OAH 3-2500-19881-2
MPUC No. P-5535, 421/M-08-952

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of Charter Fiberlink, LLC, for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252 (b)

ARBITRATOR'S REPORT

This matter was arbitrated by Administrative Law Judge Kathleen D. Sheehy on January 21-22, 2009, in the Small Hearing Room of the Public Utilities Commission in St. Paul, Minnesota. The OAH record closed on March 10, 2009, upon receipt of post-hearing briefs.

Jason Topp, Esq., 200 South Fifth Street, Room 2200, Minneapolis, MN 55402; and Thomas Dethlefs, Esq., 1801 California Avenue, 10th Floor, Denver, CO 80202, appeared for Qwest Corporation (Qwest).

K.C. Halm, Esq., Davis, Wright, Tremaine, LLP, 1919 Pennsylvania Avenue, Suite 200, Washington, DC 20006-3402, and Gregory Merz, Esq., Gray, Plant, Mooty, Mooty & Bennett, PA, 500 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, appeared for Charter Fiberlink, LLC (Charter).

Linda S. Jensen, Assistant Attorney General, Suite 1400, 445 Minnesota Street, St. Paul, MN 55101-2131, appeared for the Department of Commerce (Department).

Kevin O'Grady appeared for the staff of the Public Utilities Commission.

Procedural History

1. For purposes of this arbitration, Charter and Qwest have agreed that the "request for negotiations" date was March 1, 2008.[1] Charter's request for arbitration was filed with the Commission on August 8, 2008. Based on the timelines in 47 U.S.C. § 252(b) and Minn. R. 7812.1700, subps. 19 & 21 (2007), the statutory deadline for conclusion of the arbitration would have been November 26, 2008; during the prehearing conference on September 12, 2008, however, Charter agreed to extend that deadline to accommodate the scheduling

[1] Petition for Arbitration, Ex. A (Aug. 8, 2008).

of the evidentiary hearing on January 21-23, 2009.[2] At the conclusion of the evidentiary hearing, Charter agreed to further extend the deadline to accommodate the briefing schedule and provide time for issuance of the Arbitrator's Report, due by April 6, 2009. In addition, Charter agreed that the Commission will have a reasonable period of time after receipt of the Arbitrator's Report to make a final decision.[3]

2. Before the hearing, the parties successfully resolved a number of issues. The issues remaining for decision are identified in Ex. 2, except that Issue 18 (Rates for 911 Facilities) was resolved during the hearing.

Arbitrators' Authority

3. The Commission has jurisdiction over this proceeding under § 252(b) of the Telecommunications Act of 1996 (Act) and Minn. Stat. §§ 237.16 and 216A.05 (2008). Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .." [4] In resolving the open issues and imposing appropriate conditions, the Commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for interconnection, services, or network elements according to subsection (d); and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

4. The Act specifically permits a state commission to establish or enforce other requirements of state law in its review of an interconnection agreement (ICA), including requiring compliance with intrastate telecommunications service quality standards or requirements,[5] as long as state requirements are consistent with the Act and the FCC's implementing rules.[6] State law similarly requires that issues submitted for arbitration be resolved in a manner that is consistent with the public interest, to ensure compliance with the

[2] First Prehearing Order (Sept. 25, 2008) at 2 n. 2.
[3] Tr. 2:237.
[4] 47 U.S.C. § 252(b)(4)(C).
[5] 47 U.S.C. § 252(e)(3).
[6] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶¶ 66, 54, & 58 (Aug. 8, 1996), *aff'd in part and rev'd in part, Iowa Utils. Bd. v. FCC*, 525 U.S. 1133 (1999) (*Local Competition Order)*; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147 at ¶¶ 193-96 (Sept. 17, 2003) (*TRO*).

requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the Commission.[7]

5. Some of the disputed issues in this arbitration do not hinge on a specific provision of federal or state telecommunications law, but are either more generic business issues or involve the day-to-day mechanics of using the ICA.[8] Unless more specific authority is otherwise noted, the Arbitrator will make recommendations on these disputed provisions that the Arbitrator believes are consistent with the public interest, the requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the Commission.

Burden of Proof

6. The burden of proof in this interconnection arbitration proceeding is on Qwest to prove all issues of material fact by a preponderance of the evidence.[9] In addition, the arbitrator may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrator may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof, such as rules placing the burden on the incumbent to demonstrate the technical infeasibility of a CLEC's request for interconnection or unbundled access and rules requiring an incumbent to prove by clear and convincing evidence any claim that it cannot satisfy such a request because of adverse network reliability impacts.[10]

I. TERMS AND CONDITIONS.

Issue 5: Limitation of Liability

A. The Dispute

7. The issue is how to limit appropriately the liability of the parties for losses relating to or arising out of any act or omission in performing the interconnection agreement. The disputed sections are at section 5.8.1 (whether to cap liability for breach of contract or negligence in a certain amount); section 5.8.2 (whether to clarify a provision that generally provides for no liability for indirect, consequential, or special damages); and section 5.8.4 (whether to permit unlimited liability for acts of gross negligence).[11]

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[7] Minn. R. 7811.1700, 7812.1700; *see also* Minn. Stat. §§ 237.011, 237.16, subd. 1(a).
[8] The proposed ICA is in the record as Ex. 1.
[9] Minn. R. 7812.1700, subp. 23.
[10] 47 C.F.R. §§ 51.5 & 51.321(d).
[11] In its Initial Post-Hearing Brief, Qwest argued that section 10.4.2.6.1 was also a disputed term in Issue 5; however, this section is not identified in Ex. 2 or addressed in the testimony. The ALJ recommends that this section not be addressed in this arbitration.

B. Position of the Parties

8. For section 5.8.1, Qwest proposes language that would limit Charter's damages to the total amount that would have been charged to the other party by the breaching party for the service or function that was not properly performed, and any other losses would be limited to the amount of Qwest's charges under the contract to Charter during the year in which the event occurs.[12]

9. Charter proposes language for section 5.8.1 that would provide liability to any party causing harm to the other for "actual, direct damages."[13] In testimony, Charter defined "actual, direct damages" as the cost of repair, but the contract language contains no such definition.[14] Charter argues that because it is a facilities-based carrier and does not purchase unbundled network elements (UNEs) from Qwest, the amount of its annual billings from Qwest will be lower than for most other CLECs in Minnesota, and a limitation of liability tied to the amount of Qwest's charges therefore may not be sufficient to compensate it for any Qwest-caused damage.

10. Qwest defends its proposal as being more definite and more commonly used in the industry in both interconnection agreements and in tariffs for CLEC customers, including Charter's tariff for its own end-users.[15]

11. The Department made no recommendation on language for section 5.8.1 during the hearing,[16] but in its Post-Hearing brief agrees with Qwest that the proposal to limit damages to "actual, direct damages" is vague in comparison to Qwest's proposal and that this language would increase the uncertainty and risk that either party might experience substantial, unpredictable liability in the case of an unforeseen or unlikely event. In addition, the Department finds Qwest's language persuasive because Charter uses the same type of limitation in its tariff with end-user customers (except the amount is further limited to the customer's payments during the three months preceding the month in which damage occurred).[17] The Department recommends the language proposed by Qwest for section 5.8.1, but would revise the last clause to read "the total amounts charged ~~to CLEC~~ to either party under this agreement during the contract year in which the cause accrues or arises" to make it a reciprocal limitation.[18]

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[12] Ex. 36 (Albersheim Direct) at 14-17; Ex. 37 (Albersheim Rebuttal) at 16-20.
[13] Ex. 3 (Starkey Direct) at 5-14; Ex. 4 (Webber Rebuttal) at 18-24.
[14] Tr. 1:97-98.
[15] Ex. 37 (Albersheim Rebuttal) at 20; Ex. 6.
[16] Ex. 38 (Bahn Direct) at 18-24; Ex. 7 (Bahn Summary) at 1.
[17] Ex. 6 (Charter Fiberlink General Exchange Tariff page 13.1).
[18] Department's Initial Post-Hearing Brief at 32.

12. Section 5.8.2 contains agreed-upon language providing that neither party is liable to the other for "indirect, incidental, consequential, or special damages" resulting from breach of contract, warranty, strict liability, tort, or negligence of any kind. Charter would introduce that section with the phrase "Except as provided in Section 5.8.4," which permits unlimited liability for certain types of misconduct or gross negligence (see Issue 5.8.4). Qwest does not believe the introductory phrase is necessary but does not object to this clarification.

13. The Department made no recommendation during the hearing, but it believes the introductory phrase proposed by Charter for section 5.8.2 is a useful clarification.[19]

14. In section 5.8.4, Charter would add language permitting liability for acts of gross negligence, in addition to the agreed-upon exceptions for willful or intentional misconduct and for damage to property proximately caused solely by one party's negligent act or omission. Charter would also add a sentence defining "solely" as "not contributed to by the negligent act or omission of the other Party, or its respective agents, subcontractors, or employees." In negotiations, Qwest opposed the addition of gross negligence. During the hearing, however, Qwest agreed to use the language ordered in the AT&T arbitration, which permitted liability for acts of "willful misconduct or gross negligence."[20] Qwest does not believe the definition of "solely" is necessary but does not object to use of this phrase.[21]

15. The Department recommends that the Commission use the language approved in the AT&T Arbitration for section 5.8.4 ("willful misconduct or gross negligence") and has no objection to adding the last definition of "solely" proposed by Charter.[22]

C. Decision

16. The purpose of section 5.8.1, as proposed by Qwest and as approved by the Commission in other ICAs, is to limit liability for all claims arising under the contract, except for those claims due to gross negligence or willful misconduct (which are addressed in section 5.8.4). Qwest's language achieves that purpose by limiting liability to the total amount that was or would have been charged for the improperly performed function, and by capping the amount of damages at the total amounts charged by Qwest to CLEC during the course of the contract year. Charter's proposed language is fundamentally inconsistent

[19] Department's Initial Post-Hearing Brief at 32.
[20] Tr. 2:149; Ex. 37 (Albersheim Rebuttal) at 18.
[21] Tr. 2:175.
[22] *See In the Matter of the Petition of AT&T Communications of the Midwest, Inc., for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. 422,421/IC-03-759, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 16 (Nov. 18, 2003) (*AT&T Arbitration Order*).

with this purpose, because it does not limit liability in a meaningful way. Charter's proposal to permit recovery of "actual, direct damage" would permit essentially unlimited liability for this type of damage, which Charter maintains is essentially equivalent to the expectation damages available under contract law.[23]

17. Imposing contractual limitations on liability for breach of contract or negligence is a commercially reasonable approach for large companies that have the ability to absorb some potentially uncompensated losses arising in the ordinary course of business. As a policy matter, such clauses serve the purpose of limiting disputes and reserving litigation for larger issues involving more reprehensible conduct. Charter uses such a clause in its own tariffs for end-users, for the purpose of limiting disputes and avoiding litigation. In addition, the Commission has approved the use of such limitations on liability in all of Qwest's ICAs in Minnesota.

18. The Department recommends Qwest's language for section 5.8.1, but in the interests of reciprocity, the Department would revise the last clause to read "the total amounts charged ~~to CLEC~~ to either party under this agreement during the contract year in which the cause accrues or arises." The ALJ believes this change would create confusion, as it is unclear which party's billings would provide the cap. Moreover, Qwest's billings to a CLEC will typically exceed a CLEC's billings to Qwest; Qwest's language would set the larger amount as the cap, which would be more consistent with Charter's desire to be compensated as fully as possible for this type of damage. The ALJ accordingly recommends Qwest's language for section 5.8.1.

19. The ALJ recommends the Charter language for section 5.8.2, to clarify that there is no limitation on liability for claims under section 5.8.4.

20. For section 5.8.4, the ALJ recommends use of the AT&T language (because both parties have agreed to it) combined with Charter's proposed definition of "solely" for section 5.8.4. The section would read as follows:

> Nothing contained in this section 5.8.4 shall limit either Party's liability to the other for (i) willful misconduct or gross negligence 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. For purposes of this section 5.8, "solely" shall mean not contributed to by the negligent act or omission of the other Party, or its respective agents, subcontractors, or employees.

[23] Charter's Initial Brief at 7.

Issue 6A: Indemnification

A. The Dispute

21. The indemnification provisions are intended to address Qwest's and Charter's respective responsibilities to indemnify, defend, and hold harmless each other with regard to claims asserted by third parties that are related to the performance of the ICA. The sections at issue are 5.9.1.1 and 5.9.1.2.

B. Position of the Parties

22. For section 5.9.1.1, Qwest proposes language that would require each party to "release, indemnify, defend, and hold harmless" the other party for all third-party claims resulting from that party's breach of or failure to perform the ICA, regardless of the form of the third-party action (whether in contract, warranty, strict liability, or tort, including negligence of any kind). The obligation to indemnify would not extend to claims resulting directly from the negligence or intentional conduct of the other party. In other words, each party would be obligated to indemnify the other for third-party claims except to the extent that the claim results from the indemnified party's own negligence or intentional conduct.[24]

23. Charter would modify this proposal by inserting definitions of the "indemnifying" and "indemnified" party and "claims" and "losses"; by clarifying that the section is applicable to "third party" claims; by adding "negligence, gross negligence, or willful misconduct" to the types of conduct creating the indemnification obligation; and by changing the exclusionary phrase to include "negligence, gross negligence, or willful misconduct" instead of the phrase "negligence or intentional conduct" suggested by Qwest. In addition, Charter recommends changes to the last paragraph of section 5.9.1.2 that would give the indemnifying party sole authority to defend a claim "to the extent such action is based solely on the Indemnifying Party's network and/or services," and would make the parties' obligation to cooperate with each other subject to other provisions of the agreement addressing proprietary information. Charter would also add a phrase making the obligation to cooperate by providing relevant records limited to "non-privileged" records.

24. The Department recommends that Charter's definition of "claims" and "losses" not be used, because those terms are used elsewhere in the ICA with different definitions; it recommends use of the approved language from the AT&T arbitration that includes reference to "gross negligence" in section 5.9.1.1; and it would modify the AT&T language to include "negligence" in addition to willful misconduct or gross negligence in section 5.9.1.2.[25]

[24] Ex. 2 at 8-9.
[25] Ex. 38 (Bahn Direct) at 28-29; Department Post-Hearing Brief at 35-36.

C. Decision

25. For section 5.9.1.1, the ALJ does not believe that defining the "indemnifying" and "indemnified" parties, as proposed by Charter, makes the technically difficult legal language any easier to follow.

26. It appears to the ALJ that section 5.9.1.1 was initially developed to limit Qwest's liability to CLEC customers, in the same way that CLECs limit their own liability to their customers, for the unpredictable harm that might arise from interrupted utility service. Because Qwest would be the provider of wholesale elements and services that benefit CLEC customers, but it would have no contractual relationship with those customers, this section of the ICA would achieve the same type of limitation.[26] In this case, Charter is a facilities-based carrier. It does not lease unbundled network elements or purchase services from Qwest, other than those required to interconnect. It has a similar interest in limiting its potential liability to Qwest customers for unpredictable harm. Charter has proposed language making this section applicable to "third-party" claims in general, not just to claims by its customers against Qwest. Qwest did not specifically object to the "third party" language proposed by Charter in this section. The ALJ agrees that there is a legitimate need to clarify that this section would be applicable to all third party claims, as proposed by Charter.[27]

27. The ALJ agrees with Qwest and the Department that "claims" and "losses" should not be defined here, however, because of the potential confusion caused by inconsistent definitions in other areas of the ICA.[28]

28. As noted above, the Qwest language requires one party to indemnify the other based on any third-party claim resulting from the indemnifying party's "breach of or failure to perform under this Agreement, regardless of the form of the action, whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind." Charter's language would require indemnification for third-party claims resulting from the indemnifying party's "negligence, gross negligence, or willful misconduct, or breach or failure to perform under this Agreement, regardless of the form of action." The AT&T language refers to damages resulting from "the Indemnifying Party's breach of or failure to perform under this agreement, regardless of the form of action."

29. The Qwest/AT&T language serves the important function of tying the indemnification obligation to a third-party claim that results from the

[26] *See AT&T Arbitration Order* at 17.
[27] It is unclear why the first sentence of section 5.9.1.1 (as proposed by Qwest) appears to address claims by any third party, whereas the exception articulated in the second sentence appears to be limited to claims of the Indemnifying Party's End User customers. As the ALJ reads these provisions, section 5.9.1.1 should be applicable to any third-party claim, whereas section 5.9.1.2 should be applicable specifically to claims brought by end-user customers.
[28] *See* Qwest Post-Hearing Brief at 8 for reference to other places in the ICA using these terms.

performance of this ICA, regardless of how the third-party claim is framed (in contract, tort, or negligence of any kind). This is not an issue of failing to provide for comparative fault or proportionality, as argued by Charter. Proportionality is achieved by carving out of the indemnification obligation any claims, however framed, that are caused by the indemnified party's conduct (see next paragraph). Qwest's language ensures that the obligation to indemnify is tied somehow to the performance of the ICA. In the AT&T Arbitration, the Commission declined to expand the indemnity clause to cover conduct removed from the ICA.[29] The ALJ recommends that Qwest's language for this phrase be used.

30. The final phrase advocated by Charter would carve out of the indemnification obligation all claims arising from the indemnified party's "negligence, gross negligence, or willful misconduct." The Qwest language would similarly carve out of the indemnification obligation claims arising from the indemnified party's "negligence or intentional conduct." The ALJ does not believe that there is any substantive, legal difference between the parties' language proposals for this sentence. As a legal matter, "negligence or intentional misconduct" would certainly include gross negligence; however, the ALJ cannot see that it would cause any harm or change the meaning if "gross negligence" were included. The ALJ recommends the use of Qwest's language here, modified to include the reference to "gross negligence."

31. As recommended by the ALJ, section 5.9.1.1 would consist of the Qwest language modified as follows:

> Each of the parties agrees to release, indemnify, defend and hold harmless the other Party . . . from and against and in respect of any loss, . . . whether suffered, made, instituted, or asserted by any ~~Person or entity~~ third party, for invasion of privacy, bodily injury or death of any ~~Person or Persons~~ such third party, or for loss, damage to, or destruction of tangible property, whether or not owned by others, resulting from the Indemnifying Party's breach of or failure to perform under this Agreement, regardless of the form of the action, whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind. The obligation to indemnify with respect to third-party claims ~~of the Indemnifying Party's End User Customers~~ shall not extend to any claims . . . alleged to have resulted directly from the negligence, gross negligence, or willful misconduct of the . . . Indemnified Party.[30]

[29] *AT&T Arbitration Order* at 18.

[30] The Department's recommended language for section 5.9.1.1 in Ex. 7 and in its Post-Hearing Brief contains all the language from the same section at issue in the AT&T Arbitration, including provisions addressing indemnification for third-party claims of intellectual property infringement. Here, however, the parties have agreed to treat indemnification for infringement claims separately in section 5.10.2 (Issue 7).

32. Section 5.9.1.2 specifically addresses third-party claims made by an end-user customer of either party. Qwest's language provides in this instance that the party whose customer alleges the claim shall defend and indemnify the other party, unless the loss was caused by the "willful misconduct" of the other party. The AT&T language carved out losses caused by "willful misconduct or gross negligence." Charter's language is similar except the final phrase would carve out indemnification for losses caused by the "negligence, gross negligence or willful misconduct" of the other party, which is language that would parallel the treatment of third-party claims under section 5.9.1.1.

33. These are substantive differences. In the event that a Charter customer brought a claim for damages caused by the negligence of a Qwest employee, Qwest's language would require Charter to defend the claim and indemnify Qwest. Only if the Qwest employee committed "willful misconduct" would the Qwest language exempt Charter from its duty to defend and indemnify. The AT&T language would similarly require Charter to defend the claim and indemnify Qwest for damages caused by a Qwest employee's negligence, but would exempt Charter if Qwest's employee committed either gross negligence or willful misconduct. Charter's language, on the other hand, would require the party whose employee committed an act of negligence, gross negligence, or willful misconduct to defend and indemnify the other party for this type of claim.

34. Qwest's language has the value of quickly and expediently determining which party will defend a claim, based largely on the identity of the end-user customer. It also permits each party to be responsible for resolving claims of ordinary negligence brought by their own customers, instead of handing off these claims to a competitor for resolution. For policy reasons, it makes sense that customers should be able to deal with their own carriers to resolve ordinary problems and not be shunted off to a party with whom they have no relationship. The ALJ accordingly recommends use of the language established in the AT&T Arbitration Order for section 5.9.1.2, which would require each party to indemnify the other for claims brought by their own end user customers, except for cases involving gross negligence or willful misconduct.

Issue 7: Indemnity for Intellectual Property Claims

A. The Dispute

35. Section 5.10.2 generally provides that the parties will indemnify each other against claims that facilities used or services provided under the ICA misappropriate or otherwise violate the intellectual property rights of a third party. This dispute concerns Charter's desire to expand the parties' indemnity obligations (section 5.10.2) and to require a written agreement before the parties may use each other's intellectual property (section 5.10.4).

B. Position of the Parties

36. As proposed by Qwest, the indemnification obligation applies to any claim of infringement that results from a combination of facilities and services that is made "by or at the direction of" the indemnifying party. Charter seeks to add language that would require indemnification for infringement claims that result from combinations and services made "by or at the direction, or with knowledge of" the indemnifying party.[31] Through this language, Charter seeks to require indemnification if one party knows that a combination has been made or a service has been provided, even if that party did not perform the combination or provide the service, and even if it had no knowledge that the combination would result in an infringement claim.[32] Charter would also replace Qwest's reference to indemnification for any "loss, cost, expense, or liability arising out of a claim" with the word "Claim," which Charter would define above in section 5.9.1.1 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)."

37. Qwest opposes the addition of "knowledge" to section 5.10.2 as a basis for indemnification.[33] It points out that under its language, Qwest would be exempt from indemnifying Charter for any combination of facilities not made by or directed by Qwest; under Charter's language, Qwest would be obligated to indemnify Charter if it did nothing but nonetheless had "knowledge" of Charter's actions. Qwest argues that the meaning of this word is vague (who knew what, and when?) and might create additional litigation. But Qwest's main argument is that its indemnity obligation should be based on its own conduct, not on whether it has knowledge of Charter's conduct.[34]

38. In section 5.10.4, the parties have agreed that nothing in the ICA should be construed as granting permission to use the other party's intellectual property and that neither party may use any patent, copyright, logo trademark, trade name, trade secret, or other intellectual property rights of the other "without execution of a separate agreement between the parties." Charter would require that any such agreement be "written."

39. Qwest did not articulate an objection to the addition of "written" agreements in its testimony concerning section 5.10.4.

40. The Department recommends the use of Qwest's language for section 5.10.2.[35] It recommended against Charter's use of the word "Claim" here for the same reason it recommended against defining it in section 5.9.1.1—

[31] Ex. 3 (Starkey Direct) at 25-30; Ex. 4 (Webber Rebuttal) at 30-33.
[32] Tr. 1:46-47.
[33] Ex. 36 (Albersheim Direct) at 26-29; Ex. 37 (Albersheim Rebuttal) at 27-30.
[34] Tr. 2:166.
[35] Ex. 7 (Bahn Summary) at 3.

because of the potential confusion regarding inconsistent use of the word in other sections of the ICA. It also recommended against requiring indemnification for claims if there is mere "knowledge" of the combination or service giving rise to the claim. The Department recommended use of Charter's language for section 5.10.4 on the basis that agreements concerning the use of intellectual property should be written.

C. Decision

41. Charter's proposal to use the word "Claim" in section 5.10.2, as defined in section 5.9.1.1, should be rejected because of the possibility of creating confusion (see Issue 6A).

42. Indemnification is a contractual method of allocating foreseen risks and is not properly viewed as an obligation to insure the other party against "unanticipated and unbounded possibilities."[36] For policy reasons, the parties should be obligated to indemnify each other if their own conduct gives rise to a claim. Requiring "indemnification" for someone else's conduct, based merely on knowledge of that conduct, would be arbitrary and inconsistent with the substantive law of infringement. Charter's citation to case law holding that both infringing conduct and knowledge are necessary to establish contributory infringement is inapposite, because Charter's language would require indemnification based not on infringing conduct plus knowledge, but on knowledge alone. Qwest's language should be used for section 5.10.2.

43. Qwest has not articulated any reason why "executed" agreements concerning intellectual property should not be "written." Charter's proposal should be used for section 5.10.4.

Issue 9: Sale of an Exchange

A. The Dispute

44. This issue concerns the period of time the ICA would remain in place in the event that Qwest were to sell an exchange that includes Charter end-user customers. The language at issue is contained in section 5.12.2.

B. Position of the Parties

45. Qwest has proposed language based on the provisions of Minn. Stat. § 237.231 (2008) providing that, in the event of a sale, the transferee would be deemed a successor to Qwest's responsibilities under the ICA for a period of 90 days from notice to Charter of the transfer, or until such later time as the Commission may direct pursuant to state law. In addition, the language would

[36] *AT&T Arbitration Order* at 18.

obligate Qwest to use its best efforts to facilitate discussions between Charter and the transferee regarding the assumption of Qwest's obligations.[37]

46. Charter's proposed language would apply to transfers of exchanges that include customers that Charter serves "at present or may serve in the future." It would require the Commission, in approving such a transfer, to deem any transferee a successor to Qwest under the ICA, and if the Commission does not act, the language would require Qwest to decline to sell an exchange unless the transferee agrees in writing to be bound by the ICA without modification.[38]

47. In response, Qwest maintains that it is not appropriate to limit Qwest's control of its network or its ability to divest its assets, because Minn. Stat. § 237.231 authorizes the Commission to address any interconnection issues that arise in connection with the sale of an exchange.

48. The Department recommends adoption of Qwest's language for section 5.12.2, reasoning that successor companies to either Charter or Qwest might seek to renegotiate certain provisions of the ICA and that this is a normal cost of doing business. In addition, the Department points out that no sale of an exchange in Minnesota has ever resulted in a CLEC being disadvantaged or losing access to interconnection. The Department believes that the protections of Minn. Stat. § 237.231 provide the Commission with authority to take any necessary action to protect Charter or its end users in the event an exchange is sold.[39]

C. Applicable Law

49. Minn. Stat. § 237.231 would prohibit Qwest from selling an exchange without prior approval of the Commission and 90 days' notice to customers of its intent to sell. The Commission is required to hold a public hearing within the exchange area at least 30 days prior to deliberating on the proposed sale. The Commission may not consent to a sale unless the proposed buyer is financially responsible and capable of making the necessary investments to meet service quality rules; moreover, the Commission is authorized to require any proposed buyer to enter into binding commitments to maintain minimum levels of investment and staffing necessary to meet service quality rules.

D. Decision

50. The language proposed by Charter might impair Qwest's ability to sell any exchange in its network, whether or not Charter serves customers in that exchange, and does not appear to be needed in light of Minn. Stat. § 237.231. Qwest agrees that the Commission has authority to require a successor to abide

[37] Ex. 36 (Albersheim Direct) at 32-34; Ex. 37 (Albersheim Rebuttal) at 33-34.
[38] Ex. 12 (Giaminetti Direct) at 13-17; Ex. 13 (Giaminetti Rebuttal) at 13-15.
[39] Ex. 39 (Fagerlund Direct) at 2-4; Ex. 35 (Fagerlund Summary) at 1; Tr. 2:203-04.

by the terms of this ICA if such action is necessary to assure access to interconnection under Minn. Stat. § 237.231. The ALJ recommends that the Qwest language for section 5.12.2 be used.

II. INTERCONNECTION

Issue 10: Demonstration of Technical Infeasibility

A. The Dispute

51. This dispute is a narrow one. The parties agree that, pursuant to 47 C.F.R. § 51.305(e), Charter may seek to interconnect with Qwest at any technically feasible point on Qwest's network. They also agree that, if Qwest asserts that the chosen point of interconnection is not technically feasible, Qwest would have the burden of proving technical infeasibility to the Commission. In section 7.1.1, the parties disagree about how that process would work.

B. Position of the Parties

52. The Qwest language for section 7.1.1 provides that tandem switch connections are not required where Qwest can demonstrate that such connections present a risk of switch exhaust and that Qwest does not make similar use of its network to transport the local calls of its own or any affiliate's end user customers.[40]

53. Charter's language would require that, in all cases in which Qwest claims technical infeasibility due to imminent switch exhaust, Qwest must provide the requested interconnection that it believes is technically infeasible, then it must initiate a proceeding before the Commission to obtain approval to deny the interconnection pursuant to 47 C.F.R. § 51.305(3). Charter's language also would require that disputes arising under this section of the ICA shall be raised and resolved pursuant to the dispute resolution provisions of the agreement.[41] Charter's language would therefore require a proceeding before the Commission, and Commission approval, before Qwest may deny interconnection on the basis of switch exhaust.

54. The Department contends that, although either position is legally defensible, Qwest's language is more practical in that it requires a proceeding before the Commission only if there is a dispute as to technical infeasibility. In the interests of heading off disputes, the Department recommends that the following sentence be added to the end of Qwest's language for section 7.1.1:

> To the extent Qwest denies a CLEC request for interconnection due to technical infeasibility, upon CLEC's request Qwest will provide the CLEC with information that justifies the claim of

[40] Ex. 16 (Easton Direct) at 3-6; Ex. 17 (Easton Rebuttal) at 2-4; Ex. 22 (Linse Rebuttal) at 3-5.
[41] Ex. 9 (Gates Direct) at 2-4; Ex. 10 (Gates Rebuttal) at 2-14.

technical infeasibility and satisfies the requirements of the previous sentence.[42]

55. Qwest would further modify the sentence recommended by the Department by requiring the provision of information only to the extent it is available and is not competitively sensitive. The Department believes that all data providing the basis for a decision to deny interconnection should be available to the CLEC and that Qwest can take appropriate measures to mask any confidential information.

56. Charter maintains that the process envisioned by Qwest and the Department is insufficient to satisfy the requirements of 47 U.S.C. § 51.305(e).

C. Applicable Law

57. An incumbent LEC is required to provide interconnection at any technically feasible point within its network, including trunk interconnection points for a tandem switch, that is at a level of quality that is equal to that which the ILEC provides to itself, a subsidiary, an affiliate, or any other party, on terms and conditions that are just, reasonable, and nondiscriminatory.[43] An incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not technically feasible.[44] The regulations further provide, in defining "technically feasible," that interconnection shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of an interconnection request. An ILEC that claims it cannot satisfy such a request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection would result in specific and significant adverse network reliability impacts.[45]

D. Decision

58. Contrary to Charter's argument, the applicable regulations do not require Qwest to first provide the interconnection that it believes is technically infeasible, then seek approval from the Commission to deny it. The regulations address the burden of proof in the event there is a disagreement about technical infeasibility that results in a proceeding before the Commission. There is no evidence that this is a common problem or that Qwest has a history of improperly denying interconnection requests. The ALJ recommends the Qwest language, along with the sentence above as recommended by the Department.

[42] Ex. 39 (Fagerlund Direct) at 4-8; Ex. 35 (Fagerlund Summary) at 1.
[43] 47 C.F.R. § 51.305(a).
[44] *Id*. § 51.305(e).
[45] 47 C.F.R. § 51.5.

Issue 11: Methods of Interconnection

A. The Dispute

59. The sections at issue here (7.1.2 and 7.1.2.4) concern where and how interconnection of the networks will take place.

B. Position of the Parties

60. Qwest has proposed its standard language, which would require Charter to establish "at least one" physical point of interconnection in each LATA in which Charter has end user customers. It would require the parties to establish at least one of the following interconnection arrangements, at any technically feasible point: (1) a Qwest-provided entrance facility; (2) collocation; (3) mid-span meet POI facilities; or (4) other technically feasible methods of interconnection via the bona fide request (BFR) process, unless a similar arrangement has been previously provided to a third party or is offered by Qwest as a product.[46]

61. Qwest would define a Qwest-provided entrance facility as a "Local Interconnection Service (LIS) Entrance Facility" that extends from the CLEC's switch location or point of interconnection to the Qwest Serving Wire Center, but not beyond the area served by the Qwest Serving Wire Center. Thus, if the parties choose a Qwest-provided entrance facility, it must run from the CLEC switch or point of interconnection to the Qwest serving wire center.

62. Charter would make a number of changes to this section. First, it would provide that Charter "has the right to establish" a single physical point of interconnection in each LATA in which Charter has end user customers, but it would not require Charter to establish such interconnection.

63. Second, Charter would add the following language:

> At CLEC's option, CLEC may establish additional Points of Interconnection in each LATA in which CLEC has local End User Customers. The Parties agree that this Section 7.1.2 shall not be construed as imposing any obligation upon Qwest to establish a physical Point of Interconnection with CLEC at a point that is outside of Qwest's geographic service area or territory.

It is unclear what the second sentence would mean. The sentence suggests that other portions of the ICA might obligate Qwest to establish interconnection at a point outside its service area or territory.

64. Third, whereas Qwest's language would obligate Charter to physically interconnect in each LATA in which it serves end user customers,

[46] Ex. 16 (Easton Direct) at 6-10; Ex. 17 (Easton Rebuttal) at 4-12; Ex. 22 (Linse Rebuttal) at 5-9.

Charter's language would not require a physical interconnection in each LATA, but it would require Charter to "serve" end user customers physically located within the areas associated with NPA-NXX codes assigned to those customers. This leaves open the question, from what location would Charter serve those customers?

65. Fourth, and most importantly, Charter's language would require the parties to establish at least one of the following interconnection arrangements, at any technically feasible point: (1) a Qwest provided **interconnection facility, or an interconnection facility provided by CLEC, or by a third party**; (2) collocation; (3) mid-span meet POI facilities, **including such arrangements provided to CLEC by a third-party who has an existing mid-span meet with Qwest**; or (4) other technically feasible methods via the BFR process.

66. The substitution of the term "interconnection facility" for "entrance facility" poses a definitional problem, because the FCC has defined those terms differently. In addition, Charter's language might require Qwest to interconnect somewhere other than on its own network; specifically, Charter's language would permit interconnection at a facility provided by a third party. Charter also proposes in section 7.1.2.4 several provisions addressing the situation in which a third party provides an interconnection facility, which Charter would define as "a facility used for the transmission and routing of telephone exchange service and exchange access service between CLEC's Switch location, or equivalent facility, and the Qwest Switch location or Serving Wire Center." As noted above, Qwest's language would require that a Qwest-provided entrance facility run from the CLEC switch to the Qwest serving wire center. Qwest would leave section 7.1.2.4 blank.

67. Qwest strongly disputes that its standard language would prohibit Charter from interconnecting through a third party, maintaining that 19 service providers in Minnesota use the facilities of at least ten other service providers to interconnect with Qwest. In addition, Charter interconnects with Qwest through third parties in other states.[47]

68. The Department recommends that Qwest's language be used for section 7.1.2.4, with the addition of the following sentence: "Qwest may not require the CLEC to have more than one POI in a LATA." The Department also suggests defining in section 4 both a "LIS Entrance Facility," as Qwest proposes, and an "interconnection facility," as Charter proposes.[48]

[47] Ex. 22 (Linse Rebuttal) at 8.
[48] Ex. 35 (Fagerlund Summary) at 3.

C. Applicable Law

69. The FCC has defined an entrance facility as the transmission facilities that connect CLEC networks with ILEC networks.[49] The FCC has determined that ILECs are not required to provide "entrance facilities," which backhaul traffic from the point of interconnection to the CLEC switch, as unbundled network elements (UNEs), because entrance facilities are less costly to build, are widely available from alternate providers, and have greater revenue potential than dedicated transport between ILEC central offices. CLECs are, however, entitled to obtain "interconnection facilities" (transmission facilities that connect ILEC switches and wire centers) at cost-based rates.[50] In addition, an ILEC is obligated to provide interconnection "at any technically feasible point *within* the incumbent LEC's network."[51]

D. Decision

70. Charter has asserted a number of arguments regarding the need for its language, most of which are misdirected. Charter repeatedly asserts, for example, that Qwest is attempting to force Charter to establish multiple POIs per LATA, contrary to law. The Qwest language expressly would permit Charter to establish a single POI in each LATA, at any technically feasible place. Charter also argues that Qwest is attempting to force Charter to use a Qwest-provided entrance facility, as opposed to an entrance facility provided by a third party. The Qwest language would permit interconnection through a third party in several different ways: through (1) Charter's own collocation or that of a third party, with transport provided by either Charter or the third party; (2) a mid-span meet POI, with Charter's portion of the facilities provided by itself or a third party; (3) the BFR process in section 7.1.2.4; or (3) the agreed-upon language of section 7.2.2.1.2.2, which would permit Charter to purchase transport services from a third party.

71. There is an important distinction between an "entrance facility" and an "interconnection facility." The ALJ believes that what Qwest is trying to prevent is the situation in which Charter uses, as an "entrance facility," an "interconnection facility" that a third party has obtained from Qwest at TELRIC rates. The ALJ agrees with Qwest that this type of scenario arguably would circumvent the FCC's determination that Qwest is not obligated to provide entrance facilities at TELRIC rates. Moreover, Qwest properly is seeking to ensure that Charter interconnects within Qwest's network, as opposed to a location provided by a third party who is interconnected with Qwest.

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[49] *See, e.g.*, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand at ¶ 136, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (*TRRO*).
[50] *TRO* ¶ 365-66; *TRRO* ¶¶ 140-41.
[51] 47 C.F.R. § 51.305(a) (emphasis added).

72. Even though Charter has offered to modify some of its language to address Qwest's concerns, Charter's language still raises more questions than it answers. Qwest's language is consistent with the FCC rules, and the ALJ recommends that Qwest's language be used. Although the additional sentence recommended by the Department does not appear to be necessary, it would do no harm to include the proviso that Qwest shall not require multiple POIs within a LATA. The ALJ does not believe the additional definition of "interconnection facility" should be added, because Charter's definition is not exactly the same as the FCC's, and because there appears to be no need to define that term if Qwest's language is adopted.

Issues 13, 14 & 15: Reciprocal Compensation for Transport and Termination of Traffic

A. The Dispute

73. The parties have agreed to a bill-and-keep arrangement for the termination of each other's traffic. Issues 13 through 15 involve the question whether they should also have a bill-and-keep arrangement for direct trunked transport, as advocated by Charter, or whether they should reciprocally bill each other for transport, as advocated by Qwest (Issue 15, sections 7.3.4.1.1.2 and 7.3.4.1.3). The billing for direct trunked transport is addressed in Issue 13 (sections 7.2.2.1.2.2 *et seq*.), and the propriety of non-recurring charges (NRCs) for trunk installation is addressed in Issue 14 (sections 7.3.3.1 et seq.).

B. Position of the Parties

74. When local service providers interconnect, they both incur costs related to the transport and termination of calls originated on the other network. Transport is the transmission and any necessary tandem switching of traffic from the POI to the terminating carrier's end office switch that directly serves the called party, or other equivalent facility.[52] Termination is the switching of traffic at the terminating carrier's end office switch, or other equivalent facility, and delivery of the traffic to the called party's premises.[53]

75. Qwest has constructed a "switch-heavy" network, with switches in its central office and in multiple end offices, so that transmission facilities between Qwest end office switches and end users are relatively short. Charter, on the other hand, has constructed its network with fewer switches (one per LATA) and much longer transmission distances between its switch and its end users. FCC rules define an ILEC loop as the transmission facility between the central office and the customer premises.[54] Using this definition, Charter's transmission facility between its switch and its customer premises would be considered a loop, as opposed to transport.

[52] 47 C.F.R. § 51.701 (c).
[53] 47 C.F.R. § 51.701(d).
[54] *Local Competition Order* ¶ 380.

76. When these parties interconnect, Charter has the right to choose where to locate the POI. If the POI is near Charter's switch, Charter's cost of interconnection will be minimized because of the short distance between the POI and Charter's switch. Qwest's costs of interconnection, however, may be substantial, in that Qwest must add direct trunked transport to its network in order to pick up calls from Charter customers at the POI and bring them back to Qwest end users. If Charter were to locate the POI closer to the Qwest end office switches, then the distances and costs of transport might be more similar.

77. The example both parties used to illustrate the network issues involved is contained in Ex. 22 (Linse Rebuttal) at PL-6. Charter has a POI with Qwest in the Rochester LATA, and the distance from Charter's switch to the POI in Qwest's Rochester central office is approximately 3.8 miles. When a Charter customer in Marshall calls a Qwest customer in Marshall, Charter brings the call on its loop facilities to its switch in Rochester, and from there to the POI; Qwest must then transport the call from the POI in Rochester to its end office switch in Marshall, a total of approximately 184 miles.[55] Of this total, the 132 miles between Rochester and the Windom tandem would be considered direct trunked transport.[56] In the reverse scenario, Qwest is responsible for bringing traffic originated on its network to the POI in Rochester, where Charter picks up the call and transports it 3.8 miles to its switch. Although roughly the same mileage distances are involved on both sides of the POI, most of the distance on the Charter side is composed of its loop, whereas most of the distance on the Qwest side is composed of transport that Qwest must add to its network in order to complete the call.

78. Qwest has proposed language calling for bill and keep for the usage-sensitive costs of termination.[57] It proposes to bill Charter for transport between the serving wire center of the POI and the terminating party's tandem switch or end office switches at the TELRIC rates contained in Ex. A to the ICA, and it would permit sharing of the cost of two-way trunks based on a relative use factor.[58] Its language would permit the assessment of non-recurring charges (NRC) for installation of LIS trunks.[59] Qwest originally maintained that FCC rules do not permit use of bill and keep for transport, as opposed to termination; Qwest now agrees that bill and keep is a permissible method of compensation for both transport and termination, but it argues that use of bill and keep for transport is inappropriate here because it would shift the costs of transporting Charter-originated traffic to Qwest.

79. Charter proposes language calling for use of bill-and-keep for both transport and termination of traffic, contending that this method is more efficient

[55] Ex. 17 (Easton Rebuttal) at 14; Ex. 22 (Linse Rebuttal) at 11 & PL-6.
[56] *See* Tr. 2:60.
[57] Issue 15; Ex. 16 (Easton Direct) at 10-25); Ex. 17 (Easton Rebuttal) at 12-21; Ex. 22 (Linse Rebuttal) at 10-11.
[58] *Id*. (Issue 13).
[59] *Id*. (Issue 14).

and less administratively burdensome for both parties. Charter further contends that permitting Qwest to bill Charter for direct trunked transport does not provide Charter the opportunity to recover its transport costs, in violation of the "mutual recovery" required by statute.[60] Charter maintains it has deployed "significant transport facilities" between its switch and the Minnesota communities in which it provides service. Charter's language for Issues 13 and 14 largely assumes that bill-and-keep will be used for recovery of the cost of transport and termination of traffic; where bill and keep is not used, Charter's language would require Qwest to pay "CLEC's applicable trunking and tandem switching rates from the POI at which the traffic exchanged to CLEC's End Office Switch or equivalent device."[61]

80. In response, Qwest contends that transmission facilities between Charter's switch and its end-user customers are not "transport," as defined by 47 C.F.R. § 51.701(c) (the transmission and any necessary tandem switching of traffic from the POI to the terminating carrier's end office switch that directly serves the called party, or other equivalent facility); rather, what Charter describes as the "transport" for which it seeks compensation is really termination under 47 C.F.R. § 51.701(d) (the switching of traffic at the terminating carrier's end office switch, or other equivalent facility, and delivery of the traffic to the called party's premises), compensation for which is limited to switching costs.[62] The only "transport" provided by Charter that meets the FCC definition is that between the POI and the Charter switch.

81. In addition, Qwest points out that the FCC requires that reciprocal compensation rates must be symmetrical (meaning rates charged by CLECs must be the same as the ILEC rates) unless the CLEC presents a cost study showing that its rates are higher.[63] Although Charter proposed language that would require use of "CLECs applicable rates," Charter has not presented a cost study in this proceeding to justify a non-symmetrical rate.

82. The Department agrees with Qwest that for direct trunked transport, reciprocal payments should be used, not bill and keep. The Department concludes that requiring explicit payment for transport will prevent either party from seeking a method of interconnection (including the choice of the number of POIs) that would impose significant network-related costs on the other party, as could occur under bill and keep. For Issue 15, the Department recommends that Qwest's language be used for section 7.3.4.1.1.2 and for section 7.3.4.1.2 (with the correction of a typographic error in the last sentence). The Department recommends modifying Qwest's section 7.3.4.1.3 to reflect that traffic is exchanged in both directions. The section would read:

> Pursuant to Section 7.3.4.1.2 above, when CLEC chooses to interconnect and <u>exchange/</u>deliver traffic <u>with/</u>to Qwest utilizing a

[60] Ex. 9 (Gates Direct) at 49-52; Ex. 10 (Gates Rebuttal) at 43-48.
[61] Ex. 9 (Gates Direct) at 31-48; Ex. 10 (Gates Rebuttal) at 28-42.
[62] 47 C.F.R. § 51.701(d).
[63] *See* 47 C.F.R. § 51.711(b).

> single POI within the LATA, neither party will bill the other Party any usage sensitive charges associated with Exchange Service (EAS/Local) traffic.[64]

83. For Issue 13, the Department recommends Qwest's language for all disputed sections, except the Department would insert the word "trunks" in section 7.2.2.1.4 so the phrase reads "LIS trunks ordered" instead of "LIS ordered." In addition, the Department would add a section 7.3.2.1.5 to Qwest's language, to assure that Qwest's rates would be used for any direct trunked transport Charter appropriately bills to Qwest. The Department's section 7.3.2.1.5 would read:

> A party may bill the other party for the direct transport related to local traffic from the other party. CLEC will use Qwest's rates for such direct transport.[65]

84. Qwest does not object to the substance of this proposal, except it would clarify that this section is applicable to "Direct Trunked Transport," which is specifically defined, as opposed to "direct transport."[66]

85. Charter proposed that, in the event the Commission does not order bill and keep for transport, it would modify its language for section 7.2.2.1.4 to read "For Qwest-originated traffic, Qwest will pay CLEC's applicable trunking and tandem switching rates (which shall mirror Qwest's rates set forth in Exhibit A, Price List) from the POI at which the traffic is exchanged to CLEC's End Office Switch or equivalent device."[67]

86. Finally, for Issue 14, the Department recommends that Qwest's language be used, but be modified to reflect that rates for both parties are contained in Exhibit A to the ICA. In addition, the Department proposes to modify Qwest's section 7.3.3.2 to clarify that one-half of the NRC would be assessed for rearrangements, regardless of whether reciprocal payments or bill and keep is adopted for transport. Section 7.3.3.2 would read as follows:

> Nonrecurring charges for rearrangement requested by one Party for its own convenience may be assessed by the provider for each ~~LIS~~ trunk rearrangement ordered, at one-half (1/2) the rates specified in Exhibit A.[68]

[64] Ex. 35 (Fagerlund Summary) at 6-7.
[65] Ex. 35 (Fagerlund Summary) at 4. .
[66] Qwest Initial Post-Hearing Brief at 18.
[67] Charter Reply Brief at 36.
[68] Ex. 35 (Fagerlund Summary) at 5.

C. Applicable Law

87. The Telecommunications Act of 1996 allows CLECs the flexibility to determine how or where to interconnect within a LATA, based on their network configurations. It also requires ILECs to provide for the "mutual and reciprocal recovery" by each carrier of costs associated with the transport and termination of calls that originate on the other carrier's network.[69] Reciprocal compensation rates must be based on a "reasonable approximation of the *additional costs* of terminating such calls."[70] Termination costs consist of the traffic-sensitive component of local switching; loop costs are not traffic-sensitive and are not considered "additional costs" of terminating another party's traffic.[71] Non-traffic-sensitive services, such as dedicated transport, are to be priced on a flat-rated basis.[72] When the traffic flowing from one network to the other is roughly equal, or in balance, FCC rules allow carriers to waive mutual recovery by selecting a "bill and keep" option, through which the parties agree to transport and terminate traffic without billing the other party.[73] Use of a bill-and-keep approach for termination of traffic does not preclude a positive flat-rated charge for transport of traffic between carriers' networks.[74]

D. Decision

88. Just as there is no single "right way" to interconnect, there is no single "right way" for carriers to compensate each other for the additional costs of transporting and terminating traffic originated on the other party's network. The parties may choose to bill each other reciprocally to recover costs for both transport and termination of traffic, or they may bill for transport only, or they may opt for a bill and keep arrangement. Depending on how the networks are configured, either of these scenarios might be an appropriate method of providing for mutual and reciprocal recovery of costs. But the costs recovered must be the "additional" costs of transport and termination of the other provider's traffic.

89. Because of the manner in which Charter has configured its network, it will face additional switching costs to terminate Qwest-originated traffic, but it will not face much in the way of additional transport costs (other than the distance from the POI to its switch). Qwest, on the other hand, will face additional costs for both transport and termination of traffic originated on Charter's network. Use of a bill-and-keep method for transport, as advocated by Charter, would require Qwest to forego compensation for its more substantial transport costs. In this situation, reciprocal billing for transport of the other party's traffic is a more fair and reasonable method of recovering these costs.

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[69] 47 U.S.C. § 252(d)(2).
[70] *Id*. § 252(d)(2)(A)(ii) (emphasis added).
[71] *Local Competition Order* ¶ 1057.
[72] *Id*. at ¶ 1063.
[73] 47 C.F.R. § 51.705(a); § 51.713.
[74] *Id*. at ¶ 1096.

The ALJ accordingly recommends that Qwest's language be used for Issues 13, 14, and 15, as modified by the Department. Section 7.3.2.1.5 should refer to "Direct Trunked Transport" instead of "direct transport."

Issue 16: Indirect Interconnection

A. The Dispute

90. In these four contract sections (7.1.2.6 through 7.1.2.9) Charter would provide language to permit indirect interconnection through a transit carrier. Transit traffic is any traffic that originates from one carrier's network, transits another carrier's network, and terminates to yet another carrier's network. In this scenario, Charter would directly interconnect with a third party, whose switch would send Charter's traffic (presumably commingled with the third party's traffic) to Qwest's network for termination, or possibly to a fourth carrier's network. Qwest proposes that these sections of the ICA be left blank, because this issue was not negotiated by the parties and should be excluded from the arbitration process.

B. Position of the Parties

91. Charter argues that indirect interconnection is permitted under 47 U.S.C. § 251(a) and 47 C.F.R. § 51.100(a)(1). It has proposed language providing generally that unless otherwise agreed, the parties shall exchange all traffic indirectly through one or more transiting carriers until traffic volumes exceed 240,000 minutes per month for three consecutive months, at which time either party may request the establishment of direct interconnection. The originating party would be required to pay the transit provider for transit service, and the traffic exchanged would be subject to the same reciprocal compensation arrangements as traffic exchanged through direct interconnection. After direct interconnection has been established, the parties would not use indirect interconnection except on an "overflow basis" to mitigate traffic blockage, equipment failure, or emergency situations.[75]

92. Qwest points out that agreed-upon language, in section 7.2.1.1, provides that unless otherwise agreed to by the parties, by an amendment to the ICA, the parties will directly exchange traffic without the use of third party transit providers. Qwest further contends that the issue of indirect interconnection was not otherwise discussed during the parties' negotiations and that Qwest only became aware of Charter's proposed language on the day the Petition for Arbitration was filed. If Charter's proposal were addressed on the merits, Qwest maintains that Charter's language fails to address important issues such as how traffic will be segregated, identified, or tracked so that any applicable intercarrier compensation will be applied to Charter's traffic, as opposed to the transit carrier's traffic. Qwest argues that these are the issues that would be addressed

[75] Ex. 9 (Gates Direct) at 53-59); Ex. 10 (Gates Rebuttal) at 49-54.

in negotiating an amendment to the ICA under section 7.2.1.1. In addition, Qwest points out that Qwest and Charter are already directly interconnected in Minnesota, so Charter's language appears to be of limited applicability.[76]

93. Charter did not respond to Qwest's assertion that the parties did not discuss this issue during negotiations. Charter has argued that this is a current, real dispute between the parties, it was included in the Petition for Arbitration, and it would be more efficient to address it now than to require an amendment to the ICA. It further argued that Qwest waived any argument that the issue is not subject to arbitration because it addressed the merits in responding to the Petition.[77]

94. The Department recommends that this issue be excluded from the arbitration because Charter did not raise it during negotiations. If the Commission chooses to address the issue, the Department recommends that the Commission leave the sections at issue blank.[78]

C. Applicable Law

95. Each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.[79] During the period from the 135th to the 160th day after the date on which an ILEC receives a request for negotiation, the ILEC or any other party to the negotiation may petition a state commission to arbitrate any open issues. A petitioning party is obligated to provide the state commission all relevant documentation concerning the unresolved issues, the position of the parties with respect to those issues, and any other issue discussed and resolved by the parties.[80] The Commission shall limit its consideration of any petition to the issues set forth in the petition and in the response, if any, that is filed.[81]

C. Decision

96. When Charter filed its Petition for Arbitration, it identified this issue as being an open issue disputed by Qwest.[82] When Qwest responded to the Petition, it addressed Issue 16 on the merits and made no argument that this issue should be excluded from the arbitration because it was not the subject of negotiations between the parties.[83] The ALJ concludes that the Commission has authority to address this issue, because it is identified as a disputed issue in both the Petition and Response.

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[76] Ex. 16 (Easton Direct) at 25-27; Ex. 17 (Easton Rebuttal) at 21-22; Ex. 21 (Linse Direct) at 12-16; Ex. 22 (Linse Rebuttal) at 11-18.
[77] Charter Reply Brief at 51.
[78] Ex. 39 (Fagerlund Direct) at 24-28; Ex. 35 (Fagerlund Summary) at 7.
[79] 47 U.S. § 251(a)(1); 47 C.F.R. § 51.100(a).
[80] 47 U.S.C. § 252(b)(1) & (2).
[81] 47 U.S.C. § 252(b)(4).
[82] Petition for Arbitration, Ex. C at 28.
[83] Qwest Response to Petition for Arbitration, Ex. A at 29-31 (September 2, 2008).

97. At the time it filed the Petition, however, Charter had already agreed to the dispositive language of section 7.2.1.1.[84] That section would permit indirect interconnection through an amendment to the ICA, the negotiation of which would permit details such as traffic segregation, routing, and identification to be addressed. By proposing different language for sections 7.1.2.6 through 7.1.2.9, Charter is seeking to renege on its earlier agreement to section 7.2.1.1, which it should not be permitted to do, particularly when the language Charter is advocating appears to be of limited utility, since the parties are already directly interconnected. The Qwest language for section 7.2.1.1 would permit indirect interconnection after resolution of the technical issues involved in identifying the traffic. The ALJ accordingly recommends that sections 7.1.2.6 through 7.1.2.9 be left blank, as proposed by Qwest and the Department.

III. UNBUNDLED NETWORK ELEMENTS.

Issue 17: Miscellaneous Charges

A. The Dispute

98. Because it is a facilities-based carrier, Charter anticipates that the only UNEs it might need to obtain from Qwest are, in some circumstances, on-premises subloops and network interface devices (NIDs).[85] Section 9.1.12 permits Qwest to apply the miscellaneous charges identified in the ICA, if the ICA identifies those services as being available with the particular UNE in question. The parties dispute how Charter must demonstrate its agreement to pay those charges.

A. Position of the Parties

99. The Qwest language for section 9.1.12 provides that 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." Charter's proposed language provides that miscellaneous services are provided "at CLEC's request, and CLEC must affirmatively agree to the charges for such services in advance." Charter also proposed to add the following language before the list of possible miscellaneous charges in that section: "Depending on the specific circumstances, the items below are Miscellaneous Charges that may apply if requested by CLEC."

100. Charter maintains that its language is necessary to prevent Qwest from unilaterally deciding to impose miscellaneous charges, whether or not Charter has asked for the work to be performed. Charter also objected to Qwest's initial proposal that certain miscellaneous charges be based on market

[84] Petition for Arbitration, Ex. B at 55 (Juxtaposed Master Draft, 8-7-08).
[85] Ex. 1, § 9.1.

rates.[86] Charter has no knowledge that Qwest has ever arbitrarily or without basis imposed miscellaneous charges on Charter without advance agreement.[87]

101. After the Commission's September 18, 2008, Order in Docket No. P-421/AM-06-713, Qwest amended its proposed language for miscellaneous charges to delete the references to "market based rates" and to substitute the recently approved stipulated rates in the generic cost proceeding.[88] Qwest now proposes language specifying in section 9.1.12 that the prices are the rates for miscellaneous charges specified in Exhibit A.

102. Qwest points out that Charter agreed to the following definition of "miscellaneous charges" in section 4.0 of the ICA: "Miscellaneous charges" mean charges that apply for miscellaneous services provided at CLEC's request or based on CLEC's actions that result in miscellaneous services being provided by Qwest, as described in this agreement." Charter's proposal for section 9.1.12 is inconsistent with this agreed-upon language.

103. Qwest strenuously argues that its language does not permit "unilateral" billing, because it permits miscellaneous charges only where the CLEC requests or causes the service to be performed. Much of the agreed-upon language in section 9.1.12 specifies that a CLEC request or specific CLEC conduct is required to justify most miscellaneous services, including (c) optional testing, when CLEC reports trouble and authorizes Qwest to perform tests on CLEC's behalf; (d) additional cooperative acceptance testing, when Qwest performs specific tests requested by CLEC; (e) non-scheduled testing, as requested by CLEC; (f) cancellation of a pending order upon receipt of notice from the CLEC; (g) design change, based on information provided by CLEC or a request from CLEC that results in an engineering review and/or a design change to a pending order; (h) dispatch, based on information provided by CLEC or a request from CLEC; and (j), maintenance of service/trouble isolation, work performed by Qwest when CLEC reports trouble to Qwest and no trouble is found in Qwest facilities.[89]

104. Qwest also maintains that Charter's language is burdensome and unworkable. For example, it may happen, as those described above, that neither Charter nor Qwest knows who will be responsible for the charges until a Qwest technician is dispatched to the site. If Charter reports a problem on Qwest's network, and Qwest dispatches a repair technician, who determines that the problem is actually on the CLEC side of the network, Qwest will assess a miscellaneous charge to the CLEC for the dispatch, because the CLEC "caused"

[86] Ex. 3 (Starkey Direct) at 34-47; Ex. 4 (Webber Rebuttal) at 2-10.
[87] Tr. 1:62.
[88] *In the Matter of Qwest Corporation's Application for Commission Review of TELRIC Rates Pursuant to 47 U.S.C. § 251*, P-421/AM-06-713, Order Approving Stipulation, with Clarification (Sept. 18, 2008).
[89] *See* Ex. 2.

the work to occur, even though it did not explicitly request that the work be done on its behalf or approve the charges in advance.[90]

105. In addition, Qwest objects to Charter's "depending on the circumstances" language as being vague, confusing, and likely to lead to disputes.[91] Charter has agreed to delete this language.[92]

106. The Department initially agreed with Charter that Qwest's language permitting the imposition of miscellaneous charges "based on CLEC's actions" was too broad.[93] In its post-hearing brief, however, the Department stated that it believes the ICA adequately describes when Qwest can collect for miscellaneous charges and that Charter has not shown that the ICA language is insufficient to protect it from unnecessary charges. It recommends as an improvement, but does not insist upon, the addition of the following sentence after the second sentence of section 9.1.12: "Miscellaneous services will be provided for situations where this agreement sets out (i) when the miscellaneous service will be performed and (ii) which type of miscellaneous labor will be involved."[94]

C. Decision

107. Because Charter does not typically purchase UNEs from Qwest, the propriety of miscellaneous charges is not likely to be a recurring issue between them. Charter knows of no circumstances in which Qwest has imposed such charges on Charter without Charter's consent. The ALJ concludes that the issues regarding charges for miscellaneous services will rarely, if ever, arise between these parties.

108. Charter's argument that Qwest's language would permit it to assess charges "unilaterally" is unfounded. The agreed-upon language of section 9.1.12 is fairly specific in describing what CLEC conduct will result in a miscellaneous charge. The ICA identifies which miscellaneous charges may be imposed in connection with each UNE provided.[95] In addition, the rates themselves are specified in Exhibit A. In the everyday course of business, it appears it may not always be possible to obtain advance approval of each and every charge. Qwest's language appears to strike a reasonable balance in requiring either a CLEC request or specific CLEC conduct before a charge is imposed. In addition, the dispute resolution sections of the ICA would be available in the event of a conflict. The ALJ recommends Qwest's language for section 9.1.12 and does not believe the additional sentence recommended by the Department is necessary.

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[90] Ex. 27 (Weinstein Direct) at 2-14; Ex. 28 (Weinstein Rebuttal) at 2-10.
[91] *Id*.
[92] Charter Reply Brief at 56 n. 129.
[93] Ex. 39 (Fagerlund Direct) at 28-35; Ex. 35 (Fagerlund Summary) at 8.
[94] Department Initial Post-Hearing Brief at 20-21.
[95] *See, e.g.*, section 9.3.6.6 (miscellaneous services available with subloop); section 9.5.3, 9.5.5 (miscellaneous services available for NIDs).

IV. ANCILLARY SERVICES

Issue 19: Qwest's Use of White Pages Directory Listing Information

A. The Dispute

109. This dispute concerns the language in section 10.4.2.4. The parties agree that Qwest may not use any segregated listings of Charter's customers for customer retention marketing purposes; they disagree on how to express this agreement in the ICA.

B. Position of the Parties

110. Qwest's language provides that Qwest may use Charter's customer listings in its directory assistance products "and for other lawful purposes," except that nonpublished or nonlisted listings shall not be used for any marketing purposes. In addition, Qwest would agree not to market to Charter's customers "based on segregation of CLEC's Listings."

111. Charter maintains that Qwest's language would permit Qwest to use Charter's customer listings (other than nonpublished or nonlisted listings) for marketing purposes in ways other than through segregation of listings. It also maintains that Qwest's language is vague in that it does not define what "other lawful purposes" are. Charter proposes language providing that "CLEC's Listings supplied to Qwest by CLEC shall not be used by Qwest for marketing purposes."[96]

112. Qwest argues that it cannot and does not use directory listings for marketing purposes and that Charter's language would preclude it from lawful marketing of its directory assistance products to DA providers and third-party directory publishers.[97]

113. The Department maintains that directory listings are widely published and available to the public in non-segregated form. The Department does not believe that Charter's concerns about Qwest improperly using this material are well founded. It believes that both proposals accomplish the objective of preventing Qwest from using directory listings provided by Charter to market to Charter customers. It recommends the following language (in relevant part) for section 10.4.2.4, to which Charter has agreed:

> . . . CLEC's Listings, as provided by CLEC to Qwest, shall not be used by Qwest for marketing purposes. CLEC's Listings supplied to Qwest by CLEC and marked as nonpublished or nonlisted Listings shall not be used for marketing purposes. . . . Qwest shall be permitted to use its non-segregated directory assistance

[96] Ex. 3 (Starkey Direct) at 48-53; Ex. 4 (Webber Rebuttal) at 44-53.
[97] Ex. 27 (Weinstein Direct) at 14-25; Ex. 28 (Weinstein Rebuttal) at 10-17.

database for marketing purposes subject to applicable law. Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings.[98]

114. The first sentence above ("as provided by CLEC to Qwest") is intended to refer to segregated listing information provided for directory listing purposes. Qwest maintains that without clarification, the language of the first sentence is still unclear and may limit lawful activities. Qwest would agree to the language proposed by the Department if "as provided by CLEC to Qwest" is understood to mean CLEC's segregated listings.[99]

C. Applicable Law

115. Qwest is obligated under 47 U.S.C. § 251(b)(3) to provide nondiscriminatory access to operator services, directory assistance, and directory listings. Qwest accordingly includes Charter's end user customers in its directory listings products. In these products, customer listings are integrated and not identified by carrier, so the listings cannot be used to target any carrier's customers. In addition, Qwest must provide directory assistance listings to competing directory assistance (DA) providers under 47 U.S.C. § 251(b)(3). Qwest is not entitled, however, to use the information Charter provides for directory listing purposes as the basis for its own "winback" marketing programs.[100]

116. Qwest, and all other telecommunications carriers, are required to provide their own subscriber listing information to directory publishers; in the process, Qwest may provide CLEC listings as well, but it is not required to do so.[101]

D. Decision

117. The ALJ agrees that the meaning of the first sentence of the Department's proposal ("as provided by CLEC to Qwest") is not clear. The ALJ recommends the following language for section 10.4.2.4, which would capture more specifically the different permitted uses for segregated and non-segregated customer information:

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[98] Ex. 7 at 5 (with minor changes agreed to by Charter, Tr. 1:54-55).
[99] Qwest Initial Post-Hearing Brief at 26.
[100] *See* 47 U.S.C. § 222(b); c*f. In the Matter of Bright House Networks, LLC, v. Verizon California, Inc.*, File No. EB-08-MD-002, Memorandum Opinion and Order, 23 FCC Rcd 10704 (June 23, 2008) (Verizon may not use proprietary customer information provided by another carrier for number portability as the basis for Verizon's own customer retention marketing).
[101] *See* 47 U.S.C. § 222(e); *In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934*, as Amended, CC Docket No. 96-115; CC Docket No. 96-98; CC Docket No. 99-273, Third Report and Order ¶ 8 (Sept. 9, 1999).

> . . . Qwest shall not use CLEC's segregated Listings provided by CLEC to Qwest for inclusion in Directory Assistance Service or Directory Assistance List Service, or CLEC's Listings marked as nonpublished or nonlisted Listings, for marketing purposes. . . . Qwest shall be permitted to use its non-segregated directory assistance database for marketing purposes subject to applicable law.

Issue 20: Release of Charter Listing Information

A. The Dispute

118. This dispute in section 10.4.2.5 concerns the related issue of when Qwest must obtain Charter's permission to use Charter's customer listings for permissible or lawful purposes. As noted above, Qwest is required to provide its directory assistance database to DA providers. It is not required to provide CLEC customer listings to directory publishers, but it does so if the CLEC grants written permission.

B. Position of the Parties

119. Qwest's language for section 10.4.2.5 would require Charter to provide written authorization before Qwest provides any of Charter's listing information to a directory publisher or third party. Qwest's language would not require prior authorization before Qwest provides Charter's listing information to a DA provider. In addition, Qwest's language would provide that Listings shall not be provided or sold in such a manner as to segregate end user customers by carrier.[102]

120. Qwest implements this language by having CLECs complete a New Customer Questionnaire, in which CLECs are given the option either to have Qwest automatically provide CLEC listings to directory publishers or other third parties to which Qwest supplies its own listings, or to restrict the provision of CLEC information to others unless Qwest receives express authorization from the publisher or third party. To date, Charter has always elected to have Qwest automatically provide its listings to directory publishers.[103]

121. Charter would delete the requirement that it provide prior written authorization before its information is provided to a directory publisher or third party and would replace it with the sentence "Qwest will not release CLEC's End User Customer Listings except to the extent required by Applicable Law."[104]

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[102] Ex. 27 (Weinstein Direct) at 25-31; Ex. 28 (Weinstein Rebuttal) at 17-21.
[103] Ex. 27 (Weinstein Direct) at 26.
[104] This is the language contained in Ex. 2 and in Charter's testimony. In Charter's Initial Brief at 50, however, Charter quoted its proposed language as "Qwest will not release CLEC's End User Customer Listings without CLEC's prior written consent and only to the extent required by Applicable Law." The source of this language is unclear.

Because Qwest is not ever required to provide CLEC information to directory publishers, the effect of this change would be that Qwest is never permitted to provide Charter listings to directory publishers or third parties. It is not clear whether this is the result that Charter intends. Charter would also modify the sentence concerning provision of information to DA providers by adding "provided that Qwest does so in accordance with Applicable Law." Finally, Charter would add to the sentence precluding the provision or sale of listing information on a segregated basis the further limitation that its information "shall not be provided by Qwest for marketing purposes to third parties."[105]

122. Charter maintains that by establishing a general rule that its customer listings will not be released "except to the extent required by law," its language results in clearer, more definitive contract language. It contends Qwest's language is redundant and duplicative and that Qwest should not have any objection to complying with applicable law. Finally, Charter contends that Qwest should not be permitted to provide its customer information to third parties who may also use that information for marketing purposes.

123. Qwest argues that its process would allow Charter to determine which directory publishers obtain Charter's listings. Qwest also maintains, as it did with regard to Issue 19, that the limitation on provision of CLEC listings for "marketing purposes" is inconsistent with its obligation to provide CLEC listings in its directory assistance database to competing DA providers. Qwest maintains that its contract language is more specific than Charter's.

124. The Department recommends that if Charter really has no desire to have Qwest provide its listings to any directory publishers under any circumstances, Charter's language should be used, except for the clause "shall not be provided by Qwest for marketing purposes to third parties."[106]

C. Decision

125. It appears to the ALJ that the language recommended by both parties is consistent with the law. The ALJ does not believe Charter's language is more clear or definitive, because it does not specify what should happen before the listings are released, in the manner that Qwest's language does. It leaves it up to the parties to determine what the "extent required by law" is on a case-by-case basis. Moreover, it is unclear whether the clause "shall not be provided by Qwest for marketing purposes to third parties" means Qwest shall not transfer the listings for its own marketing purposes, or Qwest shall not transfer listings when a third party intends to use listings for marketing purposes. Qwest's language allows Charter to opt into or out of any transfer to a directory publisher, in language that is more concrete than Charter's. The ALJ recommends that Qwest's language be used for section 10.4.2.5.

[105] Ex. 3 (Starkey Direct) at 54-57; Ex. 4 (Webber Rebuttal) at 54-59.
[106] Ex. 7 (Bahn Summary) at 5-6.

Issue 22: Charges for Privacy Listings

A. The Dispute

126. "Non-published" listings are listings that the end user has requested not to be included in a white pages directory and not to be available in directory assistance; "non-listed" listings are those that the end user has requested not be included in a white pages directory but are to be included in directory assistance. The issue is whether the agreement should include language that permits Qwest to assess Charter a charge for the inclusion in its database of Charter customers who choose to have these privacy listings. The disputed sections of the agreement are 10.4.2.1.2 (Qwest's provision authorizing a charge for Charter's Privacy Listing customers) and 10.4.3.4. (Charter's provision precluding Qwest from assessing any charge for inclusion of these listings). The parties appear to agree that premium/privacy listings need not be priced at a forward-looking TELRIC rate.

B. Position of the Parties

127. For section 10.4.3.4, Charter proposes language providing that CLEC has no obligation to provide Qwest any directory listing information for these customers, and it would preclude Qwest from assessing any charge upon CLEC for "providing, maintaining, storing, or otherwise processing information" related to these listings. Charter opposes Qwest's proposed language in section 10.4.2.1.2, which would authorize a charge for privacy listings. Charter's position is that it requires little activity on Qwest's part to designate Charter customers as non-listed or non-published. Likewise, Qwest incurs few, if any, costs associated by designating Charter customers as privacy listings.[107]

128. In the first sentence of section 10.4.3.4, which is not disputed, Charter proposes language that expressly states that Charter is under no obligation to provide Qwest directory listing information related to its customers that have requested non-list or non-publish status within the directory. While Qwest believes this language is redundant and unnecessary, it does not oppose its inclusion.

129. Qwest proposes language in section 10.4.2.1.2 that would specifically authorize it to assess a charge to Charter for the inclusion of Charter's privacy listings in Qwest's database. The charge is the tariff rate minus the wholesale discount (17.66%). It is Qwest's position that these charges were approved by the Commission in a § 271 Docket and that it has uniformly assessed such charges on other CLECs as well as its own end users. In addition, Qwest asserts that all LECs charge for privacy listings. Qwest maintains that if Charter's proposed language were used, Charter would receive a service that all others pay for but Charter would not. In addition, Charter's

[107] Ex. 3 (Starkey Direct) at 62-67; Ex. 4 (Webber Rebuttal) at 64-74.

provision of white pages directory listings to Qwest is completely voluntary. Qwest contends that if Charter wishes to avoid paying a privacy listing charge, it may simply refrain from submitting a specific customer listing to Qwest. Lastly, Qwest points out that Charter charges its customers a higher retail rate for privacy listings than does Qwest. Qwest proposes to strike its reference to "market based" pricing because it contends the rate is Commission-approved, and the "market based" language is not necessary.[108]

130. Charter disputes Qwest's claim that the privacy listing rate is either Commission-approved or market-based. It is Charter's position that the Qwest 271 docket case does not necessarily control the rates, terms or conditions to be set in arbitrations.[109]

131. The Department believes that Qwest's prices to Charter for privacy listings are likely well above Qwest's costs in providing the service. The Department's position is that any rate charged by Qwest should be fair and reasonable. In order to determine whether a price is fair and reasonable, one must analyze the relationship of price to cost. Where the price of a service greatly exceeds the cost, the price is neither fair nor reasonable. The Department favors investigating the price of privacy listings in the context of a generic docket to be opened after the Commission makes a decision in the *Wholesale Rates* case, rather than in the present case.[110] The Department recommends that the Commission adopt the language proposed by Qwest in section 10.4.2.1.2 and include only the first sentence proposed by Charter in section 10.4.3.4, referenced above in paragraph 128.[111]

C. Decision

132. The ALJ recommends the adoption of Qwest's language in section 10.4.2.1.2, which permits the current practice of assessing CLECs for privacy listings, and the adoption of the first sentence of Charter's proposal for section 10.4.3.4. A charge for privacy listings appears to be industry-wide. Charter's logic in opposing the charge does not hold up to scrutiny; on the one hand, it argues that it costs Qwest little or nothing to provide the privacy listing service, yet Charter, who simply passes its customer privacy listing to Qwest, charges its end user customers more than Qwest does.

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[108] Ex. 27 (Weinstein Direct) at 36-41; Ex. 28 (Weinstein Rebuttal) at 22-27.
[109] *See, e.g.*, *AT&T Arbitration Order* at 33. Charter has also cited to a Commission decision for the proposition that the Commission has rejected a market-based rate for directory listings. That case, however, involved the proposed rate for a primary listing, not a premium/privacy listing. *See In the Matter of the Petition of MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services for Arbitration of an Interconnection Agreement with Embarq Minnesota, Inc.*, Pursuant to 47 U.S.C. § 252(b), Docket No. P-430, 5321/M-07-611, Order Adopting Interconnection Agreement with Modifications and Establishing Effective Date (Feb. 6, 2008).
[110] *In the Matter of a Proceeding to Investigate the Wholesale Rates Charged by Qwest*, P421/CI-06-1996 (*Wholesale Rates Case*).
[111] Ex. 39 (Fagerlund Direct) at 37-42; Ex. 35 (Fagerlund Summary) at 9.

133. As to the reasonableness of the privacy listings rate charged by Qwest, the ALJ agrees with Charter that the Commission has not approved or set the privacy listing rates in this case.[112] Charter may challenge the pricing of the privacy listings in a generic case as recommended by the Department, pending the outcome of the *Wholesale Rates* case.

Issue 23: Directory Listings in White and Yellow Pages

A. The Dispute

134. The parties agree that Qwest must treat Charter's yellow pages and white pages listings the same as Qwest treats its own listings when they are provided to directory publishers. Charter and Qwest have each provided proposed contract language. The issue is which party's language more accurately reflects Qwest's directory listing obligation. The disputed sections of the agreement are 10.4.5 and 15.1.

B. Position of the Parties

135. Charter recognizes the current practice is not discriminatory because both Charter and Qwest end users are treated identically. Qwest commingles its end users with Charter's end users without identifying the carrier, and it treats Charter's listings as it treats its own listings for inclusion in the white pages and yellow pages directories, without distinction. Charter's concern, however, is with Qwest's proposed language for section 15, which it believes does not specifically require the current practice. Charter is also concerned with Qwest's only specific reference to yellow pages. It states, "yellow pages Listings…will be the subject of negotiations between CLEC and directory publishers."[113] Charter's initial proposed language would have required Qwest to negotiate and amend contracts with directory publishers 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." Charter has since withdrawn the above-quoted sentence.[114]

136. Qwest objected to Charter's "negotiate and amend" language quoted above as not required by law. Qwest objected to Charter's other proposed language as unnecessary and redundant given its practice of treating Qwest and Charter end users alike. Qwest does not dispute its obligation to provide non-discriminatory access to its white pages and yellow pages directory

[112] In the cited § 271 Docket, the ALJs recommended that the Commission find that Qwest's rate for premium and privacy listings was set in compliance with § 271, but the matter was resolved without a final decision by the Commission. Conclusions regarding the propriety of the rate were neither adopted nor rejected. *See In the Matter of a Commission Investigation Into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist Items 3, 7, 8, 9, 10, and 12*, OAH Docket No. 12-2500-14485-2, PUC Docket No. P-421/C1-01-1370, ALJ Findings of Fact, Conclusions of Law and Recommendations (May 8, 2002).
[113] Ex. 3 (Starkey Direct) at 68-75; Ex. 4 (Webber Rebuttal) at 75-79.
[114] Charter Reply Brief at 73.

listings when requested by a directory publisher. Qwest's position is that section 10.4, in its entirety, compels Qwest to treat Charter listings in the same manner as Qwest listings. Qwest believes it is fully compliant with its obligation to Charter by not treating Charter end users any differently than its own end users and by providing Charter's directory listings to directory publishers, white or yellow, in an identical fashion as Qwest end users.[115]

137. The Department concurs that Qwest's current practice of providing Charter and its own listings to publishers of white pages and yellow pages, described above, is not discriminatory. To the extent that Charter can show that its end users are not being treated identically as Qwest end users, the Commission has authority to take action to correct any discriminatory act. The Department agrees with Qwest that the required "negotiate and amend" provision, quoted in paragraph 131 above, is beyond what Qwest is legally required to do. Inclusion of this language is apparently for the purpose of allowing Charter an opportunity to earn revenue from selling its directory listings to publishers. Qwest is not involved in the relationship between the yellow pages publishers and its own end users, nor should it be required to be involved in the relationship between publishers and Charter end users. The Department acknowledges an ambiguity in the sections contained in 10.4.2 because of the specific reference to white pages but not "yellow pages."[116]

C. Decision

138. The ALJ recommends that section 10.4.5 be left blank and that Qwest's language be adopted for section 15, with the additional language taken from the first phrase of Charter's proposed language for section 15: "Qwest shall provide CLEC with directory listing functions (that is, inclusion of CLEC numbers in printed white and yellow pages directories) to the same extent that Qwest provides its own End Users with such listing functions." The ALJ understands that it is Qwest's position that specific reference to "yellow pages" in section 10.4.5 is not necessary because, for all relevant purposes, Qwest treats Charter end users identically to its own end users with regard to directory publishers, be they publishers of yellow pages or white pages. While the ALJ's recommended language may add some redundancy to the agreement, the additional language makes up for the absence of any reference to "yellow pages" terminology in section 10.4.

Dated: March 30, 2009

[115] Ex. 27 (Weinstein Direct) at 42-49; Ex. 28 (Weinstein Rebuttal) at 27-34.
[116] Ex. 39 (Fagerlund Direct) at 42-45; Ex. 35 (Fagerlund Summary) at 9.

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

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NOTICE

Pursuant to Minn. R. 7812.1700, subp. 20, any party may file exceptions to the recommended decision and requests for oral argument with the Commission no later than ten days after the Arbitrator issues this recommended decision.