BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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

QWEST CORPORATION'S REPLY BRIEF

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I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby files its reply brief in response to the opening brief filed by Charter Fiberlink WA-CCVII ("Charter"). For the reasons set forth in this brief and Qwest's opening brief, the Commission should adopt Qwest's proposed language for all of the disputed issues in this case.

II. REPLY ON DISPUTED ISSUES

2 The parties have revised the disputed issues matrix and are filing it contemporaneously with these reply briefs. Qwest's reply to Charter's argument on each disputed issue is forth below.

3 One issue that Qwest did not previously believe was disputed is the legal standard that must be applied to this arbitration. The parties obviously agree that purpose of the arbitration is to produce an agreement that is consistent with the provisions of the Act and the FCC's regulations. However, Charter erroneously argues, in paragraph 10 of its opening brief, that the Act does not permit the Commission to consider the rulings in the "271 proceedings," and that the Commission may not consider whether another CLEC might opt-in to the agreement pursuant to Section 252(i). Charter is wrong on both counts.

4 The Section 271 proceedings before this Commission were conducted specifically for the purpose of determining whether Qwest met the requirements of Section 271 for entry into the interLATA business. Section 271 compliance, as determined by the FCC, with the recommendations of the state commissions, means that the ILEC is providing interconnection and access to unbundled network elements pursuant to a statement of generally available terms and conditions, and that the interconnection and access is in accordance with the requirements of Section 251(c)(2) and (3). §271(2)(A)(i)II, and §271(2)(B)(i) and (ii). The Section 271 proceeding in Washington leads directly to the compliance with the standards that Charter advocates, and is thus directly relevant to the consideration of the disputed issues in this case.

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5 Further, it is wholly appropriate for the Commission to consider whether another CLEC, opting in to this agreement, may be able to utilize the agreement in a way that the parties do not currently intend. If proposed language creates ambiguities, or unintended consequences, then the Commission may determined that other language should be adopted.

Issue 5 – Limitation on Liability

6 Issue 5 concerns the parties' disputes regarding the appropriate language in the "Limitation on Liability" section of the ICA. Charter, in paragraph 13 of its opening brief, correctly states Qwest's position that damages should be capped at the monthly charges for services at issue. Charter asserts, at paragraph 15, that such a cap is arbitrary, inappropriate, and could prevent an innocent party from being fully compensated. Qwest disagrees with Charter. The cap is neither arbitrary nor inappropriate, and does not purport to limit a party's ability to be made whole, through insurance or otherwise. Qwest does believe that the parties to an ICA should not be insurers for each other's risk though – that is what insurance is for, and that is why the parties separately negotiated an insurance provision (Issue 4).

7 Notwithstanding Charter's arguments that the cap is "arbitrary" and "inappropriate", it is clear that Charter actually agrees with Qwest that it is appropriate to limit damages in this way. Charter's Washington tariff limits its liability to its customers as follows:

> Notwithstanding any other provision of any service agreement or this tariff, the telephone company's entire liability to the customer, and the customer's sole and exclusive remedy for any damages caused by any service defect or failure, or for other claims arising in connection with any service provided by the telephone company, shall be customer's proven direct damages not to exceed per claim (or in the aggregate during any 12-month period) an amount equal to the total net payments payable by customer for the applicable service during the three (3) months preceding the month in which damage occurred.[1]

8 The tariff goes on to provide that the limitation of liability applies regardless of the form of

[1] Exhibit JHW-4, page 7.

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action, including negligence of any kind (without limitation, active and passive negligence). While it is not clear what Charter means by those terms, it suggests at least that Charter is attempting to limit liability for gross negligence as well as ordinary negligence. Thus, Charter's limitation of liability provision is wholly consistent with Qwest's proposal, including Qwest's proposal to exclude gross negligence from the exclusions. It seems unlikely that Charter would characterize its tariff as arbitrary, or unreasonable, or contend that it improperly prevents an innocent party from being fully compensated.

9 Thus, Charter's argument in paragraph 16 of its opening brief, that its position in this arbitration is consistent with Washington contract law and public policy, is unpersuasive. It is Qwest's position that is consistent with contracts and limitation of liability within the specialized area of telecommunications, and Charter's tariffed limitation of liability confirms `this point.

10 Further, in arguing against the exclusion of gross negligence in paragraph 17 of its opening brief, Charter completely misinterprets the case that it cites. *Liberty Furniture* [2] stands for the proposition that an exculpatory clause that covers "negligence" does not cover "gross negligence", a proposition with which Qwest does not disagree. This case however does not support Charter's position, and for the reasons stated above, and in Qwest's Opening Brief, the Commission should adopt Qwest's language on Issue 5. Even if the Commission determines that the holding in the Section 271 proceeding regarding the "gross negligence" exclusion should continue to be followed here, the Commission should, at a minimum, affirm the damages standard that Qwest proposes, and that is consistent with the limitations on damages that Charter has in its tariff.

[2] Liberty Furniture, Inc. v. Sonitrol of Spokane, Inc., 770 P.2d 1086 (Wash. App. 1989)

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Issue 6 – 6(a) Indemnity

11 Responding to Charter's arguments on issue 6, it is unclear if the parties continue to have a disagreement or not. The provisions regarding limitation of liability were worked out in the 271 process. In the 271 proceeding, the Commission adopted the language consistent with Qwest's proposal, and specifically prohibited an exception for gross negligence.[3] The Commission agreed with Qwest's position that concepts of negligence should not be introduced into a discussion of indemnification for breach of an interconnection agreement.[4] Charter, in its opening brief, does not discuss that issue, and may in fact have conceded Qwest's language on this issue.

12 Charter does, however, discuss the "comparative negligence" issue at length. Qwest understood that issue to be connected with Issue 5, not Issue 6, but will respond to the issue. Charter claims that Qwest's language in inequitable because it fails to recognize the principle of comparative fault. Opening Brief at paragraph 25. Qwest disagrees. Comparative negligence is a principle of law and liability in Washington, and courts will apply that principle whether it is embodied in the contract or not.

13 Qwest's other objections to Charter's language are set forth in Qwest' opening brief, but as noted, because Charter did not specifically defend its other changes in its own brief, Qwest makes no further response here.

Issue 7 – Indemnification in Connection with Intellectual Property

14 The primary issue in dispute is Charter's desire to add the phrase "or with knowledge" to the paragraph. Qwest opposes this addition because it improperly imposes indemnity obligations,

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[3] *See* WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, *28th Order* at ¶ 121 and *31st Order* at ¶¶ 43-46.

[4] *See* WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, *28th Supplemental Order* at ¶ 396 and *31st Supplemental Order* at ¶ 46.

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and because it adds a level of uncertainty to the indemnity obligation. There is no practical, legal, or policy rationale that justifies Charter's position.

15 In paragraph 28 of its opening brief, Charter defends the inclusion of this phrase by explaining that its language would make it clear that "there would *only* be intellectual property indemnity obligations where facilities or services of the parties are combined *with the knowledge*, and at the direction, of the indemnifying party." Charter cites to the testimony of Mr. Webber on this point. However, that is plainly not what Charter's proposed language says. What it says is "the obligation for indemnification recited in this paragraph shall not extend to infringement which results from (a) any combination of the facilities or services of the Indemnifying Party with facilities or services of the Indemnified Party, which combination is not made by, or at the direction**, or with knowledge** of the Indemnifying Party. . . ." Thus, Charter's argument in support of its position states that the language is the conjunctive, using "and", but the actual proposal is the disjunctive, using "or". This is not a trivial difference.

16 For purposes of clarity, and to illustrate the issue, the disputed language is set forth here using Charter's and Qwest's names, as if Qwest was the indemnifying party, and Charter the indemnified party:

> Section 5.10: Subject to Section 5.9.2, Qwest shall indemnify and hold Charter harmless from and against any **C**laim that the use of facilities of Qwest or services provided by Qwest provided or used pursuant to the terms of this Agreement misappropriates or otherwise violates the intellectual property rights of any third party. In addition to being subject to the provisions of Section 5.9.2, the obligation for indemnification recited in this paragraph shall not extend to infringement which results from (a) any combination of the facilities or services of Qwest with facilities or services of Charter, which combination is not made by, or at the direction**, or with knowledge** of Qwest. . . . [subsequent non-disputed language omitted].

17 What Charter has set up is a situation where under any of the three "or" conditions, Qwest continues to be responsible for indemnification of Charter. Thus, Qwest is responsible to indemnify Charter if Charter makes an infringing combination, and Qwest knows about it, even if Qwest has no ability to prevent the combination, and even if Qwest has

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no knowledge whatsoever that the combination *is* an infringement.[5]

18 Charter claims, in paragraph 29 of its opening brief, that its proposal on this issue is consistent with other Charter proposals on liability issues. This is true to the extent that all of Charter's proposals shift liability away from Charter and on to Qwest, but that is obviously not a reason to adopt Charter's language. As discussed in Qwest's opening brief, there is no legal or policy justification for this result, which would shift responsibility for Charter's infringement to Qwest.

Issue 10 – Interconnection – Section 7.1.1 of the ICA

19 In its opening brief, Charter mischaracterizes the issue concerning the disputed language in Section 7.1.1 as an issue about when Qwest can deny Charter interconnection at a particular point within Qwest's network. In fact, the disputed language in the last few sentences of Section 7.1.1 concerns whether Qwest must create or continue connections between its own Tandem switches, not whether Qwest must create or continue connections between a Charter switch and a Qwest switch. Charter proposes the following changes in bold to the language developed by CLECs and the Commission during the 271 process:

> New or continued Qwest local Tandem Switch to Qwest Access Tandem Switch and Qwest Access Tandem Switch to Qwest Access Tandem Switch connections are not required where Qwest **[can] has** demonstrate**d to the Commission, and the Commission has determined in accordance with 47 CFR 51.305(e),** that such connections present a**n imminent** risk of Switch exhaust, and that Qwest does not make similar use of its network to transport the local calls of its own, or any Affiliate's, **or any other LEC's** End User Customers. **Disputes arising under this Section 7 shall be raised, and resolved, pursuant to the Dispute Resolution provisions of this Agreement.**

20 Through its proposed changes, Charter is attempting to take a rule (47 CFR. 51.305(e)) applicable to interconnection points between Charter's network and Qwest's network and apply it to govern connections between switches within Qwest's network. Charter has not

[5] Tr. 70:2-9.

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cited a single authority that supports such a requirement.

21 In fact, Charter's argument is simply wrong. The FCC has ruled that an ILEC is required only to make modifications to its network that it routinely makes for its own customers.[6] Qwest's proposed language tracks this rule precisely. Under Qwest's proposed language, Qwest is not required to create new connections between Tandem switches where it "does not make similar use of its network to transport the local calls of its own, or Any Affiliate's End User Customers." Moreover, Qwest's language actually goes beyond the law's requirements because it qualifies the circumstances in which Qwest will refuse to create or continue connections between Qwest tandem switches to those situations in which Qwest can demonstrate that such connections create a risk of Switch Exhaust.

22 In its opening brief, Charter's entire argument is based on the incorrect premise that the disputed language in Section 7.1.1 concerns the circumstances in which Qwest can deny interconnection at a particular point within its network. In fact, there is no dispute that Qwest will provide Charter interconnection "within Qwest's network" when it is technically feasible. In fact, the agreed-to language immediately preceding the disputed language in Section 7.1.1 states that "Qwest Tandem Switch to CLEC Tandem Switch connection will be provided where Technically Feasible." Moreover, Qwest's language does not anywhere repudiate the requirement in FCC Rule 51.305(e) that "an incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible." Thus, Rule 51.305(e) will apply if Qwest denies a request for interconnection at a particular point.

23 The Parties appear to disagree about when Qwest can deny interconnection at a particular

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[6] *United States Telecom Association v. FCC*, 359 F.3d 554, 577-578 (D.C. Cir. 2004), *affirming in pertinent part*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd 16978, ¶¶630-648 (Rel. Aug. 21, 2003).

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point within Qwest's network. On this point, Charter contradicts itself. At times, Charter appears to argue that Qwest must make the technical infeasibility showing before denying a request for interconnection at a particular point. However, in Mr. Gates' rebuttal testimony, he concedes that Qwest makes the initial determination of technical infeasibility and that "it must then prove that to the state commission."[7] As Qwest pointed out in its opening brief, the obligation to make a showing to the state commission does not arise until after the ILEC denies interconnection at a particular point. The Commission should reject Charter's proposed changes to Section 7.1.1 of the ICA.

Issue 11 – Interconnection – Section 7.1.2

24 In Issue No. 11 Charter attempts to expand its interconnection rights beyond what it is entitled to under federal law. The first part of the dispute concerns the language that should be adopted to reflect the principle that Charter can choose to interconnect in as few places as one point of interconnection per LATA. Charter proposes that Section 7.1.2 of the ICA include the statement: "CLEC shall **have the right to** establish one (1) **single** physical Point of Interconnection ("**POI**") in Qwest territory in each LATA CLEC has local End User Customers." Standing alone, this statement is simply wrong. CLECs are entitled only to have interconnection points "within" the ILEC's network and only if it is technically feasible. Charter does not contest that these limitations apply. Instead, Charter merely argues that the sentence Charter has proposed should not be read by itself. However, that is not an adequate answer. The statement is not conditioned on other parts of the Agreement and Charter, and CLECs that opt into the Charter agreement, will be able to use that statement standing alone to contend that they are entitled to interconnection rights that they are not lawfully entitled to. Thus, Charter's first proposed modification to Section 7.1.2 should be rejected.

[7] Gates Rebuttal, Ex. TJG-3, p. 7, lines 3-6.

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25 Two sentences later in Section 7.1.2, Charter proposes the following sentence: "**The Parties agree that this Section 7.1.2 shall not be construed as imposing any obligation upon Qwest to establish a physical Point of Interconnection with CLEC at a point that is outside of Qwest's geographic service area or territory**." In its opening brief, Charter asserts that "Charter's proposal makes clear that Qwest has no obligation to establish a POI with Charter outside of Qwest's geographic territory or service area." (Charter Opening Brief paragraph 46). Charter's argument is only true if Charter's proposed modification to Section 7.1.2 is changed to read "The Parties agree that **this Agreement** shall not be construed….." As Qwest stated in its opening brief, with that change, the bold language quoted immediately above would be acceptable to Qwest and should be included in the Agreement.

26 In its opening brief, Charter repeatedly argues that Qwest somehow requires Charter to interconnect at more than one point in each LATA. That is simply not true. Qwest's language requires only one point of interconnection per LATA and Qwest witnesses testified clearly that Qwest does not require more than a single point of interconnection in each LATA so long as the interconnection point is technically feasible and within Qwest's network.[8]

27 The second part of the dispute in Issue No. 11 is whether Charter can use facilities provided by third parties to interconnect with Qwest. Strictly speaking, the use of third party facilities is not expressly contemplated by the Act. Section 251(c)(2) of the Act imposes the duty upon ILECs "to provide, for the facilities and equipment *of any requesting telecommunications carrier*, interconnection with the local exchange carrier's network."[9] Nonetheless, Qwest's language permits Charter to use third party facilities because it treats those facilities as if they are Charter's "facilities and equipment." Thus, Qwest requires a letter of authorization from the third party whose facilities will be used by Charter to ensure that the third party has

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8 Easton Rebuttal, WRE-2RT, p. 4.

9 47 U.S.C. §251(c)(2).

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authorized Charter to use those facilities to interconnect with Qwest.[10]

28 Charter attempts to describe facilities provided by third parties as a "method of interconnection" and then relies upon FCC Rule 51.321(a) to argue that it is entitled to use third party facilities to interconnect with Qwest if it is technically feasible to do so. Charter is simply wrong and its argument is refuted by its own language. Who provides the facilities does not define the method of interconnection used. Rather, it is the type of interconnection architecture that defines and distinguishes methods of interconnection. The standard methods of interconnection are "entrance facilities," "mid-span meets" and "collocation."[11] Each of Charter's proposed alternatives in its proposed Sections 7.1.2.4, 7.1.2.4(a) and 7.1.2.4(b) incorporates a reference to one of these methods. Charter changes the term "entrance facility" to "interconnection facility" in Section 7.1.2.4 but all that that change does is create an overbroad term that could in theory encompass all of the standard methods of interconnection. At a minimum, it blurs the distinctions between methods and should be rejected for that reason.

29 Charter's final proposed changes to Section 7.1.2 and its additional sections 7.1.2.4 and its subparts are not appropriate in an agreement whose purpose is to describe interconnection provided by Qwest. Accordingly, they should be rejected.

Issues 13 and 15– Direct Trunked Transport and Bill and Keep

30 Charter has grouped Issues 13 and 15 together under the general subject of bill and keep and accordingly, Qwest will respond similarly. Under Qwest's proposal, bill and keep would apply to all usage-based charges but not to direct trunked transport. Under Charter's proposal, bill and keep would apply both to usage-based charges and direct trunked transport.[12] Thus,

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10 Linse Rebuttal, PL-7RT, pp. 5 line 19 – p. 7 line 15.

11 Linse Direct, PL-1T, pp. 3-4.

12 Charter does not address the deficiencies and inconsistencies in its proposed modifications to Section 7.2.2.1.2.2,

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the primary difference between the parties concerns the treatment of direct trunked transport. In deciding between these two proposals, the issue before the Commission is whether Charter provides the same amount of transport *recoverable in reciprocal compensation* as does Qwest? The answer to this question is no.

31 Charter begins its argument by asserting that its choice of a single point of interconnection serves as a demarcation of each party's respective transport obligations. Charter then cites paragraph 209 of the FCC's *Local Competition Order* and asserts that it has the right to choose a point of interconnection that is convenient or efficient for it and that reduces its transport costs. In making this argument, however, Charter ignores the last sentence of paragraph 209, which states: "because competitive carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[13]

32 According to Charter, each carrier is responsible for carrying traffic to and from the POI (Charter Brief, ¶62) and that this necessarily "requires the carriage of traffic to and from that location, at some cost." (Charter Brief, ¶63). However, this argument completely ignores the issue in dispute. The question is what reciprocal compensation arrangement should apply when one party transports and terminates telecommunications traffic that originates on the network of the other party. This is not a question of the obligation of one carrier to deliver traffic to the POI. It is a question of the compensation obligation that applies to the delivery by the terminating carrier of the originating parties' telecommunications traffic from the POI to the called party.

7.2.2.1.4, 7.3.2.1, 7.3.2.1.1, 7.3.2.1.2, 7.3.2.1.3, 7.3.2.1.4, 7.3.2.2 and 7.3.2.3. As discussed in Qwest's opening brief, Charter's proposed changes to those sections should be rejected.

[13] First Report and Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶209 (Rel. Aug. 8, 1996)("*Local Competition Order*")(subsequent history relates to other parts of order and is omitted).,.

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33 In paragraph 66 of its opening brief, Charter asserts that "federal law requires that both parties must be able to recover *all* of their costs of delivering the other party's traffic" and implies that the recovery must come from the originating party. However, that is not the law. Under the FCC's rules for telecommunications traffic, the delivering party is only entitled to recover its "additional cost" of transporting and terminating telecommunications traffic. 47 U.S.C. §252(d)(2)(A)(ii). The FCC has ruled that the costs of local loops and line ports are not "additional costs" of terminating a call because they do not vary "in proportion to the number of calls terminated over these facilities."[14]

34 In the final sentence of paragraph 66 of its opening brief, Charter asserts that "an incumbent LEC's transport costs can not be shifted to the competitive LEC." That is not happening in this case. Rather, Charter is attempting to shift transport costs to Qwest that Qwest incurs to deliver Charter traffic and for which Charter is responsible. In other words, Charter is the party attempting to shift costs.

35 Charter seeks to shift its transport costs by arguing that Charter's loop costs should be offset against the additional transport costs Qwest incurs to deliver Charter originated traffic to the end office that serves Qwest end user customers. Charter essentially argues that it "transmits" traffic the same distance as does Qwest for calls between Qwest and Charter customers in the same community. For example, assuming a Pasco interconnection point, when a Charter customer in Walla Walla calls a Qwest customer in Walla Walla, Charter would argue that it transmits the call along the loop from its customer in Walla Walla to its switch in Kennewick (about 37.9 miles) and then to the Pasco point of interconnection. According to Charter, Qwest would then transmit the call from the Pasco point of interconnection back the same distance to its customer in Walla Walla. [15] Charter would argue that the transmission distance

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[14] *Local Competition Order*, ¶1057.

[15] Linse, Tr. 267.

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in the opposite direction (from a Walla Walla Qwest customer to a Walla Walla Charter customer) would also be the same.

36 The fallacy in Charter's argument is that the transmission costs on both sides of the point of interconnection are not both recoverable in reciprocal compensation. The transmission Qwest provides is defined to be "transport" under the FCC's rules because it transmission from the point of interconnection to the Qwest Walla Walla end office switch that serves the called party (a distance of 37.9 miles[16]). *See* 47 CFR §51.701(c). However, the transmission Charter provides is transport only from the Pasco point of interconnection to its Kennewick switch (a distance of less than five miles[17]) that directly serves the Charter customer. The transmission path from the Kennewick switch to the Charter customer in Walla Walla constitutes a local loop and the cost of that local loop is not recoverable in reciprocal compensation.[18] Charter made the decision to use a single switch in Washington to reduce its switching costs and the consequence of that decision is that it takes longer loops to reach Charter's customers.[19] Charter is now attempting to obtain a second benefit by offsetting its loop costs (which are not recoverable in reciprocal compensation) against the transport costs that Qwest is entitled to recover from Charter through reciprocal compensation.

37 Qwest's proposal to exclude direct trunked transport from bill and keep is also reasonable when the parties provide the same amount of "transport" as that term is defined by the FCC. In its opening brief, Charter uses an example that assumes that Charter retains its point of interconnection in Yakima and serves its customers in Pasco from its Kennewick switch. The evidence at hearing demonstrates that this is no longer a realistic scenario because Charter has

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16 Linse, Tr. 267.

17 Linse, Tr. 266-67.

18 *Local Competition Order*, ¶1057.

19 Easton, Tr. 261, line 20 – p. 262, line 3.

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chosen to create a point of interconnection between Pasco and its Kennewick switch. (Ex. TJG-6C). However, Charter's example nonetheless demonstrates the fairness of excluding direct trunked transport from bill and keep as Qwest proposes. In Charter's example, when a Qwest customer in Pasco calls a Charter customer in Pasco, the call would route from the Qwest caller over a loop to the Qwest Pasco switch and then over direct trunked transport from Qwest's Pasco switch to the point of interconnection in Yakima and then from that point of interconnection over direct trunked transport on Charter's side of the point of interconnection to Charter's Kennewick switch and then over a Charter loop to Charter's end user customer in Pasco. In this example, both parties provide about the same amount of "transport" as that term is defined in the FCC's rules. Under Qwest's proposal, both parties would pay about the same amount for direct trunked transport in this example.

38 These two examples only underscore the basic fairness of Qwest's position. By moving its point of interconnection from Yakima to Pasco, Charter can shift transport costs to Qwest. Qwest's proposal to exclude direct trunked transport from bill and keep ensures that Charter compensates Qwest for the additional transport costs Qwest incurs. Charter's proposal for bill and keep for all transport allows Charter to shift transport costs to Qwest but unfairly leaves Qwest uncompensated for its transport costs. The Commission should adopt Qwest's proposed language for Issue Nos. 13, 14 and 15.

Issue 14 – NonRecurring Charges for Trunks

39 Charter asserts in its brief that the nonrecurring charges for installing and rearranging interconnection trunks that connect Qwest and Charter switches should be included in bill and keep. However, under the Act, Qwest is entitled to charge Charter for the costs that Qwest incurs to provide interconnection trunks. Qwest has a duty to provide interconnection with its local exchange network "on rates, terms and conditions that are just, reasonable, and nondiscriminatory" and in accordance with the requirements of Section 252 of the Act. 47 U.S.C. §251(c)(2)(D). Section 252 of the Act in turn provides that

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determinations by a state commission of the just and reasonable rate for interconnection shall be "based on the cost…of providing the interconnection," "nondiscriminatory," and "may include a reasonable profit." 47 U.S.C. §252(d)(1). As the FCC has recognized, these provisions make clear that CLECs must compensate incumbent LECs for the costs incumbent LECs incur to provide interconnection.[20] Thus, Charter is wrong when it contends that it is not obligated to compensate Qwest for nonrecurring installation and rearrangement costs Qwest incurs to provide interconnection to Charter. Accordingly, the Commission should adopt Qwest's proposed language for Sections 7.3.3.1 and 7.3.3.2 of the ICA.

Issue 16 – Indirect Interconnection

40 In its opening brief, Charter completely mischaracterizes the dispute with respect to indirect interconnection. Both Charter and Qwest agreed that they would not exchange traffic through a third party transit provider unless they both agreed to an amendment to the ICA to address the issues that arise with respect to indirect interconnection. Specifically, the agreed Section 7.2.1.1 provides:

> Unless otherwise agreed to by the Parties, via an amendment to this Agreement, the Parties will directly exchange EAS/Local traffic between their respective networks without the use of third party transit providers.(Easton, WRE-1T, p. 28, lines 16-27).

41 Charter specifically included this language as agreed-to language in the interconnection agreement that it attached to its petition. (Charter Petition, Ex. B ICA, p. 54, §7.2.1.1). Thus, it is disingenuous for Charter to describe Issue No. 16 as a dispute involving competing language proposals. Charter agreed to the language that it now attempts to describe as Qwest's proposal. Charter did not submit its new language regarding indirect interconnection until the day it filed its petition. No negotiations regarding Charter's new language ever took place. Thus, the Commission should enforce the requirements of Section 7.2.1.1 and reject Charter's

[20] *Local Competition Order*, ¶¶199, 200.

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last minute attempt to add an issue to the arbitration.[21]

42 Charter is also wrong when it claims that it has a right to indirect interconnection vis-à-vis Qwest. Qwest's duty to negotiate an interconnection agreement with Charter extends only to duties set forth in Sections 251(b) and (c) of the Act. 47 U.S.C. §251(c)(1). Qwest does not have a duty under Section 251(c) or 252 of the Act to negotiate the terms and conditions of Section 251(a) interconnection.

43 Moreover, Section 251(a) does not confer upon Charter the right to interconnect indirectly with Qwest. Rather, by its terms, Section 251(a) imposes a "duty" upon *all* "telecommunications carriers" to interconnect *either* directly or indirectly. Section 251(a) does not impose obligations that apply only to ILECs. Nor does it confer rights that apply only to CLECs. Under Charter's argument, Section 251(a) would give Qwest a right to insist on direct interconnection that is equal to the right Charter claims to have for indirect interconnection.

44 In an arbitration such as this, Charter's only right vis-à-vis Qwest is for direct interconnection. That is specified in Section 251(c)(2) of the Act. On this point, none of the authorities Charter relies upon support Charter's position. *Atlas Telephone v. Oklahoma Corporation Commission*[22] actually supports Qwest's position because it holds that "the affirmative duty established in §251(c) runs solely to the ILEC, and is only triggered on request for direct connection." In other words, Section 251(c) does not require Qwest to interconnect with Charter indirectly.

45 *WWC License, LLC v. Public Service Commission* addressed whether Section 251(b) duties

[21] Allowing Charter to raise a new issue on the day an arbitration petition is filed will send the message to other CLECs that they can sandbag in negotiations with impunity. Charter's approach violates the spirit of good faith negotiations. In essence, Charter has attempted to deprive Qwest of the opportunity to formulate a full set of contract language to address the problems presented by Charter's last minute language.

[22] 400 F.3d 1256, 1268 (10th Cir. 2005).

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such as dialing parity and reciprocal compensation apply when carriers are indirectly interconnected. It does not purport to hold that a CLEC has a right in an interconnection arbitration to insist on indirect interconnection with an ILEC.

46 Nor do any of the public utility commission decisions cited by Charter support its position. (Charter Opening Br. Fn. 89). *In re Qwest Corporation*, 2007 WL 2827788, *12 (Colo PUC 2007) involved direct interconnection between Qwest and Union Telephone Company. Union was one legal entity that had both a wireline operation and a wireless operation. The Colorado Commission allowed Union to determine where the interconnection facility between the Qwest network and the Union network would connect to the Union network (specifically, at the Union tandem). This case did not involve indirect interconnection.

47 *In re Pacific Bell Telephone Co*., 2006 WL 2516378 (Cal. PUC 2006) addressed whether an ILEC (SBC) could be required to be a transit provider. That is not the issue here. Qwest has agreed to provide transit service to Charter in Section 7.2.2.3 of the ICA. (Charter Petition, Ex. B ICA, p. 57-58).

48 Finally, *In re Sprint Communications Co*., 2005 WL 3710338 (Ill. CC. 2005)("*Sprint*") also supports Qwest's position. In this case, Sprint sought to send traffic through an intermediary ILEC tandem to get to rural local exchange carriers ("RLECs") whose switches subtended that tandem. The Illinois Commission recognized that Sprint's proposal could create phantom traffic problems. Accordingly, the Illinois Commission required Sprint to produce summary reports to the RLECs so that the RLECs would be able to identify the calls as Sprint's calls and correctly jurisdictionalize the calls. Id. at *20.

49 Unlike in *Sprint*, Charter did not properly "tee up" Issue 16 in this arbitration. The parties had already agreed in Section 7.2.1.1 that they would amend the agreement before sending traffic to each other through a transit provider. Moreover, Charter's proposed language for Sections 7.1.2.6 through 7.1.2.9 does not address the issues that need to be addressed in

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the amendment process the parties agreed to. (Qwest Opening Br. ¶¶51-53). Charter did not address any of these issues in its opening brief. Indeed, Charter has still not even identified the carrier it intends to send traffic through to get to Qwest.

50 For all of these reasons, the Commission should hold Charter to its agreement in Section 7.2.1.1 and insist that the parties negotiate an amendment to the ICA before Charter sends its traffic to Qwest indirectly through another carrier. The Commission should reject Charter's proposed sections 7.1.2.6 through 7.1.2.9.

Issue 17 – Miscellaneous Charges

51 The issue with regard to miscellaneous charges is actually quite narrow, and the exceptional circumstances under which Qwest might perform work for Charter without a specific request by Charter are likely remote. Yet Charter argues this issue as if those circumstances are the only ones that will ever exist in connection with the application of miscellaneous charges.

52 In paragraphs 91-93 of it opening brief, Charter argues that Qwest should not be able to "unilaterally" assess miscellaneous charges. Qwest does not contend that it should be, only that it be permitted to assess miscellaneous charges when the work is either at the request of or caused by the CLEC. This language is not intended to give Qwest *carte blanche* in terms of imposing charges, rather it is intended to address the limited circumstances when the entity responsible for the work is not known until after the work is performed.

53 Charter also ignores that the language it is opposed to in Section 9.1.12 is the same as already agreed-to language in other provisions in Section 9, and in Section 4. Yet Charter is not recommending changes to the other language, which clearly allows the imposition of miscellaneous charges under circumstances that do not amount to a direct request by the CLEC. For example, see the agreed-to language in § 9.1.12(h) that provides that dispatch charges may be assessed based on "information provided by CLEC, or a request from CLEC. . ."

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54 Charter then argues, in paragraph 96, that Qwest's language would be inconsistent with Washington contract law because it would give Qwest the right to unilaterally modify the contract. Any reading of Qwest's language illustrates that Charter's argument on this point is simply ridiculous. Qwest is not asking for the right to unilaterally modify the contract, only that the contract give Qwest the right to assess charges under the circumstances where the CLEC is rightfully responsible for those charges.

55 In paragraphs 98-100, Charter argues at length that Qwest should not be permitted to establish miscellaneous charges at "market-based" rates. Qwest does not agree with Charter's arguments, but more importantly, Charter's arguments do not address Qwest's current proposal for miscellaneous charges. Qwest, in its rebuttal testimony[23], and on the stand[24], stated very clearly that it had modified its arbitration position to clarify that the rates for the miscellaneous charges would be those rates in Exhibit A, which are the cost-docket-approved rates. Because all of the rates from the cost docket and from Qwest's interconnection tariffs are in the Exhibit A, it is more appropriate in this case to reference the Exhibit A rates rather than Charter's proposal to reference "tariffed" rates which is ambiguous because it does not specify which tariff or tariffs would apply.

56 Finally, it is noteworthy that Charter does not quote its own proposed language in its opening brief, and spends virtually no time at all defending that language. Charter's proposed language injects ambiguity into the contract, and should be rejected on that basis as well as because it does not fully and fairly describe the circumstances under which Qwest may assess charges. Specifically, Charter proposes the following edit to Section 9.1.12: "Miscellaneous services are provided at CLEC's request **and CLEC must affirmatively agree to the charges for such services in advance.** ~~**or are provided based on CLEC's actions that result in**~~

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23 Exhibit RHW-2RT, pages 4-5.

24 Tr. 310:8-21.

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~~**miscellaneous services being provided by Qwest..**~~ " This edit, as just discussed, improperly limits Qwest's ability to assess miscellaneous charges and fails to address the situation where Qwest cannot obtain the CLEC's agreement before performing the work.

57 Charter also proposes to add the following to section 9.1.12: **"Depending on the specific circumstances, the items below are Miscellaneous Charges that may apply if requested by CLEC:"** This language should be rejected because Charter never defines the specific circumstances the charges would depend on, and does not explain why the language states that the charges "may" apply. This language suggests that they "may not" apply, and again Charter does not explain the circumstances under which they "may" or "may not" apply. These ambiguities should result in Charter's language being rejected. As noted in Qwest's testimony and opening brief, Charter has not provided evidence that there would ever be a concern about Qwest's application of these charges, but even if there were, Charter is protected through the dispute resolution provisions of the contract.

Issue 19 – Limitation on Qwest's Use of Charter Listing Information – Section 10.4

58 Issue 19 concerns Charter's proposal to limit Qwest's use of Charter listing information. Charter's proposal is unlawful, and is inconsistent with other agreed-to language in the ICA. Charter argues that Qwest should not be permitted to market to Charter subscribers based on segregation of Charter listings. Qwest agrees. Qwest has proposed language in section 10.4.2.4 that precisely implements this limitation, as follows: "Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings." Charter proposes to strike this language in favor of a more restrictive limitation against marketing in general, and further proposes to strike language that permits Qwest to use the listings "for other lawful purposes."

59 Charter complains that Qwest never explained what "other lawful purposes" might encompass, and that the language is broad and ambiguous. (Charter Opening Brief

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paragraphs 102-103). However, as Qwest explained in its opening brief, Charter itself has agreed to language in the ICA that states that *Charter* may use information "for other lawful purposes" and in those two cases Charter apparently does not find the language to be objectionably broad or ambiguous. (Qwest Opening Brief paragraph 75). Furthermore, Charter's limitation against marketing is unlawful – Charter agreed that Qwest is permitted to market to Charter subscribers.[25] Though Charter claims in paragraph 104 of its opening brief that "Qwest, however, has no such right [i.e., to market]" but cites no authority in support of that proposition. As a directory assistance provider Qwest may use non-segregated listing for marketing – the only prohibition is against marketing based on segregation of listings, and that prohibition is clearly stated in Qwest's language. Charter mischaracterizes Qwest's position in paragraph 106 of its opening brief when it suggests that Qwest believes it may use segregated listing information.

60 Finally, in paragraph 107, Charter raises a non-issue as a way to criticize Qwest's language – Charter claims that Qwest's language would permit Qwest to segregate its own listings and thus have a list of competitors' customers. This is true, but it is not a basis on which to reject Qwest's language or adopt Charter's – Qwest can lawfully purchase a directory list and then separate its customers from all other carriers' customers. Charter can do the same. This does not segregate a particular CLEC's customers. This practice is not unlawful, and there is no authority that supports placing such a limitation in the ICA.

Issue 20 – Prior Written Authorization to Release, Sell or Make Available Charter Listing Information

61 Section 10.4.2.5 provides the terms and conditions for Qwest to release directory listings to other parties. Charter proposes language that states that Qwest may release information only with the CLEC's prior written consent, and only to the extent *required* by applicable law.

[25] Tr. 103:23-25.

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Charter argues that its language more accurately reflects Qwest's obligations. (Charter Opening Brief paragraph 109). This is incorrect. In fact, Charter's language places an unreasonable limitation on release of listing information and creates an inconsistency with the release that Charter has already provided Qwest.

62 Charter's limitation is unreasonable because it would require Qwest to determine, prior to each release of listing information, not simply whether the release is permitted by law, but whether it is *required* by law. However, there is basis in either law or common sense to impose such a burden on Qwest, especially when Charter has ultimate control of its listings by simply selecting "Option 2" as opposed to "Option 1" on the customer questionnaire.

63 Indeed, while Charter's testimony on this issue is admittedly unclear, it does appear as though all of the limitations Charter wishes to impose with regard to listing information may be more easily and simply accomplished by having Charter select "Option 2".[26] The difference would be that with "Option 2" is it Charter who is responsible for making the decision on whether to release listings, and this is how it should be since Charter is the one proposing to limit such release.

Issue 22 – Charges for Privacy Listings

64 The dispute on this issue stems from the fact that Charter wants to obtain, at no charge, certain Privacy Listing options such as non-listed and non-published numbers, options that every CLEC and every Qwest retail subscriber pays for, and that Charter charges its own end-users to obtain. Qwest disagrees with Charter's position on this issue.

65 Charter contends that Qwest should not be permitted to charge for privacy listings, generally arguing that Qwest incurs no cost for providing this service (Opening Brief paragraphs 114,

[26] Tr. 124:17-22; 127:23-128:25.

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116-117) and that the Commission has never approved the "retail rate less wholesale discount" for privacy listings, only for premium listings (Id. at paragraph 115). Finally, Charter argues that the FCC has held that $0.04 per listing is a presumptively reasonable rate to compensate Qwest for *listings*, and then leaps to the unfounded conclusion that the same rate would apply for privacy listings (Id, paragraph 116).[27]

66 Charter points are not persuasive. First, Qwest believes that Charter seriously mischaracterizes the Commission's ruling in the 271 process. The Initial Order that both Qwest and Charter cited in the opening briefs reads, in relevant part, as follows: "Qwest offers several options for listing types. These include primary, premium, and privacy listings. These listing types are the same as those Qwest provides its own retail end users. [Qwest witness] Simpson described in some detail the different types of listings and the fees associated with the listing. **** In addition to one primary listing, customers may select premium listings or privacy listings. Qwest commits that it treats CLEC end user privacy listings with the same level of confidentiality as Qwest end user listings. *All* listings after the first primary listing are offered at the retail rate, less the applicable wholesale discount (citations omitted, emphasis added.)"[28] It seems clear that "all" listings means "all" listings, and would include privacy listings. This is confirmed by the fact that it has been Qwest's practice to charge for privacy listings in that manner since the 271 proceeding.

67 Second, Charter contends that the privacy listings rates are not cost-based, and have never been established in a wholesale cost docket. Opening Brief paragraph 115. While it is true that the rates have never been the subject of a wholesale cost docket, there is no requirement under the Act that privacy listings be provided at TELRIC rates, so this argument is irrelevant

[27] Neither order cited by Charter in its footnote 132 has anything to do with privacy listings, and Charter offers no rational explanation as to why the provision of publicly available listings to directory and other providers is the same as ensuring that those listings are *not* provided when they are non-published or non-listed as privacy listings.

[28] Docket No. UT-003022, ALJ's August 31, 2000 Order, paragraphs 107 and 108; no changes were made in subsequent final orders of the Commission.

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to this issue. Further, Charter's contention that the rates are not cost-based and are not reasonable is not supported by the record. Qwest provided evidence showing that these tariffed rates were approved by the Commission. They thus have the force and effect of law, and are presumptively reasonable.[29]

68 Charter also avoids completely the question of why it is presumably reasonable for Charter to charge its end users $5.00 *per number, per month* for privacy listings,[30] but why Charter does not want to pay Qwest the $0.50 or $0.75 per month (less the wholesale discount) for those listings as those charges are set forth in Qwest's tariff.[31]

Issue 23 – Classified (Yellow Pages) Listings

69 The dispute in Issue 23 concerns Section 10.4.5 and Section 15 of the ICA, regarding Qwest's obligation to provide directory publishers with end user listings. Charter claims, at paragraph 118 of its opening brief, that its language more accurately reflects Qwest's listing obligation. This is incorrect, as Charter's language imposes obligations on Qwest that are not required by law and that Qwest might not even be able to fulfill.

70 Further, Charter makes it clear in paragraph 119 that it is seeking to expand Qwest's obligations beyond the provision of listing information to directory publishers – Charter is trying to dictate how those listings are published. However, that issue is between Charter and the publishers, not between Charter and Qwest. Qwest's language more accurately reflects its obligation: to provide nondiscriminatory access to its directory listings to Directory Publishers and to provide subscriber list information to:

> … requesting directory publishers at the same rates, terms, and conditions that the carrier provides the information to its own directory publishing operation,

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29 General Telephone Company of the Northwest, Inc. v. The City of Bothell, 105 Wn.2d 579; P.2d 879; (1986) Wash

30 Exhibit JHW-4, page 15.

31 WN U-41, Section 5.7.1 G. The one-time non-recurring charge for each listing is $5.00, which is discounted 50% for CLECs, and the recurring charges of either $0.50 or $0.75 are discounted by the wholesale discount of 14.74%.

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its directory publishing affiliates or another directory publisher.[32]

71 In paragraph 121, Charter attempts to defend its proposal that Qwest change its contracts with third parties so Charter can provide its own listings to publishers. Charter's defense is unavailing. Charter proposes that:

> 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. (emphasis added)

72 If this language were adopted, Qwest would be required to somehow "cause agreements to be amended", though Charter frankly admits that it does not know what would happen if the directory publisher refused to agree to an amendment.[33] Nor is there any support in the record to impose this requirement. Charter is not aware of any publisher treating Charter end user listings differently than Qwest listings.[34] Charter's proposal improperly assumes there is some way that Qwest can force a publisher to accept a modification to an existing agreement.

73 Qwest meets its obligations under the Act by providing a Directory Publisher's List (DPL) product to all directory publishers, yellow and white pages, on the same terms and conditions.[35] The DPL contains Qwest end user listings commingled with the end user listings of CLECs who have provided permission for release. There is no evidence to the contrary. In addition, because Qwest provides the same lists to white and yellow pages publishers without distinction, Charter's proposal, besides being unlawfully overbroad, is simply unnecessary.

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[32] In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Third Report and Order, Docket No. 96-115 14 FCC RCD 15550 (1999), para. 58.

[33] Tr. 143:18-20

[34] Tr. 144:12-15

[35] Exhibit RHW-2RT, page 28, lines 3-4.

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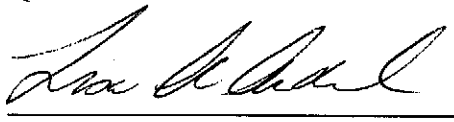
all of the disputed issues. For the issues associated with the general terms and conditions of the agreement, including Issues 5, 6, and 7, Qwest's language is consistent with prior ICAs in the state, is simpler than Charter's, provides greater certainty, and appropriately limits the parties' obligations to each other in terms of liability and indemnity. For the interconnection issues, including Issues 10, 11, 13, 14, 15, and 16, Qwest's language is consistent with its obligations under the Act, is more balanced than Charter's proposal, and provides greater certainty. For the other issues, including the miscellaneous charges in Issue 17, and the directory issues in Issues 19, 20, 22, and 23, Qwest's language is consistent with other agreed-to language in the ICA, correctly memorializes Qwest's obligations with regard to listings, and provides Charter both sufficient protections and additional options to enable Charter to obtain the results it desires.

DATED this 17th day of February, 2009.

QWEST



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