[Service Date March 30, 2009]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between CHARTER FIBERLINK WA-CCVII, LLC, with QWEST CORPORATION, pursuant to 47 U.S.C. Section 252(b).	)	DOCKET UT-083041 ORDER 07 ARBITRATOR'S REPORT AND DECISION

1 **Synopsis.** *The Arbitrator resolves 14 disputed issues as set forth in the attached Appendix A. Given the number of disputed issues, a summary is not provided in this synopsis.*

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I. BACKGROUND

A. Nature of Proceeding

2 This proceeding involves a petition submitted by Charter Fiberlink WA-CCVII, LLC (Charter), to arbitrate an interconnection agreement (ICA or agreement) with Qwest Corporation (Qwest), under 47 U.S.C. § 252(b) of the Telecommunications Act of 1996 (Act).[1] Charter served the petition on Qwest on August 8, 2008, and Qwest filed its response on September 2, 2008. The Washington Utilities and Transportation Commission (Commission) conducted a duly-noticed arbitration hearing before Administrative Law Judge Marguerite E. Friedlander (Arbitrator) on December 16 and 17, 2008.

B. Appearances

3 Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, represents Charter. Lisa Anderl, attorney, Seattle, Washington, represents Qwest.

C. Procedural History

4 On August 8, 2008, Charter, a competitive local exchange carrier (CLEC), [2] filed a petition with the Commission requesting arbitration of a new ICA with Qwest, an incumbent local exchange carrier (ILEC). The new ICA would replace their existing agreement which expired prior to Charter filing its petition. The Commission has jurisdiction over the petition and the parties pursuant to 47 U.S.C. §§ 251 and 252 and RCW 80.36.610. The parties have negotiated and agreed to the majority of terms that would be included in the new ICA; however, fourteen issues remain to be resolved in this arbitration.

5 The Commission entered an Order on Arbitration Procedure and appointed Judge Friedlander as Arbitrator on August 15, 2008. The procedural order is consistent with

[1] Public Law No. 104-104, 101 Stat. 56 (1996).
[2] A glossary of acronyms and terms is attached as Appendix B for the convenience of readers.

the Commission's procedural rules governing arbitration proceedings under the Act, as codified, as well as the Commission's rules for conducting such arbitrations.[3]

6 On September 10, 2008, the Arbitrator held a prehearing conference to establish a procedural schedule and to consider other matters that would facilitate an efficient arbitration process. On September 17, 2008, the Arbitrator entered Order 02, a prehearing conference order establishing a procedural schedule for the arbitration, and Order 03, a protective order. The parties waived the statutory deadlines for arbitration in letters filed with the Commission on September 11, 2008, but requested that the Arbitrator enter her Report and Decision (Arbitrator's Report or Report) by March 30, 2009.

7 Charter and Qwest filed their respective direct testimony and exhibits on October 8, 2008.[4]

8 On November 12, 2008, the Arbitrator granted, in Order 04, Charter's request to extend the deadline for the filing of responsive testimony. Charter and Qwest filed their respective responsive cases on November 17, 2008.

9 The Arbitrator held an arbitration hearing on December 16 and 17, 2008, in Olympia, Washington.

10 On December 30, 2008, the parties filed a joint motion to modify the procedural schedule such that post-hearing opening briefs would be due on January 29, 2009, and post-hearing reply briefs would be due on February 17, 2009. On December 31, 2008, the Arbitrator granted the parties' request in Order 06.[5]

11 Charter and Qwest filed their respective post-hearing opening briefs on January 29, 2009, and post-hearing reply briefs and a joint issues matrix on February 17, 2009.[6]

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[3]WAC 480-07-630 and 480-07-640.

[4]Charter filed a replacement page for the direct testimony of Timothy J. Gates on October 14, 2008. On November 6, 2008, Qwest submitted the corrected direct testimony of Renée Albersheim.

[5]In Order 05, the Commission granted Charter's motion to extend the filing deadline for the parties' witness lists and disclosure of their cross examination exhibits.

[6]The joint issues matrix had originally been due concurrently with the post-hearing opening briefs. On January 29, 2009, Qwest filed a letter with the Commission requesting authority to file the joint issues matrix with the post-hearing reply briefs on February 17, 2009. On January 30,

D. Resolution of Disputes and Contract Language Issues

12 This Arbitrator's Report is limited to the disputed issues presented for arbitration. *47 U.S.C. § 252(b)(4).* The parties were required to present proposed contract language on all disputed issues to the extent possible, and the Arbitrator reserves the discretion to adopt, modify, or disregard proposed contract language in making decisions. Each decision by the Arbitrator is qualified by discussion of the issue. Contract language adopted pursuant to arbitration remains subject to Commission approval. *47 U.S.C. § 252(e).*

13 This Report is issued in compliance with the procedural requirements of the Act, and it resolves all issues that the parties submitted to the Commission for arbitration. There may be instances where this Report does not specifically speak to or adopt particular contract language because neither party addressed it adequately in their advocacy, although it may appear in the disputed issues matrix that the parties submitted after the hearings. Nevertheless, in those cases, we expect that the parties will be able to apply the analysis of the relevant portion of this Report to resolve any remaining disputes that they may have relating to contract language that the parties, and therefore this Report, have left unaddressed.

14 The issues that remain in dispute and the Arbitrator's proposed disposition of each issue are set forth in the matrix attached to this Report as Appendix A. If the parties are unable to submit a complete agreement due to an unresolved issue they must notify the Commission in writing prior to the time set for filing the agreement. At the conclusion of this Report, the Arbitrator addresses procedures for review to be followed prior to entry of a Commission order approving an ICA between the parties.

II. MEMORANDUM

15 Two central goals of the Act are the nondiscriminatory treatment of interconnecting telecommunications carriers and the promotion of competition. The Act contemplates that competitive entry into local exchange markets will be accomplished through

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2009, the Commission issued a Notice Extending Deadline for Filing Joint Issues Matrix which authorized the parties to file the joint issues matrix on or before February 17, 2009.

agreements between ILECs and CLECs, which will set forth the particular terms and conditions necessary for the ILECs to fulfill their duties under the Act.[7] Each ICA must be submitted to the Commission for approval, whether the agreement was negotiated or arbitrated, in whole or in part.[8]

A. Standards for Arbitration.

16 The Act provides that in arbitrating agreements, the state commission is to: (1) ensure that the resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the Federal Communications Commission (FCC) under Section 251; (2) establish rates for interconnection services, or network elements according to Section 252(d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.[9]

17 In addition, in this arbitration, the parties have also raised the issue of whether Qwest's Statement of Generally Available Terms (SGAT), approved by the Commission in Dockets UT-003022 and UT-003040,[10] should be used to decide many of the disputed issues in this proceeding. Qwest suggests that the Commission's rulings and ultimately the Commission-approved SGAT that came out of the Commission's Section 271 proceeding is "directly relevant to the consideration of the disputed issues in this case."[11] While Qwest recognizes the fact that the

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[7] 47 U.S.C. §251(c)(1).
[8] 47 U.S.C. §252(d).
[9] 47 U.S.C. §252(c).
[10] Docket UT-003022 was a Commission-initiated proceeding to investigate the compliance of US West Communications, Inc. (US West) with Section 271 of the Act. In Docket UT-003040, US West requested that the Commission approve its SGAT. Shortly after the commencement of the proceedings in Dockets UT-003022 and UT-003040, US West merged and became known as Qwest. *In the Matter of the Investigation Into U S West Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996,* Docket UT-003022 and *In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996* (SGAT proceeding), Docket UT-003040, 28th Supplemental Order, fn 1, (March 12, 2002) (28th Supplemental Order). On June 6, 2000, the Commission consolidated Dockets UT-003022 and UT-003040, so, for ease of reference, the consolidated dockets will be referred to throughout the Arbitrator's Report as the "Section 271 proceeding."
[11] Reply Brief of Qwest, at 1, ¶ 4. The Commission's Section 271 proceeding was initiated to consider Qwest's compliance with the Act and whether Qwest had "sufficiently opened its local network to competition to permit the Commission to recommend to the [FCC] that Qwest be allowed to enter the interLATA toll market."[11] The Commission also considered Qwest's SGAT

purpose of the arbitration is to produce an ICA in full compliance with the Act and the FCC's regulations,[12] Qwest suggests that many of the issues in this arbitration have already been worked out in the Section 271 proceeding.[13]

18 Charter contends that the Act, specifically Section 252(c)(1), directs the Commission to resolve issues consistent with Section 251.[14] Charter argues that "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."[15] Charter points to an FCC decision where the FCC found that an ILEC's Section 271 order was not determinative of whether a party's language was more consistent with the Act and the FCC's rules.[16]

19 ***Decision and Deliberation.*** This arbitration, as others before it, must produce an ICA that conforms with the requirements of Section 252(c)(1) of the Act. Section 252(c)(1) provides that the Commission's duty is to ensure that the ICA meets the requirements of Section 251 of the Act.[17] Section 251 establishes the duties of all carriers generally with regard to, *inter alia*, interconnection, resale, and dialing parity.

20 This Commission approved Qwest's SGAT on July 1, 2002. Pursuant to Section 252(f)(2) of the Act, the Commission could not approve the SGAT unless it specifically complied with Section 252(d) and Section 251 of the Act. Thus, an approved SGAT, such as Qwest's, must comply with Section 251 of the Act, and its terms and conditions must be in compliance with Section 252(c)(1) of the Act. Charter has not demonstrated that the Commission approved Qwest's SGAT in contravention of Section 252(f)(2) or Section 251. Therefore, the Commission may well consider Qwest's SGAT in resolving the disputed issues in this arbitration.

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which Qwest stated "provides a comprehensive set of local interconnection terms that benefits [sic] CLECs regardless of whether they have an interconnection agreement."[11] Following numerous workshops, briefs, and SGAT versions, the Commission approved Qwest's SGAT on July 1, 2002.[11] Several amendments to the SGAT have been filed with the Commission since July 1, 2002.

[12]Reply Brief of Qwest, at 1, ¶ 3.

[13]Opening Brief of Qwest, at 8, ¶ 22.

[14]Opening Brief of Charter, at 3-4, ¶ 9.

[15]Reply Brief of Charter, at 3, ¶ 7.

[16]*Id.*, at 2, ¶ 6. *See*, *Petition of WorldCom, Inc., et. al.,* Memorandum Opinion and Order, 17 FCC Rcd 27039 at fn 123 (2002).

[17]47 U.S.C.A. § 252(c)(1).

21 That being said, Qwest acknowledges that it no longer makes the SGAT available to CLECs for adoption and has not done so for several years.[18] Furthermore, Charter was never a party to the Section 271 proceeding which resulted in the approved SGAT.[19] Thus, on its face, it appears unjust to hold a party to this arbitration to contract standards that Qwest no long makes available and to a process that Charter did not participate in. Finally, the Act provides that the approval of an SGAT does not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under Section 251 of the Act.[20] Accordingly, the Arbitrator takes administrative notice of Qwest's Commission-approved SGAT, but will weigh its terms and conditions in light of Qwest's own admission of its obsolescence and Charter's lack of influence in its development, and more importantly to consider whether those terms and conditions should operate in the context of this arbitration.

B. Issues, Discussion, and Decisions.

1. Issue 5: Limitation of Liability: Sections 5.8.1, 5.8.2, 5.8.3, 5.8.4, and 10.4.2.6.

a. The Disputes

22 There are four issues in dispute regarding the ICA's Limitation of Liability section. First, whether and to what extent the parties' liability to each other should be limited. Second, how the parties should calculate damages. Third, whether Qwest's tariff should supersede any liability imposed upon Qwest with regard to directory listings. Finally, whether the term 'solely,' as used in Section 5.8.4, should be defined in the context of one party being solely liable for the damage to the other's real or personal property.

[18] WRE-5.
[19] Reply Brief of Charter, at 3, ¶ 7.
[20] 47 U.S.C.A. § 252(f)(5).

b. Positions of the Parties/Decisions

Gross Negligence, Sections 5.8.2 and 5.8.4

23 Charter argues that the ICA language limiting the liability of one party to another in Section 5.8.4 should include an exception to this limitation if one of the parties commits gross negligence.[21] According to Charter, imposing liability for gross negligence "provides an additional incentive for both parties to ensure that their acts, and the acts of their employees and agents, are reasonable and appropriate."[22] Charter points out that the parties have already agreed to limit their liability for acts or omissions deemed the result of simple negligence.[23] Thus, Charter argues that the exception of gross negligence from the liability limitations will result in more equitable damage awards.[24]

24 Qwest maintains that its standard language, originating from the Section 271 proceeding and limiting the parties' liability to one another, has been used with its CLEC customers for years.[25] In fact, Qwest posits that Charter's own Washington tariff limits Charter's liability to its end-use customers for negligent actions.[26]

25 Qwest contends that it is appropriate to exclude gross negligence from the ICA because, as the ILEC, Qwest is the entity which provides facilities to the CLEC and faces the greatest risk of damage to its facilities.[27] According to Qwest, Charter's language would expand liability and increase the potential for litigation of damage amounts.[28] Qwest indicates that the phrase 'gross negligence' is a term of art, with an

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[21]Webber, JDW-1T at 10. The parties have agreed that their liability to each other should not be limited with regard to "(i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such party's negligent act or omission or that of their respective agents, subcontractors, or employees." HE-4 at 32.
[22]Webber, JDW-1T at 11.
[23]*Id*.
[24]Reply Brief of Charter at 5, ¶ 10.
[25]Albersheim, RA-1T at 23.
[26]Reply Brief of Qwest at 2-3, ¶ 8. While Qwest has referenced Charter's "Washington" tariff, this document is not filed with the Commission.
[27]Albersheim, RA-1T at 23.
[28]*Id*.

absence of "hard and fast rules regarding whether or not a person has acted in a grossly negligent matter [sic]."[29]

26 Charter asserts and Qwest acknowledges that the Commission found that 'gross negligence' should be an exception to the limitations on liability provision in Qwest's agreements.[30] Further, Charter contends that, in *Liberty Furniture v. Sonitrol*, a Washington court refused to honor contract provisions that limited a company's liability for gross negligence when the company's actions rise to the level of gross negligence.[31]

27 Qwest claims that Charter's language is not consistent with the position of Washington courts on contractual liability limitations.[32] Qwest states that *Liberty* does not stand for invalidating contractual limitations on liability for gross negligence.[33] According to Qwest, the *Liberty* court found that an exculpatory clause that addresses "negligence" does not include "gross negligence."[34] Qwest notes that the Commission limited indemnification to performance failure, and excluded from indemnification losses due to gross negligence.[35]

28 **Decision.** The Arbitrator recommends approving of Charter's proposed language adding the gross negligence exception to Section 5.8, Limitations on Liability. First, Qwest's citation to the limitations on liability language within Charter's own tariff to its end-use customers is irrelevant. Charter has its own telephony facilities and equipment that could, if damaged due to the gross negligence of a Qwest employee,

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[29]Albersheim, RA-2RT at 14-15. On cross examination, Ms. Albersheim admitted that the language the Parties have agreed upon anticipates the determinability of 'negligence.' III Tr. 341:23-342:15. Further, Ms. Albersheim acknowledged that, when Qwest trains its employees to comply with their legal duties, Qwest is essentially training them to not commit gross negligence. *See*, III Tr. 338:22-340:5.
[30]Reply Brief of Charter at 5, ¶ 11.
[31]*Id.*, ¶ 12, citing *Liberty Furniture v. Sonitrol*, 53 Wash.App. 879, 770 P.2d 1086 (Wash. Ct. App. 1989).
[32]Reply Brief of Qwest at 3, ¶ 9.
[33]*Id.*, ¶ 10.
[34]*Id*.
[35]Albersheim, RA-2RT at 15, citing Dockets UT-003022 and UT-003040, Twenty-Eighth Supplemental Order at ¶ 396. Upon further investigation, Qwest's citation appears to belong to the Twentieth Supplemental Order. The Twenty-Eighth Supplemental Order affirmed the Commission's finding in the Twentieth Supplemental Order on page 32, ¶ 121 and page 50, ¶ 267.

be very difficult and expensive to replace.[36] Charter's end-use customers are not in the same position if harmed by Charter's negligent conduct.

29 Further, one of the principle goals of the Act is to promote competition. Competition could be severely affected if one party were to be held harmless after acting so carelessly, so recklessly, as to constitute gross negligence. While the Arbitrator agrees that the parties should not be each others,' the language of the ICA should encourage reasonable and responsible behavior of both entities when working near or encountering their competitor's equipment. Charter's proposed language holding each party liable for actions deemed to be grossly negligent fosters public policy.

Damages, Section 5.8.1

30 For damages resulting from simple negligence, Charter asserts that an injured party to the ICA should be permitted to recoup actual, direct damages, as opposed to Qwest's proposal which would set damages by formula in an amount equal to the total monies that would have been charged to the other party for the services not performed or improperly performed under the ICA.[37] Charter points out that it has its own facilities and will not resell Qwest's services or lease unbundled network elements from Qwest.[38] The monthly charges that Charter is subject to, then, will be small and may not be sufficient to compensate Charter under Qwest's proposal.[39]

31 To demonstrate its hypothesis, Charter provides the example of a Qwest employee who, in the process of attempting to comply with its interconnection obligation, negligently cuts a clearly identified fiber optic cable that Charter has deployed.[40] In this instance, if the damages owed by Qwest to Charter for the cut fiber optic cable are determined under Qwest's language, Charter posits that the total amount it collects from Qwest would be insufficient to cover Charter's actual repair costs.[41]

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[36] And vice versa.
[37] Webber, JDW-1T at 9.
[38] *Id.*, at 7.
[39] *Id*.
[40] *Id.*, at 8.
[41] *Id*. Charter maintains that, as a facilities-based CLEC, the amount it will owe Qwest monthly for services will likely be *de minimus*. *Reply Brief of Charter* at 8, ¶ 18.

32 Qwest asserts that ILECs and CLECs "should not be insurers of each other's risk."[42] Qwest recommends that the parties to an ICA obtain insurance as is mandated in the separately negotiated insurance provision of the agreement.[43] Qwest also maintains that Charter has not adequately defined the phrase "actual, direct damages."[44] For example, Qwest asks how one would calculate the actual, direct damages if a Charter employee were to hit and knock over a Qwest telephone pole.[45] Qwest specifically inquires whether the actual, direct damages would include the depreciated value of the pole or the replacement value.[46] Qwest argues that lost revenue, employee overtime, and other expenses have not been addressed definitively as either included or excluded under Charter's "actual, direct damages."[47] Qwest indicates that none of its agreements in Washington State contain Charter's proposed damage language.[48]

33 Further, Qwest contends that Charter's example of a Qwest employee cutting one of Charter's fiber optic cables is highly unlikely.[49] Qwest reiterates that, as the ILEC, Qwest is the entity which faces the greatest risk of damage to its facilities.[50] Qwest points out that Charter will be entering Qwest's facilities to connect to Qwest's network.[51] As such, Qwest insists that it bears the greatest risk of incurring damages.[52]

34 Charter explains that lost profits, lost revenues, lost savings, and other expenses are addressed in Section 5.8.2 of the ICA which excludes incidental, indirect, consequential, and special damages from liabilities that the parties owe to each other.[53] Charter emphasizes that Qwest witness, Renée Albersheim, admitted that any

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[42]Reply Brief of Qwest at 2, ¶ 6.
[43]*Id*. *See*, HE-4 at 30, Section 5.6.
[44]Opening Brief of Qwest at 5, ¶ 15.
[45]Webber, II Tr. 78:19-23.
[46]Webber, II Tr. 79:4-5. Charter's witness, Mr. James D. Webber, responds that damages would be determined as the Party's attempted to restore Qwest to its former position, which may be as simple as re-erecting the telephone pole. Webber, II Tr. 79:6-15.
[47]Albersheim, RA-7RT at 18.
[48]Webber, II Tr. 80:20-81:6.
[49]Linse, PL-7RT at 3. *See also*, Albersheim, RA-7RT at 17.
[50]Albersheim, RA-1T at 23. During cross examination, Qwest acceded that Charter is a facilities based CLEC and that Qwest will not be providing collocation services to Charter beyond the interconnection. *See*, Albersheim, III Tr. 343:12-16
[51]Albersheim, RA-2RT at 17.
[52]*Id*.
[53]Webber, II Tr. 148:19-149:6.

damage Qwest may cause to Charter's facilities on Charter's side of the interconnection meet point would go uncompensated under Qwest's proposed language.[54] Qwest contends that this policy would apply equally to both parties and this is the reason why both parties should obtain insurance and then file claims with their own insurance companies.[55] Charter posits that, were the parties to file claims on their own policies, their individual insurance rates could increase even though the damage was caused by the other party.[56]

35 **Decision.** The Arbitrator recommends approving Charter's language implementing the recovery of actual, direct damages. Qwest's proposed language does not take into account the unique situation Charter faces, in contrast to that of most other CLECs. Charter will not be receiving any unbundled elements or services from Qwest other than the interconnection. Pursuant to Qwest's language, the injured party to the ICA would receive damages in an amount unrelated to the substance of the injury suffered. With no rational relationship between the injury experienced and the damages instituted, the parties have little to no incentive to act with care when encountering the equipment and supplies of a business competitor.

36 Further, the Arbitrator is not convinced that the calculation of the damage one has experienced due to the gross negligence or willful or intentional misconduct of the other is impossible. *Black's Law Dictionary* defines actual damages as "[r]eal, substantial and just damages, or the amount awarded to a complainant in compensation for his actual and real loss or injury, [57] as opposed on the one hand to "nominal" damages ["… a trifling sum awarded … where there is no substantial loss or injury to be compensated ..."],[58] and on the other to "exemplary" or "punitive" damages ["… awarded to the plaintiff over and above what will barely compensate him for his property loss … and are intended to solace the plaintiff for mental

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[54]Albersheim, III Tr. 346:24-347:6.
[55]Albersheim, III Tr. 347:3-6. However, under cross examination conducted by Charter, Ms. Albersheim admitted that the insurance she envisioned covering the injured party would be the injured party's policy. *See*, Albersheim, III Tr. 347:7-18. It is posited, but not definitively concluded, that this additional risk would result in higher insurance premiums for both parties. Albersheim, III Tr. 347:19-348:17.
[56]Albersheim, III Tr. 347:19-348:17.
[57]*Black's Law Dictionary* 270 (6th ed. 1991).
[58]*Id.*, at 272.

anguish, laceration of his feelings, shame …"[59]]. A cut fiber optic cable can be repaired, or, if needed, replaced. A downed telephone pole can be righted. Qwest's query into depreciation costs is unnecessary. As it is defined by *Black's Law* Dictionary, the definition of actual damages is not concerned with exemplary or punitive damages. Further, the consensus language in Section 5.8.2 of the ICA clarifies that neither party shall be liable for indirect, incidental, consequential, or special damages and even lists examples of these types of unrecoverable damages.

Directory Listings Liability, Section 10.4.2.6

37 Qwest recommends including language in Section 10.4.2.6 that would link liability for errors in provisioning directory listings to the obligations in Qwest's Washington Exchange and Network Services Tariff (Qwest's Tariff), not to Charter's proposed language in Section 5.8.1 of the ICA.[60] According to Qwest, directory listings are governed by its tariff, not the agreement.[61] Qwest states that not including a reference to its tariff "implies that the rates and terms for listings are governed by the interconnection agreement."[62] Qwest advises that, if the Commission accepts Charter's recommendation and leaves Section 10.4.2.6 blank, the ICA will be inconsistent with other agreements Qwest has with various CLECs.[63]

38 Charter disagrees and asserts that directory listing services are not governed by Qwest's Tariff because Charter is not an end-use customer receiving services from Qwest.[64] Charter states that Qwest and Charter are two co-carriers, interconnecting as peers and that directory listing services are governed by Qwest's obligations under Section 251(b)(3) of the Act.[65]

39 Furthermore, Charter posits that Qwest's Tariff provides for damages due to errors or omissions only up to the amount charged for exchange service that Qwest provides to

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[59] *Id.*, at 271.
[60] Albersheim, RA-2RT at 19. *See*, Albersheim, RA-7. For whatever reason, Qwest does not address the issue of directory listing damages in its Reply Brief.
[61] *Id.*
[62] *Id.*
[63] Albersheim, RA-1T at 23 and RA-2RT at 19.
[64] Reply Brief of Charter at 10, ¶ 23.
[65] *Id.*

a customer.[66] Qwest does not charge Charter for exchange service.[67] Charter suggests that liability for errors or omissions in the provision of directory services should be in line with the amounts Charter has proposed in Section 5.8 of the ICA; actual, direct damages for simple negligence and unlimited damages for gross negligence.[68]

40 Qwest suggests that Charter's proposal is unworkable and will prove problematic.[69] Qwest points to the example of an error or omission in transmitting a group of listings to the directory publisher.[70] Qwest indicates that Charter's witness, James D. Webber, could not verify what the actual, direct damages would be in such a situation.[71]

41 **Decision.** The Arbitrator recommends approving Qwest's proposed language that relates Qwest's liability for an error or omission in transmitting Charter's customer listings into a directory listing service with Qwest's Tariff. Charter's proposal would result in Qwest being liable for actual, direct damages associated with its error or omission. Unlike a cut fiber optic cable or a downed telephone pole, it is unclear how the parties would be able to calculate actual, direct damages for an error or omission in a directory listing. For that matter, an error or omission in the transmittal of customer listings is not likely to rise to the same level of damages as gross negligence, nor would it appear that Charter would be the injured party. The customer listing omission would surely disadvantage the customer or anyone attempting to locate the customer.

"Solely" Defined, Section 5.8.4

42 Charter has added a sentence at the end of Section 5.8.4 that defines the word "solely."[72] Charter argues that the undisputed language in Section 5.8.4 contains the term "solely," and Charter's definition of the word is only meant to clarify the scope of the term rather than modify the overall meaning of Section 5.8.4.[73] Charter's

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[66]Albersheim, III Tr. 349:14-350:3. *See*, Reply Brief of Charter at 9-10, ¶ 21.
[67]Albersheim, III Tr. 350:9-11.
[68]Webber, JDW-1T at 13.
[69]Webber, II Tr. 83:10-84:1.
[70]*Id*.
[71]*Id*.
[72]Reply Brief of Charter at 5, ¶ 10.
[73]Webber, II Tr. 149:16-25.

definition provides that damages caused "solely" by one party's negligence "mean[s] not contributed to by the negligent act or omission of the other Party, or its respective agents, subscontractors [sic], or employees."[74]

43 While Qwest expresses concern that Charter's definition of "solely" would result in contributory negligence barring recovery by the injured party, Charter's witness, Mr. Webber, clarified at hearing that Charter's intent was "not to take one party completely off the hook if the other party was partly at fault."[75] With that explanation, Qwest did not address the issue of Charter's definition of 'solely' in its Opening or Reply Briefs.

44 **Decision.** The Arbitrator recommends approving Charter's definition of the word "solely." The definition is reasonable, will minimize confusion, and should be approved. While Qwest did not adopt Charter's language in its proposed language, Qwest also did not raise objections to the definition in its briefs or its witnesses' testimony.

2. Issue 6(a): Indemnity Obligations: Sections 5.9.1, 5.9.1.1, and 5.9.1.2

a. The Dispute

45 The parties dispute whether indemnity obligation should apply to third-party claims caused by the indemnified party's actions that are negligent, grossly negligent, or qualify as willful misconduct.

b. Positions of the Parties

46 Charter suggests that neither party should be compelled to indemnify the other when the indemnified party's behavior rises to the level of negligence, gross negligence, or willful misconduct.[76] Charter advocates an approach it states is consistent with the FCC's cost causation principles, i.e., the party causing the cost pays,[77] as well as

[74]HE-4 at 32.
[75]Webber, II Tr. 76:2-3.
[76]Webber, JDW-1T at 14.
[77]*Id*.

Washington law of comparative fault, the liability standard for tort claims.[78] Charter posits that, under its language, if one party acts in a negligent, grossly negligent, or a manner deemed to be "willful misconduct," that party should not be able to invoke the indemnity provision and force the other party to defend against third-party claims.[79] Instead, the at-fault party should be liable for that portion of damages to the extent its actions or omissions caused the harm.[80] Charter cites the hypothetical example of a Qwest employee who negligently starts a fire at the scene of an interconnection job by tossing a cigarette into a dumpster.[81] Charter argues that Qwest's indemnity language would not require Qwest to indemnify Charter against a third-party claim unless the Qwest technician's actions "constituted a 'breach of or failure to perform under [the] Agreement'."[82]

47 Charter also asserts that Qwest's complaint regarding Charter's definitions of the terms "claims" and "losses" is not substantive.[83] Charter states that it used Qwest's own language in defining these terms in Section 5.9.[84] According to Charter, the only dispute over the definitions of "claims" and "losses" is whether to include them in Section 4 with the other definitions or in Section 5.9.[85] Charter contends that either location for the definitions would be sufficient, as long as the definitions are included within the ICA to ensure clarity.[86]

48 Qwest avers that, during the Section 271 proceeding, the Commission agreed with Qwest's position that concepts of negligence should not be introduced into a discussion of indemnification.[87] Including an exemption for gross negligence within

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[78]Opening Brief of Charter at 9, ¶ 23.
[79]Webber, JDW-1T at 14.
[80]Opening Brief of Charter at 9, ¶ 22.
[81]Reply Brief of Charter at 14, ¶ 31. Albersheim, III Tr. 352:18-354:1.
[82]*Id.*, quoting Qwest's proposed language in Section 5.9.1.1.
[83]*Id.*, at 14-15, ¶ 32.
[84]*Id.*, at 14-15, ¶ 32.
[85]*Id.*, at 15, ¶ 32.
[86]*Id.*, at 15, ¶ 32. Qwest also raises its concern that Charter is attempting to create formal definitions in Section 5.9.1.1 when those terms are used elsewhere and may have a different meaning. Albersheim, RA-1T at 28. However, since Charter has assented to defining the terms "claims" and "losses" in Section 4 using Qwest's language, this issue has been resolved and no further discussion will be included.
[87]Albersheim, RA-2RT at 21, citing 28th Supplemental Order, ¶ 396, 31st Supplemental Order, ¶ 46.

the indemnity section will have the effect of negating indemnification.[88] Further, Qwest asserts that Charter's language will result in more litigation since a determination will need to be made as to whether negligence, gross negligence, or willful misconduct has occurred.[89]

49 Charter counters that Qwest's SGAT filed with the Commission on June 25, 2002, contained the phrase "gross negligence" that Qwest alleges that the Commission said should be excluded.[90] Charter cites to the 28th Supplemental Order in the Section 271 proceeding, which provides that an exception for "intentional misconduct" should be excluded from Section 5.9.1.2.[91] However, Charter points out that Qwest agreed in the Section 271 proceeding to the exception for "willful misconduct."[92] As a result, Charter contends that Qwest is attempting to pick and choose which portions of the SGAT to accept or decline.[93]

50 Charter also argues that the 28th Supplemental Order states that Qwest's SGAT was patterned after the Texas T2A Agreement (T2A) which specifically included an indemnification exception for gross negligence.[94] Additionally, the successor T2A and AT&T's 22-state generic interconnection agreements contain an exception to indemnification for gross negligence.[95]

51 With regard to Charter's hypothetical fire caused by a Qwest employee's stray cigarette, Qwest witness, Ms. Albersheim, asserts that indemnification would depend on a determination of whether Qwest's technician disposed of his cigarette during the performance of his duties.[96] Ms. Albersheim states that it is possible that the disposal of the cigarette would have occurred during the performance of the technician's duties

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[88]Opening Brief of Qwest at 8, ¶ 21.
[89]Albersheim, RA-2RT at 21. *See*, Albersheim, RA-13.
[90]Webber, JDW-2RT at 21. Mr. Webber points outs that Qwest's SGAT contained the phrase "unless the loss was caused by gross negligence or intentional misconduct of the employees, contractors, agents, or other representatives of the Indemnified Party." *Id.*
[91]*Id.*, at 22.
[92]*Id.*
[93]*Id.*
[94]*Id.*
[95]*Id.*, at 22-23. Charter notes that AT&T's standard indemnity language also includes an exception for willful misconduct. Webber, JDW-2RT at 23.
[96]Albersheim, III Tr. 354:8-13.

because Qwest's technician would not have been in that location otherwise.[97] However, Ms. Albersheim does not appear certain of what this would mean under Qwest's language as far as the indemnity obligation under Section 5.9.[98]

52 Qwest also addresses Charter's comparative negligence argument. Qwest asserts that comparative negligence is a principle of law within the state of Washington, and Washington state courts will apply that principle whether it is memorialized in the contract or not.[99]

c. Decision

53 The Arbitrator recommends approving Charter's proposed language excepting negligence, gross negligence, and willful misconduct from the indemnity obligation. The parties have already agreed to certain exceptions to the obligation of one party to indemnify the other against third-party claims. Qwest even suggests, in its proposed language, the exemption of negligent or intentional conduct from the indemnification obligation. Therefore it appears that the parties dispute centers on the potential exemption of gross negligence.

54 Qwest's claim that the Commission ruled against inclusion of gross negligence in the indemnification section of the SGAT, while true, is disingenuous. Qwest's SGAT, filed on April 5, 2002, included an exception to the indemnity obligation for gross negligence.[100] Qwest has proposed that negligence and intentional conduct be excluded from the indemnity obligation. It would be unjust and unreasonable to

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[97]Albersheim, III Tr. 354:13-14.
[98]Albersheim, III Tr. 354:18-19. Ms. Albersheim asserts that she "can't imagine that smoking is acceptable while connecting, so it seems like that would not be appropriate performance of duties [pursuant to Qwest's proposed language.]" Albersheim, III Tr. 356:13-15. Yet, previously Ms. Albersheim, in assuming the facts as laid out by Charter, states that she does not know if the facts would result in Qwest's obligation to indemnify Charter. Albersheim, III Tr. 354:18-19. The sticking point for Ms. Albersheim seems to be that she is unaware of whether Qwest allows its technicians to smoke in the field. Albersheim, III Tr. 356:25-357:2. She does attest that this particular scenario would result in a fair amount of litigation over the indemnity obligation. Albersheim, III Tr. 357:3-7.
[99]Reply Brief of Qwest at 4, ¶ 12.
[100]*Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the state of Washington*, Fourth Revision, April 5, 2002, Section 5.9.1.2, at 40.

exclude actions or omissions that rise to the level of negligence but require the parties to indemnify each other even if the indemnified party committed gross negligence, bringing about the claim.

55 Furthermore, Charter's suggestion that the terms "claim" and "losses" be defined is logical and should prevent any confusion or ambiguity as to their meanings. Qwest's argument that the terms have different meanings throughout the agreement and should not be defined in Section 5.9 is compelling, until one realizes that Qwest does not provide a specific example of the terms used outside of Section 5.9 and how the meaning of these terms differ from those in Section 5.9. Charter's definitions of the terms "claims" and "losses" should be included, as Charter indicates, in Section 5.9.

3. Issue 7: Intellectual Property Indemnification: Sections 5.10, 5.10.4, and 5.10.5

a. The Dispute

56 The parties dispute whether an indemnity obligation should be established for intellectual property claims.

b. Positions of the Parties

57 Charter contends that an indemnity obligation should be limited with regard to intellectual property claims where the infringement occurred without the knowledge of the indemnifying party.[101] Under Charter's suggestion, the parties would only have an intellectual property indemnity obligation where the facilities or services of the indemnified party are combined with the knowledge, and at the direction, of the indemnifying party.[102] Charter points to the legal concept of contributory infringement in support of its plan.[103] According to Charter, contributory infringement occurs where the defendant had knowledge of the infringing activity and the defendant induced, caused, or materially contributed to the infringing conduct.[104]

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[101]Webber, JDW-1T at 24.
[102]Opening Brief of Charter at 11, ¶ 28.
[103]*Id.*, at ¶ 29.

58 Charter also proposes that any agreement allowing one party to use another party's intellectual property rights should be expressed in writing.[105] Charter explains that a written agreement will prevent future confusion over each party's rights and duties with regard to the intellectual property.[106]

59 Qwest argues that the indemnification should not be limited to situations only occurring with the knowledge of the indemnifying party. Qwest argues that Charter's inclusion of the phrase "with knowledge" is problematic because it results in another level of uncertainty.[107] Qwest maintains that litigation will be necessary to establish "who knew what and when did they know it."[108] Qwest also points out that Charter has proposed removing the phrase "loss, cost, expense or liability" in the sentence "Subject to Section 5.9.2, each Party (the Indemnifying Party) shall indemnify and hold the other Party (the Indemnified Party) harmless from and against any **loss, cost, expense, or liability arising out of a c**laim that the use of facilities of the Indemnifying Party or services provided by the Indemnifying Party provided or used pursuant to the terms of this Agreement misappropriates or otherwise violates the intellectual property rights of any third party." [109] Charter advocates replacing the above phrase with a definition of the term "Claim."[110]

60 Qwest expresses concern that Charter will have the right to access network technology that Qwest licenses from third-party vendors, and Qwest posits that Charter could violate those licenses.[111] Qwest states that, at hearing, Charter witness, Mr. Webber acknowledged that he "… hadn't contemplated a circumstance where [the Indemnifying Party] didn't have knowledge of the event."[112] Mr. Webber also opined that Qwest would still be required to indemnify Charter, pursuant to Charter's language, for any infringement Charter may commit if Qwest knew of Charter's

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[104]Opening Brief of Charter at 12, ¶ 29 and fn 21, citing *Interscope Records v. Leadbetter*, 2007 WL 1217705, * 4 (W.D. Wash. 2007).
[105]Webber, JDW-1T at 26.
[106]*Id*.
[107]Opening Brief of Qwest at 10, ¶ 26.
[108]*Id*.
[109]*Id.*, at 12, ¶ 29. (Emphasis added).
[110]*Id*.
[111]*Id*. Qwest cites to the transcript discussion at III Tr. 361:12-362:20 for an example of how Charter could avoid its intellectual property indemnification obligation due to its insertion of the "with knowledge" language into the ICA.
[112]Webber, II Tr. 69:23-25.

actions but did not know those actions infringed upon any intellectual property rights.[113] During the hearing, Mr. Webber asserted that, ultimately, claims of intellectual property infringement will go into litigation where the following questions will be answered: 1) who had knowledge of the infringement, 2) is this person a representative of the Indemnifying Party, and 3) when did this knowledge occur?[114]

61 Charter acknowledges its intention to replace the phrase "loss, cost, expense or liability" with the definition of the term "Claim" and argues that this would serve to "avoid having to restate the definition of 'Claim' each time it appeared in the indemnification section."[115] Charter proposes to define "Claim" as any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorney's fees)."[116] While its language does clarify what constitutes "loss, cost, expense or liability," Charter contends that it does not expand the potential claims for losses when compared to Qwest's proposed language.[117]

62 With regard to Qwest's argument that Charter will be infringing upon "network elements" simply by interconnecting with Qwest, Charter contends that Qwest never specifies what these network elements are or how Charter will possibly infringe upon them.[118] Charter also explains that its intent was never to expand Qwest's indemnification obligation, but instead "to add another condition to those existing conditions which would limit either party's obligation to indemnify intellectual property claims."[119] Charter maintains that, under its proposed language, a party would not have an intellectual property indemnification obligation if that party: 1) did not take action to combine facilities or services, 2) did not direct the combination of facilities or services, or 3) did not know of the combination of the facilities or services.[120]

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[113]Opening Brief of Qwest at 12-13, ¶ 30. *See*, Webber, II Tr. 70:8-15.
[114]*See*, Webber, II Tr. 71:13-23.
[115]Reply Brief of Charter at 16, ¶ 35.
[116]Webber, JDW-2RT, at 28.
[117]*Id*.
[118]Reply Brief of Charter at 16, ¶ 36.
[119]*Id.*, at 17, ¶ 37.
[120]*Id*. *See also*, Webber, JDW-1T, 24.

63 Charter alleges that it is Qwest who has expanded the intellectual property indemnification obligation.[121] Charter asserts that Qwest has inserted the phrase "any other Person" so that Section 5.10.2 reads in part:

> 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 **any other Person (including** the Indemnified Party **but excluding the Indemnifying Party and any of its Affiliates)**, which combination is not made by, or at the direction of the Indemnifying Party. [122]

64 Yet, Charter states, Qwest has not offered any testimony or legal arguments why it is appropriate to expand the indemnity obligation in this way.[123]

c. Decision

65 The Arbitrator recommends adopting Qwest's proposal with regard to limiting the parties' intellectual property indemnification obligations but not with regard to the addition of Qwest's phrase "any other Person." Qwest correctly points out that a party with mere knowledge that an infringement has taken place, who did not in any way promote or direct that such combination of facilities or services occur, should not be compelled to indemnify the infringing party. Further, Charter has not convincingly argued why the agreed-to language is insufficient and how the addition of "with knowledge" will help the parties. As Qwest argues, the ambiguity that will be created under Charter's language will result in an increase in the issues up for litigation.

66 With regard to the form that agreements should take giving consent for the use of patent, copyright, logo, trademark, trade name, trade secret, or other intellectual property rights, the Arbitrator recommends adopting Charter's language in Section 5.10.4 requiring that these agreements take written form. Charter's argument that both parties should be apprised of exactly what their rights and duties are with regard to intellectual property by way of memorializing the agreement in writing is logical.

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[121] Reply Brief of Charter at 17, ¶ 38.
[122] *Id.* Disputed language is in boldface.
[123] *Id.*, at ¶ 39. Qwest also does not raise any argument in favor of its additional language in its Reply Brief.

Qwest has not established any basis for maintaining an agreement concerning intellectual property rights in oral form.

67 Qwest had recommended including the term "any other Person" which severely limits the indemnification obligation for intellectual property. Specifically, the disputed language proffered by Qwest exempts combinations of the Indemnifying Party's facilities or services **with any other person's** facilities or services.[124] Qwest has not presented any argument, either in its sponsored testimony or in its post-hearing briefs, why the Commission should adopt its language over the agreed-to language. The phrase "any other Person" is unnecessary, and, as such, the Arbitrator recommends rejecting Qwest's additional language in Section 5.10.2.

68 Finally, the Arbitrator recommends adopting Charter's definition of the term "Claim." Charter's definition includes Qwest's phrase "loss, cost, expense or liability," and provides additional guidance as to the meaning of the term. Qwest gives short shrift to its own proposal by simply stating that Charter's language would add ambiguity and then never discussing how this would occur. If anything, Charter's language produces consistency and clarity since it replicates the definition in Section 5.9.1.1. Charter has failed, however, to include a reference back to the definition of "Claim" set out in Section 5.9.1.1. So, language should be added by the parties to reference the definition of "Claim" in that previous section.

4. Issue 10: Technically Infeasible Points of Interconnection: Section 7.1.1

a. The Dispute

69 This dispute revolves around whether Qwest should be required to present proof to the Commission that the point of interconnection (POI) is not feasible due to switch exhaustion, before denying Charter's request.

b. Positions of the Parties

70 According to Charter, Qwest has acknowledged its obligation pursuant to 47 C.F.R. 51.305(e) which provides that "[a]n 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."[125] Despite this, Charter argues that Qwest is attempting to avoid its federal obligation to demonstrate to the Commission the technical infeasibility of the provision of a certain network connection before it rejects Charter's request for interconnection at a particular POI.[126] Charter points out that Qwest's language in Section 7.1.1 only states that connection with Charter at a particular point is not required where Qwest **can** prove that the connection would present the risk of switch exhaust.[127] Charter alleges that 47 C.F.R. 51.305(e) can only be read to require that Qwest demonstrate that the point is not technically feasible before Qwest denies Charter's request.[128]

71 Charter points to the FCC's interpretation of 47 C.F.R. 51.305(c) and (d), where the FCC found a rebuttable presumption exists that certain types of connections are technically feasible.[129] According to Charter, this rebuttable presumption requires that the ILEC immediately make the connection available upon request; concurrently, Charter contends that the ILEC can present evidence that the connection point is technically infeasible to rebut the presumption.[130]

72 Qwest asserts that there is no dispute that it will provide Charter with interconnection within Qwest's network when it is technically feasible.[131] Qwest points to the agreed-to language in Section 7.1.1 which states that "Qwest Tandem Switch to CLEC Tandem Switch connections will be provided where Technically Feasible."[132] Qwest argues that the ILEC's obligation to demonstrate technical infeasibility to the state commissions arises only after the ILEC denies the requested interconnection.[133]

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[124](Emphasis added).
[125](Emphasis added).
[126]Reply Brief of Charter at 19, ¶ 44. *See*, 47 C.F.R. 51.305.
[127](Emphasis added). *See*, Reply Brief of Charter at 19-20, ¶ 46.
[128]Reply Brief of Charter at 20, ¶ 47.
[129]*Id.*, citing to *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, 15782, at ¶ 554 (1996) ("*Local Competition Order*"), in which the FCC found 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 created that such a method is technically feasible for substantially similar network architectures."
[130]Reply Brief of Charter at 21, ¶ 48.
[131]Reply Brief of Qwest at 7, ¶ 22.
[132]*Id.*, quoting HE-4, Section 7.1.1, at 49-50.
[133]*Id.*, at 8, ¶ 23.

73 Qwest explains that the proper order of sequence when a CLEC requests interconnection at a given POI would be: 1) Charter requests an interconnection point or switch connection, 2) Qwest determines whether to accept or reject the request, and 3) the burden then shifts to Charter to file the dispute with the Commission for resolution.[134] According to Qwest, Charter is attempting to have the Commission "micromanage Qwest's network."[135] Qwest asserts that it is in the best position to make the determination whether a requested interconnection point or switch connection would be technically feasible, and if Charter disputes its finding, Qwest argues that Charter then has the opportunity to resolve the disagreement through negotiations.[136] Finally, if the parties are unable to resolve their differences through dispute resolution, then either party could seek review from the Commission.[137] Qwest contends that Charter's last sentence, stating that dispute resolution should be used to resolve conflicts under Section 7.1.1, is redundant since Section 5.18.1 already provides that "[t]he Parties will attempt in good faith to resolve through negotiation any dispute, claim or controversy arising out of, or relating to, this Agreement."[138]

74 Charter counters that the FCC has specifically provided for a state commission determination that a requested connection is not technically feasible before an ILEC can deny the request.[139] The FCC found that "[t]he incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible."[140] Charter cites to 47 C.F.R. § 51.5 which defines the term "technically feasible" and requires that "[a]n incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability

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[134]Easton, WRE-1T at 5. *See*, Easton, III Tr. 214:1-10.
[135]*Id.*
[136]*Id.*, at 6.
[137]*Id.*
[138]*Id.*, quoting Section 5.18.1 of the ICA.
[139]Gates, TJG-1T at 11, fn 3.
[140]*In the Matter of Application by SBC Communications Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, ¶ 78 (2000).

impacts."[141] Charter maintains that the FCC's rules provide that "[t]he fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible."[142] Given the FCC Rule, Charter notes that the risk of switch exhaust is not enough to determine that the request is technically infeasible because Qwest could modify its facilities or equipment to relieve the potential exhaust.[143]

75 That being said, Charter asserts that it will agree that "imminent risk of switch exhaust" is grounds for denying a request for interconnection as long as Qwest proves such to the Commission.[144] Charter argues that its proposal would not put the Commission in the position of micromanaging Qwest's network.[145] With regard to Charter's reference, at the end of Section 7.1.1, to controversies under this section being resolved pursuant to the dispute resolution provisions within the ICA, Charter explains that this sentence is necessary because Qwest has posited that the burden is on Charter to contest Qwest's finding of technical infeasibility, not on Qwest to substantiate its finding.[146] Charter contends that Qwest has impermissibly shifted to Charter its burden under the FCC rules to demonstrate technical infeasibility to the state commissions.[147]

76 Qwest points out that Charter's interpretation of 47 C.F.R. § 51.305(e) is impractical because, if a good faith dispute exists as to the technical feasibility of a particular point, Qwest would have to obtain a Commission order to that effect which could take 6 months or longer.[148] Under those circumstances, Qwest argues that it would have to provide the interconnection, even though connection may be physically impossible, until the Commission's determination was rendered that the POI was technically infeasible.[149]

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[141]Gates, TJG-1T at 12-13.
[142]Gates, TJG-2RT at 4, citing 47 C.F.R. § 51.5.
[143]*Id*.
[144]*Id*. Charter insists on the use of the word "imminent" to describe the potential switch exhaust. *See*, Gates, TJG-2RT at 4-5.
[145]*Id.*, at 6.
[146]*Id.*, at 8.
[147]*Id*.
[148]*See*, Gates, II Tr. 172:22-174:12.
[149]Easton, III Tr. 214:10-16. Qwest witness, Mr. Linse, also points out that the situation where Qwest denies a POI due to switch exhaustion is rare. In fact, Mr. Linse's response to Charter

77 According to Charter, if Qwest can find that Charter's selected POI is technically infeasible, without some showing of proof, Charter would be forced to start the lengthy and expensive process of locating another POI over again.[150] This denial by Qwest, Charter argues, results in lost revenue and time since it is not serving customers.[151] Contrary to Qwest's approach, Charter sees the point for negotiation between the ILEC and CLEC over the technical feasibility of an interconnection point taking place prior to the ILEC's denial of the requested point.[152]

c. Decision

78 The Arbitrator recommends adopting Qwest's language. The FCC's rule, 47 C.F.R. § 51.305(e), mandates that "[a]n 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." (Emphasis added). Neither party disputes the fact that ILECs have the duty, under 47 C.F.R § 51.305(e), to provide the state commission with proof that interconnection at the CLEC-requested point is not technically feasible. The dispute centers on when this proof must be made.

79 The Arbitrator finds that Qwest's language best reflects the process mandated by the FCC. Charter's proposal, that Qwest make a showing to the Commission of technical infeasibility before denying Charter's request, appears impractical and effectively puts the "cart before the horse." For a meaningful process, Qwest has to receive the request to interconnect at a particular POI from the CLEC and then have an opportunity to assess the feasibility of the request. Should Qwest make the decision to deny the request as unfeasible, a CLEC's most effective course of action to resolve the dispute should then, and only then, come in the form of a proceeding before the Commission. Having said that, should Charter file a complaint with the Commission against Qwest alleging that Qwest has improperly denied interconnection with Charter, the burden then completely shifts to Qwest to demonstrate that

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indicated that, following an investigation, Mr. Linse could find no instances where Qwest had denied a requested POI due to switch exhaustion. Linse, PL-10.
[150]Gates, II Tr. 186:5-8.
[151]Gates, II Tr. 186:8-10.
[152]Gates, II Tr. 187:13-16.

interconnection at Charter's proposed POI is technically infeasible. Qwest admitted as much in its exhibit WRE-8 submitted on behalf of Mr. Easton.

5. Issue 11: Methods of Interconnection: Section 7.1.2

a. The Dispute

80 The parties disagree over whether Charter should have the authority to establish a single POI where it interconnects with Qwest, and whether Charter should have the ability to use an interconnection facility of a third-party to interconnect.

b. Positions of the Parties

81 Charter argues that CLECs have the right to choose the number of POIs to use in interconnecting with an ILEC's network, including a single POI per LATA if the CLEC prefers.[153] Charter contends that its language best captures this principle under federal law. Charter states that it needs the flexibility to decide when and where to establish a single POI or multiple POIs since customer and traffic volumes do not always warrant the expense of an additional or multiple POIs.[154] According to Charter, its language also reiterates that Qwest is not required to establish an interconnection with Charter outside of Qwest's network.[155] With regard to the method of interconnection, Charter explains that it commonly interconnects with ILECs using a third-party's facilities.[156]

82 Qwest argues that Charter's language is incomplete because it does not include the restriction under law that any POI be technically feasible.[157] Qwest also takes issue with Charter's use of the phrase "interconnection facility" instead of the more commonly used "entrance facility."[158] Qwest cites to the FCC's *Triennial Review*

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[153]Gates, TJG-1T at 17.
[154]*Id.*, at 20.
[155]*Id.*, at 17.
[156]*Id.*, at 15.
[157]Easton, WRE-1T at 9.
[158]*Id.*

Remand Order (TRRO)[159] where it found that "other CLECs and third-parties are not entitled to obtain entrance facilities as unbundled network elements and thus, are not entitled to use entrance facilities they have purchased from Qwest to provide transport to Charter."[160] As such, Qwest posits that Charter is employing the term "interconnection facility" to bypass the FCC's directive.[161] Such use of Qwest's entrance facilities by other CLECs to provide transport services to Charter would be an impermissible unbundling.[162]

83 Qwest claims that its language clearly gives Charter the right to establish one or more than one POI if Charter so chooses.[163] Qwest also disputes Charter's allegation that Qwest is limiting its methods of interconnection by excluding the use of a third-party's facilities. Qwest argues that Charter has many options of interconnecting with Qwest facilities, including: the use of a Qwest-provisioned entrance facility,[164] Charter building its own facility, collocation with Qwest, the Mid Span Meet POI option where each party would build its own facility to a negotiated meet point, or Charter may request an alternative method via the Bona Fide Request process.[165]

84 Charter defends its proposed language by stating that its language does not require Qwest to interconnect outside of Qwest's service territory or require connection at a technically infeasible point.[166] Accordingly, Charter asserts that it has modified its proposed language to read "**The Parties agree that** this agreement **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**

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[159]*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, ¶¶ 136-141 (Rel. Feb. 4, 2005).
[160]Easton, WRE-1T at 9.
[161]*See, Id*.
[162]Easton, WRE-2RT at 7.
[163]*Id.*, at 4. Qwest also points out that Charter admits to not having performed a detailed analysis of the interconnection facility arrangements that would be required under Qwest's proposed language for the state of Washington. Easton, WRE-4.
[164]Qwest explains that this interconnection would involve Qwest building a transmission path between Qwest's serving central office building and Charter's location. Linse, PL-7RT at 4.
[165]Easton, WRE-2RT at 5. *See also*, Linse, PL-2, PL-3, and PL-4.
[166]Charter's Reply Brief at 22, ¶¶ 53-54.

or territory."[167] This, Charter suggests, will leave no doubt of Charter acknowledgment that Qwest is not required to interconnect outside of its service territory or at a technically infeasible point, and that Charter's ascent covers the entire agreement, not just one section of it.[168]

85 Charter contends that, contrary to Qwest's argument, Charter's language regarding its potential use of third-party entrance facilities is necessary.[169] Charter points out that Qwest has admitted that this type of arrangement is already in use and that it is fairly routine for Qwest to allow CLECs to use third-party facilities.[170] Charter argues that Qwest's statement that the FCC's *Triennial Review Order* (TRO) and the *TRRO* do not allow Charter to participate in a third-party interconnection arrangement is untrue.[171] Charter alleges that its proposal and the FCC's TRRO would simply allow it to use a third-party's facilities to interconnect with Qwest.[172]

86 Qwest represents that other CLECs will have the right to opt-into whatever ICA results from this proceeding.[173] Qwest surmises that Charter's language does not explain that the right of a CLEC to interconnect with an ILEC's network is not absolute.[174] In fact, Qwest notes that Charter's proposed sentence stating that CLECs shall have the right to connect at a single POI in Qwest's area does not contain language limiting that right to the legal requirement that the POI be within Qwest's network and that the requested POI be determined by Qwest to be technically feasible.[175]

87 With regard to third-party facilities, Qwest asserts that interconnection via third-party facilities was not addressed by the Act.[176] That being said, Qwest argues that its

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[167]Charter's Reply Brief at 23, ¶ 56. Charter's proposed language is seen in bold, while Qwest's proposed language is double underscored.
[168]*Id.*
[169]*Id.*, at 24, ¶ 58.
[170]*Id.*, at 24, ¶ 60, citing to Qwest's Opening Brief, ¶ 37.
[171]*Id.*, at 25, ¶ 61.
[172]*Id.*
[173]Qwest's Reply Brief, at 8, ¶ 24.
[174]*Id.*
[175]*Id.*
[176]*Id.*, at 9, ¶ 27. In its subsequent pleadings, Qwest shifts away from the assumption that Charter would be interconnecting with the use of third-party facilities that have been purchased from Qwest, thus constituting an impermissible unbundling. Charter states several times that any third-party facilities it uses would be owned by the third-party, and therefore, the issue of

language allows Charter to interconnect with Qwest's network with the use of a third-party's facilities.[177] Qwest does request that the Commission require that Charter obtain a letter of agreement from the third-party and provide that letter to Qwest so that Qwest can be reassured that Charter possesses the third-party's permission to use its facilities.[178]

88 Qwest claims that there are three methods of interconnection: collocation, entrance facilities, and mid-span meet point.[179] Qwest asserts that Charter has referenced each of these three methods in its proposed language in Sections 7.1.2.4, 7.1.2.4(a), and 7.1.2.4(b), but has changed the term "entrance facility" into "interconnection facility."[180] Qwest contends that this modification should be rejected since "interconnection facility" could be seen as describing all methods of interconnection instead of only one.[181]

c. Decision

89 The Arbitrator recommends adopting Charter's proposed language with regard to the first four sentences of Section 7.1.2. The Arbitrator agrees that the use of Qwest's language "CLEC shall establish **at least** one [POI]," does imply that Charter will be required to establish more than one point of interconnection when Charter actually has the right to establish a single POI if it so chooses,[182] pursuant to *Petition of WorldCom, Inc*.[183] Charter's language best explains that it is the CLEC who gets to choose the number of POIs, as long as those POIs are within Qwest's network and are technically feasible.

90 Section 7.1.2 contains the provision that any requested POI must be within Qwest's network and technically feasible. Contrary to Qwest's position, it is not necessary

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impermissible unbundling would never arise. Qwest even asserts that its language permits Charter to use third-party facilities "because it treats those facilities as if they are Charter's 'facilities and equipment'." Qwest's Reply Brief at 9, ¶ 27.
[177] *Id.*
[178] *Id.*
[179] *Id.*, at 10, ¶ 28, quoting Linse, PL-1T, at 3.
[180] *Id.*, at 10, ¶ 28.
[181] *Id.*, at 10, ¶ 28.
[182] (Emphasis added).
[183] Memorandum Opinion and Order, 17 FCC Rcd 27039 at 52 (2002).

that every sentence discussing the interconnection possess these "requisite" conditions. The fourth sentence in Charter's proposed Section 7.1.2 provides that requirement for the entire ICA.[184] With regard to the disagreement over Qwest's third sentence in Section 7.1.2, the disputed language did not receive much time or energy from the parties but is nonetheless important. Qwest's language states that:

> CLEC represents and warrants that it is serving End User Customers physically located within the areas associated with the NPA-NXX codes assigned to those End User Customers.

This language is unnecessarily rigid when compared to Charter's language:[185]

> CLEC shall serve End User Customers physically located within the areas associated with the NPA-NXX codes assigned to those End User Customers.

91 Both proposals accomplish the goal of requiring Charter to serve end user customers physically located within the areas associated with the NPA-NXX codes assigned to those customers. Qwest's language provides that, at the time Charter signs the ICA, Charter guarantees that it is currently serving the end user customers. Charter may not currently have end user customers, making it impossible to comply with Qwest's language. Charter's language, on the other hand, is framed in the future-tense and more reasonably captures Charter's obligation under the ICA.

92 The Arbitrator recommends adopting Qwest's language replacing the Charter-created term "interconnection facility" with the more familiar and industry-accepted term "entrance facility," to provide clarity within the Methods of Interconnection section. The Arbitrator recommends adopting Charter's language in Sections 7.1.2.4, 7.1.2.4(a), and 7.1.2.4(b), since Charter's language provides more specificity regarding the use of a third-party's entrance facility and the use of a third-party's

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[184]The third sentence in Charter's proposed Section 7.1.2 provides that "The Parties agree that this Agreement 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."

[185]The disputed language is contained within Qwest's third sentence in Section 7.1.2 and within Charter's fifth sentence in Section 7.1.2.

existing mid-span meet point with Qwest. Qwest has admitted that Charter has the right to interconnect with Qwest's network with the use of a third-party's facilities.

93 The Arbitrator agrees with Qwest's assertion that Charter should provide a written letter of authorization to Qwest stating that the third-party has agreed to Charter's use of the third-party's facilities. Qwest is not a party to any agreement between Charter and a third-party. Further, Qwest's argument that it needs to know when a CLEC is utilizing the facilities of a third-party, where those facilities are located, and the fact that the use of those facilities has been authorized by the third-party, is reasonable. Neither party has proposed language which provides for the third-party's written authorization to be furnished by the CLEC to Qwest. Thus, the Arbitrator directs the parties to work cooperatively and produce proposed language for the ICA that is consistent with the Arbitrator's recommendation. The parties will file draft language consistent with this paragraph within 30 days following the issuance of this Report.

6. Issue 13: Direct Trunk Transport: Sections 7.2.2.1.2.2, 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, 7.3.2.3; Issue 14: Nonrecurring Trunk Charges: Sections 7.3.3.1 and 7.3.3.2; and Issue 15: Bill and Keep Compensation: Section 7.3.4[186]

a. The Dispute

94 In Issues 13, 14, and 15, address the parties' dispute concerning compensation for direct trunk transport. Specifically, in Issue 13; the parties do not agree whether Charter should be required to compensate Qwest for direct trunk transport circuits. In Issue 14; the question is whether Charter is required to pay a non-recurring trunk installation and rearrangement charge, despite the parties' bill-and-keep arrangement. Finally, in Issue 15; the parties dispute whether the bill-and-keep compensation arrangement, as agreed to by the parties, applies to both transport and termination of Section 251(b)(5) traffic.

[186]In their Reply Briefs, Charter dealt with Issues 14 and 15 concurrently, and Qwest addressed Issues 13 and 15 jointly. As a result, this Report will discuss Issues 13, 14, and 15 in concert.

b. Positions of the Parties/Decisions

Issue 13

95 Charter contends it should not be required to pay Qwest for direct trunk transport. Charter argues that Qwest is attempting to avoid its transport obligation by shifting its costs of carriage to and from the POI to Charter by imposing a direct trunk transport fee.[187] According to Charter, the FCC has articulated that both parties, including the ILEC, have an obligation to transport the other party's traffic to and from the POI.[188] Charter argues that the bill and keep compensation proposal should apply to the entire transmission circuit, both termination and transport of traffic, therefore eliminating Qwest's separate direct trunk transport charges.[189]

96 According to Qwest, Charter's proposal of applying Charter's "applicable trunking and tandem switching rates" is inconsistent with the FCC's symmetry requirement.[190] The FCC's symmetry mandate requires that the reciprocal compensation rates for telecommunications traffic charged by a CLEC be the same as those charged by the ILEC.[191] Qwest states that the exception to this rule requires that a CLEC present a cost study to demonstrate that its transport and termination rates are higher.[192] Qwest argues that Charter has not performed a cost study to show that its transport and termination rates are higher pursuant to the FCC requirement.[193] Finally, Qwest complains that Charter's language for Section 7.3.2.1.1, which reads "Direct trunk transport (DTT) is available between the terminating Party's Serving Wire Center **for the POI**" could be read to allow Charter to require Qwest to provide transport service outside of Qwest's area.[194]

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[187]Charter's Opening Brief, at 26, ¶ 63.
[188]*Id.*, at 25, ¶ 62.
[189]*Id.*, at 24, ¶ 59.
[190]Qwest's Opening Brief, at 16, ¶ 40.
[191]*Id. See*, 47 C.F.R. § 51.711.
[192]*Id.*, at 16, ¶ 40. *See*, 47 C.F.R. § 51.711(b).
[193]*Id.*, at 16, ¶ 40, citing to 47 C.F.R. § 51.711(b).
[194]*Id.*, at 16, ¶ 41. The double-underlined language is still in dispute, while the boldface language represents the language Qwest is contesting as requiring the ILEC to provide transport outside of Qwest's service territory. Charter points out that the parties agree that any requested interconnection will take place within Qwest's network. Since Qwest raised the concern that Charter's proposed language in Section 7.3.2.1.1 implied that a CLEC could interconnect outside

97 Charter states that Qwest's proposal would result in Qwest assessing transport charges upon Charter while Charter would be permitted to assess very limited transport fees.[195] According to Charter, this is because Qwest refuses to allow Charter reimbursement for its transmission costs from Charter's switch to the called party.[196] If the Commission were to reject Charter's bill and keep methodology, Charter claims that it would be willing to use the same rates as Qwest has proposed for direct trunked transport.[197] Further, Charter points out that neither party represents that Qwest will have to provide transport service outside of Qwest's service territory.[198] As a result, Charter agrees to Qwest's proposed language which states "of the POI" instead of Charter's proposed "for the POI" in Section 7.3.2.1.1 of the ICA.

98 Qwest contends that its proposal to exclude direct trunk transport from the bill and keep arrangement is reasonable because the parties' transport obligations are not equal.[199] Qwest also asserts that its proposal ensures that Charter will compensate the ILEC for the additional transport costs Qwest incurs.[200] Under Charter's proposal, Qwest argues that Charter can shift its transport costs to Qwest, while Qwest will not be compensated for its transport costs.[201]

99 **Decision.** The Arbitrator recommends approving Qwest's proposal. Charter clearly has the right to choose a single POI location within Qwest's service area in a LATA which contains multiple local calling areas. However, Charter must be held accountable for the consequences of its decisions. Simply stated, Charter must be prepared to pay for Qwest's additional transport costs, including Qwest's direct trunk transport costs, if Charter chooses a POI outside of a local calling area where it exchange local traffic with Qwest. In the alternative, if Charter selects a POI located

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of Qwest's network, Charter states that it is willing to modify the language within Section 7.3.2.1.1 from its language to Qwest's preferred "Direct trunked transport (DTT) is available between the Serving Wire Center **of** the POI."

[195]Charter's Reply Brief, at 29, ¶ 73, citing to Qwest's Opening Brief, ¶ 45 (wherein Qwest proposed that it would assess approximately 240 miles of transport, while Charter would only be allowed to assess transport charges for less than 5 miles).

[196]*Id.*, at 34, ¶ 81.

[197]*Id.*, at 27, ¶ 67.

[198]*Id.*, at 28, ¶ 69.

[199]Qwest's Reply Brief, at 13, ¶ 36.

[200]*Id.*, at 14, ¶ 38.

[201]Qwest's Reply Brief, at 14, ¶ 38.

within the local calling area, then the parties can use a bill and keep compensation arrangement since the transport burden is or may be shared on a more equitable basis. The record clearly shows that if Charter selects a POI located outside a local calling area Qwest will incur additional transport costs to reach the distant POI.

100 Charter's reliance on *MCI Telecommunications Corporation, et al., v. U S West Communications, et al.*, is misplaced. The issue in *MCI Telecommunications* was whether assumptions that transport costs will be roughly equal "as long as individual customers make about as many calls as they receive," was sufficient for the arbitrator to impose a bill and keep arrangement.[202] Qwest has argued that the costs will not, in fact, be equal if Charter chooses a POI located outside of Qwest's local calling area. *MCI Telecommunications* does not address the issue of disparate costs associated with a CLEC locating its POI outside of the ILEC's local calling area. Charter should be required to reimburse Qwest for those costs.

Issue 14

101 Charter asserts that Qwest should waive its installation and rearrangement non-recurring fees unless the CLEC causes unnecessary or inefficient trunks to be installed or if the CLEC requests rearrangement of the trunks.[203] Otherwise, Charter asserts that each party should be responsible for all costs on its side of the POI, including non-recurring costs associated with trunk installation activities.[204]

102 Qwest asserts that, pursuant to the FCC's definition of bill and keep as well as the FCC's *Local Competition Order*, it is willing to use bill and keep for usage-based charges but not for dedicated transport.[205] Specifically, Qwest states that this would include compensation for establishing and rearranging interconnection trunks.[206]

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[202] *MCI Telecommunications*, at 1270.
[203] Gates, TJG-1T at 45.
[204] *Id.*, at 44.
[205] Easton, WRE-1T at 20. *See*, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶¶ 199 and 200 (Rel. Aug. 8, 1996).
[206] *Id.*, at 15.

103 Charter asserts that, if Qwest is allowed to charge Charter for transport on Qwest's side of the POI, it is only fair that Charter should be able to charge Qwest for transport on Charter's side of the POI at the same rate that Qwest charges.[207]

104 **Decision.** The Arbitrator recommends adopting Qwest's proposed language. The FCC ruled that ILECs are entitled to compensation for costs from CLECs associated with the provision of interconnection. This would include the costs Qwest incurs for trunk installation and rearrangement. Charter's proposal, which would have Qwest waive its costs unless the installed trunks are unnecessary or inefficient or if Charter requests that the trunks be rearranged for Charter's convenience, is inconsistent with the FCC's ruling and, therefore, is rejected.

Issue 15

105 Charter contends that a meaningful "bill and keep" arrangement allows the parties to waive their respective costs of delivering telecommunications traffic when the traffic exchanged is roughly equal or in balance.[208] Charter proposes that the reciprocal nature of bill and keep is the most equitable reimbursement method for the parties.[209] According to Charter, two other principles of law favor the bill and keep method: 1) federal law mandates that both parties recover all of their costs for delivering a competitor's traffic and 2) an ILEC's transport costs should not be shifted to the CLEC.[210] Charter illustrates its proposal with a hypothetical call originating on Qwest's network in Pasco and connecting through the parties' POI in Yakima before being handed off to Charter at the POI in Yakima where Charter then delivers it to its own customer in Pasco, and vice versa with a call originating on Charter's side of the POI in Pasco.[211] Charter claims that the parties have agreed that their traffic roughly balanced, making the situation ripe for bill and keep compensation.[212] Charter asserts that, under Qwest's proposal, Charter would not recover its costs of delivering the call

[207]Gates, TJG-3RT at 27.
[208]Charter's Opening Brief, at 30, ¶ 73.
[209]*Id.*, at 27, ¶ 66.
[210]*Id.*
[211]*Id.*, at 28-9, ¶ 68.
[212]*Id.*, at 29 and 30, ¶¶ 70 and 74, respectively.

to its subscriber in Pasco because Qwest has excluded transport from the bill and keep arrangement.[213]

106 Qwest rejects Charter's proposal for incorporating bill and keep for traffic transport. As previously stated, Qwest is willing to apply bill and keep to usage-based charges (i.e., termination, tandem switching, tandem transmission) but not to dedicated transport (i.e., direct trunk transport).[214] In support of its proposal, Qwest cites to the *Local Competition Order* which provides that "[a] bill-and-keep approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks."[215] Qwest maintains that the Commission should adopt its language requiring bill and keep for all services except for transport, as Qwest argues that this will produce the most equitable outcome.[216]

107 Qwest maintains that it is Charter who is attempting to shift to Qwest the cost Qwest incurs to deliver Charter's traffic.[217] According to Qwest, Charter's decision to deploy only one switch has resulted in Charter using very long loops to reach its customers.[218] Charter's loop costs are not recoverable under reciprocal compensation.[219] Qwest asserts that Charter made the decision to use only one switch in Washington State, and Charter must incur the subsequent costs of that decision since it then takes longer loops to reach Charter's customers.[220]

108 Charter argues that its proposal recognizes that Section 251(b)(5) of the Act requires that costs accrued due to transport and termination of traffic must be compensated, and this compensation can occur by either having the parties invoicing and paying each other or bill and keep compensation.[221] Charter posits that Qwest's proposal penalizes Charter for using a single switch in the state of Washington.[222] Charter provides that Qwest has mischaracterized these transmission facilities as "long

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[213] *Id.*, at 29, ¶ 71.
[214] Easton, WRE-1T at 22.
[215] *Id.*, at 23, citing to 11 FCC Rcd 15499, 15590, ¶ 1096.
[216] Qwest's Opening Brief, at 17, ¶ 45.
[217] Qwest's Reply Brief, at 12, ¶ 34.
[218] *Id.*, at 13, ¶ 36.
[219] *Id.*
[220] *Id.*
[221] Charter's Reply Brief, at 26-27, ¶ 66.
[222] *Id.*, at 34, ¶ 82.

loops."[223] Charter expounds that Qwest is attempting to penalize Charter for availing itself of its federal right to establish a single POI by demanding an inequitable cost arrangement.[224] In the *Local Competition Order*, the FCC affirmed the right of CLECs to choose a single POI to minimize the CLEC's transport charges.[225] Qwest, according to Charter, is attempting to exercise undue control over Charter's investment decisions.[226]

109 Qwest rejects Charter's claim that the parties' transport obligations are roughly balanced.[227] Qwest maintains that, due to the fact that Qwest provides transport to every tandem switch in every end office in the LATA, it provides or will provide more transport than Charter provides.[228] Qwest asserts that it makes transport available to Charter between Charter's POI to over 45 central office switches; while Charter provides transport from its POI to its single switch location.[229] Qwest points out that Charter has conveniently left out an important part of the *Local Competition Order* which, following the FCC pronouncement that CLECs have the right to choose a POI that is convenient for them, states "because competitive carriers must usually compensate [ILECs] for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[230] Qwest asserts that the FCC has found that the costs of local loops and line ports should not be considered supplemental costs of terminating a call since the local loops and line ports do not vary "in proportion to the number of calls terminated over these facilities."[231]

110 **Decision.** The Arbitrator recommends adopting Qwest's proposed language. Charter's argument that a bill and keep arrangement for transport costs is the most equitable solution, is misguided. Bill and keep compensation is generally used when the transport traffic of each is roughly in balance. Qwest asserts that its transport

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[223] *Id.*, at 34, ¶ 83, citing to Qwest's Opening Brief, at n. 30.
[224] *Id.*, at 35, ¶ 86.
[225] *Id.*, at 36, ¶ 87, citing to *Local Competition Order*, at ¶ 172.
[226] Charter's Reply Brief, at 36, ¶ 88.
[227] Linse, PL-7RT at 9.
[228] Easton, III Tr. 245:11-14.
[229] Linse, PL-7RT at 9-10.
[230] Qwest's Reply Brief, at 11, ¶ 31, quoting *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (Local Competition Order), First Report and Order, 11 FCC Rcd 15499, ¶ 209 (August 8, 1996).

traffic is greater than Charters, despite any claim to the contrary by Charter. Qwest presents evidence that it provides transport from Charter's POI to over 45 central office switches; while Charter provides transport to one switch. Charter did not counter Qwest's assertion regarding the imbalance of traffic.

111 Furthermore, as previously stated, the FCC has asserted that the CLEC's right to choose one or more POIs and the location of the POI(s) should not enable the CLEC to effectively shift transport cost responsibility onto its competitors, like Qwest. As Qwest points out, the FCC specifically found that "because competitive carriers must usually compensate [ILECs] for the additional costs incurred by providing interconnection, [CLECs] have an incentive to make economically efficient decisions about where to interconnect." As a result, Qwest's proposal is more equitable and in line with the FCC's previous rulings.

7. Issue 16: Indirect Interconnection: Sections 7.1.2.6, 7.1.2.7, 7.1.2.8, and 7.1.2.9

a. The Dispute

112 The issue in dispute is whether either party should have the right to use indirect interconnection as a means of exchanging traffic with the other party.[232] The subject of indirect interconnection arises from language within the Act that provides that each telecommunications carrier has the duty to interconnect directly or **indirectly** with the facilities and equipment of other telecommunications carriers.[233]

b. Positions of the Parties

113 Charter states that the parties should include in the ICA Charter's proposal that either party may exchange traffic indirectly through a third-party "until the total volume of traffic exchanged between the Parties' networks exceeds 240,000 minutes per month for three consecutive months.[234] Charter cites to 47 U.S.C. § 251(a)(1) which

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[231] *Id.*, at 12, ¶ 33, citing to the *Local Competition Order*, ¶ 1057.
[232] Indirect interconnection involves the routing of a CLEC's traffic through a third-party carrier to get to the ILEC's network.
[233] 47 U.S.C. § 251(a)(1). (Emphasis added).
[234] Charter's Opening Brief, at 34, ¶ 84.

provides that carriers have a duty to interconnect either directly or indirectly with the facilities and equipment of other carriers.[235] Further, Charter points to a case, *Atlas Telephone v. Oklahoma Corporation Commission*,[236] whereby the 10th Circuit court found that the interconnection described in Section 251(c) of the Act does not hinder the telecommunication carriers' duty under Section 251(a) to interconnect "directly or indirectly."[237]

114 Qwest argues that it has no obligation to negotiate with Charter regarding terms and conditions for indirect interconnection.[238] Qwest raises concerns with Charter's proposed language, such as the uncertainty of which entities will be allowed to route Charter's traffic to Qwest.[239] Qwest also raises the issue of how the traffic in an indirect interconnection will be segregated and tracked for intercarrier compensation.[240] Qwest states that the uncertainty in Charter's proposal results in Qwest not being able to engineer its network to accommodate the unknown third-party who could affect service quality.[241]

115 Charter disagrees with Qwest, arguing that Qwest has not disputed its legal duty under the Act to interconnect directly or indirectly with Charter.[242] Charter claims that its language provides a framework of when the parties can use indirect interconnection for the exchange of traffic.[243] Charter's witness, Mr. Gates, provides in his testimony that Section 7.3.8 of the ICA requires each party to provide to the other signaling information to assist in identifying and billing traffic properly.[244] With regard to intercarrier compensation, Charter refutes the claim that it might be planning to engage in a "revenue sharing" scheme with the third-party carrier.[245]

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[235] *Id.*, at 34, ¶ 85.
[236] 400 F.3d 1256 (10th Cir. 2005).
[237] Charter's Opening Brief, at citing *Atlas* at 1268. Section 251(c) details the obligations of an ILEC to, *inter alia*: 1) negotiate in good faith the terms and conditions of an ICA with the CLEC, 2) provide interconnection with a few limitations, and 3) nondiscriminatory access to network elements on an unbundled basis.
[238] Qwest's Opening Brief, at 19, ¶ 49, citing to 47 U.S.C. §§ 251(a) and 251(c)(1).
[239] *Id.*, at 19, ¶ 51.
[240] *Id.*
[241] *Id.*, at 20, ¶ 53.
[242] Charter's Reply Brief, at 39, ¶ 97.
[243] *Id.*, at 40, ¶ 100.
[244] Gates, TJG-3RT at 38. *See also*, Gates, TJG-21.
[245] Charter's Reply Brief, at 41, ¶ 101.

Charter argues that an arrangement of that kind would not be cost effective since Charter has proposed that indirect interconnection be used where there are very low traffic volumes.[246]

116 Qwest posits that both parties agreed to language that was memorialized in Section 7.2.1.1 which states "[u]nless 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."[247] As a result, Qwest describes this as Charter's attempt to add an issue to this arbitration.[248]

117 According to Qwest, Charter is also wrong when it claims that it has a right to indirect interconnection with Qwest.[249] Qwest argues that *Atlas v. OCC* actually supports its position, not Charter's, noting that the 10th Circuit found that "the affirmative duty established in §251(c) runs solely to the ILEC, and is only triggered on request for direct connection."[250] Qwest contends that it does not have a duty under Sections 251(c) or 252 of the Act to negotiate the terms and conditions of Section 251(a) interconnection.[251]

c. Decision

118 The Arbitrator recommends adopting Charter's proposal. First, 47 U.S.C. § 251(a)(1) provides that "[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers…" The Act does not set out that only CLECs are bound by Section 251(a)(1). Section 252(c)(1) of the Act, which details the standards by which state commissions are to resolve arbitrations, mandates that a state commission "ensure that such resolution and conditions [created during the arbitration] meet the requirements of section 251…" Furthermore, *Atlas* stands for the principle that "the affirmative duty established in Section 251(c) runs solely to the ILEC, and is only triggered on request for direct connection."[252] While Qwest asserts that, pursuant to

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[246] *Id.*
[247] Qwest's Reply Brief, at 15, ¶ 40.
[248] *Id.*, at 15, ¶ 41.
[249] *Id.*, at 16, ¶ 42.
[250] *Id.*, at 16, ¶ 44, citing to *Atlas* at 1268.
[251] *Id.*, at 16, ¶ 42.
[252] *Atlas*, at 1268.

Section 251(c), it does not have the obligation to negotiate terms and conditions for the indirect interconnection, Section 252(c)(1) of the Act does provide that the Commission shall enforce Section 251(a)(1) providing for indirect interconnection.

119 Additionally, Qwest's argument regarding the uncertainty of an unknown third-party indirectly interconnecting with Qwest's network is unpersuasive. Charter has satisfactorily addressed this issue by pointing out that Section 7.3.8 of the ICA requires that the parties provide each other with signaling information, per 47 C.F.R. § 64.1601, which will address the identity of the third-party, traffic routing, tracking and other issues raised by Qwest.[253] Further, if the signaling information is not provided as directed in Section 7.3.8, the language mandates billing consequences that should prevent such behavior from happening again.

8. Issue 17: Miscellaneous Charges: Section 9.1.12

a. The Dispute

120 The parties disagree over whether Qwest should have the authority to impose miscellaneous charges on Charter when Charter has not requested that Qwest perform any work.

b. Positions of the Parties

121 Charter has withdrawn contested language stating that its obligation to pay miscellaneous charges for listed items "depend[s] on the specific circumstances."[254] The remaining issue between the parties is whether Qwest must obtain Charter's permission before assessing Charter a miscellaneous charge.[255] Specifically, Charter recommends language that would require it to pay a miscellaneous charge only if Charter had "requested or consented to Qwest's performance of the work giving rise to the miscellaneous charge."[256] The sticking point for Charter is Qwest's assertion that Qwest may perform work that results from a CLEC's action.[257] Charter is critical

[253] *See also*, Gates, TJG-21
[254] Charter's Reply Brief, at 42, ¶ 105.
[255] *Id.*, at 41, ¶ 104.
[256] *Id.*, at 42, ¶ 106.
[257] *Id.*, at 42, ¶ 107.

of what it characterizes as "open-ended" language in the form of "a CLEC's action."[258] Charter argues that, if the CLEC has done some action that makes Qwest's work necessary, Qwest should contact the CLEC, provide a preliminary quote of the charges for the work, and then perform the work when the CLEC accepts.[259] This, Charter asserts, is what Qwest claims to do in its normal course of business; yet, Qwest's proposed language does not reflect this.[260]

122 Charter expresses concern that Qwest's miscellaneous charges may apply to unbundled network elements (UNEs) that Charter will not be using.[261] Charter maintains that it is inappropriate for Qwest to assess any charges against Charter for UNEs without its approval, and stresses that this situation is possible when viewed in light of Qwest's ambiguous language "based on CLEC's actions."[262] Charter recommends that the Commission reject Qwest's language since Qwest's one example of the language's usage "does not justify, explain, define, or otherwise limit Qwest's insistence upon the broad and vague right to assess charges 'based on a CLEC [sic] action'."[263]

123 According to Qwest, it is not attempting to "unilaterally assess miscellaneous charges, but instead should have the right to assess charges that are at the request of or caused by the CLEC.[264] Qwest asserts that it is highly unlikely that the circumstance would arise where Qwest would perform work for Charter without a specific request.[265] Qwest claims that the language Charter opposes as ambiguous in Section 9.1.12 is the same language agreed to by the Parties in Sections 4 and 9.[266] Qwest states that it typically does try to provide notice to the CLEC of the application of miscellaneous charges prior to undertaking any work on the network.[267] According to Qwest, when it fulfills a written request made by Charter and Qwest discovers it may have to perform miscellaneous work as a result of this request, Qwest will notify Charter and

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[258] *Id.*
[259] Charter's Reply Brief, at 43, ¶ 108.
[260] *Id.*
[261] *Id.*, at 43, ¶ 109.
[262] *Id.*
[263] *Id.*, at 44, ¶ 111, quoting Qwest's proposed language in Section 9.1.12. *See*, HE-4 at 81.
[264] Qwest's Reply Brief, at 18, ¶ 52.
[265] *Id.*, at 18, ¶ 51.
[266] *Id.*, at 18, ¶ 53.
[267] Weinstein, RHW-3.

only act with the approval of the CLEC, if possible, before performing the work.[268] However, Qwest states that there may be circumstances where Qwest has already performed the work at Charter's request and the miscellaneous service occurs without separate notice such as where a dispatch for repair of a Qwest issue results in the isolation of trouble that turns out not to be the fault of Qwest, but of the CLEC.[269] In that case, Qwest would assess a miscellaneous charge for the dispatch and would not have sought approval before doing so because it was thought to be a Qwest issue.[270]

c. Decision

124 The Arbitrator recommends adopting Qwest's proposal with the caveat that Qwest's language as proposed shall be amended to read "Miscellaneous services are provided at CLEC's request or are **caused by** CLEC's actions that result in miscellaneous services being provided by Qwest" instead of "Miscellaneous services are provided at CLEC's request or are **provided based on** CLEC's actions that result in miscellaneous services being provided by Qwest."[271] Charter has not disputed Qwest's assertion that it may not know who is responsible for the miscellaneous charges before Qwest performs the work. Qwest's assertion is reasonable. However, Charter's concern is valid that Qwest's phrase "provided based on CLEC's actions" is ripe with ambiguity and could result in charges being unilaterally assessed to the CLEC for any work that Qwest performs, regardless of which entity is the cause of that work. Further, contrary to Qwest's claim, the language Qwest is referring to in Sections 4 and 9 is not similar to the disputed language "based on a CLEC's actions." Therefore, the Arbitrator recommends modifying Qwest's proposed language as stated above.

9. Issue 19: Marketing to Subscriber List: Section 10.4.2.4

a. The Dispute

125 Issue 19 addresses whether Qwest should have the authority to market its own products to Charter's subscribers.

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[268] *Id.*
[269] Weinstein, RHW-3.
[270] *Id.*
[271] (Emphasis added for easier comprehension but not suggested for ICA version).

b. Positions of the Parties

126 Charter proposes language prohibiting Qwest from using Charter customer data, which has been segregated from other listings, for marketing purposes. Charter argues that its proposal does not limit legally permissible uses of Charter's customer data.[272] Charter proposes deleting Qwest's language allowing Qwest to use this information for "other lawful purposes," stating that Qwest has not explained what is meant by this vague language.[273] Finally, Charter asserts that its attempt to prevent Qwest from marketing to a segregated Charter customer list is very different from the FCC's rejection of a competitive directory assistance (DA) provider's prohibition on other competitive DA providers from reselling customer listing data.[274]

127 Qwest agrees that it should not be allowed to market to Charter's subscribers based on a segregated listing of those customers.[275] According to Qwest, that is why it has proposed language which would prohibit Qwest from doing so.[276] Qwest argues that Charter's language would restrict Qwest beyond what is lawful.[277] Qwest posits that, as a DA provider, it is permitted to use non-segregated customer listings from a varied of sources for marketing.[278]

c. Decision

128 The Arbitrator recommends adopting Qwest's proposed language. Qwest's language captures its commitment not to market to Charter's customer listings based on a segregation of such subscribers. Charter's contention that Qwest's language, "for other lawful purposes," is overbroad is not convincing. Charter has suggested substantially similar language in Section 10.4.2.5 of the ICA, proposing that Section 10.4.2.5 state "only to the extent required by Applicable Law" and "in accordance with Applicable Law." Further, whether the language is present or not, Qwest is only permitted to use the customer subscriber listings it receives from Charter in a lawful

[272]Charter's Reply Brief, at 45, ¶ 114.
[273]*Id.*, at 45-6, ¶ 116.
[274]*Id.*, at 46, ¶ 117.
[275]Qwest's Reply Brief, at 20, ¶ 58.
[276]*Id.*
[277]*Id.*, at 21, ¶ 59.

manner. Charter has not shown why the Commission should adopt its much broader restrictions. Charter has not demonstrated that its language, prohibiting Qwest from marketing to any of Charter's customers in any way, provides a permissible legal restriction.

10. Issue 20: Release of Subscriber Information: Section 10.4.2.5

a. The Dispute

129 The parties dispute whether Qwest should be required to obtain prior written authorization before it may release, sell, or otherwise make available Charter's listing information.

b. Positions of the Parties

130 Charter's proposal gives Qwest the right to release Charter's customer listings only upon Charter's written prior authorization and only to the extent required by applicable law. Charter explains that this proposal takes into account Qwest's responsibility under Section 251(b)(3) of the Act to provide directory listing information to DA providers.[279] Charter discounts Qwest's suggestion that this issue could be solved simply by Qwest's "New Customer Questionnaire."[280] According to Charter, Qwest's assertion that Charter's language tracks Option 2 on Qwest's "New Customer Questionnaire" is an oversimplification of the situation.[281] Charter maintains that, just because Qwest's current practice tracks with Charter's proposed language, Qwest could modify its practices at any time.[282] As a result, Charter asserts that memorializing Qwest's process for releasing, selling, or otherwise making available Charter's end user customer listing will provide the parties with certainty on this issue for the length of the ICA.[283]

131 Qwest argues that that Charter's language unfairly limits Qwest's actions by requiring it to make a determination, before releasing the data, not only whether the release is

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[278] *Id.*
[279] Charter's Reply Brief, at 46, ¶ 119.
[280] *Id.*, at 47, ¶ 121.
[281] *See, Id.*
[282] *Id.*, at 47, ¶ 122.

permitted by law by also whether it is required by law.[284] According to Qwest, Charter's language places an unreasonable burden on Qwest that Charter could more easily shoulder by selecting Option 2 on Qwest's "New Customer Questionnaire."[285]

c. Decision

132 The Arbitrator recommends approving Qwest's proposal. While Charter is correct in stating that there are significant benefits to memorializing the parties' process for the release of its customer listings in the ICA, Charter fails to demonstrate why it would be necessary to include the caveat limiting the release of customer listing "only to the extent required by Applicable Law."[286] (Emphasis added). It is important to note that, here, like Issue 19, the Arbitrator is not concerned with the "Applicable Law" phrase and its alleged potential for being overbroad. The Arbitrator is concerned that, even after Qwest receives prior written consent from Charter to release the listings information, it may not do so if the applicable law only "permits" Qwest to release the information but does not "require" the action. Without a showing from Charter that this added restriction is justified or even necessary, Charter's proposal should fail.

133 Charter also inserts two other clauses into Section 10.4.2.5 of the ICA with little to no explanation. Charter has not met its burden for including these additional limitations on Qwest's actions, and the language is rejected.

11. Issue 22: Non-publish or non-list charges: Section 10.4.3.4

a. The Dispute

134 Issue 22 addresses whether Qwest should be authorized to assess charges upon Charter for non-published or non-listed customer listing information Charter submits to Qwest.

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[283] *Id.*
[284] Qwest's Reply Brief, at 22, ¶ 62.
[285] Qwest's Reply Brief, at 22, ¶ 62.
[286] HE-4, at 120.

b. Positions of the Parties

135 Charter asserts that Qwest should not assess charges on Charter for customer listings where a customer requests not to be published (non-published) or listed (non-listed). Qwest acknowledges that one of Charter's options is to not provide Qwest with the non-listed and non-published listings.[287] As such, Charter argues that Qwest should have no objection to Charter's proposed first sentence which provides that Charter is not obligated to provide Qwest with customer listings when the customer has requested non-list or non-publish status.[288] Charter further explains that, even under Qwest's argument that the public policy of encouraging customers to publish their information to justify charging a fee for privacy listings, this only warrants charging the end user not the CLEC.[289] In addition, Charter posits that the rate Qwest would like to assess Charter for each privacy listing is not cost-based, and the incremental cost of Qwest's "service" regarding privacy listings is zero or close to zero.[290]

136 Qwest maintains that it should be able to charge for privacy listings. Qwest points to Charter's own language detailing what Qwest must do with a non-list or non-publish listing, which provides that is provide to it, stating that Qwest is responsible for "maintaining, storing, or otherwise processing information."[291] Qwest contends that the Section 271 proceeding addressed its listing options and the associated rates for each option.[292] Qwest asserts that Charter wants to provide Qwest with its privacy listings and then not have to pay Qwest for the extra effort Qwest exerts in processing the listings.[293] Qwest maintains that, while the rates have not been the subject of a wholesale cost docket, there is no requirement that the privacy listings be handled at TELRIC rates so it is irrelevant whether the rates are cost-based[294] Additionally, Qwest states that the privacy listing rates were approved by the Commission, are paid

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[287]Charter's Reply Brief, at 49, ¶ 125.
[288]*Id.*, at 49, ¶ 126.
[289]*Id.*, at 50, ¶ 127.
[290]*Id.*, at 50, ¶ 127-8.
[291]Weinstein, RHW-1T at 31, citing to HE-4 at 124.
[292]Qwest's Reply Brief, at 23, ¶ 66, citing to JDW-6, *Revised Initial Order*, Docket UT-003022, August 31, 2000, ¶¶ 107-8.
[293]*Id.*, at 22, ¶ 64.
[294]*Id.*, at 23, ¶ 67.

for by every CLEC and every Qwest retail subscriber, and are presumed reasonable.[295]

c. Decision

137 The Arbitrator recommends adopting Charter's proposed first sentence in Section 10.4.3.4. There is no dispute that Charter may choose not to disclose its customer listings for those subscribers who have requested non-list or non-publish status.

138 With the exception listed in paragraph 129, the Arbitrator recommends adopting Qwest's language with regard to Sections 10.4.2.1.2 and 10.4.3.[296] Should Charter provide privacy listings to Qwest, then it should be required to pay Qwest's tariffed rate. Charter's own witness, Mr. Webber, acknowledges that Qwest may have to perform additional work for privacy listings than for the typical process, whereby Qwest must "take listing information from the CLEC, Charter in this case, and accept that information, process it, store, it and maintain it for multiple purposes."[297] Mr. Webber indicated that "it's my belief that there isn't additional or incremental work necessary [for privacy listings] **except** and only possibly **to the extent that the information which is marked as privacy** [sic] **has to be queried out or filtered out when the information is provided."**[298] Should Charter not wish to pay for the extra effort required in segregating its non-publish and non-list privacy listings, then Charter should omit them on its own before providing the data to Qwest. If Charter provides Qwest with the privacy listings, Charter should expect to pay Qwest's tariffed rates for the segregation of those listings just as other CLECs do.

12. Issue 23: White and yellow page directory listings: Sections 10.4.5 and 15

a. The Dispute

139 The parties disagree whether the agreement should require Qwest to provide directory listings for both white page and yellow page listings?

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[295] *Id.*, at 22 and 24, ¶¶ 65 and 67. Qwest is referring to its approved tariff rates. *See*, *Id.*
[296] Qwest's proposal for Section 10.4.3.4 has been intentionally left blank.
[297] Webber, II Tr. 133:10-12.
[298] Webber, II Tr. 133:13-18. (Emphasis added).

b. Positions of the Parties

140 Charter claims that Qwest must provide both white and yellow page directory listings for its subscribers on the same terms as Qwest's customers. Charter contends that ILECs are required to accept CLEC listings and submit them to a publisher.[299] Charter states that if Qwest submits its own customer listings to a yellow pages publisher, then Qwest must also submit Charter's listings on a nondiscriminatory basis.[300] Charter cites to *U S West Communications v. Hix*,[301] arguing that the United Stated District Court found that U S West was required to arrange for the publication of yellow page listings for CLEC subscribers.[302] Charter points out that Qwest's customers are receiving a complementary yellow page listing in Dex, the directory publisher.[303] Charter asserts that its customers should be treated in the same manner.[304] Charter further agrees to remove its proposed language in Section 15 of the ICA which would have required Qwest to renegotiate the current contracts it has with directory publishers.[305]

141 Qwest maintains that Charter's proposed language imposes burdens upon Qwest that Qwest is not required, and may not even be able, to fulfill.[306] Qwest asserts that Charter is attempting to control how the listings are published, which Qwest argues, is an issue between Charter and the directory publisher.[307] Qwest claims that it meets its responsibilities pursuant to the Act by furnishing a Directory Publisher's List to all directory publishers, yellow and white pages, on the same terms and conditions and without distinction between the subscribers' carriers.[308]

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[299]Charter's Reply Brief, at 54, ¶ 138.
[300]Charter's Reply Brief, at 51, ¶ 130.
[301]93 F. Supp. 2d 1115 (2000).
[302]Charter's Reply Brief, at 52, ¶ 132.
[303]*Id.*, at 52, ¶ 133.
[304]*Id.*, at 52-3, ¶¶ 133 and 135, citing to *MCI Telecommunications v. Michigan Bell Telephone*, 79 F. Supp. 2d 768 (1999).
[305]*Id.*, at 53, fn. 118. Charter has agreed to remove the following provision: "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." *Id.*
[306]Qwest's Reply Brief, at 24, ¶ 70.
[307]*Id.*

c. Decision

142 The Arbitrator recommends adopting neither party's proposal with regard to Section 10.4.5 of the ICA. Charter's proposal for Section 10.4.5 provides in part that any provisions that apply to the white pages treatment of CLEC listings also apply to the provision of a classified listing in yellow pages published by or under contract with Qwest. Charter wants its customers to receive the same free yellow page listings as Qwest's customers receive. Charter states that it does not expect Qwest to renegotiate the terms of Qwest's contract with Dex. Absent renegotiating the contract, Charter has not proposed how Qwest will provide a complementary yellow page listing for each of Charter's subscribers.[309] For that matter, Qwest's proposal, which would not memorialize Qwest's current practice of providing a commingled list to all directory publishers, is unacceptable. If it is Qwest's practice to do so anyway, then representing this in the ICA should not be a problem and will protect both parties from future misunderstandings.

143 With regard to Section 15 of the ICA, the Arbitrator recommends adopting Qwest's proposal. Charter's language would have Qwest negotiate with every directory publisher on behalf of its own customers, but also on behalf of every CLEC it has or may interconnect with, and the CLECs' customers. Charter's language comes very close to abrogating its function as a carrier to negotiate on its customers' behalf. Charter would require not only that Qwest provide its customer listings along with Qwest's and any other CLEC that Qwest is interconnecting with, but would also require the directory publisher to apply whatever additional provisions Qwest had negotiated for its customers (i.e., pricing for certain yellow page ads, placement of the ads, et cetera). Charter's explanation that Qwest should give a nonsegregated customer list to all directory publishers so that Charter's customers are indistinguishable from Qwest's, and so that Charter's customers will likely be included in directories under the same terms and conditions as Qwest's customers. The Arbitrator is unaware of, and Charter has failed to produce, the specific language within Qwest's contracts with directory publishers. Without knowing if Charter's

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[308] *Id.*, at 25, ¶ 73.

[309] It's unclear whether Charter is proposing that, since Qwest provides an unsegregated list of subscribers to Dex, Charter's subscribers should be able to reap the benefits of Qwest's contract with Dex. As Charter has not specifically stated this proposition, the Arbitrator does not address it.

proposal would violate the terms of any agreement, or even nullify such an agreement, Qwest may have with these companies, Charter's proposed language is rejected.

C. Implementation Schedule

144 Pursuant to 47 U.S.C. §252(c)(3), the Arbitrator is to "provide a schedule for implementation of the terms and conditions by the parties to the agreement." In preparing an agreement for submission to the Commission for approval, the parties may include an implementation schedule. The parties must implement the agreement according to the schedule provided in its provisions, and in accordance with the Act, applicable FCC Rules, and this Commission's orders.

D. Conclusion

145 The Arbitrator's resolution of the disputed issues into this matter meets the requirements of 47 U.S.C. §252(c). The parties are directed to submit an interconnection agreement to the Commission for approval pursuant to the following requirements.

1. Petitions for Review and Requests for Approval

146 Any party may petition for Commission review of this Arbitrator's Report and Decision by **April 29, 2009**. Any petition for review must be in the form of a brief or memorandum, and must state all legal and factual bases in support of arguments that the Arbitrator's Report and Decision should be modified. Replies to any petition for Commission review may be filed by **May 11, 2009**.

147 The parties also must file, by **May 11, 2009,** a complete copy of the signed interconnection agreement, including any attachments or appendices, incorporating all negotiated terms, all terms requested pursuant to Section 252(i) of the Act, and all terms intended to fully implement arbitrated decisions, including compliance language required in paragraph 93. This filing will include the parties' request for

approval, subject to any pending petitions for review.[310] The Agreement must clearly identify arbitrated terms by bold font style and identify by footnote the arbitrated issue that relates to the text.

148 Parties that request approval of negotiated terms must summarize those provisions of the agreement, and state why those terms do not discriminate against other carriers, are consistent with the public interest, convenience, and necessity, and are consistent with applicable state law requirements, including relevant Commission orders.

149 Parties that request approval of arbitrated terms must summarize those provisions of the agreement, and state how the agreement meets each of the applicable requirements of Sections 251 and 252, including relevant FCC regulations, and applicable state requirements, including relevant Commission orders. A party that petitions for review must provide alternative language for arbitrated terms that would be affected if the Commission grants the party's petition.

150 Any petition for review, any response, and/or any request for approval may reference or incorporate previously filed briefs or memoranda. Copies of relevant portions of any such briefs or memoranda must be attached for the convenience of the Commission. The parties are not required to file a proposed form of order.

151 Any petition for review of this Arbitration Report and Decision and any response to a petition for review must be filed (original and five (5) copies) with the Commission's Secretary and served as provided in WAC 480-07-145. Post-arbitration hearing filings and any accompanying materials must be served on the opposing party by delivery on the day of filing, unless jointly filed.

2. Approval Procedure

152 The Commission does not interpret the nine-month time line for arbitration under Section 252(b)(4)(C) to include the approval process. Further, the Commission does not interpret the approval process as an adjudicative proceeding under the Washington Administrative Procedure Act.

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[310] If the parties agree that no petition for review will be filed, the parties may file their joint request for approval and complete interconnection agreement at any time after the date of this Report.

153 The Commission will consider any request(s) for approval at an oral argument scheduled for **Tuesday, June 16, 2009, beginning at 9:30 a.m.**, in Room 206, Second Floor, Richard Hemstad Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington. Any person may appear at the hearing to comment on the request(s).

154 The Commission will endeavor to enter an order approving or rejecting the Agreement by **July 16, 2009**.[311] The Commission's order will include its findings and conclusions.

Dated at Olympia, Washington, and effective March 30, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARGUERITE E. FRIEDLANDER
Arbitrator

[311] As noted above, the parties have agreed to waive the statutory deadlines in 47 U.S.C. § 252.

APPENDIX A
RECOMMENDED DISPOSITION MATRIX

ISSUE	RESOLUTION
Issue 5 – Liability Limitations: Gross Negligence	Charter's Proposal– pp. 10-11
Issue 5 – Liability Limitations: Damages	Charter's Proposal – pp. 13-14
Issue 5 – Liability Limitations: Directory Listings	Qwest's Proposal – p. 15
Issue 5 – Liability Limitations: 'Solely' Defined	Charter's Proposal – p. 16
Issue 6a – Indemnity Obligations	Charter's Proposal– pp. 19-20
Issue 7 – Intellectual Property Indemnity	Mixed Decision– pp. 23-24
Issue 10 – Technically Feasible POI	Qwest's Proposal – pp. 28-29
Issue 11 – Methods of Interconnection	Mixed Decision – pp. 32-34
Issues 13 – Direct Trunk Transport	Qwest's Proposal – pp. 36-37
Issue 14 – Nonrecurring Charges	Qwest's Proposal – pp. 37-38
Issue 15 – Bill and Keep Compensation	Qwest's Proposal – pp. 40-41
Issue 16 – Indirect Interconnection	Charter's Proposal – pp. 43-44
Issue 17 – Miscellaneous Charges	Modified Qwest Proposal – p. 46
Issue 19 – Marketing to Subscriber List	Qwest's Proposal – p. 47
Issue 20 – Release of Subscriber Information	Qwest's Proposal – p. 49
Issue 22 – Non-publish/Non-list Charge	Mixed Decision – pp. 50-51
Issue 23 – White and Yellow Page Listings	Neither Party's Proposal – pp. 52-53

APPENDIX B
GLOSSARY

TERM	DESCRIPTION
Act	The Telecommunications Act of 1996, 47 U.S.C. §251, *et. seq.*
Bill and keep compensation	An arrangement whereby the parties would not exchange compensation for the traffic that is delivered to their network. The basis for utilizing such an arrangement stems from a belief by the parties that traffic will generally be in balance between them and that they would be exchanging the same amount of compensation.
CLEC	Competitive local exchange carrier. Not an ILEC, and generally subject to very limited regulation.
FCC	Federal Communications Commission
ILEC	Incumbent local exchange company; a company in operation at the time the Act was enacted (August 1996).
Interconnection	Connection between facilities or equipment of a telecommunications carrier with a local exchange carrier's network under Section 251(c)(2).
Interconnection Agreement or ICA	An agreement between an ILEC and requesting telecommunications carrier (which may be a CLEC) addressing terms, conditions and prices for interconnection, services or network elements pursuant to Section 251.
IXC	Interexchange carrier, i.e., a long-distance carrier.
LATA	Local Access and Transport Area. A service area for Bell Operating Companies.
LIS	Local Interconnection Service
Loop	The local loop - The copper wire, fiber, or cable serving a particular customer, generally running from a central office to a residence or building.
POI	Point of Interconnection; where both parties meet to interconnect their telecommunications networks. III Tr. 242:2-4.
Section 251(a)(1)	This provision of the Act requires telecommunications carriers to interconnection directly or indirectly with the facilities and equipment of other telecommunications carriers.
Section 251(c)(2)	The section of the Act that requires ILECs to provide interconnection with a CLEC's network.
Section 271	The portion of the Act under which Bell Operating Companies, or BOCs, could obtain authority from the FCC to provide long distance service in addition to service within their in-state service areas.
SGAT	Statement of Generally Available Terms.

TERM	DESCRIPTION
TRO	The FCC's Triennial Review Order. An August 2003 Order addressing UNEs and the impairment standard for UNEs, vacated in part and remanded in part by the D.C. Circuit Court of Appeals in *USTA II v. FCC*.
TRRO	FCC decision entered in response to D.C. Circuit's USTA II decision: Eliminates local switching as a UNE as of March 11, 2006, and limits unbundling of high-capacity transport and loops. (High-capacity refers to the ability of the facility to handle an amount of information at a single time, e.g., DS1, DS3, Ocn capacity.)
Trunk	A communication line between two switching systems. A single trunk, capable of carrying a single conversation, is referred to DS0.,
Unbundled	A network element that is provided by itself, not in connection with or "bundled" with another network element. A means for a carrier to request particular services from an ILEC to customize the service it provides, and to avoid an ILEC from offering certain services as a package that the carrier must take as an all or nothing option.
UNE	Unbundled network element. Generally a network element an ILEC must make available under Section 251(c)(3).