

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

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

Docket No. UT-083041  
  
QWEST’S ANSWER TO CHARTER’S  
PETITION FOR COMMISSION REVIEW  
OF ARBITRATOR’S REPORT AND  
DECISION, ORDER 07

**I. INTRODUCTION**

1 Pursuant to the schedule established in this matter, Qwest Corporation (“Qwest”) hereby files its  
answer to Charter’s petition for Commission review of the Arbitrator’s Report and Decision.<sup>1</sup>

2 Charter’s petition challenges a number of the Arbitrator’s rulings, and Qwest will respond to  
each of those challenges. Charter also recites the parties’ agreements on certain issues. Specifi-  
cally, Issue 10 at paragraphs 13 and 14; Issue 11 at paragraphs 15 and 16; Issue 19 at paragraphs  
51 and 52; Issue 23 at paragraph 54 (other aspects of Issue 23 remain in dispute and are briefed  
and responded to herein). With regard to the recitations of the parties’ agreements, Qwest  
confirms that Charter’s representations are accurate. In addition, the parties reached agreement

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<sup>1</sup> Referred to herein as “Arbitrator’s Decision” and cited as “Order 07”

on Issue 16. Qwest includes the agreement on that issue in this answer brief.

### **Issue 5 – Limitation on Liability for Directory Services**

- 3 At paragraphs 2-12 of its petition for review, Charter challenges the Arbitrator’s recommendation with regard to Section 10.4.2.6 – Limitation of Liability for Directory Services. The Arbitrator ruled, correctly in Qwest’s view, that Qwest’s tariffed limitation of liability should apply. Order 07, ¶ 41. This ruling is consistent with all of Qwest’s other ICAs in the state. It is also consistent with how Charter limits its own liability to its own end users.
- 4 Charter suggests that the Arbitrator’s decision on Section 5.8 (a decision that Qwest has sought review of) is inconsistent with decision concerning the inclusion of limitation of liability language related to directory listings. Charter argues that Qwest’s language suffers from the same flaw as Qwest’s language for Section 5.8, concerning general limitations of liability. Charter is incorrect. The Arbitrator considered the differences in the potential for damages covered under Section 5.8 and Section 10.4.2.6, and presented a reasoned analysis for different outcomes on both issues. While Qwest believes that the Arbitrator’s recommendation on Section 5.8 should be reversed for the reasons set forth in Qwest’s petition, that ruling, even if not reversed, does not mandate a change to the ruling on Section 10.4.2.6. As the Arbitrator observed, there is no need for an “actual and direct damages” provision in connection with directory listings because of the difficulty in calculating such damages and likelihood that Charter would not be the injured party. Order 07, ¶ 41.
- 5 It is important to ensure consistency on this issue – in other words, Qwest’s obligation to its own customers should be consistent with its obligations to CLECs. In this way Qwest’s incentives to treat all listings in the same manner are preserved. If Qwest’s potential liability to Charter is greater than it is to other CLECs, then Charter will be receiving an undue advantage – one which is unsupported in the record by any facts about whether Qwest has failed to adequately perform its listing obligations.

6 Charter’s argument, that its subscribers might be damaged by an error in the directory listings (petition at paragraphs 8-10), does nothing to support Charter’s position. First, those customers are not parties to the ICA and cannot claim rights under it. Second, Charter limits its liability to its own subscribers for errors in listings. Third, Charter had utterly failed to demonstrate why its subscribers should have a right to claim damages that is superior to the rights of Qwest’s end users, whose rights are limited by Qwest’s tariffs.

7 On this issue, Qwest is willing to accept Charter’s proposal in paragraph 11 as to how Section 10.4.2.6 could be clarified, with the caveat that Qwest’s tariff section numbers could change, so the ICA should have a clause in it that states “or other applicable sections regarding limitation of liability for Listings.”

**Issue Nos. 13 – 15: Direct Trunked Transport and Bill and Keep**

8 Issue Nos. 13, 14 and 15 concern the Parties’ proposed reciprocal compensation arrangements for the transport and termination of telecommunications traffic under Section 251(b)(5) of the Act. Both Charter and Qwest propose bill and keep arrangements. Qwest proposes bill and keep for everything except direct trunked transport.<sup>2</sup> Charter proposes bill and keep for all transport and termination, including direct trunked transport.

9 Qwest’s proposal is more equitable because it takes into account the fact that Charter has the ability to shift transport costs to Qwest by selecting a point of interconnection (“POI”) that is closer to Charter’s switch. (Ex. WRE-2RT, p. 12). The Arbitrator found that Charter has the right to choose the POI and that Charter’s choice could increase Qwest’s transport costs. Order 07, ¶¶99-100. Accordingly, the Arbitrator found Qwest’s bill and keep proposal to be more appropriate because it prevents Charter from shifting additional transport costs to Qwest. Order 07, ¶111. The Arbitrator recognized that Qwest’s proposal is more in line with the FCC’s

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<sup>2</sup> Under Qwest’s proposal, the cost of direct trunked transport is split based on relative use. Linse, Tr. 307 line 20 – 308 line 8; Qwest Proposed Sections 7.3.2.2 and 7.3.2.2.1, 2/11 Joint Revised Issues List, pp. 25-26. Thus, Charter pays Qwest for direct trunked transport to the extent that it is used to carry calls placed by Charter’s customers.

rulings regarding a competitor's obligation to compensate an ILEC for interconnection costs. *Id.* The same conclusion was reached by an Arbitrator in the Minnesota arbitration between Qwest and Charter.

10 In its petition for review, Charter makes four general arguments. First, Charter erroneously asserts that the Arbitrator's Decision conflicts with the FCC's single POI per LATA rule. Second, Charter incorrectly claims that there was no evidence to support Qwest's position that it provides substantially more transport than Charter. Third, Charter argues that the Ninth Circuit and the Commission have found bill and keep to be an efficient method for assigning cost responsibility. Finally, Charter erroneously claims that the Arbitrator's Decision conflicts with federal policy encouraging the deployment of efficient networks.

11 Charter's arguments are wrong. Qwest's bill and keep proposal fully complies with the FCC's single POI per LATA rule and other rulings. Indeed, Qwest's bill and keep proposal is more consistent with federal law than Charter's proposal. Furthermore, the Arbitrator's Decision correctly finds that Qwest's bill and keep proposal is more equitable because Qwest provides substantially more transport than Charter. And Qwest's proposal is a type of bill and keep recognized by the FCC and as such complies with Ninth Circuit and Commission precedent. Finally, Qwest's bill and keep proposal furthers the federal policy encouraging the deployment of efficient networks. Thus, the Commission should adopt the Arbitrator's Decision on Issue Nos. 13 to 15.

### **The Arbitrator's Report Does Not Conflict With the FCC's Single POI per LATA Rule**

12 Charter and Qwest agree that Charter may interconnect with Qwest at any technically feasible point within Qwest's network and that Charter may choose to have only a single POI within each LATA. However, that is where the agreement ends. In its petition for review, Charter erroneously contends that this "right to a single POI" means that it does not have to compensate

Qwest for additional transport costs that Qwest incurs as a result of Charter's choice of a POI. The Arbitrator correctly rejected Charter's contention and held that Charter's choice of a single POI has consequences, one of which is that Charter may be required to compensate Qwest for additional transport costs that result from Charter's choice. Order 07, ¶99.

13 Charter argues that requiring it to pay Qwest's increased transport costs will thwart the purpose of the single POI per LATA rule and cites paragraph 209 of the FCC's *Local Competition Order* ostensibly in support. (Charter Petition, ¶22) However, the FCC has never held that the single POI per LATA rule is intended to shift transport costs to the ILEC. Quite the contrary, the FCC has recognized that a CLEC's choice of a POI may very well lead to increased transport costs for the CLEC. Indeed, in paragraph 209 of the *Local Competition Order* cited by Charter, the FCC stated that "because competitive carriers must usually compensate incumbent LECs for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."<sup>3</sup> Order 07, ¶111.

14 Charter's choice of a single POI in a LATA raises Qwest's transport costs in two ways. First, it raises Qwest's costs to deliver Qwest local traffic to Charter customers. To deliver its local traffic to Charter customers, Qwest must transport the traffic outside the originating local calling area to a POI with Charter in a different local calling area. Second, Charter's choice of a POI raises Qwest's cost to deliver Charter local traffic to Qwest customers. To deliver Charter originated traffic to Qwest customers, Qwest must transport Charter traffic from the POI in a distant local calling area to the local calling area in which the call is placed and received. In both cases, Qwest transports traffic outside of local calling area, something it would not otherwise have to do but for Charter's choice of a single POI in the LATA. Order 07, ¶99.

15 The Arbitrator's Decision does not require Charter to compensate Qwest for all of the increased

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<sup>3</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶209 (Rel. Aug. 8, 1996) ("*Local Competition Order*"), *subsequent history omitted*.

transport costs that Qwest incurs as a result of Charter's choice of a single POI. Under Qwest's proposed language, Charter pays for direct trunked transport to the extent that the direct trunked transport is used to carry Charter traffic *from the POI* to Qwest customers.<sup>4</sup> Under Qwest's proposed language, Charter does not compensate Qwest for direct trunked transport to the extent that it is used to deliver Qwest telecommunications traffic to Charter for termination.

16 Charter glosses over this important fact concerning compensation for direct trunked transport in its petition for review. Charter asserts that it has a right to choose a POI on Qwest's network and that this choice will "dictate each carrier's respective obligations concerning the transport of traffic *to, and from,* the POI." Charter Petition, ¶23. According to Charter, each carrier is responsible for carrying traffic to and from the POI and this necessarily "requires the carriage of traffic *to and from* that location, at some cost." *Id.* Charter claims that it cannot be forced to deliver traffic at "less convenient or efficient interconnection points." *Id.*

17 However, the issue here is not whether the choice of the single POI will affect transport costs to and from the POI. The issue here is who has responsibility for the additional transport costs. Under the FCC's rules, Charter is responsible for the "additional costs" Qwest incurs to transport Charter's telecommunications traffic *from the POI* to the end office switch serving the called party. The right to choose a single POI in the LATA does not excuse Charter of its obligation to compensate Qwest for the "additional costs" Qwest incurs. Indeed, the FCC has recognized that Charter must take these costs into account so that it chooses an interconnection point that is efficient.<sup>5</sup>

18 Charter's bill and keep proposal attempts to shift transport costs to Qwest. Under Charter's bill and keep proposal, Qwest does not recover the additional costs it incurs to provide direct trunked

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<sup>4</sup> This concept is implemented through what is known as a "relative use factor" or "RUF." Linse, Tr. 307 line 20 - 308 line 8.

<sup>5</sup> *Local Competition Order*, ¶209.

transport to carry Charter's traffic. The Arbitrator correctly chose Qwest's bill and keep proposal because it is more equitable than the Charter proposal.

**The Arbitrator's Decision Correctly Finds That Qwest Provides More Transport Than Charter**

- 19 The Arbitrator correctly found that Qwest provides substantially more "transport" than does Charter. Under the FCC's rules "transport" is defined to be "the transmission and any necessary tandem switching of telecommunications traffic...from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party..." 47 C.F.R. §51.701(c). The evidence showed that Qwest presently provides transport to over 45 end office switches from the Yakima POI while Charter provides transport from the POI to just one switch. Order 07, ¶110; Linse, PL-7RT, pp. 9-10.
- 20 Charter argues that because it does not serve customers in Spokane, the Arbitrator's Decision errs in accepting Qwest's evidence that it provides transport to over 45 end offices in Washington. Charter Petition, ¶27. According to Charter, Qwest would provide direct trunked transport to Charter for only a small portion of the 45 switches. *Id.* Charter is wrong for two reasons. First, there is nothing in the ICA that prohibits Charter from serving customers in Spokane. Second, even if the number of end office switches is smaller than 45, it remains the case that Qwest provides more transport than Charter since Charter provides transport only to a single switch. Thus, Charter's argument questions only the degree to which Qwest provides more transport, not the fact that Qwest provides more transport.
- 21 In Washington, Charter has chosen to deploy a network using a single switch. Charter determined that it was to its advantage to reduce its switching costs by deploying a single switch even if that meant that it would incur larger loop costs. Easton, Tr. 261 line 20 – 262 line 3. As a result, Charter provides very little transport that is recoverable in reciprocal compensation. In contrast, a much greater portion of the costs Qwest incurs to deliver a call consists of transport

that is recoverable in reciprocal compensation. The Arbitrator recognized that Qwest provides more transport and accordingly concluded that Qwest's proposal to exclude direct trunked transport from bill and keep was more appropriate. Order 07, ¶¶110-111.

22 Moreover, Charter has the ability to shift transport costs to Qwest by selecting a POI that is closer to Charter's switch. Ex. WRE-2RT, p. 12. For example, at the time of hearing in Washington, Charter interconnected with Qwest in Yakima, approximately 71.4 miles from Charter's switch in Kennewick. At that time, as an example, Qwest provided Charter with approximately 167 miles of direct trunked transport from Yakima to Qwest's Spokane Tandem. However, at the time of hearing, Charter had selected a new point of interconnection between its Kennewick switch and Qwest's Pasco end office switch. Exhibit TJG-6C. The transport that Charter will provide from the new POI near Pasco to its switch in Kennewick is less than five miles. Linse, Tr. 266-67. The transport that Qwest will provide from the new POI to the communities in which Charter presently has customers is much greater (45 miles to Qwest's end office in Waitsburg, 37.9 miles to the Qwest end office in Walla Walla, and over 70 miles to the Qwest tandem in Yakima). Linse, Tr. 267.

23 In paragraphs 28 through 32 of its petition for review, Charter attempts to argue that the Arbitrator failed to apply what Charter calls the "mutual cost recovery standard" under Section 252(d)(2)(A)(i) of the Act. According to Charter Section 252(d)(2)(A)(i) of the Act requires "that each party be permitted to recover their entire costs of delivering calls." Charter Petition, ¶32. Charter asserts that its "transport" costs are equivalent to Qwest's transport costs because the distance Charter "transmits" a call is about the same distance that Qwest transports a call. Charter Petition, ¶¶30-31.

24 There are two fallacies in Charter's argument. First, Charter has not cited the correct legal standard. Section 252(d)(2)(A)(i) of the Act must be read together with Section 252(d)(2)(A)(ii) of the Act. Section 252(d)(2)(A)(ii) provides that "charges for transport and termination of



traffic” shall be based on cost determined “on the basis of a reasonable approximation of the *additional costs* of terminating” calls.<sup>6</sup> Under this standard, Charter is not entitled to recover loop costs through reciprocal compensation.<sup>7</sup> In short, Section 252(d)(2)(A)(i) does not provide that each party must recover the *entire cost* of delivering calls through reciprocal compensation as Charter claims.

25 Second, Charter’s transport costs are not equivalent to Qwest’s transport costs. Qwest provides substantially more “transport” as this term is defined under the FCC’s rules than does Charter. For example, consider the transport that Charter will provide from its new point of interconnection near Pasco to its switch in Kennewick. The distance from that POI to Charter’s switch in Kennewick is less than five miles. Linse, Tr. 266. In contrast, the transport that Qwest provides from this POI to its Waitsburg end office is 45 miles. The transport that Qwest provides from the POI to its Walla Walla switch is 37.9 miles. And the transport that Qwest will provide from this POI to its Yakima tandem is over 70 miles. Linse, Tr. 267.

26 The transmission paths Charter provides from its switch in Kennewick to Waitsburg, Walla Walla and Yakima are considered local loops under the FCC’s rules. Charter is attempting to equate Qwest’s transport costs that are recoverable in reciprocal compensation with Charter’s loop costs that are not. Under the Act, the costs that are recoverable in reciprocal compensation are the “additional costs” of terminating calls.<sup>8</sup> Loop costs are not recoverable in reciprocal compensation because the FCC has determined that they are not “additional costs” of terminating calls.<sup>9</sup> The costs of loops “do not vary in proportion to the number of calls

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<sup>6</sup> 47 U.S.C. §252(d)(2)(A)(ii).

<sup>7</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶1057 (Rel. Aug. 8, 1996) (“*Local Competition Order*”); Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶¶13-14, n. 40 (Rel. March 3, 2005) (“*Intercarrier Compensation FNPRM*”) (“The [FCC] permitted carriers to receive compensation only for “the traffic-sensitive components of local switching, and not for local loop costs, which it concluded were not considered traffic sensitive.”).

<sup>8</sup> 47 U.S.C. § 252d(2)(A)(ii).

<sup>9</sup> *Local Competition Order*, ¶1057.

terminated over these facilities.”<sup>10</sup>

27 Charter’s decision to use long loops involved a trade-off between switching costs and loop costs. Charter uses a switch located in Kennewick to serve its customers in Washington and gains a cost advantage by using just a single switch. The decision to use a single switch means that Charter’s loops are commensurately longer. Charter determined that the costs and other benefits of using just a single switch outweighed the costs of longer loops. Charter made the decision to deploy a single switch with full knowledge that costs of longer loops would not be recoverable in reciprocal compensation.

28 In essence, Charter is asking the Commission to adopt a bill and keep proposal that allows it to setoff loop costs against the additional costs Qwest incurs to transport Charter calls. If the parties were to pay each other reciprocal compensation (i.e., no bill and keep), Charter would not be entitled to charge Qwest for Charter’s loop costs. The same outcome should follow under bill and keep. Charter should not be permitted to offset its loop costs which are not recoverable in reciprocal compensation against Qwest’s transport costs which are recoverable in reciprocal compensation.

29 The Arbitrator reached the same conclusion as an Arbitrator in the Minnesota interconnection arbitration between Qwest and Charter. Both Arbitrators came to the conclusion that Qwest’s proposed bill and keep proposal was more equitable. In the Minnesota arbitration, the Arbitrator stated the following:

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 force Qwest to forego compensation for its more substantial transport costs. Minnesota Arbitrator’s Report, Attachment A to Qwest’s Petition for Review, ¶89.

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<sup>10</sup> *Id.*

**The Qwest Bill and Keep Proposal Adopted in the Arbitrator's Decision Is  
Consistent with Ninth Circuit and Commission Precedent**

- 30 Charter argues that the Ninth Circuit and the Commission have affirmed that bill and keep is an efficient method for assigning cost responsibility. According to Charter, the Arbitrator's Decision does not reconcile the record evidence that bill and keep for the transport and termination of all traffic would be efficient and equitable. Charter Petition, ¶133. Charter is wrong and its arguments do not justify adoption of the Charter bill and keep proposal.
- 31 First, Qwest's proposal is a bill and keep proposal. Under Qwest's proposal, neither party would bill the other for usage-based charges. Easton, Tr. 237 lines 1-19. The only charges under Qwest's proposal are flat-rated charges for direct trunked transport. Under Qwest's bill and keep proposal, the parties avoid the administrative costs to bill minutes of use. Billing the flat-rated charges for direct trunked transport is not difficult and Charter provided no evidence that billing for direct trunked transport was in any way burdensome.
- 32 Second, the FCC expressly recognized that Qwest's bill and keep proposal is permissible in paragraph 1096 of its *Local Competition Order* where it stated that "a bill-and-keep approach for termination of traffic does not, however, preclude a positive flat-rated charge for transport of traffic between carriers' networks."<sup>11</sup> For this reason, Charter's reliance on *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262 (9<sup>th</sup> Cir. 2000) is misplaced. *MCI* addresses bill and keep proposals generally and holds that they are permissible. *MCI* does not hold or even suggest that Qwest's bill and keep proposal is impermissible.
- 33 Third, the Arbitrator's Decision finds that Qwest's proposal is more equitable because Qwest provides more "transport" as this term is defined by the FCC than does Charter. Qwest's bill and keep proposal prevents Charter and other carriers who might opt into the Charter ICA from shifting transport costs to Qwest through selection of the POI. On this point, Charter takes

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<sup>11</sup> *Local Competition Order*, ¶1096.

testimony given by Qwest witness Bill Easton completely out of context. Mr. Easton did not testify that Charter's bill and keep proposal was appropriate. He testified that Charter's proposal was not appropriate and should be rejected because it does not recognize that Qwest provides more transport than does Charter even when the traffic in each direction is in balance. Easton: Tr. 245 lines 9-14; Tr. 260 line 12 – 260 line 19. It is not appropriate in such circumstances to include direct trunked transport in bill and keep because it permits Charter to shift transport costs to Qwest and effectively deprives Qwest of compensation for additional transport costs that Qwest incurs for Charter's benefit.

34 Finally, selection of Qwest's bill and keep proposal over Charter's proposal was also appropriate because Charter's proposed contract language was riddled with inconsistencies, ambiguities and other problems. For example, certain parts of Charter's proposed language prescribed bill and keep and other parts of Charter's proposed language proposed reciprocal compensation payments. *See* Qwest's Opening Brief, ¶¶38-43. As a result, it would not be appropriate to adopt Charter's proposed contract language even if one agreed with the arguments that Charter has made in its petition for review.

**The Arbitrator's Decision Is Consistent with Federal Policy Concerning the Deployment of Efficient Networks and Technology**

35 Charter asserts that Qwest's bill and keep proposal is somehow inconsistent with the federal policy concerning the deployment of efficient networks and technology. In its arguments, Charter discusses at length the FCC's deliberations in the intercarrier compensation rulemaking proceedings. Those proceedings are still pending and the FCC has not yet rendered a decision, a point Charter largely ignores. Moreover, Charter's argument is long on rhetoric and short on facts. Charter did not even make this argument to the Arbitrator and submitted no testimony to support it. Nowhere does Charter show even a remote connection between adoption of its proposed contract language and increased deployment of efficient networks and technology. That is because there is none.

- 36 According to Charter, the Qwest bill and keep proposal adopted by the Arbitrator forces Charter either (1) to pay Qwest for transporting Charter's traffic that is delivered outside of the calling area where the POI is located or (2) to establish multiple POIs with Qwest. As an initial matter, Charter has not framed its choice correctly. Charter's real choice is either to compensate Qwest the additional costs Qwest incurs to provide a service to Charter (i.e., transporting Charter's traffic) or to invest in more efficient and cost effective technology to provide its own transport.
- 37 When the issue is stated correctly, it is apparent that Charter's contentions regarding investment incentives and promotion of competition are mistaken. Qwest's proposed contract language does not in any way require Charter to duplicate Qwest's network. It merely requires Charter to pay for direct trunked transport that Qwest provides to Charter to complete calls placed by Charter's customers.
- 38 Charter argues without any evidentiary support that the Arbitrator's Report "has the perverse effect of eliminating any incentive for Qwest to upgrade its networks by establishing more efficient and cost-effective technology to transport calls on its network." Charter Petition, ¶42. In fact, the Arbitrator's Report creates the economically correct incentives. When Qwest provided transport benefits Charter by allowing Charter's customers to complete their local calls, Charter should bear the additional transport cost so that Charter will take these costs into account in deciding which communities to serve and whether to deploy a transport network of its own using the most advanced technology. In this circumstance, if Charter gets free use of Qwest's network, Charter will not invest in transport even though it should do so when the cost of its own transport is less than what it must pay Qwest for providing the transport.
- 39 Charter's arguments are based on the false notion that only ILECs should invest in transport. In fact, the Act was intended to create incentives for both ILECs and CLECs to invest, not to allow CLECs to obtain free use of the ILEC's network.<sup>12</sup> Charter's bill and keep proposal is nothing

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<sup>12</sup> *Global Naps, Inc. v. Verizon New England, Inc.*, 454 F.3d 91, 102-103 (2<sup>nd</sup> Cir. 2006)("[W]here a company does not own

more than an attempt to shift to Qwest costs for which Charter should be responsible. Charter's bill and keep proposal would inappropriately force Qwest to bear both (1) the additional cost of transporting and terminating calls placed by Qwest customers and (2) the additional costs of transporting calls placed by Charter's customers.

40 Charter's bill and keep proposal does not promote competition on the basis of the efficiency and value of the service provided as Charter contends. Instead, it tilts what should be a level playing field into one that favors Charter over Qwest. The end result under Charter's proposal is that neither Qwest nor Charter will have the proper incentive to invest. Qwest will not have an incentive to invest under Charter's proposed language because Qwest will not be compensated for the direct trunked transport Qwest provides to carry Charter's traffic. Charter will not invest under its proposal because it gets direct trunked transport from Qwest for free under that proposal.

41 To support its argument, Charter attempts to introduce extra-record comments filed with the FCC in its intercarrier compensation rulemaking proceeding. Charter Petition, ¶¶44. Contrary to Charter's assertions, those comments do not demonstrate that requiring a CLEC to pay for transport of its own traffic "effectively requires new entrants to replicate the existing incumbent LEC network." *Id.* Indeed, that was not even the issue in the rulemaking proceeding. The issue in the rulemaking proceeding was whether CLECs should be required to pay for transport both to and from a POI in a different local calling area for both ILEC and CLEC traffic. And the FCC has not made any determination in that proceeding that supports Charter's argument.

42 Whether the single POI in the LATA rule is intended to benefit CLECs is not the issue here. The issue here is whether Charter must compensate Qwest for direct trunked transport that

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the infrastructure and is not willing to pay for using another company's infrastructure, we see no reason for judicial intervention. Congress opened up the local telephone markets to promote competition, not to provide opportunities for entrepreneurs unwilling to pay the cost of doing business.")

Qwest provides for Charter's benefit. The FCC has never held that the single POI in the LATA rule was intended to eliminate CLEC transport costs. In fact, the FCC is considering whether to require CLECs to pay for all of the additional transport costs that result when a CLEC chooses a single POI in a distant local calling area, including the costs that an ILEC incurs to transport its own traffic to the single POI with the CLEC.<sup>13</sup>

43 Under Qwest's proposed language, the cost of direct trunked transport is split based on relative use. Charter pays for direct trunked transport to the extent it is used to carry Charter's own traffic. As a result, Charter will have the incentive to invest in modern, more efficient transport facilities when the cost of that transport is lower than the rates it would otherwise have to pay Qwest. Under Charter's bill and keep proposal, Charter has no incentive to invest in transport because it gets that transport for free.

44 Adoption of the Arbitrator's Decision on Issue Nos. 13-15 will not hinder Charter's ability to compete fairly with Qwest or diminish its incentives to make efficient investments. Instead, the Arbitrator's Decision creates a level playing field under which Charter must pay for the additional transport costs that are incurred so that Charter can serve its own customers. In making its investment decisions, Charter should consider additional transport costs that will result when it expands into new service areas. Nothing in the policies underlying the Act or the FCC's rules suggest that Charter is entitled to shift transport costs to Qwest.

45 The Arbitrator struck the correct balance by adopting Qwest's proposal and excluding direct trunked transport from bill and keep. Accordingly, the Commission should reject Charter's petition for review with respect to Issue Nos. 13-15.

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<sup>13</sup> Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, 16 FCC Rcd 9610, ¶72 (Rel. April 27, 2001); Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Inter-carrier Compensation Regime*, 20 FCC Rcd 4685, ¶87 (Rel. March 3, 2005).

## **Issue 16 – Indirect Interconnection**

46 In its petition for review, Charter informed the Commission that the parties had settled certain issues by agreeing to contract language. However, Charter did not inform the Commission that the parties had reached compromise language for Issue No. 16 concerning indirect interconnection. The parties agreed to the following language for Issue No. 16:

The Parties agree that the provisions of sections 7.1.2.6 through 7.1.2.9 shall apply only when CLEC (1) is exchanging mandatory EAS Traffic with Qwest between another incumbent LEC service territory and a Qwest exchange and (2) interconnects with an incumbent LEC in that service territory at an industry recognized and disclosed tandem switch. For purposes of these sections 7.1.2.6 through 7.1.2.9 the term “EAS Traffic” shall have the same meaning as the term “EAS/Local Traffic” as defined in section 4 of this Agreement.

7.1.2.6 Either Party may deliver Local Traffic and ISP-bound Traffic indirectly to the other for termination through any carrier to which both Parties’ networks are interconnected directly or indirectly. The Originating Party shall bear all charges payable to the transiting carrier(s) for such transit service with respect to Local Traffic and ISP-bound Traffic.

7.1.2.7 Unless otherwise agreed, the Parties shall exchange all Local Traffic and ISP-bound Traffic indirectly through one or more transiting carriers until the total volume of Local Traffic and ISP-bound Traffic being exchanged between the Parties’ networks exceeds 240,000 minutes per month for three (3) consecutive months, at which time either Party may request the establishment of two-way Direct Interconnection. Notwithstanding the foregoing, if either Party is unable to arrange for or maintain transit service for its originated Local Traffic upon terms satisfactory to that party before the volume of Local Traffic and ISP-bound Traffic being exchanged between the Parties’ networks exceeds 240,000 minutes per month, that Party may unilaterally, and at its sole expense, utilize one-way trunk(s) for the delivery of its originated Local Traffic to the other Party.

7.1.2.8 After the Parties have established Direct Interconnection between their networks, neither Party may continue to transmit its originated Local Traffic and ISP-bound Traffic indirectly except on an overflow basis to mitigate traffic blockage, equipment failure or emergency situations.

7.1.2.9 Local Traffic and ISP-bound Traffic exchanged by the Parties indirectly through a transiting carrier shall be subject to the same bill and keep arrangement as Local Traffic and ISP-bound Traffic exchanged through Direct Interconnection.

## **Issue 23 – White and Yellow Pages Directory Listings – Section 15**

47 As noted, Qwest and Charter have agreed upon language for Section 10.4.5. However, Issue 23



addressed both Section 10.4.5 and Section 15. Charter argues that its Section 15 should be adopted, contrary to the Arbitrator's recommendation that Qwest's language should be used for Section 15.

48 Charter's Section 15 language is redundant and unnecessary. The agreed upon language in 10.4.5 states:

10.4.5 Qwest will provide CLEC's Directory Listings to white and yellow pages directory publishers in a non-discriminatory manner, and commingled and integrated with Qwest's and other CLEC listings, pursuant to the terms of this Agreement.

For Section 15, **Charter proposes:**

Qwest shall provide CLEC with directory listing functions (that is, inclusion of CLEC numbers in printed white and yellow pages directories) to the same extent that Qwest provides its own End Users with such listing functions, irrespective of whether Qwest provides such functions itself or relies on a third party to do so.

49 In the agreed language for Section 10.4.5, Qwest agreed to provide what Charter defines in its Section 15 proposal to be "directory listing functions (that is, inclusion of CLEC numbers in printed white and yellow pages directories)" in the same manner as Qwest and other CLECs. So Charter's Section 15 proposal is duplicative, and Charter's concern about yellow pages listings is already addressed in Section 10.4.5. Charter's addition of the language regarding a "third party" is meaningless, as Qwest is obligated under the ICA regardless of how it fulfills its obligation.

50 Qwest's proposal simply memorializes the fact that there are issues that are between a publisher and the end user without Qwest's involvement. Charter appears to agree with this – the last sentence of Charter's Section 15 acknowledges that end users must negotiate with the publisher. In addition, Charter's language only mentions Qwest's Official publisher, rather than including the other publishers that exist as Qwest's proposal does.

51 There is one minor issue with Qwest's Section 15 language in light of the parties' agreement on

15. Qwest and CLEC agree that certain issues outside the provision of basic ~~white page~~ Directory Listings, such as yellow pages advertising, ~~yellow pages Listings~~, directory coverage, access to call guide pages (phone service pages), applicable Listings criteria, white page enhancements and publication schedules will be the subject of negotiations between CLEC and directory publishers, including Qwest's Official Directory Publisher. Qwest acknowledges that CLEC may request Qwest to facilitate discussions between CLEC and Qwest's Official Directory Publisher.

52 Qwest's language fulfills its obligations under the Act. Qwest agreed in Section 10.4.5 to provide the listings in a nondiscriminatory manner to white and yellow page publishers. Qwest treats CLEC listings the same as its own when provided to directory publishers. This is the extent of Qwest obligations, and Qwest's language best memorializes those obligations.

## II. CONCLUSION

53 For the reasons set forth herein, the Commission should deny Charter's Petition for Review and affirm the Arbitrator's Report and Decision on Issues 5 (Directory Listings only), 13-15, and 23.

DATED this 18th day of May, 2009.

QWEST



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