by Qwest of FiberCom's unpaid invoices, at which time the amounts owed under the Interconnection Agreement totaled over \$1.3 million. TR 108; Ex 25. That figure was lower than the amount that would have been owed under the original Interconnection Agreement, as it reflected the reduced charges under the amendments to the Interconnection Agreement. TR 108; Ex 6. Ultimately, FiberCom entered into a settlement agreement with Qwest on July 29, 2002, twenty-two months after FiberCom submitted its first invoices to Qwest, in which FiberCom agreed to accept a partial payment by Qwest in satisfaction of all outstanding reciprocal compensation due under the Interconnection Agreement. TR 107-108; Ex 22. The amount of the settlement is confidential and is set forth in Confidential Exhibit A hereto as Finding A-1.

26. In contrast to the above described reciprocal compensation billings by FiberCom for Rapid City originated Qwest-to-FiberCom ISP traffic, the FiberCom ISP-Bound Traffic originates outside of Rapid City and is routed to Qwest ISPs having Rapid City numbers. The evidence concerning the FiberCom ISP-Bound Traffic primarily concerns AOL.

27. "Central office code" or "NXX code" refers to the second three digits of a ten-digit telephone number in the form NPA-NXX-XXXX. 47 C.F.R. § 52.7(c). NXX is a term utilized in the telecommunications industry to denote the central office or NXX code. NXXs are assigned to a telecommunications company to denote the central office, i.e. local switching facility, to which the number is assigned. Local exchange areas are in turn defined by state commissions with respect to defined geographic areas served by a telecommunications carrier. SDCL 49-31-1(12). The traffic at issue in this case (i.e. the FiberCom ISP-Bound Traffic) is traffic that is originated by FiberCom customers located outside of Qwest's Rapid City local exchange area to ISPs served by Qwest having NXXs assigned to Qwest's Rapid City local exchange.

28. The FiberCom ISP-Bound Traffic begins when a FiberCom customer who is located outside of Qwest's Rapid City local exchange area, e.g. in Spearfish, activates the modem on his computer. This in turn dials the number of a Qwest-served ISP having an NXX associated with Qwest's Rapid City local exchange. The call is carried over FiberCom transport facilities to FiberCom's end office switch in Rapid City. There the FiberCom switch switches the call onto a trunk (i.e. cable) which transports the call some two miles from the FiberCom end office to Qwest's switching facilities in Rapid City. TR 198. FiberCom installed and owns the trunks that carry FiberCom originated ISP calls from the FiberCom switch to the Qwest switch(es). TR 85; Ex 47 at 40.

29. The only real conflict in the evidence in this case related to whether there was any difference at all between the routing of a Rapid City originated FiberCom-to-Qwest ISP call and a non-Rapid City originated FiberCom-to-Qwest ISP call (i.e. the FiberCom ISP-Bound Traffic). Qwest's witness testified that Rapid City originated calls are routed over local interconnection service (LIS) trunks directly to Qwest's Rapid City end office and that non-Rapid City originated calls are routed over interexchange toll or access trunks to Qwest's access tandem which in turn switches the call to Qwest's Rapid City end office switch. FiberCom's witness testified that he believed all of the traffic was delivered over LIS trunks directly to Qwest's end office switch.

30. The Commission finds that the FiberCom ISP-Bound traffic is routed over trunks designated by Qwest on its trunk forecast schedule as interexchange tandem trunks owned by FiberCom to the

Qwest Rapid City tandem and then switched by the tandem to the Qwest Rapid City central office switch where it is switched to Qwest ISPs. TR 205-207; Ex 49.

31. Once the calls reach Qwest's Rapid City end office switch, both the Rapid City originated ISP-bound call and the non-Rapid City ISP-bound call have identical routing to the Qwest ISP customer. The findings regarding the remainder of the routing of the FiberCom ISP-Bound Traffic are set forth on Confidential Exhibit A.

32. The only differences between the routing of a call from a Rapid City FiberCom customer to a Qwest ISP and a call from a non-Rapid City FiberCom customer to a Qwest ISP are therefore: (i) the trunk that the call travels over from the Black Hills FiberCom end office switch to the Qwest end office switch and (ii) the delivery to and switching by the Qwest access tandem of the non-Rapid City originated calls. TR 211; Ex 47, p. 43. There was no evidence in the record that there was a physical reason why the FiberCom ISP-Bound Traffic could not be routed to the Qwest ISPs over LIS trunks directly to the Qwest Rapid City end office switch.

33. The parties agree that the traffic at issue in this case, the FiberCom ISP-Bound Traffic, is not subject to the Interconnection Agreement between the parties. Ex 19, p. 3, Req # 7; Ex 43, p. 65.

34. Reciprocal compensation is the term applied under the Telecommunications Act of 1996 and FCC decisions to intercarrier compensation for exchange of local traffic, i.e., traffic that begins and ends within a state commission defined local calling area. Access charges is the term applied to intercarrier compensation for calls between local calling areas. Access charges are either intrastate or interstate. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 F.C.C.R. 15499, para. 1034 (Rel. Aug. 8, 1996)

35. Although addressing reciprocal compensation under the parties' Interconnection Agreement, neither Qwest's November 3, 2000, letter nor any of Qwest's subsequent statements to FiberCom made a distinction between ISP-bound traffic originating within the local exchange, or such traffic originating elsewhere. TR 96, Ex 2 and 5. Despite its insistence in its various letters and other communications that Qwest-originated ISP-bound traffic was interstate, Qwest treated ISP traffic generated by FiberCom's customers as intrastate if the traffic crossed Qwest exchange boundaries and billed FiberCom for it under its intrastate Access Service Tariff. Ex 19, p 1, Req # 1; Ex 13. Thus, Qwest treated as interstate the ISP bound traffic it originated in Rapid City, but treated as intrastate the ISP bound traffic FiberCom originated outside of Rapid City.

36. According to FiberCom's witness, if Qwest's access charges for the FiberCom ISP-Bound Traffic were billed under its interstate access tariff, the charges would be around one-tenth of what was billed under its South Dakota Access Service Tariff. Ex 43, p. 34.

37. From July 2000 to the present, FiberCom has been paying Qwest monthly intrastate access charges for the FiberCom ISP-Bound Traffic. According to FiberCom, as of March 2002, Qwest had billed and FiberCom had paid \$1,028,879.39 in intrastate access charges to Qwest. Ex 13.

38. FiberCom agrees that it may owe Qwest something for the FiberCom ISP-Bound Traffic if the traffic were compensable under an FCC order. TR 175.

39. FiberCom has no filing with the FCC that relates to interstate interexchange charges. TR 183.

Qwest's Conditional Motion to Dismiss

40. The Commission has subject matter jurisdiction to resolve disputes arising out of intrastate tariffs, including Qwest's intrastate Access Service Tariff in this case. SDCL 49-13-1 and 49-31-1.1; 49-31-3, 49-31-15; 49-31-19. SDCL 49-31-3 provides:

The commission has general supervision and control of all telecommunications companies offering common carrier services within the state to the extent such business is not otherwise regulated by federal law or regulation. The commission shall inquire into any complaints, unjust discrimination, neglect, or violation of the laws of the state governing such companies. The commission may exercise powers necessary to properly supervise and control such companies. (Emphasis supplied).

41. In its Conditional Motion to Dismiss for Lack of Subject Matter Jurisdiction, Qwest argues that the Commission lacks subject matter jurisdiction to consider this case at all because the FiberCom ISP-Bound Traffic is interstate in nature and that jurisdiction properly resides in the FCC or the federal courts.

42. FiberCom counters that Qwest chose to treat FiberCom's ISP-bound traffic as intrastate traffic rather than interstate traffic and billed it as such under Qwest's intrastate Access Service Tariff. FiberCom thus contends that Qwest itself elected to invoke state law through its application of a state sanctioned tariff, that the Commission has jurisdiction to interpret and determine the applicability of tariffs approved under state law, that the Commission has authority to consider whether the billings Qwest issued to FiberCom pursuant to its state tariff were improper and to order the refund of inappropriate charges.

43. The Commission agrees with FiberCom. Although the FCC held in the *Order on Remand* that ISP-bound traffic is jurisdictionally interstate and Qwest repeatedly took the position that ISP traffic is interstate with respect to its Interconnection Agreement and reciprocal compensation for local traffic, Qwest continued to bill FiberCom under its South Dakota intrastate Access Service Tariff for calls delivered to Qwest ISPs. By its actions, Qwest continued to invoke the jurisdiction of this state and this Commission.

44. The Commission finds that it has jurisdiction and authority to determine the lawfulness and reasonableness of billings made by Qwest under the authority of a Commission sanctioned intrastate tariff and to order the refund of payments made against erroneous or improper billings under that tariff.

45. The Commission rejects Qwest's argument that if the Commission rules against Qwest only the FCC has jurisdiction. The Commission bases its finding that it has jurisdiction in this case on the fact that the Qwest charges at issue were billed under authority of its intrastate access tariff and state law.

Statute of Limitations

46. Qwest issued invoices to FiberCom for the ISP traffic in dispute pursuant to its intrastate Access Service Tariff. The jurisdiction and authority of the Commission to consider FiberCom's Complaint rests in its power to decide the propriety of charges levied under an intrastate tariff sanctioned under state law. We find that the six year statute of limitations imposed by SDCL 15-2-13 is applicable to this case.

FiberCom's Complaint

47. In the Complaint, FiberCom contests the lawfulness of Qwest's intercarrier switched access billings to FiberCom for calls initiated by FiberCom customers located in South Dakota outside Qwest's Rapid City local exchange area to ISPs whose network access is provided by Qwest and whose central office or NXX codes are associated with Qwest's Rapid City local exchange. Qwest billed these calls as intrastate switched access service under its South Dakota *Qwest Corporation Access Service Tariff* as filed with and approved by the Commission. Ex 20. FiberCom contends that these ISP-bound calls are interstate in nature pursuant to the FCC's *Declaratory Ruling and Order on Remand* and that Qwest's switched access billings for this ISP-bound traffic were unlawful. FiberCom asks the Commission to determine that FiberCom's ISP-bound traffic is interstate in nature and is therefore not subject to intrastate switched access charges, to determine the number of ISP-bound minutes to which Qwest has applied intrastate switched access charges, to order Qwest to immediately issue revised invoices to FiberCom for all relevant invoicing periods, which shall reflect no charges for the ISP-bound calls at issue herein, and to order Qwest to refund to FiberCom the difference between the amount paid to Qwest under these intrastate switched access billings and the amount FiberCom should have been billed, plus statutory interest on such amounts.

48. Qwest's Access Service Tariff states in Section 1.1:

This Tariff contains regulations, rates and charges applicable to the provision of . . .
. Switched Access . . . hereinafter referred to as services

The provision of such service by the Company as set forth in this Tariff is specifically intended to provide exchange network access to customers as follows:

- Providers of interexchange service, that furnish service between Local Calling Areas, must purchase services from this Tariff for their use in furnishing their authorized intrastate telecommunications services to end user customers (emphasis supplied).

Qwest's Access Service Tariff states in Section 2.3.10.A.:

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 within which the called station (as determined 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 determined by the called station number) is situated is an interstate communication.

Qwest argues that the language of Sections 1.1 and 2.3.10.A of its Access Service Tariff renders the ISP-bound traffic at issue in this case intrastate.

49. The Commission finds that in the *Declaratory Ruling* and later in the *Order on Remand*, the FCC determined, based upon its end-to-end analysis, that ISP-bound traffic is interstate and that these findings were not overturned by the Court of Appeals in either *Bell Atlantic* or *Worldcom*. Although the *Declaratory Ruling* was reversed in *Bell Atlantic*, we find that ISP-bound traffic did not become interstate in nature by administrative fiat in the *Order on Remand*. Rather, the FCC in the *Order on Remand* merely recognized the nature of ISP-facilitated communications and further recognized, consistent with its earlier holdings, that such communications are interstate. In *Worldcom*, the court did not vacate the FCC's decision, but only reversed and remanded based upon the court's conclusion that the legal basis asserted by the FCC for its decision was incorrect.

50. As creatures of state law, neither Qwest's Access Service Tariff nor ARSD § 20:10:29:06 take precedence over the FCC's decisions establishing the jurisdictional nature of ISP-bound calls as interstate.

51. In its communications with FiberCom, beginning at least as early as October 2000, Qwest itself consistently maintained that calls to ISPs were interstate. Ex 1, 2 and 4. The fact that a call to an ISP originates in Spearfish or Sturgis rather than Rapid City does not transform that call into an intrastate call.

52. Although the *Declaratory Ruling* declared ISP-bound traffic to be jurisdictionally interstate, the FCC in that order nevertheless continued its consistent policy up to that time of permitting ISPs to purchase their network access from "local" business tariffs. In the *Declaratory Ruling*, the FCC also left intact the authority of state commissions to determine compensation applicable to ISP-bound traffic pursuant to 47 U.S.C. §252. The *Declaratory Ruling* states in para. 26-27:

26. . . . By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. . . . [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

53. In the *Order on Remand*, the FCC reiterated its characterization of ISP-bound traffic as "non-local" interstate traffic, but this time expressly assumed active jurisdiction over compensation for exchange of ISP-bound traffic and expressly pre-empted the authority of state commissions to establish compensation for such traffic. The *Order on Remand* specifically dealt only with reciprocal compensation and not access charges. There is nothing in either the *Order on Remand* or the *Declaratory Ruling*, however, to indicate that the FCC's finding that ISP-bound traffic is interstate in nature is somehow limited only to calls to ISPs made within the same ILEC local calling area. Such a result would seem absurd. There is nothing in the nature of the particular traffic at issue in this case which would indicate that the single call and end-to-end analyses the FCC employed in reaching its conclusion about the jurisdictional nature of ISP-bound traffic should not compel a like finding as to the jurisdictional nature of the FiberCom ISP-Bound Traffic. We therefore find that the FiberCom ISP-Bound Traffic was interstate traffic.

54. Likewise, although the *Declaratory Ruling*, like the *Order on Remand*, was directed at "local" ISP-bound traffic and the intercarrier reciprocal compensation arrangements for exchange of such traffic under 47 U.S.C. § 252, there would seem to be no reason why its reasoning should not apply similarly to interexchange ISP-bound traffic, particularly the traffic in this case that had attributes, from the calling parties' perspective, of local traffic under FiberCom's approved expanded local calling area.¹

¹ It is not surprising that neither of the FCC's ISP orders addressed ISP traffic in the context of the interexchange access charge regime (at least not from the calling party's perspective). Generally speaking, traffic which subjects a carrier to access charges also subjects the end user of such service to per minute toll charges. The very nature of Internet calls as noted by the FCC - almost exclusively one-way calls of lengthy duration far exceeding the duration of normal voice traffic - dictates that ISP-bound traffic will be almost exclusively local or it won't exist at all. The orders of the FCC permitting ISPs to procure their network access through "local" business tariffs have recognized the necessity of matching the regulatory treatment of such traffic to the economic realities

55. From the calling parties' perspective, calls to ISPs that cross local exchange area boundaries are the interexchange analog to "local" calls to ISPs within the same local calling area. Just as state commissions were authorized in the *Declaratory Ruling* to continue to establish intercarrier compensation at the local level under the order, it would seem to follow that this treatment would similarly have applied to calls to ISPs that crossed exchange boundaries within the state. We therefore find that prior to the *Order on Remand*, the Commission was authorized to approve and Qwest was authorized to apply intrastate access tariffs to ISP-bound traffic that crossed local exchange boundaries in this state on its way to an ISP having a called station number assigned to an end office located in this state. We accordingly find that Qwest's South Dakota filed Access Service Tariff could be applied to the FiberCom ISP-Bound Traffic prior to the effective date of the *Order on Remand* and that Qwest's billings to FiberCom for such traffic prior to the effective date of the *Order on Remand* were proper.

56. Applying this same reasoning to the *Order on Remand*, however, we find that the FCC's directives that ISP-bound traffic was interstate and that states were subsequently precluded from establishing reciprocal compensation rates for ISP-bound traffic ought to apply to the interexchange traffic at issue in this case. We accordingly find that under the facts of this case, as of the effective date of the *Order on Remand*, Qwest's South Dakota intrastate Access Service Tariff could no longer be properly applied to the FiberCom ISP-Bound Traffic.

57. The particular facts of this case support such a construction and application of the FCC's ISP-bound traffic decisions, particularly the *Order on Remand*. First, Qwest itself consistently characterized FiberCom's Rapid City ISP-bound traffic as interstate and demanded that its Interconnection Agreement with FiberCom and FiberCom's reciprocal compensation charges be amended to reflect this characterization.

58. Second, the actual point-to-point nature of these calls, even before they were routed onto the Internet by the servers of AOL and Qwest's other ISP customers, supplies a basis for a finding that these calls were interstate. The findings of fact regarding the actual routing of these calls are found in Appendix A, Confidential Findings of Fact. See *Declaratory Ruling*, para. 10 and FN 33:

New York Telephone Co., 76 FCC 2d 349, 352-53 (1980) (physically intrastate foreign exchange facilities used to carry interconnected interstate traffic are subject to federal jurisdiction). FN 33.

59. Third, from Qwest's standpoint, there was essentially no necessary physical difference, other than the NXX portion of the FiberCom customers' numbers, between calls delivered by FiberCom from its Rapid City customers and those from its customers located outside Rapid City. Although the Interconnection Agreement between the parties required the segregation of "local" and interexchange traffic onto different trunks and the delivery of calls with non-Rapid City NXXs to Qwest's tandem switch, there is no evidence in the record of a physical necessity for this requirement. Unlike the virtual NXX cases from other jurisdictions, where competitive carriers have

of its facilitation if the Internet is to flourish as a vehicle for information exchange and commerce. See *Declaratory Ruling*, FN 8 (FN 8. The Commission has acknowledged the significance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues.) This regulatory treatment has in turn then driven the means by which the service has been deployed in fact, and it is now an embedded customer assumption that dial-up Internet service is available via a local dial-up number. This being the case, the likely reason for the non-existence of any pronouncement from the FCC or otherwise regarding access charges for ISP traffic is that, outside the virtual NXX or foreign exchange context, such traffic is so minuscule as to be non-existent as a practical matter. TR 114-115.

used NXX number assignments to freeload on incumbent carriers for interexchange transport and switching, here FiberCom itself supplied all of the transport using its own physical facilities at its own expense pursuant to a Commission-approved expanded local calling area. TR 85; Ex 43 at 40; Ex 47 at 40. There is no evidence in the record and no reason that we can discern why these calls could not have been routed over the LIS trunks along with all of the other FiberCom ISP-Bound Traffic in a direct connection between the two companies' end offices. These were not calls that utilized or accessed Qwest's local loop or local transport facilities in its Rapid City local exchange area. There is no evidence in the record as to this traffic necessarily causing any costs to Qwest that were not similarly incurred for Rapid City originated traffic.

60. Lastly, applying the *Order on Remand's* rationale to the FiberCom ISP-Bound Traffic, at least to the extent of subjecting it only to the lower interstate access rate, is supported by common sense and simple fairness. The same overwhelmingly one-way traffic flows and lengthy call durations would otherwise give to one party an out-of-balance revenue windfall at the other party's expense solely as a result of an unintended and unexpected regulatory disparity. FiberCom embarked on its plan of providing an expanded local service area in the northern Black Hills with knowledge that it would have to bear the cost of access charges for its customers' calls to Qwest-served ISPs under the law as it stood at that time. Ex 23. FiberCom's business plan also, however, assumed that these charges would be offset by reciprocal compensation revenues from Qwest-originated calls to its Rapid City based ISP customers. TR 80-81. To now find that the *Order on Remand* renders only the Qwest "local" ISP traffic interstate and totally relieves it of charges, but leaves the FiberCom traffic subject to a 5.9 cent per minute intrastate access charge would create the same kind of lopsided regulatory "gotcha" that the order was meant to correct. As the South Dakota Supreme Court stated in *U.S. v. State, supra*, at 213:

Such an important proceeding should not be relegated to a game of "gotcha."

61. It certainly could be argued, as FiberCom has done, whether all calls from FiberCom's customers to Qwest-served ISPs were interstate calls from the outset and thus subject to interstate access charges, if anything. It could also be argued that these calls should not be subject to access charges at all. See *Global NAPS, Inc. v. Verizon New England Inc.*, 327 F.Supp.2d 290, 300 (D.Vt.,2004).

62. The Commission believes, however, that the Commission's jurisdiction over charges levied under intrastate tariffs together with the FCC's decision in the *Declaratory Ruling* regarding the authority of state commissions to consider and review the appropriate compensation for ISP bound traffic pending finalization of the FCC rulemaking on the subject, provide a sufficient basis for the decision in this case and for the Commission's jurisdiction to make it. The Commission further finds that the parties in fact viewed the situation prior to the *Order on Remand* as one in which Qwest would owe FiberCom reciprocal compensation under the Interconnection Agreement and that FiberCom would owe Qwest off-setting access charges under its intrastate access tariff. The Commission's decision therefore seems to reflect a symmetrical resolution consistent with the parties' prior understanding and simple fairness.

63. We do not think this decision will open the door for any significant opportunities for abuse of the intrastate access charge system in this state. This case presents unique facts, chief among which are (i) that the Commission approved an expanded local calling area for FiberCom due to the special community-of-interest circumstances present in the northern Hills region and (ii) that FiberCom constructed a fully facilities-based system to serve that area. Neither the parties nor the Commission were able to find a single case addressing access charges for ISP traffic outside the VNXX or foreign exchange context. The evidence in this case revealed the reason for this. Absent the unique circumstances presented here, interexchange traffic to ISPs is essentially non-existent.

TR 114-115. Customers simply do not elect to incur the per-minute tolls charged on long distance calls to make their typically lengthy connections to the Internet.

64. For this reason we emphasize that our decision in this case is intended to be narrowly applied to the facts of this particular case where, due to FiberCom's peculiar circumstances, the magnitude of the "interexchange" ISP traffic and the intercarrier charge imbalance between FiberCom and Qwest for this traffic were significant. As the evidence in this case clearly demonstrated, interexchange calls to ISPs are insignificant under normal circumstances.

65. We do not find, in fact cannot find, that Qwest is prohibited from billing FiberCom for the traffic it delivered to Qwest-served ISPs following the *Order on Remand*. It may be that interstate access charges are appropriate for traffic occurring after the effective date of the *Order on Remand*. We do find, however that the Commission lacks jurisdiction and authority following the effective date of the *Order on Remand* to determine such charges as they are within the interstate jurisdiction.

66. Exhibit 13 provides FiberCom's version of its minutes of use and payment history for Qwest's access billings to FiberCom for ISP-bound traffic from June 2000 through March 2004. Because our decision does not adopt either party's theory of the case completely, the evidence regarding damages does not closely match our findings. For example, Exhibit 13 does not contain precise enough evidence concerning the month of June 2001, to determine how that month splits as of the effective date of the *Order on Remand* and concerning FiberCom's payment dates to determine interest payable on such amounts. The Commission accordingly finds that the parties should have an opportunity to present additional evidence to the Commission for a determination of the appropriate refund damages amount and interest due thereon if they are unable to agree on such amount following issuance of this order. The Commission will accordingly leave the Docket in this case open for a period of 90 days following the entry of this order to enable the parties to so move.

67. The Commission also notes that additional compensation may be due to Qwest under its interstate tariff for the period after the effective date of the *Order on Remand*. This Commission, however lacks authority to determine what that compensation should be. The Commission urges the parties to negotiate in good faith to reach a settlement of the refund and interest amount giving due regard to Qwest's potential entitlement to compensation for the period after the effective date of the *Order on Remand* and to the fact that FiberCom received partial but significant reciprocal compensation payments from Qwest for local ISP-bound traffic terminated by FiberCom prior to April 1, 2002, as a result of the parties' settlement agreement. Ex 23. In this regard, the Commission notes with approval Qwest's pro-active actions to reach negotiated commercial agreements with its UNE customers following the decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) and would encourage the parties to approach the resolution of this matter in the same spirit of constructive commercial negotiation.

68. We accordingly find that Qwest erroneously billed FiberCom for the FiberCom ISP-Bound Traffic from and after the effective date of the *Order on Remand* and that Qwest must refund to FiberCom the amounts erroneously billed under its intrastate access tariff plus interest thereon in accordance with SDCL 21-1-13.1. Qwest may elect to re-bill FiberCom under an appropriate interstate tariff, but the Commission lacks authority to approve such action.

Qwest's Counterclaims

69. With respect to Qwest's claims of unlawful discrimination and misuse of customer or carrier proprietary information, all of FiberCom's actions of which Qwest complains occurred after the effective date of the *Order on Remand*. In fact, it was Qwest's insistence on the amendment of its Interconnection Agreement with FiberCom and resulting racheting down and eventual total elimination of reciprocal compensation for ISP traffic that led FiberCom to take the actions that it did.

Because the allegedly discriminatory and misappropriation of CPNI actions of FiberCom were directed solely at ISP services after the date of the *Order on Remand* and were therefore within the interstate jurisdiction, the Commission finds that these claims are properly brought under 47 U.S.C. §§ 202 and 222 before the FCC or a court having jurisdiction.

70. With respect to Qwest's claims of intentional inference with business relations and unjust enrichment, the Commission finds that to the extent these claims may state causes of action under state law despite the interstate nature of the service, the Commission nevertheless lacks jurisdiction because these claims are grounded in the common law of tort and in equity, respectively. As the Commission concluded in *Matter of the Complaint Filed by Christopher A. Cutler on Behalf of Recreational Adventures Co., Hill City, South Dakota, Against AT&T Communications of the Midwest, Inc. Regarding Failure to Provide Service*, Final Decision and Order Granting Motion to Dismiss, Docket CT02-021 (Rel. Sep. 26, 2003):

The jurisdiction of an administrative agency consists of the powers granted to it by statute. *Thies v. Renner*, 78 S.D. 617, 106 N.W.2d 253 (1960). In *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 S.D. 77, 648 N.W.2d 342 (2002), the Supreme Court further explained the general limits of the jurisdiction of administrative agencies in South Dakota:

The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. [citations omitted]. Furthermore, "[an administrative agency] may not acquire jurisdiction by estoppel or consent, and, where it acts without jurisdiction, its orders are void." [internal citations omitted]. An agency has only such power as expressly or by necessary implication is granted by legislative enactment; an agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. [internal citations omitted] 2002 S.D. at ¶ 15, 648 N.W.2d at 346.

As the Commission concluded in *Recreational Adventures*, courts of general jurisdiction are the proper forum for claims grounded in the common law or equity.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear and render a decision in this case in so far as it concerns the propriety and reasonableness of Qwest's billings under its intrastate switched access tariff pursuant to SDCL Chapter 49-13, including 49-13-1 through 49-13-14, inclusive, and SDCL Chapter 49-31, including 49-31-3, 49-31-7, 49-31-7.1, 49-31-7.2, 49-31-11, 49-31-18, 49-31-19 and 49-31-76, and ARSD Chapters 20:10:01, 20:10:24, 20:10:27, 20:10:28, 20:10:29 and 20:10:32.
2. FiberCom's Complaint, Qwest's Counterclaim and Qwest's Motion to Dismiss were duly and timely filed, the responsive pleadings thereto were duly and timely filed by the other party, thus joining the issues raised in each of these pleadings and motions and the hearing and other proceedings in this matter were held upon due and proper notice.
3. South Dakota law permits the pleading and presentation of inconsistent claims and defenses, even in the same proceeding, and Qwest's assertion of an inconsistent legal theory in proceedings in another state, whether true or not, has no legal or factual significance in this case. SDCL 15-6-8(e)(2); *U.S. v. State*, 598 N.W.2d 208 (S.D., 1999). The Commission may, however, consider decisions from other states as legal precedent when appropriate, such decisions are appropriately

factually and legally distinguished in the legal briefs of parties, and Qwest's Motion to Permit Post-Hearing Affidavit was properly denied.

4. In the *Declaratory Ruling*, the FCC stated in FN 87, "We conclude in this Declaratory Ruling, however, that ISP-bound traffic is non-local interstate traffic." In the *Order on Remand*, the FCC again determined that ISP-bound traffic is interstate. This determination was not reversed by the court in *Worldcom*. The Commission concludes that the FiberCom ISP-Bound Traffic was interstate.

5. Despite having concluded in the *Declaratory Ruling* that ISP-bound traffic is interstate, the FCC neither established a compensation regime for such traffic nor preempted state jurisdiction over compensation for such traffic, except for recognizing its earlier exemption of ISPs themselves from interstate access charges. The *Declaratory Ruling* states in para. 26-27:

26. . . . By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

27. . . . [N]othing in this Declaratory Ruling precludes state commissions from determining, pursuant to contractual principles or other legal or equitable considerations, that reciprocal compensation is an appropriate interim inter-carrier compensation rule pending completion of the rulemaking we initiate below.

The FCC further concluded in para. 20 that ISPs could continue to purchase their access through "intrastate (local)" business tariffs and that states could continue to establish compensation for such traffic through the arbitration process in 47 U.S.C. § 252, stating in FN 87:

As discussed, supra, in the absence a federal rule, state commissions have the authority under section 252 of the Act to determine inter-carrier compensation for ISP-bound traffic.

6. In reversing the *Declaratory Ruling*, the *Bell Atlantic* court stated at p. 336

We do not reach the objections of the incumbent LECs--that § 251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have not adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.

7. The Commission recognizes that these statements apply in the context of § 252 reciprocal compensation proceedings, but the Commission nevertheless concludes that under the particular facts of this case, which are closely analogous to a reciprocal compensation situation, they offer the best guidance available to the Commission to determine the appropriate resolution of the jurisdictional dilemma posed by these facts.

8. As a general proposition, the Commission has subject matter jurisdiction over disputes arising out of a carrier's application of an intrastate tariff, including Qwest's intrastate Access Service Tariff in this case. SDCL 49-13-1 and 49-31-1.1; 49-31-3, 49-31-15; 49-31-19. The Commission concludes that Qwest continued to bill FiberCom under its South Dakota intrastate Access Service Tariff for calls delivered to Qwest ISPs after the *Order on Remand* despite its having strongly asserted to FiberCom that such traffic was interstate. By its actions, Qwest continued to invoke the jurisdiction of this state and this Commission. The Commission accordingly concludes that it has jurisdiction and authority to determine the lawfulness and reasonableness of billings made by Qwest

under the authority of a Commission sanctioned intrastate tariff and to order the refund of payments made against erroneous or improper billings under that tariff.

9. Although neither the *Declaratory Ruling* nor the *Order on Remand* addressed the issue of ISP traffic that traverses intrastate incumbent LEC exchange boundaries as is the case here, we conclude that the FCC in these decisions did not preempt the authority of the Commission to consider and render a decision concerning the appropriateness of intercarrier billings under a South Dakota intrastate access tariff. The Commission accordingly concludes that it has jurisdiction to consider and render a decision with respect to the intrastate billings and to award appropriate relief.

10. The Commission concludes that Qwest's Conditional Motion to Dismiss should be denied.

11. The Commission concludes that prior to the *Order on Remand*, the Commission was authorized to approve and Qwest was authorized to apply its intrastate switched access tariff for termination of ISP-bound traffic that crosses local exchange boundaries in this state on its way to an ISP having a called station number assigned to an end office located in this state. We further conclude that Qwest's South Dakota filed Access Service Tariff could be applied to the FiberCom ISP-Bound Traffic prior to the effective date of the *Order on Remand* and that Qwest's billings to FiberCom for such traffic prior to the effective date of the *Order on Remand* were proper.

12. The effective date of the *Order on Remand* was June 14, 2001.

13. In the *Order on Remand* the FCC stated in para. 92:

This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here. Because we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, however, state commissions will no longer have authority to address this issue.

14. The Commission concludes that following the effective date of the *Order on Remand*, the appropriate intercarrier compensation for the FiberCom ISP-Bound Traffic could no longer be established by the Commission and that Qwest's billings for such traffic made under state law pursuant to its South Dakota Access Service Tariff were invalid.

15. The Commission further concludes that Qwest's billings to FiberCom under its intrastate access tariff following the *Order on Remand* were unreasonable under this state's telecommunications statutes in light of Qwest's own insistence that FiberCom's reciprocal compensation billings for essentially identical service were precluded.

16. As creatures of state law, neither Qwest's Access Service Tariff nor ARSD § 20:10:29:06 may take precedence over the FCC's decisions establishing the jurisdictional nature of ISP-bound calls as interstate nor the intercarrier compensation authorized by the FCC for such traffic under federal law.

17. The Commission concludes that Qwest should be required to refund to FiberCom all payments made by FiberCom from and after the effective date of the *Order on Remand*. The Commission further concludes that such relief constitutes "damages" under SDCL 49-13-1.1 and that interest is therefore due thereon under SDCL 21-1-13.1.

18. The Commission concludes that it is not capable of determining the amount of such refund on the record before us and that the parties shall have ninety (90) days following the effective date

of this decision and order to move the Commission for leave to present additional evidence as to the amount of such refund.

19 If Qwest believes compensation is due it for the FiberCom ISP-Bound Traffic following the effective date of the *Order on Remand*, Qwest may re-bill FiberCom under the appropriate FCC tariff or compensation order. The Commission concludes that it does not have authority to determine such compensation.

20. The Commission concludes that since all of the actions complained of by Qwest in its Counterclaims occurred after the effective date of the *Order on Remand*, the Commission lacks jurisdiction to determine whether such actions constituted discriminatory, unlawful or unreasonable conduct under federal law.

21. The Commission concludes that Qwest's counterclaims for tortious interference with business relations and unjust enrichment are claims based upon common law tort and equity principles, and are outside the jurisdiction of the Commission. The South Dakota Supreme Court has held that the jurisdiction of administrative agencies is limited to specific statutory delegations of regulatory authority and that claims arising under the common law are matters for courts of general jurisdiction.

22. The Commission accordingly concludes that Qwest's Counterclaims should be dismissed without prejudice.

THE PARTIES' PROPOSED FINDINGS AND CONCLUSIONS

In conjunction with their post-hearing briefs, the parties each submitted detailed sets of proposed findings of fact and conclusions of law. The substance of many of these proposed findings and conclusions are reflected in the Findings and Conclusions set forth herein. Because the Commission fully adopts neither of the parties' positions in this case and in order to avoid needless repetition of the analysis contained in the above Findings and Conclusions, the Commission rejects the proposed findings and conclusions of both parties in their entirety except to the extent that they are incorporated in substance in whole or in part in this decision.

It is therefore

ORDERED, that Qwest's Conditional Motion to Dismiss is denied; and it is further

ORDERED, that Qwest shall refund to FiberCom those amounts that it received from FiberCom pursuant to billings under its South Dakota intrastate access tariff from and after the effective date of the *Order on Remand* together with interest thereon as provided by South Dakota law; and it is further

ORDERED, that Qwest's Counterclaims are dismissed without prejudice; and it is further

ORDERED, that the docket in this case shall remain open for 90 days following the effective date of this Order in order to enable the parties to ascertain the proper damages amount and interest thereon and that either party may move the Commission to re-open the record to produce additional evidence of damages in the event the parties are unable to agree upon the proper refund and interest amount.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 24th day of February, 2005. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 24th day of February, 2005.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Alaine Kolbo</u>
Date:	<u>2/24/05</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

Robert K. Sahr
ROBERT K. SAHR, Chairman

Gary Hanson
GARY HANSON, Commissioner