**BEFORE THE**
**WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

# REPLY BRIEF
# OF
# CHARTER FIBERLINK WA-CCVII, LLC


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## I. INTRODUCTION

1. Charter Fiberlink WA-CCVII, LLC ("Charter Fiberlink" or "Charter") hereby files its Reply Brief in response to the arguments offered by respondent, Qwest Corporation ("Qwest"). Charter and Qwest are referred to as the "Parties" herein.

## II. LEGAL STANDARD

2. As Charter noted in its initial brief, the standard by which the disputed issues must be resolved is governed by the substantive and procedural requirements set forth in Sections 251 and 252 of the federal Telecommunications Act.[1] Section 252(c)(1) of the Act directs this Commission to resolve open issues in a manner that "meet the requirements of 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).

3. In its opening brief Qwest does not acknowledge this standard. Instead, Qwest asks the Commission to use very different standards. Specifically, Qwest asks the Commission to use

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

[2] 47 U.S.C. § 252(c)(1).

prior decisions from the so-called "271 proceeding" as a basis to decide many of the disputed issues in this proceeding.

4. As discussed in Charter's opening brief, however, the legal standard applicable to this arbitration proceeding is not whether specific language was previously approved in a prior proceeding concerning Qwest's request to receive authorization to provide long distance services under Section 271 of the Act.[3]

5. Instead, Section 252(c)(1) of the Act directs this Commission to resolve open issues in a manner that "meet the requirements of Section 251, including the regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251."[4] Therefore, resolution of these issues must be determined not by whether Qwest's language has been approved in prior proceedings, but by whether it meets the requirements of Section 251 and the FCC regulations promulgated under that statute.

6. The FCC itself has affirmed this approach in its 2002 arbitration of disputed issues between Verizon and several CLECs in Virginia. In that proceeding the FCC, standing in place of the Virginia SCC, resolved disputed issues concerning Verizon's interconnection obligations. In so doing, the FCC specifically refused to rely upon its own prior decisions in a 271 proceeding as precedent. As the FCC explained: "[t]hus, the *Verizon Pennsylvania 271 Order* is not determinative of the question we address here, which is whether Verizon's or petitioners' [proposed interconnection agreement] language is more consistent with the Act and our rules."[5]

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[3] Tr. (Webber) 45:6-10 (discussing purpose of 271 proceedings).

[4] 47 U.S.C. § 252(c)(1).

[5] *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 n. 123 (2002). 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).

7. Further, Qwest's witnesses acknowledged that Charter was not a party to the 271 proceeding, and the record in that proceeding reflects the fact that other cable telephony providers like Charter (i.e. Comcast, Time Warner, etc.) did not participate in that proceeding either.[6] Further, the record reflects that Qwest no longer makes available the Statement of Generally Available Terms ("SGAT") which was one byproduct of the 271 proceeding.[7] Qwest's decision to discontinue the availability of the SGAT further calls into question the continuing validity of the terms set forth in that document. Accordingly, the Commission should draw no presumptions based simply on the fact that one party's language may, or may not, have been approved in a prior proceeding.

8. For that reason, the Commission must look only to federal law, and the rules and orders prescribed by the FCC in accordance with Section 251, to resolve the disputed issues in this proceeding.

## III. GENERAL TERMS AND CONDITIONS ISSUES

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

9. Qwest contends that the language that Charter has proposed for Section 5.8 of the ICA, which is the subject of Issue 5, creates ambiguity and increases the likelihood of litigation. *Qwest Brief* at ¶ 10. Qwest's assertions are unsupported. As described in greater detail below, Charter's proposed language is not ambiguous; its proposed language is clear and direct. Further, as to Qwest's claim that Charter's proposed language might increase the likelihood of

[6] Qwest's witness Mr. Easton testified that the "major" CLECs, whom he identified as AT&T and MCI, participated in the 271 proceeding. But he acknowledged that those companies did not have the same business model as Charter. Tr. (Easton) at 208:6-21. The record reflects that Charter was not a party to that proceeding, nor were any other cable telephony providers. *See also*, UTC Docket No. 003022, Workshop 2 Initial Order at ¶ 16 (Wash. UTC Feb. 2001) (identifying parties).

[7] Tr. (Webber) 135:21-24.

litigation, the Commission must recognize that the potential for litigation is inherent in any contractual provision apportioning potential liability. Contract language establishing each party's liability does not, in and of itself, create the potential for litigation. Instead, it is each party's *actions* (and the extent that such actions harm the other party) which create the potential for litigation. Thus, the decision concerning the scope of each party's liability to the other should apportion liability in a reasonable, rational manner, rather than imposing arbitrary limitations that prevent the injured party from obtaining the cots of its actual damages to cure the harm.

10. The first question raised by Qwest is whether Charter's language is ambiguous. It isn't. Charter's proposed Section 5.8.1 is merely a modification of Qwest's language. Instead of Qwest's arbitrary cap on damages when the parties harm each other, Charter's proposal substitutes the term "actual, direct damages." That is to say, the parties will pay the costs to repair (or cure) the harm they caused each other, without an artificial limitation that may require the injured party to pay for part of the damages. Requiring the injured party to pay for part of the actual damages is an unjust result. Actual, direct damages is in contrast to the generally agreed to prohibition on indirect, consequential and special (i.e., punitive) damages, in addition to lost profits and revenues in Section 5.8.2. Charter's proposed addition at the beginning of Section 5.8.2 is merely intended to clarify that the prohibition on damages other than actual damages, doesn't apply when the parties' fault rises to gross negligence (in addition to intentional misconduct, i.e., willful misconduct). Charter's first revision to Section 5.8.4 adds "gross negligence" (i.e., substantially greater than ordinary negligence)[8] to the list of exclusions where the parties' liability isn't limited to each other. In other words, under Charter's proposal, if the

[8] HE-5 (Issue Matrix) at 9.

parties behave in a grossly negligent manner (in addition to intentionally harming each other) there are no limitations on damages, which is an equitable result. Finally, the last revision to Section 5.8.4 clarifies what is meant by "solely" in the context of 5.8.4(ii), when one party is solely responsible for damage to the other's real or personal property.

11. The second question raised under this issue is whether gross negligence should be excluded from the limitation of liability provisions of the Agreement. On this question, Qwest acknowledges that the Commission has previously ruled that gross negligence should be an exception to the limitations on liability provisions of Qwest interconnection agreements. *Qwest Brief* at ¶ 11.[9] Nonetheless, Qwest contends that there should be no such exception to the limitation of liability because the Commission also ruled that there should be no obligation to indemnify based upon gross negligence. *Qwest Brief* at ¶¶ 11-12. Qwest's assertion that the Commission's ruling on the indemnity question should guide the Commission here is incorrect. In fact, to the contrary, the Commission's prior ruling that gross negligence is an exception to any limitations of liability should also be applied to the question of indemnity obligations.

12. Under Washington law, a party's gross negligence vitiates any limitation of liability protections it may have under a contract. In *Liberty Furniture v. Sonitrol,*[10] the Washington Court of Appeals refused to uphold a contract provision limiting an alarm monitoring company's liability (for simple or gross negligence) where the jury found that the company was grossly negligent. The court relied upon the holding in *McCutcheon v. United Homes,*[11] that "exculpatory clauses exempting one from liability 'may be legal, when considered in the

[9] *Id.* at ¶ 11. Although Qwest cites the 28th Supplemental Order at ¶ 374 for this ruling, it is actually ¶ 374 of the 20th Supplemental Order, which the Commission reaffirmed in ¶ 117 of the 28th Supplemental Order.

[10] 53 Wash. App. 879, 770 P.2d 1086 (Wash. Ct. App. 1989).

[11] 79 Wash.2d 443, 447, 486 P.2d. 1093 (1971).

abstract. However when applied to a specific situation, one may be exempt from liability for his own negligence *only when the consequences thereof do not fall greatly below the standard established by law.*'"[12]

13. Under the holdings of the Washington courts, then, Qwest cannot limit its liability for damages caused by its gross negligence. For that reason Charter's proposed exclusion of gross negligence from the limitation of liability provisions of the interconnection agreement are consistent with the standard under Washington law. As discussed more fully under Issue 6(a), because Qwest may not limit its liability for gross negligence, it should also be required to indemnify Charter against the consequences of its gross negligence.[13]

14. Qwest also argues that Charter's language represents an "expansion of liability" to Qwest. *Qwest Brief* at ¶ 13. This assertion ignores the fact that any potential liability will be the direct result of Qwest's own actions. If Qwest ensures that its employees take due care in their actions, the risk of additional liability should not increase. As noted above, the inclusion of contract language clarifying each party's obligations does not in and of itself create the potential for litigation. Instead, it is each party's *actions* (and the extent that such actions harm the other party) which create the potential for expanded liability.

15. Finally, as to the third question of whether Qwest should be permitted to cap the amount of damages that Charter may seek from Qwest, Qwest contends that "it is highly unlikely that Qwest will cut a Charter fiber in the process of interconnecting Charter to Qwest's network." *Qwest Brief* at ¶ 14.[14] The likelihood of a particular claim, or of particular damage, is not the

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[12] *Sonitrol,* 53 Wash. App. at 880 (emphasis added). *See also Baker v. Seattle,* 79 Wash.2d 198, 484 P.2d 405 (1971) (holding contractual exculpatory clause for rental of golf cart to be against public policy).

[13] Note that Charter's proposed language is mutual, and would therefore apply to both parties.

[14] Nevertheless, Qwest's witnesses admitted that a fiber cut, although not likely, is possible. Tr. (Linse) 268:18-25; 269:18-24 (acknowledging fiber cut is possible).

point, however.[15] Both parties have substantial experience in providing communications services and, under Charter's proposed language, have appropriate incentives to train their employees and contractors to act prudently. Only in exceptional cases should there be any question of liability at all, particularly given that Charter is simply adding gross negligence to the list of exclusions under Section 5.8.4. As the Washington courts have explained, gross negligence constitutes the "failure to exercise slight care. … There is no issue of gross negligence without 'substantial evidence of serious negligence.'"[16] Under these circumstances, the very nature of liability provisions brings the focus upon the exceptional case, not upon what is likely to occur. Further, the fact that Qwest's original proposal unreasonably limits its liability to Charter in cases where it is at fault, should not be turned against Charter for seeking a more reasonable limitation for both parties, i.e., actual damages. Charter urges the Commission to apply a more equitable standard – "actual, direct damages" – to ensure that the parties will compensate each other for the actual costs to fix the damage caused.

16. Qwest expresses concern that Charter is trying to expand the measure of damages to include things such as "lost revenue, employee overtime, or anything else that Charter might consider bringing to litigation over the measure of damages for a particular incident." *Qwest Brief* at ¶ 15. However, there is absolutely no evidence to support this claim. Indeed, the record

[15] There is some language in the agreement that could arguably be read to exclude fiber cuts from the exclusion for limitations of liability. *See* Section 5.8.4. However, on its face that provision only excludes damage to real property arising from acts of *simple* negligence, and does not specifically address acts of *gross* negligence. Because Qwest seeks to limit its liability from "negligence of any kind" under Section 5.8.1, the scope of 5.8.4 is ambiguous, at best. The Commission can remedy that by affirming that neither party may limit their liability for acts of gross negligence, and that damages may not be arbitrarily capped, as Charter has proposed.

[16] *Kelley v. State,* 17 P.3d 1189, 1192 (Wash. Ct. App. 2001) (quoting from *Nist v. Tudor,* 67 Wash.2d 322, 332, 407 P.2d 798 (1965)).

demonstrates that Charter has already agreed that Qwest will not be liable for any "special" or consequential damages. Agreed upon language for Section 5.8.2 provides that:

> neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result.

17. In addition, Charter witness Mr. Webber explained that the scope of Charter's proposed language was narrow, and intended only to provide a basis for the injured party to be "made whole."[17]

18. Also, "direct damages" is a relatively narrow standard under Washington law.[18] Charter seeks only to insure that each party is responsible for the direct damages actually caused by its negligent conduct, and that neither party is left without a meaningful remedy if the other party's negligence causes substantial harm. This is in contrast to Qwest's language, which could effectively preclude Charter from recovering any damages. As Qwest witness Ms. Albersheim acknowledged, where Charter is not paying anything to Qwest for a particular network interconnection arrangement (as is often the case), Qwest's language would prohibit Charter from recovering *any* damages.[19] That would be an inequitable and unreasonable result.

19. The final question raised under this issue concerns damages related to errors in the provisioning of directory listings at Qwest proposed Section 10.4.2.6. On this point Qwest contends that the limitation of liability should be governed by its tariff because "it is … not

[17] Tr. (Webber) 77:8-11.

[18] For example, in *Foss v. Pacific Telephone & Telegraph* 173 P.2d 144 (Wash. 1946) the Washington Supreme Court rejected claims for special damages for certain unforeseeable harms.

[19] Tr. (Albersheim) 346:24-5; 347:1:6 (explaining that if neither party pays for facilities to interconnect their networks, then there would be no permissible damages under Qwest's proposal).

appropriate to impose obligations in an interconnection agreement on a service that is governed by a tariff," *Qwest Brief* at ¶ 17, and because Charter's own service offering contains a limitation of liability similar to what is in Qwest's tariff. *Id*. at ¶ 18.

20. Charter is not, as Qwest contends, seeking to impose obligations on a service that is governed by a tariff. The directory listing service that Qwest provides to Charter is not governed by tariff, but is provided to Charter pursuant to Qwest's obligations under Section 251(b)(3). Nor does Charter seek to expand Qwest's direct liability to Charter's *customers* beyond what Qwest's tariff provides with respect to Qwest's own customers. Charter seeks only to hold Qwest responsible for damages incurred by *Charter itself* as a result of an error or omission by Qwest. The limitations of liability related to directory errors in Charter's service offering are not a reason to subject Charter to the limitations of liability in Qwest's tariff; rather, they unreasonably benefit Qwest by limiting the loss that Charter could suffer and for which Qwest should be required to compensate Charter.

21. More problematic is the fact that Qwest's proposal could preclude Charter from recovering any damages if Qwest acted in a manner that caused significant harm. Section 2.4.4 of Qwest's Washington Exchange and Network Services Tariff,[20] for example, limits Qwest's liability for errors and omissions in listings furnished without additional charge to an "amount not in excess of the charge for exchange service (excluding additional message charges) during the effective life of the directory in which the error or omission is made."[21] Other sections of

[20] Qwest has stated that this is one of the limitations of liability that would apply to a claim based upon a directory listing error. *Qwest Brief* at ¶ 17. The Commission may take official notice of Qwest's filed tariffs.

[21] Qwest Washington Exchange and Network Services Tariff § 2.4.4(A)(1).

Qwest's tariff generally limit its liability for directory errors and omissions, or for the improper disclosure of non-listed or non-published information to the *amounts paid* to Qwest.[22]

22. Because Charter will not pay Qwest a "charge for exchange service," or any other charge in connection with primary directory listings, Section 2.4.4 of Qwest's tariff would deny Charter *any remedy* for Qwest's error or omission in a primary directory listing.[23] That is not a just, or reasonable, result. If Charter's service offering imposed the same limitation, Charter would have substantial liability to its customer for Qwest's error or omission, but would be unable to recover anything from Qwest. This is an unjust result that would utterly fail to compensate Charter for actual damages it would likely suffer as a result of Qwest's, or its agent's, negligence, gross negligence, or intentional misconduct.

23. Finally, Qwest ignores the fact that questions of liability between two co-carriers, interconnecting as peers, are very different from liability allocated between a carrier and its end user customers. A service provider's liability to its end user customer is governed by state law and tariff terms, whereas the obligations as between Charter and Qwest are governed by Section 251, and the FCC regulations implementing that statute. It is therefore not instructive, as Qwest suggests, to analogize the two situations.

24. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 5.

[22] *See id.* at §§ 2.4.4(A)(2), 2.4.4(B), 5.7.1(E) and 5.7.1(F).

[23] Similarly, even if Qwest were permitted to charge Charter for privacy listings, which it should not for reasons discussed elsewhere in Charter's Briefs, if Qwest's and Charter's retail charges for such listings were the same, Charter would be unable to recover from Qwest the full amount for which Charter would be required to reimburse its own customer because Charter would receive a wholesale discount on the listing charges.

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

25. Qwest argues that the parties' interconnection agreement should not require the parties to indemnify each other against acts of gross negligence because the Commission did not require such indemnification in Qwest's 271 case. *Qwest Brief* at ¶ 22. As previously discussed,[24] whether the Commission did or did not require specific language some seven years ago in a proceeding concerning Qwest's request to provide long distance services does not provide a valid basis to conclude that such language is not appropriate in an arbitrated interconnection agreement today. The Commission's task in the 271 case was to determine whether Qwest was sufficiently in compliance with the specific obligations set forth in 47 U.S.C. § 271(c) for the purpose of evaluating Qwest's request to provide long distance services. For that reason, the Commission's determinations concerning matters that are not directly addressed by Section 271 were only incidental to its primary task, and should be given little weight.

26. Moreover, with respect to the specific issue of indemnification, it appears that the Commission may not have given the matter the level of analysis that is appropriate in an interconnection arbitration like this one. The Commission's decisions concerning limitations of liability and indemnification in the 271 case were based solely upon the provisions it found to be "common" in existing interconnection agreements. There is no discussion in the Commission's 271 orders either of Washington law concerning limitations of liability, or indemnification, or of the policies or purposes that such provisions should promote. Instead, the order only addresses whether the Commission was persuaded that particular provisions were "standard" in the industry *at that time*.[25]

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[24] *See, supra*, ¶ 13 (discussing FCC's rejection of 271 as standard for 251 arbitration).

[25] *See* Docket Nos. UT-003022 and UT-003040, *20th Supplemental Order* at ¶¶ 372-375 (limitation of liability) and ¶¶ 393-397 (indemnification) and *28th Supplemental Order* at ¶¶ 113-114 (limitation of

27. Qwest's citation to paragraph 121 of the *28th Supplemental Order* and paragraphs 43-46 of the *31st Supplemental Order* in the 271 proceeding in support of its assertion that "[t]he Commission specifically prohibited an exception for gross negligence," *Qwest Brief* at ¶ 22, n. 9, is misleading. Although the Commission agreed with Qwest that the "standard" indemnification provision did not require indemnification against gross negligence, there is no suggestion that the Commission would *prohibit* such an indemnification provision if it had been presented with the same facts and arguments presented in this proceeding.

28. Further, the paragraphs cited by Qwest concern a different issue altogether. Paragraph 397 of the *20th Supplemental Order* rejected "Qwest's proposal to create exemptions from the obligation to indemnify when the claim is brought by an end-user and the loss was caused by willful misconduct by the indemnified party."[26] And, in paragraph 121 of the *28th Supplemental Order*, the Commission "concur [red] with Qwest and other parties that there is a need for indemnification concerning end-user claims" but modified Qwest's proposed language "to exclude from indemnification 'losses due to negligence, gross negligence, or intentional misconduct …."[27] In the *30th Supplemental Order,* in response to an unopposed petition for reconsideration by Qwest, the Commission deleted the word "negligence" from the exception. This has nothing to do with the generally applicable indemnification provision in Section 5.9.1.1 of the disputed interconnection agreement, but rather concerns the indemnification against end user claims in Section 5.9.1.2.[28] It appears, moreover, that even Qwest recognizes that the

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liability) and ¶¶120-121 (indemnification). Note that Qwest's citation at ¶ 22 n.10 of its Opening Brief to ¶ 396 of the *28th Supplemental Order* should be to the *20th Supplemental Order*. There are only 274 paragraphs in the *28th Supplemental Order,* which refers to the *20th Supplemental Order* as the "*Initial Order*."

[26] WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, *20th Supplemental Order* at ¶ 397.

[27] WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, *28th Supplemental Order* at ¶ 121.

[28] Coincidentally, the section numbers for the general and end-user indemnification provisions in the

Commission went too far in eliminating the reference to "negligence" in Section 5.9.1.2, because Qwest's proposed language for Section 5.9.1.1 of the parties ICA provides:

> The obligation to indemnify with respect to claims of the Indemnifying Party's End User Customers shall not extend to any claims for physical bodily injury or death of any Person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the ***negligence or intentional conduct*** of the employees, contractors agents, or other representatives of the Indemnified Party.[29]

29. In Section 5.9.1.2, Charter seeks only to apply the same indemnification principle to all end user claims that Qwest (contrary to the Commission's decision in the 271 proceeding) recognizes as appropriate for claims for bodily injury, death, or loss, damage to, or destruction of property.

30. As Qwest notes in its Initial Brief, the limitation of liability and indemnification provisions should be consistent.[30] In the 271 case the Commission got it right: limitations on liability for gross negligence should not be permitted in interconnection agreements because the concept is not consistent with Washington law. The indemnification provisions in the parties' interconnection agreement should be consistent with the limitations of liability provisions. The obligation to indemnify the other party should not be limited to claims "resulting from the Indemnifying Party's breach of or failure to perform under [the] Agreement," as Qwest proposes.

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parties' ICA are the same as those in Qwest's SGAT to which the Commission referred in the 271 orders.

[29] HE-5 (Issue Matrix) at 11 (emphasis added.)

[30] Qwest Initial Brief at ¶ 11. *Cf.* WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, *20th Supplemental Order* at ¶ 378 (AT&T argues that the limitation of liability and indemnity provisions … must work hand-in-hand to create sufficient disincentives for Qwest to engage in anticompetitive behavior.") As discussed above, in its 271orders the Commission never addressed the policy arguments concerning limitations of liability and indemnification, but only what it viewed to be the "standard" provisions.

31. The hypothetical discussed at the hearing by Charter's attorney and Qwest's witness, Ms. Albersheim,[31] provides an excellent example of why the parties should be required to indemnify each other against their acts of negligence. In the hypothetical, a Qwest employee departing the scene of an interconnection job site starts a fire by tossing a cigarette into a dumpster. If that conduct were found to be negligent, Qwest's liability to Charter would not be limited if the fire damaged or destroyed Charter's truck because of Qwest's (and Charter's) proposed language for Section 5.8.4 of the ICA. Under Qwest's proposed language for Section 5.9.1.1, however, if the fire damaged the property of a third party who sued Charter as well as Qwest, Qwest would be required to indemnify Charter against the third party claim *only if* the Qwest employee's conduct constituted a "breach of or failure to perform under [the] Agreement." Although Qwest witness Albersheim appeared to suggest that such might be the case,[32] that conclusion is not evident from Qwest's proposed language. Further, even Ms. Albersheim admitted that "under this particular scenario, we're going to have a fair amount of litigation over whether or not there's an obligation to [indemnify]."[33]

32. Qwest also complains of Charter's proposal to define the terms, "claims" and "loss" in the disputed portions of section 5.9. *Qwest Brief* at ¶ 24. The concerns expressed with Charter's proposed language are not substantive, but amount to nothing more than different approaches to drafting contract language. A review of Charter's language reveals that it proposed to define these terms by reference to the language used by Qwest to describe a claim, or a loss. Indeed, Charter used Qwest's specific language to define these terms. Thus, there does not appear to be any substantive dispute as to what constitutes a claim, or a loss. The only dispute is whether

[31] *See* Tr. (Albersheim) 352:15 through 357:7.

[32] *Id*. at 356:7-15

[33] *Id*. at 357:3-7.

those terms should be defined here, or in Section 4. Either approach is sufficient for Charter's purposes. The main point, though, is that the terms should be defined to ensure clarity. Further, Charter believes that Qwest's assertion that Charter's proposal "creates confusion" because other sections also use these terms, is unfounded. That concern can be easily addressed simply by adding the clause "For purposes of this Section 5.9 the term ["Claims"] shall be defined as …." Thus, defining terms in the manner proposed by Charter will not lead to confusion, and will instead promote a clear and consistent interpretation of these provisions.

33. Thus, there are several reasons why the Commission's determination in the 271 proceeding on this question is not instructive here. Although the Commission relied upon what it determined to be "standard" indemnification language at that time, some seven years have passed and such language may no longer be "standard." Further, the Commission did not address any of the policy arguments raised by parties who opposed Qwest's proposed language; nor did it consider the relationship between the limitation of liability and indemnification provisions, and how its decision on those terms is arguably inconsistent. Washington law does not permit parties to limit their liability for gross negligence, and reflects an apparent intent to hold parties responsible for their grossly negligent conduct. For these same reasons, the general indemnification provision in Section 5.9.1.1 should require each party to indemnify the other against claims resulting from the indemnifying party's gross negligence. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 6(a).

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

34. Qwest raises several points in opposition to Charter's modifications to Section 5.10 of the agreement. First, Qwest argues that Charter's proposal to remove the clause "loss, cost, expense

or liability" and replace it with the defined term "Claim" would expand the potential claims for losses that could become the subject of litigation. *Qwest Brief* at ¶ 29. This assertion seems to ignore the fact that Charter's proposal to remove the clause is made in conjunction with Charter's proposal to define the term "Claim" as any "loss, cost, expense or liability."

35. This is the same drafting dispute raised by Qwest with respect to Issue 6(a), above, concerning whether the Parties should define the term "Claim." As explained above, Charter is simply trying to formally define those types of claims that will be subject to indemnity obligations, and does not intend to expand the potential claims that could be litigated. Charter has not proposed to expand potential claims, and simply defining the terms, as Charter has proposed, will not lead to that result. Charter proposed it merely for administrative ease to avoid having to restate the definition of claim each time it appeared in the indemnification section. Qwest's concern here is without merit.

36. In support of its arguments Qwest also asserts that one purpose of the agreement is "to give Charter access to Qwest's facilities…" and "… network technology that Qwest licenses from third party vendors." *Qwest Brief* at ¶ 29. This point is misleading because the record reflects that Charter does not request "access" to Qwest's physical facilities other than through interconnection. Charter does not lease unbundled network elements, or use collocation arrangements, in order to interconnect with Qwest.[34] Nor is it evident (and Qwest never explains) what "network technology" Charter would be accessing simply by physically interconnecting its network with Qwest's network.

37. Qwest also argues that Charter's proposal extends indemnity obligations to Qwest simply if Qwest knew of actions that Charter has taken which could lead to allegations of infringement.

[34] TJG-1T (Gates Dir.) at 5:14-15.

*Qwest Brief* at ¶ 30. This is not Charter's intent. A review of the language makes clear that Charter is proposing to modify a sentence in Section 5.10 which *limits* (rather than expands) each party's indemnity obligations.[35] By adding the "with knowledge" phrase Charter is simply trying to add another condition to those existing conditions which would limit either party's obligation to indemnify intellectual property claims. Thus, under Charter's proposal, a party will ***not*** be required to indemnify infringement claims if that party: (1) did not make (take action to effectuate) the combination of facilities; (2) did not direct the combination of facilities; or, (3) did not know of the combination of facilities. Charter's proposed addition therefore represents only incremental change to the existing language. It further limits the circumstances by which either party will be required to assume indemnity obligations.

38. In contrast, it is Qwest's proposed additional language in this Section 5.10 which would expand the indemnity obligations of either party. Specifically, under Qwest's proposed inclusion of the clause "any other Person (including the Indemnified Party but excluding the Indemnifying Party and any of its Affiliates)"[36] Qwest seeks to expand the scope of the indemnity obligations by broadly defining those parties with whom a combination of facilities may occur.

39. Qwest has not met its burden of proof with respect to this proposal. It has not offered any testimony, or briefing, explaining why it is appropriate to expand the scope of this provision in this manner. Nor was this proposed addition offered by Qwest discussed during the hearing. There is, simply, nothing in the record explaining the basis for Qwest's proposal to modify Section 5.10 by including Qwest's proposed "any other Person" language.

40. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 7.

[35] HE-5 (Issue Matrix) at 13.

[36] *Id*. at 13 (Qwest proposed language for Section 5.10).

## 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?**

41. In defense of its proposal here Qwest argues that its proposal for Section 7.1.1 was developed during the 271 "workshops" which reflects the consensus developed during that proceeding. *Qwest Brief* at ¶ 32. As discussed in Charter's opening brief, however, the legal standard applicable to this arbitration proceeding is not whether specific language was previously approved in a prior proceeding concerning Qwest's request to receive authorization to provide long distance services.

42. Further, as noted above,[37] the legal standard governing resolution of the contested issues here is set forth in Section 252(c)(1) of the Act,[38] not Section 271. Accordingly, the Commission should draw no presumptions based simply on the fact that one party's language may, or may not, have been approved in a prior proceeding.

43. Qwest also argues that there is no FCC rule that requires Qwest to make a showing concerning connections between Qwest tandem switches. *Qwest Brief* at 33. Qwest's intent here is unclear, though it seems to suggest that the language at issue here has nothing to do with the question of whether it may reject requests for interconnection at certain points on its network. If so, that assertion is unfounded.

44. In reviewing each party's proposed language, it is important to recognize the context of Charter's proposals. In all instances Charter is proposing to modify language originally offered by Qwest. That, of course, means that the scope of the issue is driven not by Charter's proposed language, but by Qwest's original language. In this circumstance, Charter simply modified

[37] *See, supra*, ¶ 13 (discussing FCC's rejection of 271 as standard for 251 arbitration).

[38] 47 U.S.C. § 252(c)(1).

several words to clarify the legal standard governing when Qwest is not required to provide certain network connections. As Qwest's language illustrates, the question is when will Qwest be relieved of this obligation: "… connections are not required where Qwest can demonstrate that such connections present a risk of switch exhaust…"[39] Thus, it is Qwest who has framed this issue by its own language, which reflects Qwest's attempt to avoid its obligations under federal law to make a showing of technical infeasibility to this Commission before rejecting requests for interconnection.[40]

45. Qwest's final argument is that the rule which requires Qwest to make a showing of proof does not require that the showing be made prior to rejecting the request for interconnection. *Qwest Brief* at 34. Before responding to this assertion, it is appropriate to take a moment to recognize that Qwest now concedes that FCC Rule 51.305(e) requires Qwest to make a showing of technical infeasibility to this Commission. As Qwest's witness Mr. Easton admitted on the stand: "the rule [51.305(e)] does state that the ILEC must prove to the state commission that interconnection is not feasible, …"[41] And Qwest's initial brief clearly indicates that the company does not dispute that it has an obligation to make such a showing. *Qwest Brief* at 34 (discussing application of FCC Rule 51.305(e)). Thus, the only dispute between the parties, then, is *when* that showing must be made (either before, or after, the request).

46. Although Qwest acknowledges the application of FCC Rule 51.305(e), and the obligation it must bear under that rule, there is no reference to the rule in Qwest's proposed language. Qwest's language simply refers to the possibility that Qwest "*can* demonstrate" technical

[39] HE-5 (Issues Matrix) at 18 (Qwest proposed language for § 7.1.1, shown as double underline).

[40] *See* 47 C.F.R. 51.305.

[41] Tr. (Easton) 212:2-4.

infeasibility, not that it "will" or "must" prove infeasibility.[42] That, in turn, means that if Qwest's language is adopted, there would be no language in the contract reflecting Qwest's obligation to make a showing to this Commission. The Commission must not overlook this significant gap in Qwest's proposed language. Instead, the Commission should affirm the application of this rule by incorporating a reference to the rule in its resolution of this issue. That resolution is necessary regardless of how this Commission resolves the question of whether the showing is required before, or after, Qwest denies the request for interconnection. Thus, the Commission must affirm that Qwest is obligated, under FCC Rule 51.305(e), to prove technical infeasibility to this Commission.

47. That affirmation is necessary regardless of whether the Commission requires such proof before, or after, Qwest acts to deny an interconnection request for tandem exhaust. Qwest argues that the language of Rule 51.305(e) can only be read as requiring a showing of proof *after* a request for interconnection is denied. *Qwest Brief* at 34. This assertion, however, ignores the fact that the FCC's interconnection rules (of which 51.305(e) is one element) establish a rebuttable presumption that interconnection is technically feasible. For example, subsections (c) and (d) of Rule 51.305 establish that previous interconnection at a particular point, using particular facilities, is substantial evidence that such interconnection is technically feasible.[43] And the FCC has explained that "in accordance with our interpretation of the term technically feasible, we conclude that, if a particular method of interconnection is currently employed between two networks, or has been used successfully in the past, a *rebuttable presumption* is

[42] HE-5 (Issues Matrix) at 18 (Qwest proposed language for § 7.1.1, shown as double underline).

[43] 47 C.F.R. § 51.305(c), (d).

created that such a method is technically feasible for substantially similar network architectures. [44]

48. By creating a *rebuttable* presumption, the FCC clearly intended to establish a framework which requires the incumbent LEC to make interconnection available to the competitor immediately, upon request. The use of a rebuttable presumption requires the incumbent LEC to provide the interconnection immediately, upon request. At the same time, the incumbent LEC has the opportunity to present evidence of technical infeasibility, which would then rebut the presumption and negate the obligation to provide the interconnection immediately.

49. Such interconnection must, therefore, be made available immediately upon request, unless the incumbent LEC proves that such interconnection would be technically infeasible.[45] In other words, the incumbent LEC must first make the interconnection available (upon request), and is only relieved of that obligation after it proves to the state commission that such interconnection would be technically infeasible.

50. Any other result would render the rebuttable presumption meaningless, because the incumbent LEC could effectively ignore its obligation (and the presumption) by simply denying the request without also making its showing of proof to the state commission. For that reason, this Commission should affirm that Qwest's right to deny interconnection at a particular location is relieved only ***after*** it has made a showing of technical infeasibility to this Commission.

51. Consistent with this result, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 10.

[44] *Local Competition Order* at 554 (emphasis added).

[45] *See* 47 C.F.R. § 51.5, and 51.305(e).

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

52. Qwest raises several arguments in opposition to Charter's proposed language (without offering any language in support of its own proposal). Each of these arguments is addressed, in turn, below.

53. Qwest's first argument, is that Charter's proposed language in Section 7.1.2 referencing its "right to establish a single POI" is overbroad because the right is exists only if the point of interconnection is technically feasible. *Qwest Brief* at ¶ 35. But this concern is groundless because the parties have already agreed upon language which requires that any interconnection arrangement be technically feasible. Specifically, in that same section, Section 7.1.2, there is undisputed language stating that "[t]he Parties shall establish, at least one (1) of the following Interconnection arrangements, at any Technically Feasible point:…"[46] Thus, there is no doubt that Charter's right to a single POI is limited to those instances where that arrangement is technically feasible. Charter and Qwest[47] agree on that point. Further, as Charter demonstrated in its opening brief, *Charter Brief* at ¶¶ 17-22, there can be no doubt that federal law confirms this right upon Charter.

54. Qwest's second argument is that Charter's language could require Qwest to establish a point of interconnection outside of Qwest's geographic area or territory. *Id*. at 36. This, too, is another groundless concern raised by Qwest. First, Qwest does not point to any language proposed by Charter as the basis for this alleged problem. That, of course, is because there is ***no language*** which would require Qwest to establish a point of interconnection outside of Qwest's

[46] HE-5 (Issues Matrix) at 19 (undisputed language for § 7.1.2). Similar language, also undisputed, is found at Section 7.1.1 of the agreement: "Qwest will provide Interconnection at any Technically Feasible point within its network…"

[47] Tr. (Easton) at 220:16-25; 221:1; *and* 232:3-15 (admitting that Charter's proposal includes important limitation requiring that any point of interconnection must be technically feasible).

geographic area or territory. Charter has not proposed such language, and Qwest has not identified any such language.

55. Actually, the only language that Qwest identifies is Charter's proposal for Section 7.1.2, which, on its face, states that Charter's proposed language "shall ***not*** be construed as imposing an obligation upon Qwest to establish a physical point of interconnection … outside of Qwest's geographic area or territory."[48] This language clearly states that Charter's intention is not to impose any such obligation. Further, Qwest acknowledges that Charter's witness stated at the hearing that it was not Charter's intent to impose such an obligation upon Qwest. *See Qwest Brief* at 36. There can be no doubt, then, that Charter's proposed language, and its intent, is not to impose any obligation upon Qwest to interconnect outside of its service territory. The record on that point is clear.[49]

56. Furthermore, to resolve any question about this matter, Charter will agree to accept the language proffered by Qwest in its brief at paragraph 36, to read: "**The Parties agree that** this Agreement [in place of Charter's proposed **"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 area or territory.**"[50]

57. In recognition of Charter's willingness to accept this broader language and to address Qwest's stated concern, this Commission should similarly require Qwest to accept Charter's proposed language concerning the right to establish a single point of interconnection. That language clearly reflects applicable standards under federal law, which Qwest has not rebutted.

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[48] HE-5 (Issue Matrix) (Charter proposed language for Section 7.1.2) (emphasis added).

[49] Tr. (Easton) 222:6-18 (admitting that point of interconnection would be on Qwest's network).

[50] Throughout the agreement, Charter's proposed language is **bolded** and Qwest's proposed language is double-underlined.

58. Qwest's third argument is that Charter's proposed language concerning the provision of entrance facilities by third parties is "unnecessary," *id*. at 37, because the purpose of the interconnection agreement is only to describe interconnection provided by Qwest, not by third parties. *Id*. This assertion ignores the fact that the section at issue here, Section 7.1.2, is titled: "Methods of Interconnection." This section imposes a mutual obligation on the parties to establish "specific arrangements" that will be used to interconnect their respective networks. There is nothing in this section, or elsewhere, which excludes interconnection methods that may be used if a third party is involved.

59. Furthermore, as Qwest's own witnesses have acknowledged, Qwest itself contemplates that third parties may sometimes provide "transport services" between Charter and Qwest. As Qwest witness Mr. Linse testified, Qwest's proposed language for Section 7.2.2.1.2.2 states that CLEC may purchase transport services from Qwest "or from a third party."[51] Thus, Qwest (and the express contract terms) clearly do contemplate that there will be some circumstances when a third party could provide certain facilities to facilitate interconnection between Charter and Qwest.

60. More significantly, Qwest offers no substantive objections that Charter's proposal is either unlawful or technically infeasible. There is no evidence that the use of a third-party provider, as contemplated by Charter's language would create technical feasibility issues. Indeed, Qwest has offered evidence in this proceeding that such an arrangement is already being utilized, and is therefore, technically feasible.[52] Further, Qwest admitted that it "routinely" allows CLECS such as Charter to use facilities provided by third parties. *Qwest Brief* at ¶ 37.

[51] PL-7RT (Linse Reb.) 6:12-14.

[52] *See Charter Brief* at ¶ 55 (citing to evidence of third party interconnection arrangements).

Thus, it is clear that Charter's proposal to include language permitting the use of such third-party facilities does not present any question of technical infeasibility.

61. Further, there is no contention by Qwest, in its briefs, that Charter's proposal conflicts with applicable law. Qwest had previously asserted that Charter's proposal would require Qwest to unbundled facilities in a manner that conflicts with the FCC's *TRO* and *TRRO* decisions.[53] This assertion, however, is unfounded. The FCC affirmed in the *TRO* and *TRRO* decisions that incumbent LECs like Qwest must continue to make available "entrance facilities" for purposes of interconnection.[54] As the FCC explained, competitive LECs are entitled to "access these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network."[55] That result is consistent with Charter's proposal, which would simply permit the use of a third party's facilities, for purposes of *interconnecting* with Qwest's network.

62. Qwest's assertion that Charter's proposed language is unnecessary is, therefore, incorrect. There is evidence today that such third party arrangements are currently available, and in use. Further, Charter witness Mr. Gates explained that Charter proposed this language to ensure that this option was available in the future, if it chose to modify the current interconnection methods in place with Qwest. This language is, therefore, necessary and appropriate for inclusion in the agreement.

63. Thus, Charter's proposals for Issue 11 are consistent with the law and technically feasible. Qwest has offered no reasonable grounds to reject Charter's proposed language.

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[53] WRE-1T at 9:13-19.

[54] *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, at ¶ 140 (2005).

[55] *Id*.

Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 11.

**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)?**

64. On this issue, Qwest limits its arguments to a critique of Charter's proposed language. Upon close review of the existing contract language, and the testimony offered in support of Charter's proposed language, Qwest's criticisms are unpersuasive.

65. As to Qwest's first criticisms, Qwest criticizes Charter's proposed revision to Section 7.2.2.1.2.2, *Qwest Brief* at ¶ 39, arguing that the language concerning a point of interconnection is ambiguous, *id*., and that language in this section contradicts Charter's bill and keep proposal. *Id*. As to the alleged ambiguity concerning the reference to points of interconnection (or "POIs"), Charter witness Mr. Gates explained that the term "any POIs" and "networks" referred to in the phrase "to connect any POIs between the networks with CLEC's network**"** are the Charter/Qwest POIs and the Charter and Qwest networks.[56] That there may be more than one POI established for Charter and Qwest to exchange traffic is neither unreasonable, or impermissible. Therefore, the reference to POIs in the plural simply captures the possibility that there may be more than one POI that is established (although that would generally not be Charter's preference).

66. With respect to the second concern, that Charter's language in Section 7.2.2.1.2.2 contradicts Charter's bill and keep proposal, that criticism is also misplaced. Again, Mr. Gates explained in his rebuttal testimony that Charter's proposed Section 7.2.2.1.2.2 simply recognizes

[56] TJG-3 (Gates Reb.) at 23, lines 15-17.

that Section 251(b)(5) requires the transport and termination of traffic, which in turn causes costs that must be compensated.[57] Charter's proposal, in its entirety, recognizes that this compensation can occur under one of two scenarios: (a) the parties invoicing and paying each other, ***or*** (b) through an in–kind compensation arrangement such as bill and keep. It is Charter's position that since the traffic will be roughly balanced between the parties, and therefore invoices between the parties will likely be a wash, that a bill and keep compensation arrangement is the most efficient arrangement.[58]

67. Qwest also criticizes Charter's proposed language in Section 7.2.2.1.4, *Qwest Brief* at ¶ 40, because it contains a condition concerning the application of bill and keep arrangements. That criticism fails to recognize that the parties will clearly know when they have implemented a bill and keep arrangement, and when they have not. This condition does not confuse the obligations, but instead simply recognizes that there may be instances in which the parties do not use bill and keep, and conditions such situations on that fact. As Mr. Gates testified, Charter informed Qwest during negotiations that, as an alternative to Charter's proposal to use bill and keep arrangements (if not adopted by this Commission), Charter would be willing to use the same rates that Qwest proposes to assess upon Charter for direct trunked transport.[59] The phrase shown in Charter's proposed Section 7.2.2.1.4 accounts for situations in which the parties do not use bill and keep for transport, and in these instances, the parties would use the same rates Qwest proposes to assess upon Charter.

68. To the extent that the language does not specifically reflect Charter's position, Charter would have no objection to modifying the clause to reflect Charter's position (as Mr. Gates

[57] *Id*. at 23, lines 1-9.

[58] *Id*.

[59] *Id*. at 25, lines 4-13.

testified) in the event that the Commission doesn't approve bill and keep rates for transport and termination of the parties' traffic, as Charter advocates.[60] Therefore, Charter's proposed 7.2.2.1.4 would apply only when bill and keep does not apply (as in the case of Charter's alternative proposal for compensation for transport), and is consistent with Charter's overarching bill and keep proposal.

69. Qwest's third criticism of Charter's language is that Section 7.3.2.1.1 should be rejected because it could be read to require Qwest to provide transport outside of its service territory. *Qwest Brief* at ¶ 41. This concern is unfounded. Again, Charter witness Mr. Gates explained that the parties have already agreed upon language which establishes that the interconnection point between Qwest and Charter will be on Qwest's network, as evidenced by the agreed-upon language in Section 7.1.1 which states: "Qwest will provide Interconnection at any Technically Feasible point *within its network*…"[61]

70. Qwest is similarly off target when it claims that Charter's use of the preposition "for" rather than "of" would allow Charter to "argue that Qwest is required to provide transport to a wire center in another state…" *Qwest Brief* at ¶ 41. This argument borders on the ludicrous. Charter has not made such an argument in this case, and there is no reason to believe that is Charter's intent. Although Charter does not believe that its use of the preposition "for" rather than "of" would result in the problem that Qwest suggests may arise, Charter is willing to modify its proposed language and include the preposition that Qwest proposes, such that the clause in

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[60] Specifically, Charter would agree to modify its language for its proposed last sentence of Section 7.2.2.14 by adding the following additional language shown in *italics* below:

> 7.2.2.1.4 **For Qwest-originated traffic, Qwest will pay CLEC's applicable trunking and tandem switching rates *( which shall mirror Qwest's rates set forth in Exhibit A, Price List)* from the POI at which the traffic is exchanged to CLEC's End Office Switch or equivalent device.**

[61] *Id*. at 24, lines 10-13 (emphasis added).

Section 7.3.2.1.1 which Qwest complains of would read: "Serving wire center of the POI" (as Qwest proposes).

71. Qwest has offered no reasonable grounds to reject Charter's proposed language. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 13.

**Issues 14 and 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?**

72. Qwest addresses issues 14 and 15 together, under the heading of "bill and keep." *Qwest Brief* at ¶ 44. Qwest's arguments on these issues do not support the conclusion that this Commission should adopt the inequitable and imbalanced compensation arrangements proposed by Qwest. Indeed, as Charter pointed out in its initial brief, both the law and general principles of equity, demand the adoption of a bill and keep arrangement that covers both the transport and termination of both parties' traffic.

73. Recall that Qwest's proposal here is that the parties use a "modified" bill and keep arrangement such that there would be no compensation obligations (of either party) for the "termination" of traffic, but that there will be compensation obligations for the "transport" of traffic. Notably, under this arrangement Qwest intends to assess charges upon Charter for a significant amount of transport on Qwest's network.[62] At the same time, Qwest expects that Charter will be permitted to assess charges upon Qwest for only a very limited amount of transport.[63] Thus, the inequity of Qwest's proposal is apparent on its face. But the problems do not end there. Qwest's proposal also violates the principles of reciprocal and symmetrical

[62] *See Qwest Brief* at ¶ 45 (explaining that Qwest seeks terms which permit it to assess charges for 240 miles of transport, while it expects Charter will be permitted to assess charges for "less than five miles" of transport).

[63] *Id.*

compensation and cost recovery mandated by Sections 251 and 252 of the Act, and as affirmed by the FCC. Those authorities are discussed in greater detail below.

A. FCC Rules Permit States to Impose Bill and Keep Arrangements

74. Qwest's first argument in support of its proposed language is that both parties' proposals are permissible under federal law, and "no FCC rule or order prohibits the Commission from adopting either [party's bill and keep] proposal." *Qwest Brief* at ¶ 44. This statement is a significant departure, indeed a complete reversal, from the testimony provided by Qwest's witness, Mr. Easton. In his direct testimony Mr. Easton argued that Charter's proposal "is not consistent with FCC rules."[64] Mr. Easton went even further and asserted that the FCC's definitions and statements in FCC Rule 51.713(a) and (b) did not permit the bill and keep proposal offered by Charter.[65] Now, however, Qwest has abandoned those assertions and concedes that Charter's proposal is permissible under the law. Thus, the Commission should discount that portion of Mr. Easton's testimony, given that Qwest has now acknowledged that Charter's proposal is permissible under FCC rules.

75. Indeed, the FCC has recognized that Section 252(d)(2), the statute establishing the basic reciprocal recovery standard for the reciprocal compensation arrangements, explicitly states that bill-and-keep arrangements are not precluded under section 252(d)(2) [66] Building upon the express language of the statute, the FCC has affirmatively ruled that states may impose bill-and-keep arrangements if traffic is roughly balanced in the two directions and neither carrier has

[64] WRE-1T (Easton Dir.) at 22, lines 20-21.

[65] *Id*. at 23, lines 15-24.

[66] *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 ¶ 175, n. 346 (1996) ("*Local Competition Order*").

rebutted the presumption of symmetrical rates. [67] That the volume of traffic will be roughly balanced, and is expected to remain so, is a fact which the parties agree upon.[68] Thus, Charter's proposal is not only permissible under FCC rules, it is fully consistent with those rules.[69] As Charter witness Mr. Gates explained, FCC Rule 51.705 establishes specific standards regarding incumbent LECs' rates for transport and termination.[70] In particular, the rule provides a basis for state commissions to adopt several different rate schemes, and specifically includes bill and keep arrangements. Notably, the rule indicates that bill and keep arrangements are appropriate for both transport *and* termination.[71] Thus, Rule 51.705 refers to both transport ***and*** termination in the context of bill-and-keep arrangements which state commissions may elect to impose. Although the rule refers to Rule 51.713 (which Qwest relies upon), the plain language of Rule 51.713 does not prohibit a bill-and-keep arrangement that covers both termination and transport. Thus, Rule 51.705 demonstrates that state commissions, like this one, are empowered to adopt a bill and keep arrangement that covers both transport and termination. Again, on this point, Qwest concedes that Charter's construction of FCC regulations is consistent with applicable law.[72]

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[67] *Id*. at ¶ 1112.

[68] Tr. (Easton) 237:9-11 (testifying that his understanding is that the parties traffic is in balance); *see also* § 7.3.4.1.2 (Parties agree that traffic "historically has been roughly balanced").

[69] *Id*. at 236:3-12.

[70] TJG-3 (Gates Reb.) at 16:10-21; 17:1-6.

[71] Rule 51.705(a)(3) reads, in part:

> 51.705 Incumbent LECs' rates for transport and termination.
>
> (a) An incumbent LEC's rates ***for transport and termination*** of telecommunications traffic shall be established, at the election of the state commission, on the basis of: …
>
> (3) A bill-and-keep arrangement, as provided in § 51.713.

47 C.F.R. § 51.705(a)(3) (emphasis added).

[72] *See Qwest Brief* at fn. 24 (acknowledging that FCC rules 47 C.F.R. 51.713, and 51.705, when read together, support Charter's construction of the law).

76. In addition, there are obvious efficiencies associated with bill and keep arrangements. As Qwest's witness Mr. Easton explained, "if the parties believe the traffic is going to be in balance and that they would be exchanging the same amount of compensation, from an administrative standpoint it makes more sense that the parties would choose not to exchange dollars."[73]

77. As explained in Charter's opening brief, *Charter Brief* at ¶¶ 67-71, Section 252(d)(2) requires that reciprocal compensation arrangements (including bill and keep arrangements) are not just and reasonable, unless they 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.[74]

78. In construing the scope of the obligations the FCC has construed the obligations under the statute in this way:

> Section 252(d)(2) states that, in connection with an incumbent LEC's compliance with section 251(b)(5), a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless: (1) the terms and conditions provide for mutual and reciprocal recovery of costs associated with the transport and termination of calls that originate on the network of another carrier; and, (2) such terms and conditions are a reasonable approximation of the additional costs of terminating such calls.[75]

79. Several elements of this statement are relevant here. First, the statute requires that compensation arrangements be just and reasonable. That, in turn, raises the question of whether a compensation arrangement which will result in inequitable and imbalanced charges (as Qwest has proposed), can be just and reasonable as the statute requires. Second, the bill and keep compensation arrangement ordered by this Commission must provide for the ***mutual*** and

[73] Tr. (Easton) 236:3-8.

[74] 47 U.S.C. § 252(d)(2)(A)(i).

[75] *Local Competition Order* at ¶ 175, n. 346.

***reciprocal*** recovery of costs associated with the transport and termination of calls. [76] Qwest s proposal, which contemplates that Charter would not be permitted to recover a large portion of the transmission costs it incurs, (and which would result in the greater charges and payments from Charter to Qwest, but not from Qwest to Charter), does not afford an opportunity for mutual and reciprocal recovery of costs. Third, and finally, a bill and keep arrangement need not be established upon specific cost evidence, but instead such terms and conditions may constitute a reasonable approximation of the additional costs of terminating such calls. [77]

B. Qwest s Proposal Is Inequitable Because It Would Effectively Prohibit Mutual Recovery of Costs

80. Qwest s second argument in support of its bill and keep proposal under issues 14 and 15 is that its proposal is more equitable. *Qwest Brief* at ¶ 45. In support of this assertion Qwest argues that it will be providing much greater transport on its network than Charter provides on its network. Specifically, Qwest expects to charge Charter for transport on its network from the POI in Yakima to Qwest end offices in Waitsburg, Walla Walla, and elsewhere. *Id*. It is for these routes, which collectively could equal several hundred miles, that Qwest would assess upon Charter its so-called Direct Trunk Transport charges.[78] However, Qwest expects that Charter will only be permitted to charge Qwest for less than five miles of transport that Charter provides on its network.

81. There is nothing equitable about that arrangement. To the contrary, Qwest s proposal, if adopted by this Commission, would result in an inequitable and imbalanced compensation

[76] 47 U.S.C. § 252(d)(2)(A)(i).

[77] *Id*.

[78] Qwest also identifies transport it would provide from Yakima to the Qwest Spokane Tandem. *Qwest Brief* at ¶ 45. But this example is not instructive, because Qwest's witness admitted that Charter has no retail end user customers in Spokane, and therefore does not send local traffic to (or from) Spokane. Tr. (Easton) 247:21-25; 248:1-5 (admitting that there is no local end user traffic delivered to, or from, the Spokane tandem).

arrangement. Specifically, Qwest would be permitted to assess a significant amount of transport charges upon Charter, while Charter would only be permitted to assess a very limited amount of charges upon Qwest. This is so because Qwest proposes to exclude from transport compensation arrangements the transmission associated with the termination of calls. Specifically, when Charter transmits a Qwest-originated call from its switch to the called party, which would entail the same transmission that Qwest will undertake, under Qwest s proposal, Charter would not be entitled to recover the costs of that transmission. This is true even though Qwest s witness admitted that both parties are providing the same total transmission (transport and termination) functions on their own respective networks.[79] That result is not equitable. Nor is it just or reasonable, as is required by Section 252(d)(2).

82. The basic inequity of Qwest s proposal arises from the fact that Charter has chosen to deploy its network by using a single switch in the state of Washington.[80] As Charter witness Mr. Gates explained, "[i]n the past, switching was relatively cheaper than transport, so a switch-centric PSTN was developed. Today, with fiber and electronics making transport very inexpensive, and packet switching increasing efficiencies even more, carriers can serve very large areas with only one switch."[81] That, in turn, means that Charter has deployed very long transmission lines between its switch and the various communities that it serves in Washington.

83. Qwest acknowledges this fact, though it incorrectly characterizes these transmission facilities as long loops. *See Qwest Brief* at n. 30. In a traditional incumbent LEC network these transmission facilities may be characterized as loops. But regardless of the label used by

[79] Tr. (Easton) at 243:13-16; 244:17-20 (Charter is responsible for carrying calls back from the Yakima POI to the same communities where the calls originated).

[80] TJG-1T (Gates Dir.) at 26.

[81] *Id*. at n. 10.

Qwest, that does not change the fact that these are simply transmission facilities that Charter has deployed from its switch to the communities (indeed all the way to the customer s home or business) which are used to transmit calls to the customer. [82]

84. In sum, Qwest s proposal allows Qwest to charge for significantly greater amounts of transport than Charter provides to Qwest. In contrast, Charter s proposal covers all of the transport that each party provides.

85. Qwest defends its attempt to impose greater transport charges upon Charter by asserting that Charter has the ability to shift transport costs to Qwest by selecting a point of interconnection that is closer to Charter s switch. *Qwest Brief* at ¶ 45. Qwest explains that by excluding transport from bill and keep, its proposal will require Charter to take[] into account Qwest s transport costs when [Charter] selects its points of interconnection *id*. at ¶ 46, and that a consequence of selecting a point of interconnection close to its own switch is that Charter will have to pay for direct trunked transport on Qwest s side of the point of interconnection. *Id*.

86. In other words, Qwest s view is that if Charter decides to avail itself of its federal law right to establish a single point of interconnection, that decision comes at a significant cost. Specifically, Charter must pay Qwest s transport charges (but without the ability to recover its own transport costs) simply for choosing an efficient point at which to exchange traffic with Qwest. Implicit in Qwest s assertions is the idea that Charter could avoid these transport costs by interconnecting at multiple points on Qwest s network, or by deploying multiple switches in

[82] Qwest also asserts that "loop costs are not recoverable in reciprocal compensation [arrangements]." *Qwest Brief* at n. 30. This statement fails to account for the fact that the paragraph cited by Qwest, paragraph 1057 of the Local Competition Order, addressed the loop costs of ***incumbent*** LECs, not competing carriers (like Charter). Moreover, accepting Qwest's reading of this paragraph would simply perpetuate the already inequitable result that Qwest is proposing here, in that it would preclude Charter from recovering its transmission and transport costs over facilities deployed from its switch to its customers. For the reasons explained above, this result is not consistent with standards of Section 252(d)(2).

Washington, such that Charter s network would more closely mirror Qwest s network in Washington.

87. But neither result is consistent with federal law. With respect to Charter s right to establish a single POI, the FCC has adopted a policy that provides CLECs, like Charter, the right to utilize a single POI to minimize the CLECs transport charges. In the Local Competition Order the FCC explained that: [t]he interconnection obligation of section 251(c)(2), discussed in this section, allows competing carriers to choose the most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination of traffic. [83] Thus, the FCC contemplates that competing carriers, like Charter, may choose to use a single POI arrangement. Adoption of Qwest s proposal to require Charter to pay for Qwest s transport would thus be inequitable, and would also undermine the FCC s policy of encouraging competition by reducing competitor s costs.

88. In addition, Qwest s implicit suggestion that Charter can avoid these charges simply by deploying multiple POIs, or switches, is also contrary to the FCC s policies. As Charter witness Mr. Gates explained, the FCC has rejected the idea that the incumbent should be permitted to force the competitor to build a network that mirror s the incumbent s network.[84] That would effectively provide Qwest undue control over Charter's investment decisions, and could force Charter to invest in facilities that are not justified from a financial or engineering standpoint, a result which this Commission should not accept as it is contrary to the promotion of competition in Washington.

89. The promotion of efficient markets dictates that CLECs such as Charter only be required to interconnect in a specific area where traffic volumes and customer demand justify investment

[83] *Local Competition Order* at ¶ 172 (emphasis added).

[84] TJG-1T (Gates Dir.) at 24, lines 15-18.

in facilities needed to reach that area. Charter is not required to extend its facilities to multiple POIs unilaterally identified by Qwest; instead, Qwest is obligated to provide interconnection for Charter's facilities at a single POI or multiple POIs, whichever Charter properly determines best serve its network architecture and business plans in a particular LATA.[85]

90. Further, Qwest's assertion that Charter should pay for "transport on Qwest's side of the point of interconnection," *Qwest Brief* at ¶ 46, conflicts with the principle that each party should be responsible for facilities on its side of the POI. The Fifth Circuit, in *Southwestern Bell Telephone Co. v. PUC of Texas*,[86] affirmed a district court ruling that prohibited an incumbent LEC, Southwestern Bell, from imposing "transport costs" on the interconnected CLEC as compensation for the incumbent LEC's costs of carrying traffic outside of a local calling area to the parties' single POI arrangement. Similarly, this Commission should not permit Qwest to shift the costs of transport on its side of the POI to Charter by allowing bill and keep on only one portion of the call transmission path, i.e. for termination only.

C. Potential Adoption of this Agreement by Other Carriers Is Not a Basis to Find in Favor of Qwest

91. Finally, Qwest also opposes these proposed terms because it would permit other carriers to opt into this agreement. *Qwest Brief* at ¶ 47. But that is simply not a proper basis for the Commission to find in favor of Qwest on this issue (or any other). The fact that another carrier may adopt these terms reflects the fact that Qwest has a continuing legal obligation to provide interconnection to all competitive LECs on non-discriminatory raters, terms and conditions.

92. That obligation arises from Section 252(i) of the Act, which the FCC has explained "entitles all parties with interconnection agreements to most favored nation status regardless of

[85] *Id*. at 26, lines 12-19.

[86] 348 F.3d 482 (5th Cir. 2003).

whether they include "most favored nation" clauses in their agreements. [87] What this necessarily means is that the potential that another carrier may adopt this agreement is precisely what Congress intended when it enacted Section 252(i). From a policy perspective, the potential for adoption by other carriers should be viewed as a *positive* development, rather than a negative development, as Qwest seems to suggest. This is true because the potential for adoption ensures that the Commission will be reinforcing Qwest s non-discrimination obligations, and because it may increase the potential for competition in Washington if other competitors can benefit from the equitable terms sought by Charter.[88]

93. Qwest has offered no reasonable grounds to reject Charter's proposed language. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issues 14 and 15.

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

94. Qwest offers several arguments in opposition to Charter s proposal to include terms providing for the potential use of indirect interconnection in the agreement. *Qwest Brief* at 49-53. Namely, Qwest asserts that it has no legal obligations under Section 251(a), *id*. at ¶ 49; that Charter s language does not address every conceivable technical issue that may arise between the parties; *id*. at ¶¶ 51, 53; and, that Charter s language conflicts with Qwest s language on indirect traffic exchange. *Id*. at ¶ 50.

95. Clearly, the parties have a real dispute over the indirect interconnection provisions of this agreement. That, of course, is why Charter included this as an unresolved issue in its petition,

[87] *Local Competition Order* at ¶ 1316.

[88] However, it is not clear that adoption by many other CLECs is likely. Because this interconnection agreement will not have any terms providing for unbundling (except for one type of sub-loop) and collocation, it will not be useful to most CLECs that obtain unbundled network elements from Qwest to provide service to their end user customers.

and offered supporting testimony and briefing on its position. Similarly, Qwest identified the issue in its answer, and also offered supporting testimony and briefing on its position on this issue. Thus, regardless of when the language was first introduced, the issue is in dispute and properly before this Commission for adjudication. For that reason, the Commission should disregard Qwest s assertions about how or when language was presented. Instead the Commission must focus on resolving the core issue in dispute: is Qwest obligated, under Section 251(a), to include terms of indirect interconnection in its agreement with Charter?

96. Qwest s first assertion is that it has no legal obligations to negotiate the terms of indirect interconnection under Section 251(a). *Qwest Brief* at ¶ 49. Interestingly, Qwest does not dispute that it has a federal statutory obligation to interconnect directly or indirectly, as is required by Section 251(a). It only contests the obligation to negotiate terms of indirect interconnection.

97. But Qwest does not, indeed cannot, dispute that Section 251(a) imposes an obligation to interconnect directly or indirectly with Charter. As Charter demonstrated in its initial brief, *Charter Brief* at ¶¶ 85-86, the statute, on its face, requires every telecommunications carriers to interconnect "directly *or indirectly* with the facilities and equipment of other telecommunications carriers."[89] And several federal appellate courts have affirmed the "statutory provision [Section 251(a)] that imposes the duty to interconnect networks expressly permits direct or indirect connections…"[90] Thus, Qwest has an obligation to interconnect indirectly, and directly, with Charter.

98. Qwest's assertion that it has no obligation to negotiate terms for such interconnection suggests that it would not have agreed to any Charter-proposed language, no matter when that

[89] 47 U.S.C. § 251(a)(1) (emphasis added).

[90] *WWC License, LLC v. Pub. Serv. Comm'n*, 459 F.3d 880, 884 (8th Cir. 2006); *see also Atlas Telephone v. Oklahoma Corporation Commission*, 400 F.3d 1256 (10th Cir. 2005).

language was offered. This conclusion is supported by the fact that Qwest points to Section 7.2.1.1 of the agreement, which contemplates that the parties will not use indirect interconnection under any circumstances. This language clearly conflicts with Charter's proposed language, and as such, should have been marked as "disputed" language by the parties in their initial pleadings.

99. Qwest also contends that Charter's language does not address certain technical issues concerning traffic routing and tracking. *Qwest Brief* at ¶¶ 51. The implication raised by these questions is that the Commission cannot order Qwest to provide means of indirect interconnection unless these questions are answered. That is not the case.

100. First, Charter's proposed language provides the necessary detail, and framework, to establish when the parties may use indirect interconnection as a means of exchanging traffic. As for the identity of who the third party carrier will be, that is not necessary for this agreement.[91] Notably, Charter's language places no limits on Qwest's ability to use any suitable third party to send its traffic back to Charter's network. Second, indirect interconnection is a common form of traffic exchange. As a result, there are certain technical parameters concerning the exchange of indirect interconnection which address routing, tracking, and other questions raised by Qwest.

101. Charter's witness, Mr. Gates, also answered the speculative concerns raised by Qwest's witness Mr. Linse related to these terms. Specifically, Mr. Gates affirmed that existing terms of the agreement, including Section 7.3.8, require each party to provide the other party the signaling information necessary to properly identify and bill traffic,[92] and that these terms include protections (and consequences) if the required signaling information is not provided.[93] Mr.

[91] TJG-3RT (Gates Reb.) at 38:18-19.

[92] *Id*. at 35:9-12.

[93] *Id*.

Gates also refuted Qwest's unsupported, and speculative, assertions that Charter could use indirect interconnection arrangements to engage in some form of "revenue-sharing" arrangement.[94] Such arrangements would not be financially practical given that Charter has proposed that the use of indirect interconnection terms be limited to very low volumes of traffic.[95]

102. Furthermore, under the existing terms of the agreement Charter would have an ongoing obligation to negotiate in good faith any amendments that may be necessary to address traffic exchange issues that may arise in the future.

103. Qwest also opposes these proposed terms because it would permit other carriers to opt into this agreement. As demonstrated above, *supra* ¶¶ 91-93, the fact that another carrier can adopt this agreement is not a valid reason for rejecting Charter's proposed language. As shown, Qwest is obligated to exchange traffic with Charter both directly *and* indirectly. Qwest's unwillingness to negotiate provisions should not prejudice Charter's federal right to immediate indirect traffic exchange, if it chooses. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 16.

## 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?**

104. Qwest correctly notes that Issue 17 involves two sub-issues: (1) whether Qwest should be required to obtain Charter's approval before assessing a miscellaneous charge; and (2) whether the language should include the phrase that Charter's obligation to pay "depend[s] on the specific circumstances." *Qwest Brief* at ¶ 55, Charter agrees that there is no dispute concerning the rates

[94] *Id*. at 35:13-20, 36:1-14.

[95] *Id*. at 36:3 (Charter proposal uses "relatively low threshold" as a trigger for when the parties may move off of an indirect interconnection arrangement).

for miscellaneous charges as long as the Commission has previously approved the amounts of such charges, and such charges are explicitly referenced in the interconnection agreement.

105. Regarding the latter issue, concerning Charter's proposal to include the "Depending on the specific circumstances" clause, Charter's intent simply was to reaffirm that Charter will agree to pay miscellaneous charges when it has either requested or approved the work in advance. Because Qwest appears to be concerned that such clause could be read to limit Charter's obligation to pay miscellaneous charges when Charter has requested that Qwest perform some work,[96] Charter is willing to withdraw the clause.[97]

106. In so doing, Charter hopes that this clarification will further illustrate Charter's intent with respect to the former issue. Specifically, the interconnection agreement should clearly state that Charter will only be responsible for a miscellaneous charge if it: has either requested or consented to Qwest's performance of the work giving rise to the miscellaneous charge. In its brief Qwest fails to explain why it should be permitted to assess charges where Charter has not requested or consented to the work.

107. Qwest first asserts in its brief that "Qwest only performs [miscellaneous] services after a CLEC has submitted either a service order or a trouble ticket," *Qwest Brief* at ¶ 57, but Qwest contradicts this statement in the very next sentence, noting that it "trains its technicians not to perform any work not authorized by a CLEC *unless Qwest performs a service based on a CLEC action* …." *Id*. (emphasis added). It is this open-ended potential for unexpected charges resulting from "Qwest perform[ing] a service based on a CLEC action" to which Charter objects.

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[96] *See* RHW-1T (Weinstein Direct) at 11:10-12.

[97] Thus, Charter would agree to the following revision to its proposed language for Section 9.1.12:

> "~~**Depending on the specific circumstances,**~~ **The items below are Miscellaneous Charges that may apply if requested by CLEC:**"

108. CLEC has submitted either a service order or a trouble ticket"[98] and that "[i]f the CLEC doesn't request the work, but causes the work, it is Qwest's process to contact the CLEC, quote the charges and commence work once the customer accepts."[99] These are precisely the procedures that Charter expects, and which would be utilized if Charter's language were adopted. Notably, however, Qwest's proposed language does not require it to follow these procedures, leaving Charter to guess at the charges Qwest might assess for work performed "based on a [Charter] action." Qwest's witness admitted that the procedures which Qwest employs (performing service only after CLEC submits a request) are ***not*** set forth in the agreement.[100] Thus, Qwest has testified that its practice is to provide notice on nearly all occasions, but at the same time it refuses to include language in the agreement that reflects that (apparent) fact. There is no reason to perpetuate this unreasonable disconnection between Qwest's actions and its proposed contract language.

109. Charter is also concerned that most of the activities associated with miscellaneous charges appear to relate to the use of unbundled network elements. Indeed, the provision for such charges appears in the part of the agreement that addresses unbundled network elements. Because Charter does not use unbundled network elements, for Qwest to assess any charges associated with unbundled network elements without Charter's specific approval would be especially inappropriate. The lack of clarity concerning when an "action" might trigger a charge usually associated with the use of unbundled network elements can only provoke disputes over such charges. Such a result would inevitably lead to additional billing disputes, and likely, formal Commission complaints.

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[98] RHW-2RT (Weinstein Rebuttal) at 8:23-24.

[99] *Id.* at 9:7-9.

[100] Tr. (Weinstein) at 314:3-10, 18-21.

110. Moreover, the only clear example that Qwest has provided of when a miscellaneous charge might apply is the situation addressed in the agreed language for Section 9.1.12(j) of the ICA. Qwest's witness testified that:

> There could be the situation where a CLEC requests work be performed and additional service is performed as a result of that request. For example, suppose a CLEC notifies Qwest that there is a network issue that is a result of a problem on Qwest's network. Qwest dispatches a Qwest technician to examine the facility and the Qwest technician discovers that Qwest's network is working properly but the issue is actually on the CLEC's side of the network. In such a circumstance, Qwest would assess a miscellaneous charge for the dispatch. Qwest would not have sought approval of the miscellaneous charge prior to the dispatch because it was informed that it was a Qwest issue. The CLEC's action caused Qwest to dispatch a technician. In fact, it was at the CLEC's request that the dispatch occurred. Qwest should be paid for performing the service.[101]

111. Charter agrees that Qwest should be paid under such circumstances, as indicated by Charter's acceptance of the language for Section 9.1.12(j) of the ICA. However, this example does not justify, explain, define, or otherwise limit Qwest's insistence upon the broad and vague right to assess charges "based on a CLEC action."

112 Charter has no objection to the imposition of charges under the specific circumstances delineated in Sections 9.1.12(a)-(j) of the agreement, when it specifically asks Qwest to perform such work. Because Charter does not use unbundled network elements, Charter will not be requesting services or issuing trouble tickets under most of the circumstances identified in the individual examples of this provision. Qwest has failed to explain why it should be allowed generally to assess charges "based on a CLEC action" in addition to the specific provisions of Section 9.1.12, and it should not be permitted to do so.

113. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 17.

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[101] RHW-2RT (Weinstein Reb.) at 10:27 through 11:7. *See also Qwest Brief* at ¶ 58.

## 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?**

114. Qwest argues that Charter's proposed language for Section 10.4.2.4 of the agreement improperly limits permissible uses of Charter's customer listing information, and violates FCC orders concerning the marketing of such information. *Qwest Brief* at ¶¶ 70-75. Qwest's argument is based upon its apparent confusion concerning both the scope, and the effect, of Charter's proposed language.

115. First, the scope of Charter's proposed language is limited. It only limits one entity, Qwest, from engaging in one specific activity, marketing to Charter's listings when such listings are segregated from other listings in the Qwest directory database. Qwest repeatedly states that it does not use its directory listings for marketing purposes.[102] If that is so, Qwest cannot reasonably object to agreeing to language in the agreement which simply memorializes Qwest's current practice. That is precisely what Charter's proposed additional sentence ("CLEC's Listings supplied to Qwest by CLEC shall not be used by Qwest for marketing purposes.") achieves.

116. Second, the effect of Charter's proposed language is limited. The language does not prohibit Qwest from providing Charter's customer listing information to third party DA providers, as the FCC rules require. Nor does Charter's language limit the purposes for which those DA providers may use Charter's listings. Further, with respect to Charter's proposed deletion of the broad reference to the Qwest clause which permits Qwest to use this information for "other lawful purposes", Qwest has failed to identify what other "lawful purposes" Charter's

[102] *See, e.g., Qwest Brief* at ¶ 68 ("Qwest does not use the Directory Listings in its marketing programs."); RHW-2RT at 16:23 ("Qwest does not use listing information for marketing purposes").

language would prohibit. Nor is Charter's proposed deletion of language prohibiting Qwest from marketing based on segregation of Charter's listings inconsistent with Charter's proposal that Qwest be prohibited from using Charter's listing information for marketing purposes --a prohibition that Qwest concedes is consistent with its actual practices. Charter proposed to delete Qwest's language prohibiting marketing based on segregation because Charter offered alternative language which more clearly addressed the prohibition.

117. Finally, Charter's limited proposal to prohibit Qwest from marketing Qwest's services to Charter's customers by using subscriber listing information that Charter provides to Qwest pursuant to Section 251(b)(3) is very different from the efforts to prohibit competitive DA providers from reselling the customer listing information itself that the FCC rejected in the *SLI/DA First Report and Order* cited by Qwest. *Qwest Brief* at ¶ 74. Notably, Charter's language does ***not*** limit third party directory assistance ("DA") providers from using the Qwest DA database to engage in marketing to any listing in that database. Thus, Charter's language does not limit the activities of competitive DA providers, or their use of Charter's listing information, in any way.

118. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 19.

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

119. Qwest first contends that "Charter's language does not acknowledge Qwest's 251(b)(3) obligation to provide directory listings to DA providers," Qwest *Brief* at ¶ 81. But this statement is simply not accurate. Charter's proposed language for Section 10.4.2.5 clearly states that:

> No prior authorization from CLEC shall be required for Qwest to sell, make available, or release CLEC's End User Customer Directory Assistance Listings to Directory Assistance providers, provided that Qwest does so in accordance with Applicable Law.[103]

120. Just as in the case of Issue 19, there is nothing in Charter's proposed language for Issue 20 that limits the availability of Charter's customer listing information to third party DA providers, or restricts their use of Charter's listings in any way. Qwest's complaint in this respect is purely semantic, apparently insisting that an exception to the requirement of obtaining Charter's consent to the release of its customer listings must be expressed in the same sentence as the requirement itself. Qwest's complaint is without merit.

121. Qwest next argues that Qwest's "New Customer Questionnaire" gives Charter the ability to control Qwest's release of its customer listings to directory publishers and other third parties (other than DA providers), and that Charter's proposed language "is really just a complicated choice of [Qwest's] 'Option 2.'" *Qwest Brief* at ¶ 84. Qwest fails to recognize that, as with a number of other issues in this arbitration, Charter's concern is less with Qwest's practices than with the fact that Qwest's proposed contract language does always not reflect those practices.

122. Since Charter's language does, in fact, reflect the current practices used by Qwest, there is no harm in including such language in the agreement. In fact, there are significant benefits to memorializing the process in the agreement. Doing so will ensure that the process continues through the term of the agreement, and will provide operational certainty for both Parties. This stands in contrast to Qwest's proposed resolution, to rely only upon Qwest's representations concerning its current practices, without incorporating those practices in binding contract language (as Charter proposes). That approach would effectively subject Charter to practices that Qwest is free to change at will.

[103] HE-5 (Issue Matrix) at 37-8.

123. Importantly, Qwest concedes that Charter's language for Issue 20 is consistent with Qwest's current practices. Further, Charter's language does not limit Qwest's ability to provide Charter's customer listings to DA providers in accordance with law, or the uses to which third-party DA providers put the listing information. In order to minimize the potential for disputes concerning Qwest's release of Charter listing information to other third parties, Charter's language should be adopted for Section 10.2.4.5.

Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 20.

**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?**

124. Qwest contends that a privacy listing is a "privilege" for which, as a matter of "public policy," there should be a "small charge." *Qwest Brief* at ¶ 89. Unfortunately, Qwest cites no authority in support of its assertion of "public policy." However, because Qwest's position is premised on the non-availability to the public of privacy listings, even Qwest would have to concede its argument cannot be applied to non-listed numbers, which are available in the DA database. According to Qwest's own tariff, "non-listed" means not in the printed directory, but still "published" (and available to the public) through Qwest's directory assistance service. In contrast, Qwest's use of the term "non-published" in its tariff means not available to the public at all.[104] Thus, because Qwest makes non-listed numbers available to the public through directory assistance services, charging customers for non-listed numbers does not further the asserted public policy of discouraging customers from restricting the public availability of their numbers.

[104] Qwest Washington Exchange and Network Services Tariff, WN-U40, § 5.7.1.F.

125. Moreover, although Qwest's argument is premised on its statements that Charter has the "option" of providing its listings to Qwest, *Qwest Brief* at ¶¶ 88, 93-4, that fact is not clearly set forth in the contract language Qwest has proposed. For example, although the parties' agreed-upon language establishes that "primary, premium and privacy" listings "may" be provided "by mechanized or by manual transmission," there is no contract language which establishes that an additional "option" for Charter is simply not to provide listings information. Instead, Qwest's language merely sets forth a description of the means by which listings shall be provided to Qwest. However, Qwest has conceded that Charter does have this option, *Qwest Brief* at ¶ 93, and that if Charter chooses to avail itself of this option not to provide listing information to Qwest there should be no charge. *Id*. at ¶ 88.

126. Likewise, although the parties' agreed-upon language premises Qwest's access to Charter's end user listings information as follows: "[i]f CLEC provides its End User Customer's Listings to Qwest,"[105] Qwest has not stated that such contract language is intended to mean anything other than access will be granted to the listings information that is provided. Accordingly, instead of characterizing Charter's proposed clarifying language as "redundant and unnecessary,"[106] Qwest should have no objection to the first sentence of section 10.4.3.4 as proposed by Charter: "CLEC shall have no obligation to provide Qwest directory listing information related to CLEC End User Customers that have requested non-list or non-publish status within the directory." This statement merely reflects Qwest's explanation of its practice today, and should therefore be incorporated into the agreement.

127. Moreover, even if the Commission believes that a privacy listing is a "privilege" for which an end user is charged in order to provide an incentive to publish its listing information,

[105] *Id*. at 36-7 (§ 10.4.2.4 of the draft agreement).

[106] RHW -1T (Weinstein Dir.) at 31:13-14.

that rationale only supports charging the end user (as both Qwest and Charter do). The same reasoning does not provide a basis for Qwest to charge Charter and other carriers whose end users request privacy listings, especially since there is no cost justification for imposing such a charge. Notably, Qwest has not refuted the fact that it performs little or no work in providing a "service" regarding privacy listings. Charter has established that any such "service" is, at most, comprised of electronic functions automatically performed by Qwest's computers,[107] for which Qwest has already agreed not to impose charges[108] and for which the incremental costs are "if not zero, then something very close to zero."[109] Qwest's description of its processes do not indicate any manual intervention is necessary.[110] In any event, Qwest provides no evidence it is not already recovering its purported costs, particularly through Qwest's sales of listing information to directory publishers, DA providers and others.[111]

128. Finally, Qwest contends that the rate it proposes to charge Charter was approved in the Commission's section 271 process. *Qwest Brief* at ¶ 96. The evidence, however, categorically demonstrates that the rate is not cost-based, but is instead based on a retail tariffed rate approved by the Commission in 1980.[112] Moreover, as discussed in Charter's initial brief, Qwest's proposal in the 271 case was to charge the retail rate minus the wholesale discount for *Premium* Listings, *Charter Brief* at ¶ 115, and Qwest has cited no Commission decision approving the same methodology for pricing *Privacy* Listings for customers of competitive carriers. Therefore,

[107] JDW-2RT (Webber Reb.) at 60:27-29.

[108] *Id*. at 61:16-17; 62:1-4.

[109] *Id*. at 61:2-4, 18-19.

[110] *Id*. at 61:1-2.

[111] *Id*. at 62:7-14.

[112] RHW-2RT (Weinstein Reb.) at 25:20-24.

in the absence of a cost case establishing a rate for use in the context of a section 251/252 interconnection agreement, there is no justifiable basis for imposing Qwest's rate on Charter.

129. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 22.

**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?**

130. As noted in Charter's Opening Brief, *Charter Brief* at ¶ 118, there appears to be no real disagreement regarding Qwest's obligations concerning yellow pages listings for Charter's business customers. Qwest stated in its brief that "[t]he listings of Charter and other CLEC's [*sic*] are commingled with Qwest's listings and provided in a manner that does not distinguish between whose carrier the end user uses," *Qwest Brief* at ¶ 97, and that "Qwest provides directory listings to requesting directory publisher [*sic*] on nondiscriminatory terms." *Id*. at ¶ 98. Charter seeks no more than this, but Qwest's proposed language is not consistent with what Qwest has said in its testimony[113] and elsewhere in its brief.

131. Qwest objects that "Charter's language would require Qwest to negotiate with the directory publisher so 'that CLEC may provide its own End Users' information for inclusion in such printed directories on the same terms and conditions that Qwest End User information is included,'" *Qwest Brief* at ¶ 103. Also, Qwest contends that "yellow pages publishers are not public service companies and are not subject to the Commission's jurisdiction." *Id*.

132. On the latter question Qwest is simply wrong, as a matter of law. Contrary to Qwest's assertions, the United States District Court for the District of Colorado, affirming an arbitration decision by the Colorado Public Utilities Commission, held in *U S West Communications v.*

[113] *See* Qwest testimony cited in Charter Brief at ¶ 118 n.133.

*Hix*,[114] that Section 251(b)(3) and the FCC's implementing regulations required Qwest's predecessor to arrange for the publication of yellow pages listings for CLEC customers. The United States District Court for the Eastern District of Michigan reached the same conclusion in *MCI Telecommunications v. Michigan Bell Telephone*.[115] There the court, in construing the scope of the FCC's regulations promulgating Section 251(b)(3), explained:

> [T]he issue of whether [the directory publisher] is an affiliate of [the ILEC] is not relevant because the regulation is drafted more broadly. "Directory listings" include those that an incumbent carrier has "caused to be published." [The ILEC] causes its own customers to be published in the … Yellow Pages. Therefore, [the ILEC] has the duty to provide nondiscriminatory access to such yellow pages publication to [the CLEC's] customers.[116]

133. Qwest admits that it "has negotiated with Dex to provide a complementary yellow page listing for those business listings Qwest provides in its directory listings." *Qwest Brief* at ¶ 102. In other words, Qwest "causes its own customers to be published in the … Yellow Pages," and thus "has the duty to provide nondiscriminatory access to such yellow pages publication to [Charter's] customers," as both the *Michigan Bell* and *Hix* courts have ruled.

134. Qwest's position also conflicts with its duty under Washington law to publish yellow pages listings.

> [U]nder Washington law, the initial yellow-page listing in standard-size print is an essential part of the telephone company's directory service in aid of its primary business of transmitting messages and is subject to public regulation.[117]

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[114] 93 F. Supp. 2d 1115 (2000).

[115] 79 F. Supp. 2d 768 (1999).

[116] *Id.* at 802 (citation omitted).

[117] *Allen v. General Telephone Company of the Northwest, Inc.*, 578 P.2d 1333, 1337 (Wash. Ct. App. 1978).

135. Because Qwest is required by Washington law to arrange for yellow pages listings for its own customers, the nondiscrimination principle of Section 251(b)(3) requires that Qwest do the same for Charter's customers.[118]

136. Finally, notwithstanding Qwest's protests, it appears that Charter's proposed language would not, in fact, require Qwest to negotiate anything with directory publishers. Mr. Weinstein testified that "Qwest provides its Directory Publishing List (DPL) to Dex for the white pages and the DPL includes its customer listings along with CLEC's [*sic*] including Charter"[119] and that Qwest's White Pages Directory Listings 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."[120] All that Charter asks is that the contract language say the same thing. If Qwest already provides a single list, without distinguishing between Qwest customers and Charter customers, to all directory publishers, whether they publish white pages, yellow pages or both, then there is nothing that Qwest needs to negotiate with directory publishers in order to permit Charter to "provide its own End Users' information for inclusion in such printed

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[118] To resolve this issue Charter would be willing to withdraw that portion of its proposed language which would require Qwest to cause contracts to be modified. Thus, Charter would agree to the following revision to its proposed language for Section 15:

> 15. **Qwest shall provide CLEC with directory listing functions (that is, inclusion of CLEC numbers in printed white and yellow pages directories) to the same extent that Qwest provides its own End Users with such listing functions, irrespective of whether Qwest provides such functions itself or relies on a third party to do so.** [Begin deleted text: ~~Qwest shall promptly cause any contracts or agreements it has with any third party with respect to the provision of these services and functions to be amended, to the extent necessary, so that CLEC may provide its own End Users' information for inclusion in such printed directories on the same terms and conditions that Qwest End User information is included~~. End deleted text] **Notwithstanding the foregoing, CLEC acknowledges that yellow pages advertising arrangements will be established directly between Qwest's Official Directory Publisher and any End Users seeking to place such advertising**.

[119] RHW-2RT (Weinstein Reb.) at 27:5-7.

[120] *Id.* at 28:13-16.

directories on the same terms and conditions that Qwest End User information is included," as required by Charter's proposed language.[121]

137. Qwest insists that "Qwest's proposed language for Section 15 correctly defines the scope of Qwest's yellow page directory role," *Qwest Brief* at ¶ 101, but that is simply not the case. Although Qwest acknowledges in its testimony, and briefs, that it must submit Charter's listings to publishers of yellow pages directories, its contract language says something quite different. Specifically, Qwest's proposed language for Section 15 states that: "yellow pages Listings … will be the subject of negotiations between CLEC and directory publishers …."[122]

138. Qwest's language conflicts directly with the testimony of its own witness, Mr. Weinstein, who explained that "Qwest is required to accept Charter's listings and submit them to a publisher."[123] If Qwest submits its own customer listings to a yellow pages publisher, it must also submit Charter's listings on a nondiscriminatory basis, as both the *Michigan Bell* and *Hix* courts have ruled.

139. Charter's proposed language seeks simply to require Qwest to do what Qwest insists it does anyway, while Qwest's proposed language disclaims any responsibility related to yellow pages in contravention of its obligation under federal law. Accordingly, the Commission should reject Qwest's proposed language, and instead adopt Charter's proposed language for Issue 23.

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[121] Charter does not seek to require Qwest to negotiate terms permitting Charter to provide its listings directly to publishers, as Qwest appears to assume. *See* Qwest Opening Brief at ¶ 103; RHW-2RT (Weinstein Reb.) at 30:29 through 31:6. Indeed, "[i]f Charter wants to provide its listings to a publisher, Charter can do so without Qwest's approval and certainly without Qwest's involvement." *Qwest Brief* at ¶ 103. In this arbitration, Charter seeks only to be able to provide its end user listings to Qwest and have Qwest provide them to directory publishers on the same terms as it provides its own customer listings.

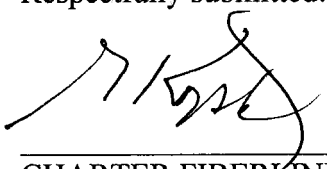
[122] HE-5 (Issues Matrix) at 40 (Qwest proposed language for Section 15).

[123] RHW-2RT (Weinstein Reb.) at 31:4-5.

## VII. CONCLUSION

140. 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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