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 REPLY TO QWEST CORPORATION PETITION FOR ADMINISTRATIVE REVIEW OF ARBITRATOR'S REPORT AND DECISION BY CHARTER FIBERLINK WA-CCVII, LLC

CHARTER FIBERLINK WA-CCVII, LLC'S REPLY TO QWEST CORPORATION'S PETITION FOR ADMINISTRATIVE REVIEW OF ARBITRATOR'S REPORT AND DECISION, ORDER 07

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1. Pursuant to Order No. 08 in Docket No. UT-083041, Charter Fiberlink WA-CCVII, LLC ("Charter") hereby replies to Qwest Corporation's ("Qwest's") petition for Commission review of the Arbitrator's Report and Decision ("Decision") that Qwest filed on May 6, 2009 (hereinafter "Qwest Petition").

Issue 5: Limitation of Liability

2. Qwest asks the Commission to review the Arbitrator's Decision on Issue 5, concerning each party's respective limitations of liability. In paragraphs 28-29 and 35-36 of Order 07, the Arbitrator recommended the adoption of Charter's proposed language, which allows both parties to limit their liability to "actual, direct damages." In so doing, the Arbitrator correctly reasoned that Qwest's proposed alternative would produce a result that disaggregated potential damages from actual damages, which would, in turn, leave little to no incentive to act with care when "encountering the equipment and supplies of a business competitor" (like Charter). *Decision* at ¶ 35. Further, the Arbitrator concluded that the calculation of damages under Charter's proposed standard of actual, direct damages would be possible.[1] *Id.* at ¶ 36.

3. Qwest argues that the Commission should reject the Arbitrator's recommendation on this issue for three reasons. First, Qwest erroneously asserts that the Decision is not supported by "the evidence." *Qwest Petition* at ¶¶ 5-6. Second, Qwest claims that the Decision deviates from "industry" standards. *Id.* at ¶ 7. Third, Qwest argues that the liability standard between itself and Charter should be the same as the standard used between Charter and its end user subscribers. *Id.* at ¶ 8. These claims are without merit, and should be rejected by the Commission for the reasons set forth below.

[1] In contrast to Qwest's exaggerated claim, in its opening brief, that determining actual, direct damages would be impossible or difficult to calculate. *See, e.g.*, Qwest Opening Brief at ¶ 15.

4. Qwest's first argument, that the Decision is not supported by "the evidence," *Qwest Petition* at ¶¶ 5-6, is contradicted by the record itself. Implicit in Qwest's assertion is the idea that the Arbitrator was called upon to adjudicate a dispute of fact which must be resolved by factual evidence from the record. But that, of course, is not what is generally required in an interconnection arbitration proceeding. Instead, the Arbitrator is required to resolve disputes arising from each party's proposed contract language. So the disputes, by their nature, concern questions of which party's proposal best addresses *potential* issues that may arise in the future between the parties. To resolve those kinds of disputes, the Arbitrator must evaluate each party's proposed language, and the potential impact of such language on each party if adopted. That is precisely what the Arbitrator did, in a rational and well reasoned manner.

5. Importantly, in deciding this issue for Charter, the Arbitrator did rely upon record evidence. For example, the Arbitrator specifically relied upon the rationale offered in the pre-filed testimony of Charter's witness, Mr. Webber,[2] in determining that Qwest's proposal would act as a disincentive to ensure that its employees and agents act in a reasonable and appropriate manner. *Decision* at ¶ 29. As the Arbitrator explained, "the language of the ICA [i.e., interconnection agreement] should encourage reasonable and responsible behavior of both entities when working near or encountering their competitor's equipment." *Id.* The Arbitrator's decision that Charter's language supports that principle, and constitutes good public policy, is therefore supported by record evidence.

6. The Arbitrator also relied upon record evidence in finding that Qwest's proposal does not take into account Charter's unique situation of having an extensive facilities-based network and no need to purchase resale, unbundled network elements or collocation from Qwest, in contrast to the situation of most other CLECs that do purchase such services from Qwest. *Decision* at ¶

[2] Webber, JDW-1T at 11.

35. This finding is supported by the testimony of Charter witness, Mr. Webber, who testified that Charter has its own facilities and will not resell Qwest's services or lease unbundled network elements from Qwest.[3] Indeed, in paragraph 8 of its own pleading, Qwest specifically points out that the Decision is based upon record evidence – the testimony of Charter's witness. *See Qwest Petition* at ¶ 6 (first and second sentence). Thus, it is clear that the Arbitrator's Decision is supported by testimonial evidence in the record, as Qwest acknowledges in paragraph 6 of its pleading.

7. Qwest's actual concern, it seems, is that the Arbitrator did rely upon Charter's evidence in making her finding, while at the same time rejecting the evidence offered by Qwest's witness, Ms. Albersheim. To that end, Qwest notes that it presented testimony "demonstrating that the factual scenario on which Charter relies is highly *unlikely* to occur." *Qwest Petition* at ¶ 5 (emphasis added). Notably, however, Qwest failed to demonstrate that the fact scenario would not, or could not occur. Indeed, Qwest's witness, Ms. Albersheim, conceded that the scenario raised by Charter *could* occur under certain circumstances.[4] What Qwest refuses to recognize is that liability provisions like those at issue here are specifically included in contracts to address potential problems that *may* arise in the future. While the likelihood of a fiber cut can be debated, there is no question that it is the type of situation that a limitation of liability provision is intended to address in these types of contracts.

8. In further support of its argument here, Qwest also asserts that "many other carriers obtain only interconnection services from Qwest and do not purchase UNEs or other services." *Qwest Petition* at ¶ 6. Ironically, Qwest points to no evidence in the record to support this claim. The Commission should not overrule the Arbitrator's decision on this point without any record

[3] *Id.* at 7.
[4] Albersheim, III Tr. 344:2-21.

evidence to support Qwest's claim. More importantly, Qwest fundamentally misunderstands the Arbitrator's rationale for rejecting its proposed language. The Arbitrator rejected Qwest's language because "the injured party to the ICA would receive damages in an amount unrelated to the substance of the injury experienced" by the injured party, *Decision* at ¶ 35, not because other carriers may not purchase UNEs, resale, or collocation services from Qwest.

9. Qwest's second argument is that the Decision "deviates from industry standards" on this issue. *Qwest Petition* at ¶ 7. The gist of this argument seems to be that the Arbitrator approved contract language that is not found in other Qwest interconnection agreements. *Id.*

10. Indeed, the "industry standard" that Qwest relies upon to make this claim is nothing more than other approved ICAs, *Qwest Petition* at ¶ 7, that Qwest refers to in its pleading. (Notably, again, Qwest does not identify any record evidence to support this assertion.) Notwithstanding that, the provisions of other interconnection agreements do not constitute an industry standard. Nor do those terms provide any basis for the Commission to reverse, or modify, the Arbitrator's well-reasoned and rational decision on this issue. There is simply no authority that supports the conclusion that ICA terms must be wholly uniform and cannot deviate from those found in agreements previously approved by the Commission. As Charter witness Mr. Webber testified, "interconnection agreements need not be uniform, and in fact, the Act, this Commission, and even Qwest itself has promoted the use of interconnection agreement terms and conditions individually tailored to the specific needs of a particular carrier."[5]

11. Indeed, a federal court rejected the argument that Qwest puts forward here (that agreement terms must not deviate), finding the idea to be contradictory to the foundation principles of contract formation set forth in the statute: that parties will negotiate, or arbitrate, terms of interconnection agreements on a case-by-case basis. For example, reviewing an

[5] Webber, JDW-1T at 18:6-9.

interconnection agreement arbitration decision of the Illinois Commerce Commission, the federal district court in Illinois rejected Ameritech's (the incumbent LEC in that case) argument that all of the limitation of liability provisions of its agreements had to be identical.[6] The court noted that taking the incumbent's argument out to its logical conclusion would mean that every interconnection agreement would need to be identical. But that result, the court found, is inconsistent with Section 252 of the Act.[7] Further, former FCC Chairman Powell rejected the proposition that interconnection agreements must be identical when, in 2004, the FCC modified its opt-in rules by eliminating the so-called "all or nothing" opt-in rule. As former Chairman Powell explained: "[a]s carriers continue their migration away from unbundled network elements and toward increased reliance upon network elements they own and control, they will require ***more specialized interconnection agreements*** with incumbent LECs. Today's decision removes a rule that has thwarted those individualized agreements."[8]

12. Qwest's third, and final, argument is that Charter has not explained why limitation of liability provisions of this interconnection agreement should differ from similar provisions in Charter's Washington "tariff." *Qwest Petition* at 8.[9] In essence, Qwest asks this Commission to reverse the Arbitrator's Decision and ignore the inherent differences in contractual interconnection terms between co-carriers, and the tariffed terms between a carrier and its end-users.

13. On this issue, the Arbitrator properly determined that the terms between Charter and its own end user subscriber is "irrelevant" to the question of appropriate limitation of liability terms

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[6] *See MCI Telecommus. Corp. v. Illinois Bell Tel.*, 1999 U.S. Dist. LEXIS 11418 at * 39 (N.D. Ill. 1999).
[7] *Id.* at * 40.
[8] *In the Matter of the Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Second Report and Order*, 19 FCC Rcd 13494 (2004) (Separate Statement of Chairman Powell) (emphasis added).
[9] Because services offered by competitively classified companies like Charter are not tariffed, Charter assumes that the "tariff" to which Qwest refers is Charter's Washington price list posted on its web site.

between Charter and Qwest. *Decision* at ¶ 28. The Arbitrator explained that Charter's end-user customers are "not in the same position" as two co-carriers that have interconnected complex and sophisticated communications networks. *Id.*

14. Further, common sense tells us that liability between two co-carriers, interconnecting as peers, is a very different question from liability allocated between a carrier and thousands (if not tens of thousands) of end user customers. The potential harm that a carrier may incur as a result of the actions of an interconnecting co-carrier is quite different from the potential harm that an end user subscriber may face from their service provider. Additionally, a service provider's liability to its end user customer is governed by state law, whereas the obligations between Charter and Qwest are governed by Section 251, and the FCC regulations implementing that statute. It is therefore not instructive, as Qwest suggests, to analogize the two situations.

15. In analyzing this same legal issue, a number of state public service commissions have rejected the idea that liability limitations in end-user tariffs should mirror the liability limitations in the interconnection context. Indeed, this commission had previously determined that liability provisions in the interconnection context are properly the subject of negotiation between two interconnecting carriers, and that such provisions should not necessarily limit liability in the same manner that one party limits liability to its own end users via tariffs.[10] On this point the California Public Utilities Commission has also ruled that if one party to an interconnection agreement "causes significant damage to the other's property, it is *not appropriate* to limit

[10] *See Washington Utilities and Transportation Commission v. US West Communications, Inc., Memorandum*, 1996 WL 252308 (Wash.U.T.C. 1996)). This Commission has also ruled, in a 271 proceeding, that there was "insufficient evidence" to modify Qwest's standard liability limitation provisions in their proposed SGAT. *In re U.S. West Communications, Inc.* 2001 WL 1672338 (Wash.U.T.C. 2001). But that ruling is distinguishable from the present case because the record in this case does provide sufficient evidence to support the Arbitrator's Decision adopting Charter liability limitations language. *See, supra*, paragraphs 5 and 6, herein (discussing record evidence upon which Arbitrator relied). Further, the FCC has made clear that determinations in a 271 proceeding are "not determinative" of how to resolve unresolved issues in a section 251/252 arbitration proceeding. *Petition of WorldCom, Inc., et. al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, 17 FCC Rcd 27039 at n. 123 (2002).

liability to a minimal amount similar to the liability for damages which is due to end-user customers."[11] Similarly, the Utah Public Service Commission found that "traditional tariff language limiting carrier liability, which is primarily applicable to end users, [is] *inappropriate* for the intercarrier interconnection environment inasmuch as such tariffs impose minimal carrier liability related to the availability or impairment of provided services."[12]

16. These state commissions have declined to use end-user tariff terms as a basis for liability limitations in the interconnection context primarily because they recognized the importance of the co-carrier relationship and how it differs from the carrier-end user relationship. As the Alabama Public Service Commission explained, one of the more notable differences between tariffs and interconnection agreements relates to the fact that tariffs are filed with the FCC, or state commissions, and can become effective almost immediately following little or no review by the regulating authority.[13] Interconnection agreements, on the other hand, are bilateral contracts negotiated between incumbent local exchange carriers and requesting carriers which cannot be unilaterally amended by either party –a fact that demonstrates the parties are acting as co-carriers and peers, rather than as service provider and end-user to one another.[14] In contrast, federal and state tariffs are prepared and filed by carriers who have the legal right to unilaterally revise them.[15] Moreover, carriers have a right to request arbitration of any disputed issues in interconnection agreements before they become effective, and such agreements typically provide a dispute resolution mechanism that can be invoked by either party. In contrast, carrier customers do not have the right to invoke arbitration for disputed tariff provisions, but are

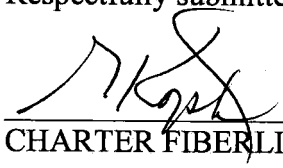
[11] *In re AT&T Communications of California, Inc., et al.*, Opinion, 2000 WL 1752310 (Cal.P.U.C. 2000) (affirming Final Arbitrator's Report) (emphasis added).
[12] In re *AT&T Communications of the Mountain States, Inc.*, Arbitration Order, 1998 WL 855420 (Utah P.S.C. 1998) (emphasis added).
[13] *In re Generic Proceeding to Establish Prices for Interconnection Services and Unbundled Network Elements*, Order on Reconsideration, 2003 Ala. PUC LEXIS 47, * 81 (Ala. PSC 2003).
[14] *Id.*
[15] *Id.*

limited to challenging unlawful provisions by filing a petition or complaint with the FCC after the tariff has become effective.[16] These points illustrate that the structure, and purpose, of end-user tariffs is very different from interconnection agreements. It would, therefore, be a mistake to analogize terms in end-user tariffs as a basis for resolving the disputed issues in this interconnection arbitration proceeding.

Conclusion

17. For the reasons set forth herein, Charter respectfully requests that the Commission deny Qwest's petition for review of issue 5 of the Arbitrator's Report and Decision.

Respectfully submitted:



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[16] *Id.* at * 82.