BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between CHARTER FIBERLINK WA-CCVII, LLC. and QWEST CORPORATION Pursuant to 47 U.S.C. Section 252.	Docket No. UT-083041 CHARTER OPENING BRIEF

OPENING BRIEF
OF
CHARTER FIBERLINK WA-CCVII, LLC

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VERSION

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I. INTRODUCTION

1. Charter Fiberlink WA-CCVII, LLC ("Charter Fiberlink" or "Charter") provides the following Opening Brief in support of its Petition for Arbitration of an interconnection agreement with Qwest Corporation ("Qwest"). Charter and Qwest are referred to as the "Parties" herein.

II. PARTIES, PROCEDURAL HISTORY AND PRELIMINARY MATTERS

A. The Parties

2. Charter Fiberlink is a subsidiary of the cable broadband company, Charter Communications, Inc., headquartered in St. Louis, Missouri. Charter Fiberlink is a facilities-based competitive carrier – a CLEC – in Washington. Charter Fiberlink, referred to in this case and this pleading as "Charter," provides both competitive residential and business telephone services in large and small markets in Washington. Charter and its parent company have made significant capital expenditures to build and deploy high-capacity networks in Washington and elsewhere. As such, the company's presence in this state enhances competition and benefits consumers.

3. As a facilities-based carrier, Charter deploys and operates its own loops, switches, and transport facilities. Because it owns and operates its own network, Charter does not resell the services of other LECs or purchase unbundled network elements ("UNEs") from Qwest, or other incumbent LECs. That is why this arbitration, and the evidence in this arbitration, does not focus upon UNEs or resale, issues that the Washington Utilities and Transportation Commission (the "Commission" or "UTC") may have dealt with in prior arbitration proceedings.

4. This arbitration proceeding is the product of certain irreconcilable differences between the Parties. Charter and Qwest's representatives spent approximately nine months attempting to negotiate the terms of an interconnection contract. Only after it was clear that there were certain issues that simply could not be resolved between the Parties, did Charter petition the Commission for arbitration of the disputed terms.

5. And precisely what terms does Charter seek in the Agreement? Charter seeks terms that reflect three key principles. First, Charter seeks business terms that are fair, equitable and reciprocal - terms that benefit both parties and not simply one party. By "business terms" Charter means indemnification, limitations of liability, dispute resolution, and the like. Second, Charter seeks the ability to compete with Qwest on a level playing field. In order to compete, Charter simply needs the ability and the opportunity to interconnect its network and exchange traffic with Qwest on reasonable rates, terms and conditions. Once that happens, competition can flourish in the areas where Charter and Qwest operate. Third, Charter proposes contract language that reflects each party's obligations under federal law, in particular Section 251 of the Telecommunications Act of 1996.

B. Resolved and Unresolved Issues

6. Given Charter's status as a facilities-based competitor, the disputed issues between the Parties are in many respects quite different from those between Qwest and other CLECs in Washington. For example, the Parties are not disputing UNE, resale, or collocation provisions.

7. Fortunately, since this case began, Charter and Qwest have continued to negotiate and resolve, a number of disputed issues. Specifically, the Parties have resolved the following disputed issues: Issue 1 (Disconnecting Service), Issue 2 (Backbilling), Issue 3 (Security Deposits), Issue 4 (Insurance), Issue 6(b) (Indemnification and Settlement), Issue 8 (Warranties), Issue 9 (Terminations as to a Specific Operating Area), Issue 12 (Mid-Span Meet Point of Interconnection), Issue 18 (Rates for 911 facilities); Issue 21 (Charges for Directory Listings), and Issue 24 (Cost Responsibility for Audits), as set forth in the issues matrix which has been designated as Hearing Exhibit 5. Since the Commission does not have to decide these newly resolved issues, they are not addressed here.

C. Preliminary Matters

8. This brief is organized by presentation of the issues sequentially, and as presented in the revised issues matrix filed jointly by the Parties on January 29, 2009. Generally, the four major issue areas presented in this brief are: 1) General Terms and Conditions; 2) Network Interconnection; 3) Miscellaneous Charges; and 4) Directory Issues.

D. Legal Standard

9. The standard by which the disputed issues must be resolved is clear. This arbitration proceeding is governed by the substantive and procedural requirements set forth in Sections 251 and 252 of the federal Telecommunications Act.[1] Specifically, Section 252(c)(1) of the Act directs this Commission to resolve open issues in a manner that "meet the requirements of

[1] 47 U.S.C. § 151, *et seq.* (hereinafter "Act").

Section 251, including the regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251."[2] Thus, the Commission must apply Section 251 and the FCC's regulations promulgating the Act to arrive at a decision consistent with Section 252(c)(1).

10. Notably, this standard does not permit the Commission to take into consideration several factors that Qwest has relied upon. Specifically, that its proposed language was approved in a prior proceeding concerning Qwest's entry into the long-distance market (the so-called "271 proceeding"), or that some other CLEC may "adopt" the final agreement pursuant to 47 U.S.C. § 252(i). Instead, the Commission must look only to federal law, and the rules and orders prescribed by the FCC in accordance with Section 251, and state law that comports with the Act.

III. GENERAL TERMS AND CONDITIONS ISSUES

Issue 5: How should the parties agree to limit liability, and damages, arising from either party's actions?

11. The question arising under this issue is whether Qwest may limit its damages to Charter, or whether damages should be tied to actual damages incurred by the injured party. Qwest proposes language that would limit damages to no more than the total amount that is or would have been charged to the other party in the "contract year" in which the cause accrues, even in those situations where the other party acts in a manner that is deemed to be grossly negligent. Charter asserts that such limitations on damages are improper.

12. The provisions at issue deal with liability for damages when the parties engage in behavior that results in harm to the other party. Notably, this provision does not limit the parties' indemnification obligation to a third party. Under Qwest's proposal, any damages that either party may be liable to other party for will be strictly limited by a formula that is equivalent to the

[2] 47 U.S.C. § 252(c)(1).

total amount of charges that is, or would have been, assessed upon the other party by the breaching party for the services or functions not performed or improperly performed under the Agreement for any particular year, in which the cause accrues.[3] The Parties' competing proposed language for Section 5.8 differs in two significant ways.

13. First, the Parties disagree as to whether damages should be capped at a pre-determined level that may, or may not, reflect the amount of actual damages suffered. Charter believes that damages between the parties should be measured by actual, direct damages. (i.e., excluding indirect, special, consequential or lost business type damages).[4] Qwest argues that damages between the parties should be capped at monthly charges.

14. Second, the parties also dispute the question of whether damages arising from the gross negligence of the other party should be specifically excluded from any limitation on damages. Charter proposes to include gross negligence in this provision, so that damages between the Parties would *not* be limited where damages arise as a result of grossly negligent behavior by the Party at fault.[5] Qwest, on the other hand, declines to include gross negligence in this provision.

15. As to the first question, Qwest's proposal to impose an arbitrary cap upon the total amount of damages that may be available to either party, is without merit. It is not appropriate, either practically or as a matter of public policy, for the Parties to set an artificial cap on potential damages liability to each other. Practically speaking, it is inappropriate to cap potential damages because that would likely prevent the innocent party from being fully compensated for its actual damages. For example, if Qwest acted in a grossly negligent manner such that Charter's network facilities were damaged, and Charter's service was impaired, Charter's damages (i.e., repair

[3] HE-5 (Issues Matrix) at 7 (Qwest proposed language for General Terms and Conditions, § 5.8.1).

[4] HE-2 (Interconnection Agreement) at § 5.8.2.

[5] *Id*. at 8-9 (Charter proposed language for General Terms and Conditions, § 5.8.4).

costs) could be significant. In that circumstance, there is no valid reason to limit Qwest's liability for such damages to the arbitrary amounts that Qwest proposes.

16. Notably, Charter's approach is consistent with the general principle under Washington law that breach of contract damages are ordinarily based on the injured party's expectation interest, and are intended to give that party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been had the contract been performed.[6] Qwest's proposed language would lead to the opposite result as it is likely that it would preclude recovery of the amount of direct damages that arise from a significant harm or error that occurred to one party's network, employees, or assets. Moreover, from a public policy standpoint, setting an artificial cap on damages reduces incentives for the Parties to ensure that their actions do not result in harm to the other Party. In other words, by not limiting artificially damages, both Parties have appropriate incentives to take due care with respect to the network and facilities of the other Party.

17. As to the second question, the effect of Qwest's language is that it would artificially cap the amount of damages available to Charter, even in the context of damages that arose from Qwest's *grossly negligent* actions.[7] Qwest's position is directly at odds with Washington law

[6] *See* David K. DeWolf et. al., *Contract Law and Practice, Standardized Agreements/Adhesion Contracts – The Exculpatory Clause*, in 25 WASHINGTON PRACTICE § 14.4 (2008) (citing *Floor Exp., Inc. v. Daly*, 158 P.3d 619 (Wash.App. 2007); *Ford v. Trendwest Resorts, Inc.*, 43 P.3d 1223 (Wash. 2002)); *see also* 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:1 (4th ed. 2002). ("The fundamental principle that underlies the availability of contract damages is that of compensation. That is, the disappointed promisee is generally entitled to an award of money damages in an amount reasonably calculated to make him or her whole and ***neither more nor less***…" (emphasis added)).

[7] HE-5 (Issues Matrix). at 8 (Qwest proposed language for General Terms and Conditions, § 5.8.4).

which provides that a contractual exculpatory clause (such as Section 5.8) exempting one party from liability is not valid where the negligent act rises to the level of gross negligence.[8]

18. Other state commissions and courts have rejected similar language.[9] For example, in the 2005 arbitration proceeding between SBC and various LECs, the Missouri Commission affirmed the Arbitrator's ruling that "it is contrary to public policy to cap liability for intentional, willful, or grossly negligent action."[10] This limitation is a well-recognized principle in many jurisdictions, and has specifically been applied to communications companies in a variety of contexts. Further, in *Holman v. Southwestern Bell Telephone Company*,[11] a federal court in Kansas considered whether a telephone company's limitation of liability in a tariff was properly limited. In a well-reasoned opinion, the court, after reviewing Kansas case law, concluded that a reasonable limitation on liability is appropriate, but that a limitation which excluded liability for "willful or wanton conduct" (liability standards often coupled with gross negligence) would *not* be reasonable.[12] Many state courts, and commissions, have followed this approach.[13] For the

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[8] *See Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc.*, 770 P.2d 1086, 1087 (Wash.App. 1989) (finding that gross negligence is sufficient to invalidate a contractual exculpatory clause for negligence).

[9] *See e.g., In the Matter of Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC*, Arbitrator's Final Report, Case No. TO-2009-0037 (Mo. PSC Dec. 15, 2008) (hereinafter "*MoPSC Arbitrator's Decision*") (finding that it would be inappropriate for the parties to set an artificial cap on potential liability to each other); *In re Application of Central Power and Light Company for Approval of Tariff Amendment Application of Southwestern Bell Telephone Company for Approval of Tariff Amendment*, Docket Nos. 3198 and 3234, 1981 WL 178870 (Tex.P.U.C. 1981) ("The specific language proposed by SWB for this purpose makes clear that the company is not exempt or shielded from claims for gross negligence.").

[10] *See Southwestern Bell Telephone d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Final Commission Decision (July 11, 2005) at 56 (affirming Arbitrator's Final Report, Sec. 1(a) at p. 71).

[11] 358 F.Supp. 727 (D.Kan. 1973).

[12] *Id*. at 729-30.

[13] *See e.g., Satellite Sys., Inc. v. Birch Telecom of Okla., Inc.*, 51 P.3d 585, 589 (Okla. 2002) ("Courts overwhelmingly reject attempts to limit liability either by contract or by tariff for gross negligence, willful

same reasons, this Commission should reject Qwest's proposed damage limitations in this arbitration proceeding.

19. Accordingly, the Commission should adopt Charter's proposed language for Issue 5.

Issue 6(a): How should the parties' respective indemnity obligations be established?

20. This issue requires the Commission to determine whether one Party should be forced to indemnify another Party when the indemnified Party has acted in a manner that is deemed to be negligent, grossly negligent, or acts in a manner that constitutes willful misconduct. Charter argues that indemnity obligations should not be limited in those situations; Qwest disagrees.

21. Generally, both Parties have agreed to indemnify one another against third-party claims. However, Charter proposes language which would limit either Party's indemnity obligations "*to the extent that*" the indemnified Party engages in certain acts that give rise to the potential third-party claims. Specifically, Charter asserts that if the indemnified Party has engaged in acts that are deemed negligent, grossly negligent or which constitute willful misconduct, then that Party (the indemnified party) may not demand indemnification to the extent that it was at fault.[14]

22. Under Charter's proposed language the parties would be required to defend third-party claims in the following manner. First, after the plaintiff filed its claims, Qwest might invoke the indemnity provisions and require Charter to defend the claims. Second, Charter would assume the defense of the claims, and (likely) implead Qwest into the dispute. Then, each Party's

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misconduct, and fraud."); *In the Matter of the Petition of AT&T Commc'ns of the Midwest, Inc. for Arbitration of an Interconnection Agreement with Qwest Corp. Pursuant to 47 U.S.C. § 252(b),* Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement, Docket No. P-442, 421/IC-03-759, 2003 WL 22870903 at *12 (Minn. P.U.C. 2003) ("The public policy discouraging negligent behavior, articulated by the Commission when adopting the current ICA, applies equally well today."); *In re Liability Limitations, Disclaimers, or Indemnity Provisions in Telecommunication Tariff Filings,* Case No. 90-774-T-GI, 137 P.U.R.4th 436, 1992 WL 396194 (W.Va. P.S.C. 1992) (finding that it would be detrimental to the public interest to let liability limitations cover acts of gross negligence, willful neglect, or willful misconduct).

[14] HE-5 (Issues Matrix) at 9.

respective liabilities to the third party would be addressed in the litigation. In this way, Charter would, technically, continue to indemnify Qwest against the claims, but Qwest would be liable for the proportion of damages, in a manner commensurate with the level of harm caused by its acts or omissions. In other words, Charter would be required to indemnify Qwest, but only *to the extent that* the indemnified party is not at fault.

23. This approach is, of course, consistent with the concept of comparative fault, the liability standard for tort claims under Washington law.[15] Under this fault standard, courts weigh the relative liability of each party to an action based upon the comparative fault of each party involved in the transaction. In practice, the Court would join all parties to a transaction in a single lawsuit. That, in turn, allows for the comparison of the fault of all affected parties. Thus, Charter's proposal is consistent with the governing fault standard in Washington. It therefore ensures that indemnity obligations are limited to the extent that the indemnified Party has contributed to the alleged harm.

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[15] *See Tegman v. Investigations, Inc.*, 150 Wn.2d 102, 116, 75 P.3d 497 (Wash. 2003) (discussing the Washington legislature's rejection of the absolute bar of contributory negligence and adoption of comparative fault principles); *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 830, 959 P.2d 651 (Wash. 1998) (noting the Washington legislature's adoption of comparative fault via RCW 4.22.005 and 4.22.015); *Amend v. Bell*, 89 Wn.2d 124, 130-31, 570 P.2d 138 (Wash. 1977) (explaining the concept of comparative negligence); *see also In the Matter of Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC*, Arbitrator's Final Report, Case No. TO-2009-0037 (Mo. PSC Dec. 15, 2008) (hereinafter "*MoPSC Arbitrator's Decision*"). The MoPSC considered this precise issue and rejected all of an ILEC's arguments that are strikingly similar to that raised in this proceeding on this issue. Specifically, the MoPSC determined that:

> CenturyTel's language is inequitable because it fails to recognize the principle of contributory fault. In other words, if the indemnified party is partly liable for the harm to a third party, CenturyTel's proposal would require the indemnifying party to pay for the entire claim. Charter's language properly recognizes the principle of contributory fault by only requiring the indemnifying party to reimburse the indemnified party up to the extent that the indemnified party is not at fault.

MoPSC Arbitrator's Decision at 55.

24. Qwest opposes Charter's proposal and argues that Charter's approach would have the effect of voiding indemnification and eliminating the purpose of having the indemnification provisions in the Agreement. But Qwest offers no reasoned explanation as to why Charter should in fact assume indemnity obligations (in their entirety) when Qwest acts in a manner that contributes to the harms. Further, Washington courts' repeated affirmation of this principle of comparative fault, and the mechanism by which liability is established when there is more than one defendant, sufficiently answers any Qwest claim that Charter's proposal voids indemnification. That claim simply does not reflect the fact that the Washington courts have expressly adopted these very principles.

25. Qwest's language is inequitable because it fails to recognize the principle of comparative fault. In other words, if the indemnified party is partly liable for the harm to a third party, Qwest's proposal would unfairly require the indemnifying party to assume responsibility for the entire cost of the claim. Charter's language properly recognizes the principle of contributory fault by requiring the indemnified party to reimburse the indemnifying party an amount equal to the extent that the indemnified party is at fault.

26. For the foregoing reasons the Commission should adopt Charter's language for Issue 6(a).

Issue 7: How should the parties' respective indemnity obligations, as they relate to intellectual property rights, be established?

27. This issue requires that the Commission determine how the parties should define their respective indemnity obligations as they relate to intellectual property rights. Charter's position is that the addition of the phrase "or with knowledge" to Section 5.10 would serve to properly limit indemnity obligations. Charter also proposes that separate agreements to use the other

party's intellectual property, or trade secrets, should be executed in writing.[16] Conversely, Qwest claims that separate agreements for intellectual property rights can be oral agreements and that adding the phrase "or with knowledge" creates ambiguity and could expand litigation to include the question of how to define what "knowledge" is and who has such "knowledge."[17]

28. With respect to Charter's proposed use of the phrase "or with knowledge," the parties' dispute on this issue is fairly narrow. Under Charter's proposal, the Agreement would include language that makes clear that there would *only* be intellectual property indemnity obligations where facilities or services of the parties are combined *with the knowledge*, and at the direction, of the indemnifying party.[18] In other words, where facilities or services are combined in a manner that may infringe upon the intellectual property rights of a third party, without the knowledge of the indemnifying party, then that party would not be required to indemnify such third-party claims related to an alleged combination of facilities or services.[19]

29. Charter's proposal is not only consistent with other proposals that Charter has offered with respect to liability issues,[20] but it is also consistent with general contributory infringement principles. Indeed, the law is clear that where a party *with knowledge* of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, that party may be held liable as an infringer.[21] Implicit from this principle is that where one party is not at fault, or

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[16] JDW-1T (Webber (adopting Starkey) Dir.) at 22: 8-15.

[17] RA-1T (Albersheim Dir.) at 34:1-3.

[18] JDW-1T (Webber Dir.) at 24:25-27.

[19] *Id*. at 24:28-31; 25:1

[20] *Id*. at 25:1-2.

[21] *See Interscope Records v. Leadbetter*, 2007 WL 1217705, * 4 (W.D. Wash. 2007) (stating that in order to prove contributory infringement, the plaintiff must show that defendant: (1) had knowledge of the infringing activity, and (2) that he induced, caused or materially contributed to the infringing conduct); *Fonovisa Inc., v. Cherry Auction, Inc*., 76 F.3d 259, 264 (9th Cir. 1996) (citing *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162) (noting that this principle is derived

has no knowledge of the alleged infringement, that party should not be liable.[22] Consequently, in this instance, it stands to reason that a party should not be required to indemnify the other party for claims based upon alleged infringement arising from the combination of facilities or services which the first party had no knowledge of.

30. Moreover, Qwest's claim that the use of the phrase "or with knowledge" creates ambiguity or could somehow expand litigation is without merit for several reasons. First, the use of the "or with knowledge" phrase simply makes clear that one party should indemnify the other party for intellectual property infringement only when the indemnifying party had knowledge of the infringement or direction over the infringing facility or service so that, in effect, the indemnifying party is actually responsible for such infringement.[23] Second, it is common practice for a court to determine whether a defendant (in an intellectual property rights infringement proceeding) had "knowledge" of the infringing materials. Specifically, the court analyzes whether the defendant in such a proceeding had actual or constructive knowledge of the infringing actions.[24] Indeed, the court is able to make this fairly straightforward determination based on the facts before it in the record. Third, and finally, because having the requisite knowledge is an element to any such proceeding, the act of determining whether this element has been satisfied does not in any way expand the scope of the litigation. As a result, the Commission should ignore Qwest's contention on this point.

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from the common law doctrine in tort law that one who knowingly participates in or furthers a tortuous act is jointly and severally liable with the prime tortfeasor); *see also Veritas Operating Corp. v. Microsoft Corp.*, 526 F. Supp.2d 1141 (W.D. Wash. 2008) (explaining that to prevail on a contributory patent infringement claim, a patentee must prove two elements: (1) *knowledge* and (2) materiality).

[22] JDW1-T (Webber Dir.) at 25:4-5.

[23] JDW-2RT (Webber Reb.) at 29:14-18.

[24] *See e.g. Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 2008 WL 5383905, *5 (N.D.Cal. 2008). Actual knowledge exists where it can be shown by a defendant's conduct or statements that it actually knew of specific instances of infringing material. *Id.* Constructive knowledge exists where it can be shown that a defendant should have known of the infringing material. *Id.*

31. With respect to Charter's proposal to require that separate agreements between the parties to use certain intellectual property be in writing, such an arrangement would eliminate confusion in the future over what constitutes an agreement to use such intellectual property. As Mr. Webber explained in his testimony, using a written agreement to memorialize each party's rights under the relevant language in the Agreement ensures that each party is fully apprised of its respective rights and obligations, and ensures that there is an enforceable document in place to protect those rights.[25] On the other hand, under Qwest's approach, allowing either party to use certain intellectual property rights pursuant to an oral agreement could invariably, and predictably, lead to future disputes between the parties over the extent to which any such rights were granted. As such, it is more logical to memorialize such agreements in a written document, as Charter suggests, rather than simply leaving the arrangement to an oral agreement.[26] Thus, the Commission should adopt Charter's proposed language for Issue 7.

IV. NETWORK INTERCONNECTION ISSUES

Issue 10: What standard should be used to excuse Qwest from the obligation to allow Charter to interconnect at certain points on the Qwest network?

32. The parties disagree as to what terms should apply when Qwest seeks to deny Charter's right to interconnect at a particular location due to claims of switch exhaustion. Charter's position is that Qwest should only be permitted to deny Charter's request to interconnect to a particular tandem switch when Qwest has demonstrated to this commission that such interconnection would present an "imminent" risk of exhaust. Qwest asserts that the Agreement should include language that allows Qwest to deny Charter's right to interconnect where Qwest

[25] JDW-1T (Webber Dir.) at 26:12-15.

[26] *Id*. at 26:15-16.

believes, in its sole discretion, that it *can* demonstrate (but has not yet demonstrated) that such switch is at risk of exhaust.

33. Section 251(c)(2) of the Act requires an ILEC to provide, for the facilities and equipment of a CLEC, interconnection with the ILEC's network at any technically feasible point on the incumbent LEC's network.[27] FCC rules require that an ILEC which attempts to deny a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.[28] Indeed, the FCC has explained that "[t]he incumbent LEC is relieved of its obligation to provide interconnection at particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible."[29] Implicit in this statement, and contrary to Qwest's position, is the conclusion that an ILEC cannot simply deny a CLEC's request for interconnection based solely on the ILEC's belief that it can, at some point in the future, make a showing of "technical infeasibility."

34. FCC's rules establish that interconnection is "technically infeasible" when there are "technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods."[30] With this framework in mind, the parties agree that when a tandem switch nears exhaust, there may be "technical or operational concerns" that could render interconnection at that switch technically

[27] 47 U.S.C. §251(c)(2)(B).

[28] 47 C.F.R. 51.305(e); *see US West Communications v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002).

[29] *In the Matter of Application of SBC Communication Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas,* Memorandum Opinion & Order, 15 FCC Rcd 18354, 18390 ¶78 (2000).

[30] 47 C.F.R. 51.5.

infeasible.[31] Notably, tandem exhaust occurs where a switch must be augmented or replaced because there are no longer a sufficient number of available ports.[32]

35. The crux of the parties' dispute on this issue is what standard should be used in making a determination of technical infeasibility in order to excuse Qwest of its obligation to allow Charter to interconnect at a particular point on the Qwest network. Under Charter's proposed language, in those circumstances where Qwest seeks to deny Charter's right to interconnect at a particular tandem switch location (based upon a claim of potential switch exhaust), it must first prove to the commission that the switch exhaust is imminent, and would render interconnection at that location technically infeasible.[33] In other words, a Qwest showing, followed by a state commission decision of "technical infeasibility," is a prerequisite to relieving Qwest of its interconnection obligations at a particular point.[34]

36. Notably, FCC rules also require an ILEC to "provide, on terms and conditions that are just, reasonable, and *nondiscriminatory* in accordance with the requirements of this part, any technically feasible method of obtaining interconnection …. at a particular point upon a request by a telecommunications carrier."[35] Put another way, an ILEC is required to provide interconnection that is at least equal in quality to that which the ILEC provides to itself, or any other interconnecting carrier. Charter's proposed language addresses this nondiscrimination principle by requiring Qwest, before it attempts to deny interconnection at a tandem switch location, to first prove that it does not make similar use of its network to transport the local calls

[31] HE-5 (Issue Matrix) at 16-17 (Interconnection, Section 7.1.1).

[32] TJG-1T (Gates Dir.) at 8: fn. 2.

[33] HE-5 (Issues Matrix) at 15-16.

[34] TJG-1T (Gates Dir.) at 12:6-8.

[35] 47 C.F.R. 51.321(a) (emphasis added).

of it's own, or any affiliates, or any other LEC's end user customers. Thus, Charter's approach is consistent with the FCC's regulations, and the federal statute.

37. Nevertheless, and despite the clear legal authority on this point, Qwest claims that it has the right, in its sole discretion, to reject requests for connections between Qwest tandem switches where such connections would risk switch exhaust.[36] This assertion is without merit for several reasons. First, there is no legal basis in support of Qwest's position. Indeed, Qwest's own witness, Mr. Easton, admitted in response to Charter Data Request No. 5, that his testimony on this issue is "not based on an FCC or Washington rule."[37] Second, Qwest's language blatantly contradicts the plain language of the FCC's regulation. Qwest's language would allow it to improperly forego the process of providing proof of technical infeasibility to the commission *before* it attempted to reject Charter's request for interconnection.

38. In deciding this issue, the Commission must ensure that Qwest is not permitted to engage in the same type of anti-competitive and discriminatory actions that the Commission found that Qwest had engaged in the past. In particular, the Commission has previously found that Qwest's failure to provide reasonable, and timely, information concerning potential switch exhaust problems was a form of discrimination under RCW 80.36.170, which expressly prohibits Qwest from subjecting Charter "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." Similarly, Qwest's proposed language could subject Charter to undue disadvantage if Qwest uses information of potential exhausts to deny, in its sole discretion, Charter the right to interconnect with Qwest's network at a particular location.[38]

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[36] HE-5 (Issues Matrix) at 15.

[37] WRE-9 (Qwest/Easton response to Charter discovery request number 5).

[38] *See e.g., MCImetro v. US West Communications*, Docket No. UT-971063 (Wash. UTC 1997) (finding that US West violated RCW 80.36.170 by granting an unreasonable preference to itself by making planning decisions based upon foreknowledge of the availability of facilities).

39. For these reasons, the Commission should adopt Charter's proposed language for Section 7.1.

Issue 11: Should the agreement limit the methods by which Charter can establish interconnection with Qwest when using leased interconnection facilities?

40. Two separate questions arise under this issue. Both questions relate to Charter's interconnection rights, and whether Qwest may arbitrarily limit such rights. The first dispute is whether Charter is entitled to establish one, and only one, (i.e. a "single") point of interconnection ("POI") in the LATA where it interconnects its network with Qwest. The second dispute addresses the specific methods of interconnection available to Charter, and requires this Commission to decide whether Charter may use an interconnection facility provided by a third-party, or self-provisioned, to interconnect with Qwest.

1. Charter Is Entitled to Establish a Single POI per LATA

41. A point of interconnection, or "POI," is the point at which two communications companies interconnect their networks for the exchange of traffic between the two networks. The POI defines that point at which the parties will connect their networks for the exchange of traffic, and is also used to establish the demarcation of each party's responsibility for the network facilities used to carry traffic on their respective sides of the POI.[39]

42. Consistent with its rights under federal law, Charter currently maintains a single POI with Qwest in LATA 676 (the only LATA in which the parties' currently compete in Washington). Federal law specifically permits competitive LECs, like Charter, to establish a single POI with incumbents like Qwest. Specifically, Section 251(c)(2) of the Act references a technically feasible *point*, in the singular, as the place at which an ILEC must provide

[39] *See* Tr. at 242:9-19 (Easton) (testifying that POI serves as demarcation point for the handoff of traffic from one network to the other).

interconnection.[40] As such, the plain terms of the Act reveals that a requesting carrier can choose to interconnect with the incumbent LEC at a *single* point on the incumbent's network, as long as that point is technically feasible.

43. Indeed, the FCC has repeatedly construed the Act to permit competitors to establish a single POI on the incumbent LEC's network. As recently as March 2005, the FCC reaffirmed that: "[u]nder section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point. The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect *at a single point of interconnection* (POI) per LATA."[41] The FCC has repeatedly affirmed this principle.[42] It is, therefore, settled law that competitive providers, such as Charter, have the right to interconnect with incumbent providers, such as Qwest, at a single POI within a LATA.[43]

44. Consistent with these principles, Charter has proposed language for Section 7.1.2 of the draft agreement which expressly affirms this right. An excerpt of Charter's proposed language is set forth below:

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[40] Section 251(c)(2)(B) establishes: "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange network—(B) at any technically feasible ***point*** within the carrier's network;…" (emphasis added).

[41] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 at ¶ 87 (2005) (emphasis added) (footnotes omitted).

[42] *Petition of WorldCom, Inc., et. al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, 17 FCC Rcd 27039 at ¶ 52 (2002) (hereinafter "*FCC Worldcom Arbitration Order*") (emphasis added). The Fourth Circuit affirmed that the Bureau's decision is entitled to the same deference that would normally be granted to a decision of the full Commission. *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872, n. 8 (4th Cir. 2003). *See also*, *In the Matter of Developing A Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd 9610 at ¶ 112 (2001); *and In the Matter of Application by SBC Communs. Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In-Region, InterLATA Services in Texas*; CC Docket No. 00-65; 15 FCC Rcd 18354 at ¶ 78 (2000).

[43] TJG-3 (Gates Dir.) at 21:19-22, 22:1-10.

> The Parties will negotiate the specific arrangements used to interconnect their respective networks. CLEC shall **have the right to** establish one (1) **single** physical Point of Interconnection **("POI")** in Qwest territory in each LATA CLEC has local End User Customers. **At CLEC's option, CLEC may establish additional Points of Interconnection in each LATA in which CLEC has local End User Customers**. **The Parties agree that this Section 7.1.2 shall not be construed as imposing any obligation upon Qwest to establish a physical Point of Interconnection with CLEC at a point that is outside of Qwest's geographic service area or territory**. … []44

45. In contrast, Qwest's competing language on this point states that Charter will "establish at least one" POI:

> The Parties will negotiate the specific arrangements used to interconnect their respective networks. CLEC shall establish at least one (1) physical Point of Interconnection in Qwest territory in each LATA CLEC has local End User Customers.45

46. The merits of Charter's language are evident. Most significantly, the language affirmatively memorializes Charter's right to decide whether to establish a single POI per LATA. Alternatively, if Charter decides it is appropriate to deploy more than one POI per LATA, in which Charter serves local end user customers, the language expressly permits such action. The flexibility to make such determination ensures that Charter can deploy its network facilities in the most efficient manner possible.[46] In addition, the language clearly establishes that Charter retains the discretion to determine whether additional POIs may be established. Finally, Charter's proposal makes clear that Qwest has no obligation to establish a POI with Charter outside of Qwest's geographic territory or service area.[47]

47. Nevertheless, and despite the fact that the parties currently exchange traffic at a single POI in LATA 676, Qwest refuses to unambiguously acknowledge that federal law entitles

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[44] HE-5 (Issues Matrix) at 19 (setting forth Charter's proposed language for Section 7.1.2, shown in bold).

[45] *Id*. (Qwest language shown as double underline).

[46] TJG-3 (Gates Dir.) at 20:1-9 (explaining benefits of single POI flexibility afforded to Charter under federal law).

[47] HE-5 (Issues Matrix) at 19 (Charter proposed § 7.1.2).

Charter to establish a single POI at which it will exchange traffic with Qwest. Qwest's unwillingness to accept this well-settled principle is not surprising, given that Qwest has sufficient incentives to raise Charter's interconnection costs.[48] Further, implementation of the single POI rule also has a direct impact on the transport costs that each party will bear when a single POI arrangement is established. As the FCC explained, in its first decision implementing Section 251:

> Section 251(c)(2) [of the Act] gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, *rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points.*[49]

48. This statute has been interpreted to permit a CLEC to have access at any point on the Qwest's network where connection is technically feasible.[50] Thus, it appears that Qwest may also be concerned that it will be required to assume responsibility for its own transport costs which arise from the use of a single POI. The proper allocation of those costs is discussed more fully below, in Issues 13 and 15.

49. The only specific objection that Qwest has raised is that Charter's proposal does not contain the limitation that "the interconnection point be technically feasible."[51] But this point, that Charter's right to interconnection is limited by one exception, technical infeasibility, is not contested. Charter's own witness, Mr. Gates, explained that if an ILEC proves to the state commission that a request for a single POI per LATA is technically infeasible (as that term is

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[48] *Id*. at 26:1-19, 27:1-5.

[49] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 at ¶ 209 (1996).

[50] *See e.g., U.S. West Communications v. AT&T Communications of the Pac. Northwest, Inc.*, 31 F. Supp. 2d 839, 852 (D. Or. 1998); *In re Petition of Worldcom, Inc.*, 17 FCC Rcd 27039, 27074 ¶67 (2002) (noting that the right to pick the physical point of interconnection rests with the CLEC subject to technical feasibility).

[51] WRE-1T (Easton Dir.) at 9: 5-8.

defined by applicable federal rule), then the ILEC may be relieved of its obligation to provide interconnection at that particular point.

50. That is why the parties have agreed to language in Section 7.1.2, which states: "The Parties shall establish, at least one (1) of the following Interconnection arrangements, at any Technically Feasible point…"[52] Given this language, and the repeated references[53] throughout the ICA to "technically feasible" interconnection arrangements, it is clear that Qwest's criticism is unwarranted.

51. Nor can Qwest assert that Charter's language does not require that the point of interconnection be located within Qwest's network.[54] Charter's proposed language in Section 7.1.2 states: "The Parties agree that this Section 7.1.2 shall not be construed as imposing any obligation upon Qwest to establish a physical Point of Interconnection with CLEC at a point that is outside of Qwest's geographic service area or territory." Again, Qwest's concerns are addressed by language that is already set forth in Section 7.1.2, and which is either agreed upon, or Charter-proposed, language.

52. Accordingly, there is no reasonable basis to oppose Charter's language, and the Commission should adopt the express language permitting a single POI, as Charter has proposed.

2. <u>The Agreement Should Permit Charter to Use Any Technically Feasible Method of Interconnection, Including an Interconnection Facility Provisioned by Charter or a Third-Party</u>

53. The second aspect of this dispute is Qwest's attempt to limit the methods of interconnection that Charter may utilize. Charter proposes language that would permit Charter to

[52] Tr. at 220:16-19 (Easton) (confirming that Charter's proposal includes "technically feasible point" limitation).

[53] *See, e.g.*, Section 7.1.1 and the definition of the term "Technically Feasible" in the ICA.

[54] HE-5 (Issues Matrix) at 19-20.

self-provision an interconnection facility (i.e., a non-UNE entrance facility between the parties' switches), or obtain an interconnection facility from a third party, in order to interconnect with Qwest.[55] In contrast, Qwest attempts to limit Charter's interconnect options, by specifically limiting Charter's use to only "Qwest-provided entrance facilities."[56] Similarly, Charter's proposal would allow Charter to utilize the mid-span meet POI facilities of a third party who has an existing mid-span meet POI with Qwest, while Qwest's proposal would not allow this arrangement.

54. Charter's proposals are consistent with FCC rules which explicitly permit Charter to use *any* technically feasible method of interconnection. Specifically, 47 C.F.R. §51.321(a) provides, in relevant part, that an incumbent LEC (like Qwest):

> … shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, ***any technically feasible method of obtaining interconnection*** or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.[57]

55. Qwest has presented no evidence that Charter's use of an interconnection facility provided by a third party is technically infeasible. Indeed, to the contrary, Qwest offered specific evidence that in Washington Charter currently [** BEGIN CONFIDENTIAL **] [redacted] [** END CONFIDENTIAL **] Nor has Qwest provided any evidence that it would be technically infeasible for Charter to provide its own interconnection facility to interconnect with Qwest.

[55] *Id*. (Issue Matrix) at 20.

[56] *Id*. at 19.

[57] 47 C.F.R. § 51.321(a) (emphasis added).

[58] *See* PL-8C (**CONFIDENTIAL**).

56. Therefore, the use of either a self-provided, or third-party provided, interconnection facility represents a technically-feasible method of interconnection with Qwest's network. As such, that method is permissible under FCC rules and should be available to Charter under this Agreement.

57. Finally, Qwest proposes certain language in its proposal concerning an obligation for Charter to represent and warrant as to its provision of service to end user customers physically located in the areas associated with the NPA-NXX codes assigned to these end users.[59] Qwest has not provided any evidentiary support for this language,[60] and has therefore failed to meet its burden of proof as to the necessity for this language. Accordingly, the language should be omitted from the final Agreement approved by this Commission.

58. Accordingly, for the foregoing reasons, the Commission should adopt Charter's proposed language that permits the use of interconnection facilities provided either by Qwest, a third-parry, or self-provisioned by Charter. In addition, the Commission should also adopt Charter's proposed definition of an interconnection facility, which is consistent with the methods of interconnection discussed above.

Issue 13: Is Charter required to compensate Qwest for so-called "direct trunk transport" circuits which carry traffic from the parties' POI to Qwest's tandem switch or end office switches, even where Charter has already compensated Qwest under the reciprocal compensation provisions of the agreement (via bill and keep arrangements)?

Issue 15: Should the parties' agreed upon bill and keep compensation arrangement apply to both the transport, and termination, of Section 251(b)(5) traffic exchanged between the parties?

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[59] HE-5 (Issues Matrix) at 19. The specific language that Qwest proposes is shown in double underline as: "CLEC represents and warrants that it is serving End User Customers physically located within the areas associated with the NPA-NXX codes assigned to those End User Customers."

[60] Tr. 234:19-24 (Easton) (confirming that neither Mr. Easton, nor any other Qwest witness, addressed this language in pre-filed testimony).

59. Issues 13 and 15 raise inter-related questions of law, and policy, and are therefore addressed in conjunction herein. The dispute arising under these issues requires the Commission to determine whether the Agreement should include language that provides for a "bill and keep" compensation arrangement between the parties which permits each party to recover their respective costs of transmitting traffic on their networks. Charter's position is that a bill and keep reciprocal compensation arrangement should apply to the entire transmission circuit, which would include both the "transport" and "termination" of traffic, between the Parties. In other words, both parties would transport and terminate the traffic originated by the other party, and they would each do so without charge to the other party. Qwest is opposed to this in-kind compensation arrangement and believes that bill and keep should *only* apply to one portion of the transmission circuit, rather than the entire circuit.

A. Single Point of Interconnection (POI) per LATA Serves as Demarcation Point for Parties' Respective Transport Obligations

60. The resolution of this issue, and the related compensation questions raised by Issues 13, 14 and 15, is inextricably tied to the question of Charter's use of a single point of interconnection ("POI"), per LATA[61] in Washington. As explained above, the FCC has repeatedly construed the Act to permit competitors to establish a single POI on the incumbent LEC's network. In addition, the POI defines that point at which the parties will connect their networks for the exchange of traffic, and is also used to establish the demarcation of each party's responsibility for the network facilities used to carry traffic on their respective sides of the POI.[62]

61. Further, the FCC has explained that the location of the POI dictates each party's

[61] LATA is an acronym for "local access and transport area," a geographic area defined under federal law for purposes of establishing certain obligations of incumbent LECs, like Qwest. In the state of Washington there are two LATAs: 675 and 676.

[62] *See* Tr. at 242:9-19 (Easton) (testifying that POI serves as demarcation point for the handoff of traffic from one network to the other).

respective obligations concerning the transport of traffic to, and from, the POI:

> Section 251(c)(2) [of the Act] gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, *rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points*.[63]

62. In this statement the FCC not only articulates the single POI rule, but also relates the rule to each party's obligation to transport, or carry, traffic to and from the single POI. That obligation is central to the resolution of issues 13, 14, and 15 in this proceeding because the establishment of a single POI necessarily means that each carrier must deliver all of their traffic to, and from, the single POI.[64]

63. The FCC's statement in paragraph 209 of the Local Competition Order (quoted above) reflects the fact that the establishment of a single POI will, by necessity, require the carriage of traffic to and from that location, at some cost. Moreover, the FCC specifically explained that competitors have the right to choose a POI location that minimizes, or reduces, *the competitor's* obligation to carry traffic to less convenient or efficient POIs.[65] In so doing the FCC recognized that it is the incumbent who bears the obligation to "carry," or transmit, traffic to the single POI with the competitor. Implicit in this statement is the conclusion that the incumbent may not avoid that obligation by shifting its costs of carriage to and from the POI back on to the competitor.

64. Qwest's witness Mr. Easton explained that the POI is used to distinguish each party's responsibility for the network facilities used to carry traffic on their respective sides of the POI.[66]

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[63] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 at ¶ 209 (1996) ("*Local Competition Order*").

[64] Tr. 185:22-25, 186:1-4 (Gates).

[65] *Local Competition Order* at ¶ 209.

[66] *See* Tr. at 242:9-19 (Easton) (testifying that POI serves as demarcation point for the handoff of traffic

Applying that principle to the question of the parties' respective traffic carriage obligations, it is also appropriate to use the POI as the demarcation for each party's obligation to carry traffic to and from the POI. Doing so is consistent with the parties' respective obligations under Section 251(b)(5) of the Act.

B. Reciprocal Compensation via Bill and Keep Arrangements Ensures the Mutual Recovery of Costs and Prohibits Qwest from Shifting Transport Costs on to Charter

65. Section 251(b)(5) is the statute which imposes upon the parties the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[67] In implementing this statute the FCC established a series of regulations which require the party that initiates, or "originates," a call which is destined for another carrier's network to pay for the costs of delivering, or "terminating," that call to the called party. In other words, employing the principle of "calling party's network pays" the FCC's rules require the "originating" carrier to compensate the "terminating" carrier for the costs of delivering the call. Because traffic will be exchanged between the parties, and each party will be originating traffic which is sent to the other party, this obligation is reciprocal. Thus, both parties are required to compensate the other party for the costs of terminating traffic.

66. In resolving this dispute, the Commission must recognize three important principles of law which define the reciprocal "compensation" obligation under Section 251(b)(5). First, federal law requires that both parties must be able to recover all of their costs of delivering the other party's traffic. Second, in-kind compensation, via "bill and keep" arrangements, is a more equitable and efficient approach. Third, an incumbent LEC's transport costs can not be shifted to the competitive LEC. These principles are discussed in full below.

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from one network to the other).

[67] 47 U.S.C. § 251(b)(5).

1. Mutual Recovery of Each Party's Costs of Delivering Other Party's Traffic Is Mandated by Section 252(d)(2)(A)(i)

67. First, the compensation arrangement that is finally ordered in this proceeding must ensure that both parties are able to recover their costs of delivering the other party's traffic (i.e. calls) to the called party. Section 252(d)(2)(A)(i) of the Act establishes that, at a minimum, a reciprocal compensation arrangement must provide for the mutual recovery by each carrier of costs associated with the transport and termination on each carrier's network of calls that originate on the network of the other carrier.[68]

68. Consistent with this mandate, the Commission must recognize that both parties have equivalent obligations to carry traffic originated by the other party. For example, the record reflects that Charter provides service in several Qwest service areas, including Pasco, Waitsburg, Walla Walla, and Kennewick. In these areas, Charter is competing directly with Qwest to obtain telephone subscribers. As a result, both parties serve customers in these same service areas.[69] That fact, and the fact that the parties currently exchange traffic via a single POI in Yakima,[70] means that the parties' each have the same obligations to carry traffic to and from the POI in Yakima, back to their respective subscribers, who reside are in the same communities (Pasco, Waitsburg, Walla Walla, and Kennewick).

69. The call flow of a single telephone call illustrates this fact. The record reflects that both parties have subscribers in Pasco, and that the parties' existing single POI is in Yakima.[71] Thus, when a Qwest subscriber in Pasco phones a Charter subscriber in Pasco, the following steps

[68] 47 U.S.C. § 252(d)(2)(A)(i).

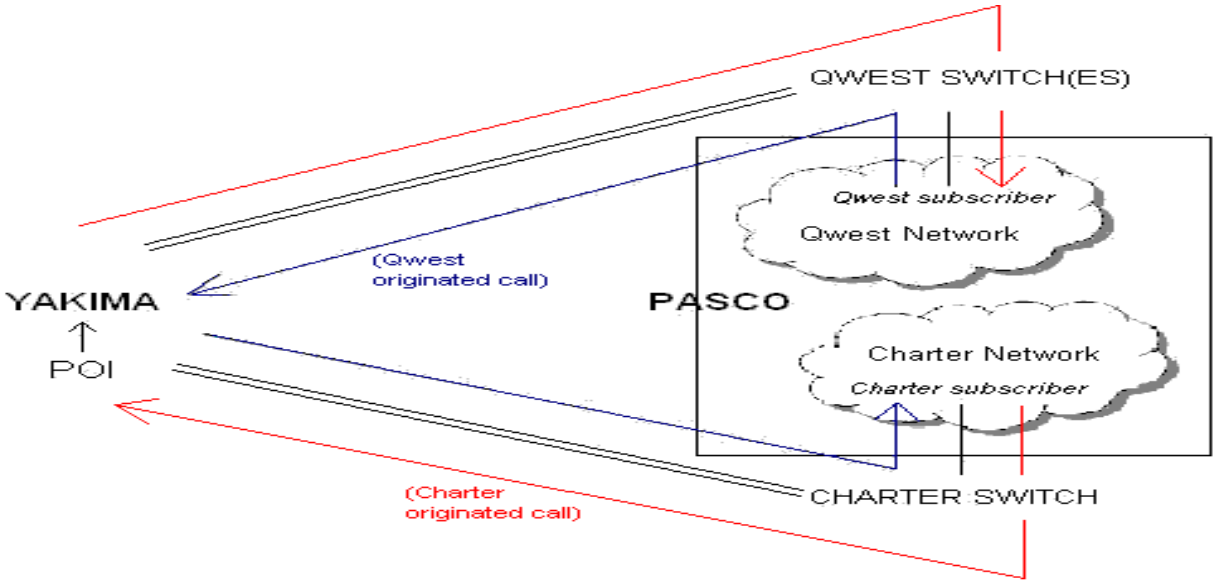
[69] Tr. 242: 20-25, 243:1-6 (Easton) (identifying communities where Qwest and Charter providing service in competition with one another)

[70] *Id*. at 165:10-11.

[71] Tr. 243: 7-20, 244:10-21 (Easton) (affirming each party's obligation to carry calls to and from Pasco to the POI in Yakima).

occur: (1) Qwest picks up the call on its network in Pasco. (2) Qwest sends the call over its own network to the POI in Yakima. (3) Qwest hands off the call to Charter at the Yakima POI. (4) Charter then carries the call back to Pasco over Charter's own network. (5) Charter then delivers the call to the called party (a Charter subscriber) in Pasco, over its own local network in Pasco. Of course, the same steps occur (in reverse order) when a Charter subscriber in Pasco calls a Qwest subscriber in Pasco. A simple call flow diagram, set forth below, reflects the call flow of a single telephone call described in this paragraph.

Call Flow Diagram



70. Therefore, the parties have the same overall call delivery, or transmission, obligations when calls are sent to, and from, their respective networks. This means that each party incurs roughly the same costs in transmitting calls from the POI in Yakima back to their respective subscribers in Pasco. The mutual recovery of cost standard of Section 252(d)(2)(A)(i) mandates that each party be permitted to recover their entire costs of delivering such calls.

71. However, under Qwest's proposal, Charter would not be permitted to recover its costs of delivering the call all the way back to Pasco. Instead, Qwest's proposal would limit Charter's

recovery of costs to only that portion of the call from the POI to the Charter switch located in Kennewick. Because Qwest attempts to exclude "transport" from the scope of bill and keep arrangements, Charter would only be able to recover a portion of the total call delivery costs that it incurs when taking calls from the POI in Yakima back to Pasco. This is the case because Qwest's proposal would exclude that portion of the call delivery process that occurs after Charter has switched traffic. As a result, Qwest's proposal would not permit Charter to recover its costs of transmitting calls from the POI back to the Pasco service area.

2. *Bill and Keep Is the Most Efficient and Equitable Means of Ensuring Mutual Cost Recovery*

72. The second principle the Commission must recognize is that the "compensation" obligation under Section 251(b)(5) does not always require the payment of fees between the parties. Instead, both the Act and FCC rules recognize the utility of compensation arrangements that provide for reciprocal "compensation" via *in-kind* payments. In those arrangements, both parties can deliver the other party's originating traffic as a means of providing in-kind compensation, in lieu of direct payments. This arrangement, which recognizes the basic *quid pro quo* of the traffic exchange arrangements required by Section 251, is known as a "bill and keep" arrangement.[72]

73. Under a bill and keep arrangement, the two interconnected carriers do not charge one another for their respective costs of delivering traffic from the POI to the called party. This arrangement is appropriate where the traffic exchanged between the parties is roughly balanced. Indeed, FCC rules specifically authorize state commissions to impose a bill and keep arrangement if "traffic from one network to the other is roughly balanced with the amount of

[72] *See* 47 U.S.C. § 252(d)(2)(B)(1); *and* 47 C.F.R. 51.705(a)(3).

telecommunications traffic flowing in the opposite direction, and is expected to remain so, …"[73]

74. The parties agree that traffic is balanced. Indeed, the record establishes that traffic from one network to the other is roughly balanced with the amount of traffic flowing in the opposite direction, and is expected to remain balanced in the future.[74] Accordingly, the pre-condition required under FCC rules (balanced traffic) is satisfied, and this Commission may therefore order the parties to adopt a bill and keep arrangement.

75. The Ninth Circuit has expressly affirmed the imposition of bill and keep arrangements, in lieu of direct payments between Qwest and competitive providers. In fact, the court has specifically affirmed this Commission's imposition of such an arrangement on Qwest. In *MCI Telecomms. Corp. v. U.S. West Commus.*,[75] the Ninth Circuit affirmed the Washington UTC's decision to order Qwest's predecessor, U.S. West, to enter into a bill and keep arrangement with competitor MCImetro Communications.[76] In so doing the Ninth Circuit explained that bill and keep represents an equitable arrangement (a sort of "rough justice approach"), and that the adoption of such an arrangement was appropriate given the Washington UTC's "general policy favoring bill and keep arrangements."[77] The same considerations apply in this instance, and demand the same result as that ordered by this Commission, and affirmed by the Ninth Circuit.

76. Accordingly, for the foregoing reasons, the Commission should adopt Charter's proposed language to resolve these Issues 13 and 15.

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[73] 47 C.F.R. § 51.713(b). This rule is conditioned on the fact that "no showing has been made pursuant to § 51.711(b)." Rule 51.711(b) addresses the potential for asymmetrical rates, and is not at issue here (nor has any "showing" been made).

[74] *See* Section 7.3.4.1.2 of draft agreement; *and* Exh. TJG-3 (Gates Reb.) at 17.

[75] 204 F.3d 1262 (9th Cir. 2000) (affirming district court's decision to affirm the Washington UTC arbitration ruling between Qwest and MCImetro on several issues).

[76] *Id*. at 1270-71.

[77] *Id*.

Issue 14: Should Qwest be entitled to impose non-recurring trunk installation and rearrangement charges upon Charter even where the parties have agreed to a bill and keep compensation scheme?

77. Resolution of this issue is, or should be, tied to the resolution of Issues 13 and 15 above. Should the Commission determine that Charter and Qwest are each responsible for their respective network facility costs on their respective sides of the POI, as Charter proposes, then each party must, necessarily, assume its own trunk installation charges on its side of the POI.

78. As the facts in this proceeding reveal, Qwest and Charter are both facilities-based providers that have deployed extensive network facilities and switches within their service territories to serve their respective customers.[78] When interconnecting those networks for the exchange of traffic, the parties will need to establish trunks on their respective facilities to facilitate the exchange of traffic. A trunk is simply a communication path between two switches.[79]

79. Although Charter and Qwest have already established numerous trunks between their respective switches it is possible that additional trunks could be established once the terms of this agreement are finalized (and implemented). Notably, these trunks begin at one party's switch and terminate at the other party's switch (as is the nature of a trunk). Since a trunk must be established between the parties' switches, each party will necessarily incur some costs in establishing these trunks.

80. Qwest proposes to impose non-recurring charges upon Charter as a means of recovering Qwest's purported costs of establishing such trunks. Charter, on the other hand, does not propose to assess a non-recurring charge upon Qwest to collect it's (Charter's) costs of establishing such trunks. Instead, in recognition of the fact that each party will necessarily have

[78] TJG-1T (Gates Dir.) at 5:11-17.

[79] NEWTON'S TELECOM DICTIONARY, at 932 (22nd Ed., 2006).

their own trunk installation costs, Charter proposes that each party absorb such costs in lieu of paying the other party for performing a function that each party must perform.[80]

81. Charter's proposal provides an equitable way to address the question of each party's recovery of trunk installation costs. As Charter witness Mr. Gates explained, both parties should be responsible for their own costs on their respective side of the POI(s) when establishing interconnection arrangements (including trunks) between the parties.[81] Trunk installation and rearrangements are part of the process of establishing interconnection arrangements between the parties.[82] Accordingly, and consistent with the FCC decisions affirming that carriers are responsible for costs on their side of the POI, Qwest (and Charter) should be responsible for all costs on its side of the POI, including non-recurring costs associated with trunk installation activities.

82. Further, Charter's proposal is also reasonable because it would allow one party to assess the installation non-recurring charge (or "NRC") on the other party if the other party caused unnecessary or inefficient trunks to be installed.[83] Also, it would allow one party to assess the rearrangement NRC on the other party if it is requested by the first party for that first party's convenience.[84] In other words, extraordinary work performed by one party for the other will be compensated. Finally, Charter's proposal will also ensure that each party has the incentives to continue to forecast and operate the points of interconnection between the parties efficiently.

[80] HE-5 (Issues Matrix) at 27-28 (Charter proposed language for issue 14).

[81] TJG-1T (Gates Dir.) at 44:6-8.

[82] *Id*. at 44:8-9.

[83] *Id*. at 45:18-20.

[84] *Id*. at 45:20-22.

That, in turn, will ensure that the other will not be required to incur unnecessary or inefficient costs on its side of the POI.[85]

83. Accordingly, for the foregoing reasons, the Commission should adopt Charter's proposed language to resolve Issue 14.

Issue 16: Should either party have the right to utilize indirect interconnection as a means of exchanging traffic with the other party?

84. This dispute concerns whether either party may use indirect interconnection as a means of exchanging traffic with the other party. The Parties disagree on the terms and conditions under which the Parties may exchange extended area service ("EAS") or local traffic between their respective networks via a third party transit provider. Qwest proposes that indirect interconnection should be used in only limited circumstances and *only* after the parties amend the agreement to that effect. Charter proposes to address this issue in the agreement now, so that an amendment will not be necessary in the future. Specifically, Charter proposes terms that would allow the parties to exchange traffic indirectly until the total volume of traffic exchanged between the parties' network exceeds 240,000 minutes per month for three consecutive months.[86]

85. Section 251 of the Act requires telecommunications carriers to interconnect "directly *or indirectly* with the facilities and equipment of other telecommunications carriers."[87] Indeed, the federal circuit courts have refused to interpret the various provisions of the Act to impose a duty

[85] *Id*. at 45:23-24.

[86] Notably, this arrangement would not necessarily preempt current traffic exchange arrangements, but would be available if needed.

[87] 47 U.S.C. § 251(a)(1) (emphasis added); *see also WWC License, LLC v. Pub. Serv. Comm'n*, 459 F.3d 880, 884 (8th Cir. 2006) (finding that the "statutory provision that imposes the duty to interconnect networks expressly permits direct or indirect connections. Nothing in the Act suggests that Congress intended a carrier's duties to be altered based on the carrier's election to connect indirectly rather than directly…").

on competitive LECs to connect directly rather than indirectly.[88] State commissions have repeatedly affirmed the rights of competitors to utilize the right of indirect interconnection.[89] There is no reason that Charter and Qwest cannot be interconnected, directly, under the standards of Section 251(c)(2), for the exchange of traffic in one area and, at the same time, interconnect indirectly pursuant to Section 251(a) for the exchange of relatively small amounts of traffic in another area.

86. This principle was affirmed in *Atlas Telephone v. Oklahoma Corporation Commission,*[90] where the court ruled that the use of direct interconnection in one instance does not preclude the use of indirect interconnection in another instance. The court stated: "the affirmative duty established in § 251(c) runs solely to the ILEC, and is only triggered on request for direct connection. The physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligation under § 251(a) to interconnect 'directly or *indirectly.*'"[91]

87. Charter seeks to maintain its federally-established right to choose indirect interconnection when it is the most appropriate means of exchanging traffic. Contrary to Qwest's assertion, Charter is not attempting to obtain "the *unlimited* ability to route traffic destined for Qwest's

[88] *See e.g., WWC License, LLC,* 459 F.3d at 884; *Atlas Telephone v. Oklahoma Corporation Commission,* 400 F.3d 1256 (10th Cir. 2005).

[89] *See, e.g., In re Qwest Corporation,* 2007 WL 2827788, *12 (Colo. PUC 2007) (requiring Qwest to indirectly interconnect with a commercial mobile radio service provider). See also, *In re Pacific Bell Telephone Co.,* 2006 WL 2516378, *6 (Cal. PUC 2006) (explaining that "[a]n indirect interconnection is a right given to each CLEC that the ILEC cannot by itself deny or vacate. The ILEC has the duty to negotiate the provision of interconnection, including indirect interconnection …"); and *In re Sprint Communications Co.,* 2005 WL 3710338, *24 (Ill. C.C. 2005) (rejecting RLECs opposition to indirect interconnection and noting that "[i]n addition to being more efficient than direct interconnection when traffic volume is low, indirect interconnection also allows for the implementation of greater innovations in the offering of telecommunications services".).

[90] 400 F.3d at 1268.

[91] *Id.*

network through any carrier connected to Qwest's network,"[92] but rather to establish a reasonable threshold of traffic volume before the parties would be required to move away from indirect interconnection arrangements. Mr. Gates explained in his testimony that Charter is not seeking unlimited indirect interconnection rights.[93] Indeed, Charter's proposed language "requires that the amount of traffic routed over an indirect interconnection will be relatively small – i.e., to be used in [those] circumstances when it is most cost effective ...."[94] Charter has a statutory right under Section 251(a) to utilize indirect interconnection as a means of exchanging traffic with Qwest. There are no statutory or regulatory limitations on the use of indirect interconnection.[95] Charter can use indirect interconnection as a means of exchanging local, EAS and other traffic with Qwest's network, where appropriate.

88. In short, Charter has a right under the Act to interconnect with Qwest through direct or indirect means. Because the Act contains no limitations on this right, Charter is entitled to use indirect interconnection as a means of exchanging EAS/local and other traffic. Qwest's position is inconsistent with federal court and commission decisions on this issue and impedes competition by imposing impermissibly restrictive limitations on the use of indirect interconnection arrangements.

89. Further, Qwest's proposal to amend the agreement in the event that EAS/local traffic is exchanged in the future is inefficient and unnecessary. Qwest has failed to establish a credible basis in the record for prolonging the process of resolving this issue until some future date;

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[92] PL-1T (Linse Dir.) at 13: 32-34 (emphasis added).

[93] TJG-1T (Gates Dir.) at 56: 9-10.

[94] TJG-3T (Gates Reb.) at 38: 13-15.

[95] *See e.g., In the Matter of Sprint Comm'n Co. L.P., Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc.*, Arbitrator's Decision at 13-14, ARB 830 (Ore. PUC 2008) (rejecting an ILEC's attempts to impose language that would limit a CLEC's right to indirectly interconnect).

especially when the parties are currently negotiating and arbitrating the terms of the Agreement. Thus, it is entirely appropriate to address the disputes over this language now, before the Commission. As Mr. Gates explained, Charter is not adverse to the notion of amending the agreement to reflect future changes in law, or either party's network or facilities arrangements,[96] but in this instance the parties can avoid the time and expense associated with engaging in an amendment process by simply having the Commission decide this issue as part of the arbitration.

90. Given that this issue was properly teed up for arbitration by Charter and for the foregoing, the Commission should adopt Charter's proposed language for this issue.

V. MISCELLANEOUS CHARGES

Issue 17: Should Charter be liable for miscellaneous charges assessed by Qwest, even where Charter does not request that Qwest perform any work?

91. The parties disagree as to whether Charter should be held liable for miscellaneous charges that Qwest attempts to impose upon Charter even in those instances where Charter has not specifically requested that the work be performed. Charter's position is that it should not be held liable for miscellaneous charges in those circumstances. Qwest claims that it should be permitted to unilaterally assess miscellaneous charges on Charter regardless of whether or not Charter requested that the work be performed.

92. Charter does not disagree that where one party performs work at the request of the other party, the party performing such work should be compensated in accordance with federal and state laws.[97] Rather, Charter's position is that neither party should be liable for charges to the other party where one party has not requested that the other party perform the work.[98] As such,

[96] TJG-1T (Gates Dir.) at 54: 19-20; 55: 1.

[97] JDW-1T (Webber Dir.) at 34:24-26.

[98] *Id*. at 34:29-30.

Charter's proposed language provides that miscellaneous services will only be performed at Charter's request, and that Charter must agree to the charges for such services in advance.[99] This approach is based on the notion of fundamental fairness that each party should be informed about the expectations of the other party related to the work being performed and the charges that will apply for that work *before* the work is performed.[100]

93. Under Charter's approach, the parties would avoid potential disputes that could arise if one party unilaterally decides to perform miscellaneous services for the other, and the other party unexpectedly receives a bill for that work *after* the work has been performed.[101] Charter's proposed language also ensures that the parties have greater certainty under the agreement since both Charter and Qwest will know what work will be performed and what charges will apply for that work before the work is performed.

94. Further, the notion that miscellaneous services should only be performed at the CLEC's request is entirely consistent with undisputed language in the Agreement that the parties have already agreed to.[102] For example, Section 9.1.12 provides that "Miscellaneous services are provided at CLEC's request…"; the miscellaneous service identified as "additional cooperative acceptance testing" is described as "performing specific tests requested by CLEC"; and the miscellaneous service identified as "design change" is described as "information provided by CLEC or a request from CLEC that results in an engineering review and/or a design change." Thus, Charter's proposed language is preferable because the already agreed upon language in the

[99] *Id.*

[100] *Id.* at 35:1-3.

[101] JDW-1T (Webber Dir.) at 35:3-6.

[102] *Id.* at 35:17-19.

Agreement regarding miscellaneous services specifically uses the CLEC request as the triggering event for Qwest to perform the work.

95. Nevertheless, Qwest urges the Commission to adopt its proposed language which would establish a process that provides Qwest with the unilateral right to determine when it would assess charges upon Charter. Qwest's proposal has several deficiencies. First, there is no reasonable basis for the parties to incorporate language in the Agreement, as Qwest suggests, that would provide a unilateral right to assess charges upon the other party. In the event that Qwest performs work on Charter's behalf, and at Charter's request, Qwest would be compensated for such work. But Qwest should not have the right to unilaterally assess charges upon Charter when Charter does not request that work be performed.

96. Second, providing Qwest the unilateral right to assess charges upon Charter that are not otherwise covered by the Agreement would effectively modify the terms of the agreement. Such a result would be inconsistent with Washington law. Specifically, the Washington courts have made clear that "[m]utual assent is required and one party may not unilaterally modify a contract."[103] The Commission should not permit Qwest to bypass fundamental contract formation principles by forcing Charter to pay for work that it did not request or otherwise agree to have performed.

97. Third, and finally, Qwest's proposed language would likely lead to future disputes between the parties as it relies upon ambiguous terms. Specifically, Qwest proposes the following language: "Miscellaneous services are provided at CLEC's request or are provided based on CLEC's actions that result in miscellaneous services being provided by Qwest." Qwest's proposal fails to define or otherwise explain in the Agreement what is meant by

[103] *Jones v. Best*, 950 P.2d 1, 5 (Wash. 1998) (*citing In re Relationship of Eggers*, 638 P.2d 1267 (Wash. App. 1982)).

"CLEC's actions." This approach provides no certainty as to what "actions" Qwest may use as a basis for assessing charges and could, therefore, lead to future disputes.

98. Qwest's proposed language would also establish what it refers to as "market-based" prices that are "subject to change" for the miscellaneous services. This is contrary to Charter's proposal which bases the prices for the miscellaneous services on the rates found in Qwest's tariffs.[104] Qwest's approach of using so-called "market-based" prices is misleading. As Mr. Starkey explained in his testimony, there is only ***one*** seller of miscellaneous services, and that's Qwest.[105] In other words, under this approach, Qwest would have complete and unfettered control over the process of setting the prices it charges for miscellaneous services because there is no "market" to constrain Qwest's proposed "market-based" prices.

99. For instance, because the miscellaneous services apply to UNEs, which are inherently non-competitive, bottleneck facilities that Qwest must provide due to its status as an ILEC, there is no "market" available to establish "market-based" prices for these services.[106] Indeed, under Qwest's proposed language, Qwest would have unilateral power to charge whatever price it wants for miscellaneous services for UNEs and it would also have the authority to change the prices without any input from either Charter or the Commission.[107] Thus, Qwest's proposal on this point compounds the problem as not only would Charter not know *when* it will be charged for miscellaneous services for UNEs by Qwest, but Charter will also not know *what* it will be charged by Qwest.[108]

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[104] JDW-1T (Webber Dir.) at 30:6-8.

[105] *Id*. at 37:13-14.

[106] *Id*. at 38:2-6.

[107] *Id*. at 38:18-19; 39:2-3.

[108] *Id*. at 39:10-13.

100. Furthermore, the Commission has already rejected Qwest's attempts to assess so called "market-based" rates for the miscellaneous service identified as design changes.[109] Starkey Direct at 40, lines 1-3. The Commission specifically determined that Qwest must provide design changes as part of its obligations under Section 251(d)(2)(B) and price the services at TELRIC. The Commission reasoned that "Qwest is the only entity that can provide these functions. If [the CLEC] does not have access to these functions, it cannot provide service to its customers without unanticipated delay."[110]

101. The Commission should therefore adopt Charter's proposed language as it would set these prices based on Qwest's tariffed rates for these services which would avoid granting Qwest unilateral control over the prices it charges for miscellaneous services related to UNEs.[111]

VI. DIRECTORY ISSUES

Issue 19: Should Qwest be permitted to undertake marketing of its own activities based upon the identity of Charter's subscriber listings?

102. This dispute centers around the use of Charter's subscriber listing information by Qwest. Qwest proposes language that would permit it to use Charter's subscriber listing information (i.e. a compilation of the names, addresses and telephone numbers of Charter's subscribers) for use in Qwest's Directory Assistance Service and Directory Assistance List service, as those services are described in Sections 10.5 and 10.6 of the Agreement.[112] However, Qwest's proposal does not end there. Instead, Qwest does not propose to limit the use of such information to *only* directory

[109] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Qwest Corp. and Eschelon Telecom, inc. Pursuant to 47 USC Section 252(b)*, Docket No. UT-063061, Arbitrator's Report at 14-15, Order No. 16 (Wash. UTC 2006).

[110] *Id.*

[111] JDW-1T (Starkey Dir.) at 37: 14-17.

[112] *See* HE-5 (Issues Matrix) at 38 (Qwest proposed language for Section 10.4.2.4, shown as double underline).

assistance functions, but also proposes language that would permit Qwest to use such information "for other lawful purposes,…"[113] Unfortunately, Qwest has never explained precisely what "other lawful purposes" it would propose to use Charter listing information for, or precisely what such purposes may be.

103. In response to Qwest's broad and ambiguous "other purposes" proposal, Charter proposed clarifying language which permits Qwest to provide Charter subscriber listing information to providers of directory assistance services. However, Charter's proposed language specifically limits Qwest's rights to use Charter's subscribers listings to engage in marketing of Qwest's own services.[114] Thus, the question here is whether there should be some reasonable restrictions in the Agreement which ensure that Qwest does not improperly use Charter subscriber listing information for marketing its own services.

104. Qwest has unequivocally stated that it does not use directory listing information for marketing purposes.[115] Charter has proposed to include that commitment in the interconnection agreement, while at the same time preserving Qwest's ability to use Charter subscriber listings for directory assistance purposes (including the provision of such information to third-party directory assistance providers). Qwest, however, opposes that proposal, taking the position that while Qwest may not use currently use directory listing information for marketing purposes, it wants to reserve any right it has to do so in the future.[116] Qwest, however, has no such right, and its position is unreasonable.

105. Neither the Act nor the FCC has authorized ILECs to use the directory listings they

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[113] *Id.*

[114] *Id.*

[115] *E.g.*, Ex. RHW-2RT (Weinstein Reb.) at 16:23.

[116] *E.g.*, Tr. at 323:3-8 (Weinstein).

receive from a competing provider to market their services to the competitor's customers. To the contrary, Section 222 of the Act expressly provides, "A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts."[117] There is an exception to this general prohibition that permits a carrier to disclose "subscriber list information gathered in its capacity as a provider of [telephone exchange] service" but only "upon request for the purpose of publishing directories in any format."[118] Qwest thus has no legal right to use Charter's directory listings, on a segregated basis (i.e. separated from other listings in the database), for marketing purposes.

106. Qwest disagrees, pointing to language from FCC orders that Qwest contends stand for the proposition that Charter and other carriers cannot dictate how their listing information can be used.[119] In none of those orders, however, did the FCC explicitly authorize the use of a CLEC's directory listing information for marketing purposes by the ILEC that collected that information. Nor could the FCC have made such a ruling in light of the clear statutory prohibition on such use. Indeed, the FCC has demonstrated that it takes the restrictions in Section 222(b) very seriously and has refused to allow an ILEC to use information it receives from a competitor in the ILEC's role as a service provider for marketing purposes.[120]

107. Qwest claims that it has proposed language that addresses Charter's concerns, specifically that "Qwest will not market to CLEC's End User Customers' Listings based on

[117] 47 U.S.C. § 222(b).

[118] *Id.* § 222(e).

[119] Ex. RHW-1T (Weinstein Dir.) at 17-18.

[120] *E.g.*, Ex. JDW-1T (Webber Dir.) at 44:6-16.

segregation of CLEC's listings."[121] Notwithstanding Qwest's contrary position that it has a right to use Charter's listings for marketing purposes, Qwest's proposal is deficient in at least two respects. First, the language precludes Qwest from marketing to customer *listings*, not to the customers themselves – an essentially meaningless prohibition given that Qwest would be marketing to people not paper.[122] Second, Qwest proposes not to be able to market "based on segregation of CLEC's Listings," an ambiguous limitation at best. Even when given its apparent ordinary meaning of separation of Charter's listings from Qwest's and other carriers' listings, Qwest's proposed language would not prevent Qwest from "segregating" Qwest's listings and using the remaining listings provided by its competitors for marketing purposes. Qwest is not entitled to use Charter's information that Qwest receives as a service provider to market its services to Charter's customers.

108. The language Charter has proposed for Section 10.4.2.4 complies with federal law and Qwest's actual practices, while Qwest's proposed language is inconsistent with both. The Commission, therefore, should adopt Charter's proposal.

Issue 20: Whether prior written authorization to release, sell, or make available, Charter listing information should be obtained by Qwest?

109. Charter and Qwest agree that Qwest will not provide Charter's listing information to third parties other than directory assistance ("DA") providers without Charter's permission. The dispute between the parties, therefore, is how best to capture that concept in the parties' interconnection agreement. Charter and Qwest have each proposed contract language, but Charter's language more accurately reflects Qwest's obligations.

[121] *E.g.*, *id*. at 15:20-21.

[122] *See* Tr. at 323:13 through 324:4 (Weinstein) (agreeing that Qwest would market to customers, not to listings).

110. Charter proposes that the agreement state, "Qwest will not release CLEC's End User Customer Listings without CLEC's prior written consent and only to the extent required by Applicable Law."[123] This sentence unambiguously establishes the general rule that Charter's written consent is required prior to disclosure of its listings. Largely agreed language in the remainder of Section 10.4.2.5 provides the exception to this rule for DA providers and clarifies that Qwest will not provide listing information segregated by carrier. Consistent with the concerns discussed under Issue 19 above, Charter also proposes that listings "shall not be provided by Qwest for marketing purposes to third parties."[124] Charter thus proposes language that clearly and precisely delineates Qwest's responsibilities.

111. Qwest disagrees and proposes its own language: "Prior written authorization from CLEC, which authorization may be withheld, shall be required for Qwest to sell, make available, or release CLEC's End User Customer Listings to directory publishers, or other third parties other than Directory Assistance providers."[125] Qwest's language is more convoluted than Charter's proposal and does not include the concepts that Qwest's release of Charter's listing information is constrained by applicable law and that Qwest may not provide that information for marketing purposes to third parties. Thus, Qwest's language is deficient, as well as inferior to Charter's proposal.

112. Qwest nevertheless contends that Charter, rather than Qwest, is and should be responsible for determining which third parties can obtain Charter's listings and that Charter's proposed language would improperly shift that obligation to Qwest. Qwest, however, has an independent obligation under Section 222(b) of the Act to protect the listing information that Charter provides

[123] *E.g.*, Ex. JDW-1T (Webber Dir.) at 47:1-4.

[124] *E.g.*, *id*. at 47:10-11.

[125] *E.g.*, *id*. at 47:18-21.

to Qwest.[126] From a practical perspective, third parties will be working with Qwest, not Charter, to obtain listing information, and thus Qwest is in a much better position to know the purposes for which that information is sought. Yet, Qwest's witness did not know whether Qwest provides notice to Charter – or if there is any communication at all between Qwest and Charter – when Qwest receives a third party request for listings.[127] Charter has no desire to arbitrarily deny its listing information to third parties who seek to use it for legitimate directory publishing purposes, but Charter has a strong interest in ensuring that its customers are not the targets of Qwest's marketing efforts solely because they obtain local telephone service from Charter. Accordingly, because Qwest has a legal obligation under Section 222(b), maintains and controls the listings database, and has the most comprehensive contact with third parties requesting access to that database, Qwest should be required to ensure that Charter's listing information is not used for marketing purposes.

113. The Commission, therefore, should adopt Charter's proposed language for Section 10.4.2.5 of the parties' interconnection agreement as the most precise and accurate means of delineating Qwest's obligation to ensure that Charter consents to release of its listing information to third parties and that Charter's customers are not subjected to misuse of their listing information for marketing purposes.

Issue 22: Should the agreement include language establishing that Qwest is prohibited from assessing charges upon Charter when Charter submits non-publish or non-list information to Qwest?

114. Charter opposes Qwest's proposal to charge Charter for non-listed and non-published listings when Charter customers chooses not to include their listing information in directories.

[126] Although Section 222(e) imposes certain obligations with respect to the provision of subscriber list information, that subsection is limited in purpose and scope, and can not be read as negating the general duties set forth under Section 222(b).

[127] Tr. at 327:13 through 328:5 (Weinstein).

Qwest produced no evidence of any costs it incurs to maintain such listings. Further, even assuming that Qwest may have some minimal costs, it has not produced any evidence to show that it is not already recovering such costs through the revenues Qwest receives when providing Charter's listings to directory publishers, DA providers, and other third parties. In the absence of cost evidence, Qwest should not be authorized to impose a charge.

115. Qwest contends that "the Commission has approved Privacy Listings as a rate element and approved a rate for such listings," and that rate is listed "in Exhibit A to the ICA [as] 'General Exchange Tariff Rate, Less Wholesale Discount.'"[128] The Commission, however, has never established a cost-based rate for Privacy Listings provided to competitive carriers in a cost docket. Nor is Qwest's proposed rate for Privacy Listings included in the Interconnection Services Tariff that the Commission required Qwest to file to include rates the Commission established for facilities and services required under the Act. Rather, the Commission found that Qwest's proposal to charge its retail tariff rate less the avoided cost discount for *Premium* Listings was compliant with Qwest's obligations under Section 271 of the Act, and no party challenged that proposal.[129] Qwest apparently extended the same pricing methodology to Privacy Listings by inserting "/Privacy" into the rate element for "Premium Listings," but Qwest has not identified any Commission order that approved such an extension or adopted that pricing methodology for Privacy Listings to apply to all competing carriers.

116. Qwest also claims that Charter is improperly seeking to have Qwest provide services on Charter's behalf without compensation. As Charter's witness explained, however, "most, if not all, the 'services' performed for Privacy Listings are really electronic functions that are

[128] Ex. RHW-1T (Weinstein Dir.) at 32:13-16.

[129] *See In re Investigation Into [Qwest's] Compliance with Section 271 of the Act*, Docket Nos. UT-003022 & UT-003040, Revised Initial Order ¶¶ 108, 122 & 124 (Aug. 31, 2000).

automatically performed by Qwest's computer systems,"[130] and "the incremental cost to Qwest related to privacy listings is *de minimis* – if not zero, then something very close to zero."[131] Qwest did not even attempt to produce any evidence to dispute this fact. Even if Qwest undertakes the same activities with respect to Privacy Listings as Qwest performs for published listings – which Qwest has not shown – the FCC established a presumptively reasonable *annual* rate of $0.04 per listing to fully compensate Qwest and other ILECs for those activities.[132] Qwest's proposed rate vastly exceeds this amount.

117. Qwest's proposed Privacy Listings charge has no demonstrable cost basis and otherwise lacks any evidentiary support. The Commission, therefore, should refuse to authorize Qwest to impose that charge on Charter.

Issue 23: Should the agreement reflect the fact that Qwest has the obligation under Section 251(b)(3) to provide directory listing for both white pages and yellow pages listings?

118. Charter and Qwest apparently agree that Qwest is obligated to treat Charter listings in the same manner as Qwest treats its own listings for inclusion in both white pages and yellow pages directories,[133] and Charter's proposed language reflects that common understanding.[134] Unfortunately, Qwest's proposed contract language does not, despite Qwest's representations to

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[130] Ex. JDW-2T (Webber Reb.) at 60:27-29.

[131] *Id*. at 61:2-4.

[132] *See Provision of Directory Listing Information Under the Telecommunications Act of 1934, as Amended*, First Report and Order, 16 FCC Rcd 2736 (2001). Another Commission Arbitrator recently observed that the $0.04 rate for initial listings is cost based and "would allow most carriers to recover the incremental costs of providing the [subscriber list information] as well as provide a reasonable contribution to the LEC's common costs and overheads." *In re Petition for Arbitration of an Interconnection Agreement between Comcast Phone of Washington, LLC, with United Telephone Co. of the Northwest, Inc. d/b/a Embarq Pursuant to 47 U.S.C. Section 252(b)*, Docket No. UT-083025, Order 04, Arbitrator's Report and Decision ¶ 38 (Jan. 13, 2009).

[133] *E.g.*, Ex. RHW-2RT (Weinstein Reb.) at 27:18 through 28:16; Ex. JDW-2T (Webber Reb.) at 67:3-9.

[134] Ex. JDW-1T (Webber Dir.) at 61:1-11.

the contrary. The issue, therefore, is which party's proposed language more accurately reflects Qwest's directory listing obligation.

119. Charter's proposed language directly and unambiguously requires Qwest to give equal treatment to Charter's listings in both the white and yellow pages directories: "The same provisions and requirements that apply to white pages directory treatment of CLEC Listings also apply to the provision of a classified listing in any classified (Yellow Pages) directory published by or on behalf of, or under contract to, Qwest."[135] Charter's proposed language makes equally clear that this obligation applies only to primary listings and does not extend to other arrangements, such as advertisements, which are the responsibility of the end user and the directory publisher.

120. Qwest claims that Charter's proposed language is unnecessary because the term "White Pages Directory Listings Service" includes both white and yellow pages listings:

> The whole of Section 10.4 compels Qwest to treat Charter listings in the same manner as Qwest listings. Although called White Pages Directory Listings Service, the service provides directory publishers of white or yellow pages the same list in the same manner and treats Charter listings in the same manner as Qwest listings.[136]

No provision of the agreement, however – either agreed upon or proposed by Qwest – expressly states that White Pages Directory Listings Service applies to yellow pages listings. To the contrary, Qwest's proposed language for Section 15 of the agreement provides "that certain issues outside the provision of basic white page Directory Listings, such as . . . yellow pages Listings . . . will be the subject of negotiations between CLEC and directory publishers."[137] Qwest cannot plausibly contend that "White Pages Directory Listings Service" includes yellow

[135] *E.g.*, *id*. at 59:16-20.

[136] Ex. RHW-2RT (Weinstein Reb.) at 28:12-16.

[137] *E.g.*, Ex. RHW-1T (Weinstein Dir.) at 34:8-13.

pages listings when Qwest is proposing language that would expressly exclude yellow pages listings from the terms and conditions of the agreement.

121. Qwest also takes issue with language Charter has proposed to require Qwest to ensure that it provides Charter with nondiscriminatory directory listings functions, including revising any contracts that Qwest has with third parties to the extent necessary to ensure such nondiscrimination. As an initial matter, Qwest does not identify a single agreement that it would be required to modify if the language Charter proposed is included in the agreement. Nor are any such contracts likely to exist if, as Qwest asserts, Qwest includes all listings – its own as well as CLECs – in an unsegregated data base that is provided to third parties. Charter's proposed language, moreover, expressly excludes directory advertising, which must be arranged directly between the directory publisher and the end user wishing to place such advertising, so only contracts with respect to directory listings are at issue. Qwest has not justified – and could not justify – entry into contracts with third parties that would afford more favorable treatment to Qwest's listings than to competitors' listings. Qwest, therefore, has provided no basis on which to reasonably object to Charter's proposals.

122. Charter's proposed contract language is consistent with applicable law and Qwest's practices and unambiguously requires Qwest to treat its own and Charter's listings the same with respect to their inclusion in white and yellow pages directories. Qwest's proposed language, on the other hand, is ambiguous and does not accurately reflect Qwest's legal obligations or practices. The Commission, therefore, should adopt Charter's proposals for Sections 10.4.5 and 15 of the interconnection agreement.

VII. CONCLUSION

123. For the foregoing reasons, Charter respectfully requests that the Commission rule on these disputed issues by finding in Charter's favor, and by adopting Charter's proposed language for each issue discussed herein. In those instances where the Commission adopted a ruling on an issue, but declines to adopt either party's proposed language, Charter respectfully requests that the Commission provide detailed drafting instructions for the Parties, to ensure that they will be able to draft contract language necessary to implement the Commission's award.

Respectfully submitted:

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