

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration
of an Interconnection Agreement Between
CHARTER FIBERLINK WA-CCVII, LLC.
and
QWEST CORPORATION
Pursuant to 47 U.S.C. Section 252.

Docket No. UT-083041

QWEST'S PETITION FOR COMMISSION
REVIEW OF ARBITRATOR'S REPORT
AND DECISION, ORDER 07

I. INTRODUCTION

- 1 Qwest Corporation ("Qwest") hereby files its petition for Commission review of the Arbitrator's Report and Decision ("Order 07") entered in this matter on March 30, 2009. Qwest asks for Commission review of Order 07 on Issue 5 regarding the appropriate limitation on liability.
- 2 On the same day as Order 07 was entered, the Arbitrator in Minnesota entered a proposed order as well. That order is attached for the Commission's information as Attachment A to this petition.

Issue 5 – Limitation on Liability

- 3 Issue 5 concerns the parties' disputes regarding the appropriate language in the "Limitation on Liability" section of the ICA. Qwest's position is that damages should be capped at the monthly

charges for the services at issue. However, in paragraphs 35-36 of Order 07 the Arbitrator ruled in favor of Charter's position on this issue, allowing recovery of "actual, direct damages". The provision is reciprocal, expanding both parties' rights to recover damages from each other.

4 The Commission should decline to adopt the Arbitrator's recommendation on this issue for three reasons. First, the recommendation is not supported by the evidence - it is based on the contemplation of a factual pattern that is unlikely to occur, and even if it did occur, the evidence is that the limitation of liability provision in the ICA would not apply to those facts. Further, the Arbitrator's recommendation deviates from industry standards on this issue, without sufficient justification. Finally, Charter has not demonstrated any reason why limitation of liability should be different in the ICA than those limitations that Charter believes to be appropriate in dealing with its own customers.

5 The recommendation is not supported by the evidence. Charter presented testimony at the hearing that suggested that Charter would be left uncompensated for certain damages, such as a cut to fiber optic cable, if Qwest's standard were adopted. While it is true that Qwest's language on damages is more limited than Charter's, Qwest presented testimony demonstrating that the factual scenario on which Charter relies is highly unlikely to occur.¹ Furthermore, even if Qwest were to cut a cable, that activity would most likely not be governed by the limitation of liability provisions in the ICA.² Thus, there is no factual basis to support a change to the liability provisions that are the industry standard (see discussion below).

6 In addition, Charter contends that the damages standard should be different in its ICA because it is in a unique position with Qwest in that it does not lease UNEs, but is only interconnecting with Qwest. The Arbitrator's recommendation relies upon this in support of the conclusion that the damages standard should be different for Charter. (Order 07, ¶ 35). However, the fact that

¹ See the testimony of Qwest witness Philip Linse (Exhibit PL7-RT at page 3).

² See the testimony of Qwest witness Albersheim (Exhibit RA-2RT at page 17).

Charter only seeks interconnection does not distinguish it in any material way from other CLECs. Under Qwest's proposed standard, an interconnecting carrier who also purchases UNEs would have its damages limited in the same way that Charter would be limited. Many other carriers obtain only interconnection services from Qwest and do not purchase UNEs or other services. Thus, the factual distinction upon which Charter and Order 07 rely to distinguish Charter's situation is not relevant or material to the issue of how to appropriately limit parties' liability to each other.

- 7 Further, the Arbitrator's recommendation deviates from industry standards on this issue, without sufficient justification. The Commission, in fulfilling its duty to review and approve arbitrated and negotiated agreements, is aware that Qwest does not have any ICAs in Washington that have an "actual and direct damages" provision, and Charter was unable to point to any. Thus, there are dozens of approved ICAs that limit damages to the amounts billed for the services at issue, consistent with Qwest's position in this case. Furthermore, the Section 271-compliant Statement of Generally Available Terms ("SGAT") that Qwest filed prior to obtaining interLATA approval from the FCC contains the same limitation of liability that Qwest proposes in this case.³
- 8 Finally, Charter has not demonstrated any reason why limitation of liability should be different in the ICA than those limitations that Charter believes to be appropriate in dealing with its own customers. Charter's Washington tariff limits its liability to its customers as follows:

Notwithstanding any other provision of any service agreement or this tariff, the telephone company's entire liability to the customer, and the customer's sole and exclusive remedy for any damages caused by any service defect or failure, or for

³ On June 25, 2002, Qwest filed its SGAT with the Commission in Docket No. UT-003022. On July 1, 2002, the Commission entered the 39th Supplemental Order in that proceeding, holding that Qwest's SGAT met the requirements of Section 271 of the Telecommunications Act of 1996. That SGAT contained the following language at Section 5.8.1 – the same section at issue in this proceeding:

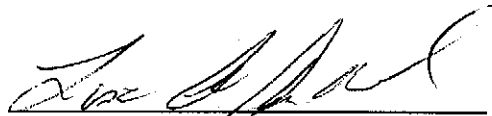
5.8.1 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises.

other claims arising in connection with any service provided by the telephone company, shall be customer's proven direct damages not to exceed per claim (or in the aggregate during any 12-month period) an amount equal to the total net payments payable by customer for the applicable service during the three (3) months preceding the month in which damage occurred.⁴

- 9 Thus, Charter's limitation of liability provision is wholly consistent with Qwest's proposal, and Charter's argument in paragraph 16 of its opening brief, that its position in this arbitration is consistent with Washington contract law and public policy, is unpersuasive. It is Qwest's position that is consistent with contracts and limitation of liability within the specialized area of telecommunications, and Charter's tariffed limitation of liability confirms this point.
- 10 For these reasons, the Arbitrator's Report recommendation on Issue 5 should not be adopted.

DATED this 6th day of May, 2009.

QWEST



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⁴ Exhibit JHW-4, page 7.