

1 BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION

2 COMMISSION

3 In the Matter of the Petition )  
for Arbitration of an )  
4 Interconnection Agreement ) Docket UT-083041  
Between ) Volume IV  
5 ) Pages 366 - 421  
CHARTER FIBERLINK WA-CCVII, )  
6 LLC, )  
7 with )  
8 QWEST CORPORATION, )  
Pursuant to 47 U.S.C. Section )  
9 252(b). )

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11 An oral argument in the above matter was held  
12 on June 16, 2009, at 9:30 a.m., at 1300 South Evergreen  
13 Park Drive Southwest, Olympia, Washington, before  
14 Administrative Law Judge MARGUERITE FRIEDLANDER,  
15 Chairman JEFFREY GOLTZ, Commissioner PATRICK OSHIE,  
16 Commissioner PHILIP JONES.

17 The parties were present as follows:

18 CHARTER FIBERLINK WA-CCVII, LLC, by K.C.  
19 HALM, Attorney at Law, Davis, Wright, Tremaine, LLP,  
19 1919 Pennsylvania Avenue Northwest, Suite 200,  
Washington D.C. 20006-3402; telephone, (202) 973-4288.

20 QWEST CORPORATION, by LISA A. ANDERL,  
21 Attorney at Law, 1600 Seventh Avenue, Suite 3206,  
Seattle, Washington 98191; telephone, (206) 345-1574.

22 QWEST CORPORATION, by THOMAS DETHLEFS,  
23 Attorney at Law, 1801 California Street, Tenth Floor,  
Denver, Colorado 80202; telephone, (303) 383-6646.

24  
25 Kathryn T. Wilson, CCR, Court Reporter

1 P R O C E E D I N G S

2 JUDGE FRIEDLANDER: Good morning. My name is  
3 Marguerite Friedlander. I'm the administrative law  
4 judge presiding over this telecommunications  
5 proceeding. With me are Chairman Jeffrey Goltz,  
6 Commissioner Patrick Oshie, and Commissioner Philip  
7 Jones. We are at the offices of the Washington  
8 Utilities and Transportation Commission on Tuesday,  
9 June 16th, 2009, to address several disputed issues  
10 within Docket UT-083041, an arbitration proceeding  
11 between Charter Fiberlink WA-CCVII, LLC, and Qwest  
12 Corporation.

13 On March 30th, 2009, the arbitrator's report  
14 and decision was entered. Both Charter and Qwest have  
15 filed petitions for review. Charter's petition seeks  
16 review of Issue 5 relating to limitations of liability  
17 for directory services; Issues 13, 14 and 15 regarding  
18 the exclusion of transport from the bill-and-keep  
19 compensation scheme, and Issue 23 relating to possible  
20 responsibilities Qwest may have to provide Yellow Page  
21 directory functions. Qwest's petition seeks review of  
22 Issue 5 solely relating to the calculation of damages  
23 between the parties.

24 The purpose of the proceeding today is to  
25 hear oral arguments from both parties on the issues up

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1 for review. Each side will have 30 minutes total, and  
2 that will include the time either side may wish to  
3 reserve for rebuttal. We will begin with Charter and  
4 proceed to Qwest and then go into rebuttal if there is  
5 any reserved, and finally, we will have questions from  
6 the Bench.

7 After taking abbreviated appearances, let's  
8 go ahead and address preliminary administrative issues  
9 the parties may have, and then we will proceed right to  
10 the oral arguments. Since you've already made full  
11 appearances on the record, I just want to know who is  
12 appearing for each side, and we will start with  
13 Charter.

14 MR. HALM: Thank you, Your Honor. For  
15 Charter, K.C. Halm, with Davis, Wright, Tremaine,  
16 Washington D.C.

17 JUDGE FRIEDLANDER: For Qwest?

18 MS. ANDERL: Thank you, Your Honor. Lisa  
19 Anderl, in-house attorney, on behalf of Qwest.

20 MR. DETHLEFS: And Tom Dethlefs, in-house  
21 attorney on behalf of Qwest as well.

22 JUDGE FRIEDLANDER: Are there any preliminary  
23 procedural matters that we need to address before we  
24 begin the oral arguments? Hearing nothing, let's go  
25 ahead, and do the parties wish to reserve any time for

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1 rebuttal?

2 MR. HALM: Your Honor, I would like to  
3 reserve five minutes for rebuttal.

4 JUDGE FRIEDLANDER: Thank you.

5 MS. ANDERL: Your Honor, Qwest would also  
6 like to reserve five to ten minutes.

7 JUDGE FRIEDLANDER: Do you have a preference?

8 MS. ANDERL: We expect that my portion of the  
9 argument addressing Issues 5 and 23 will only take  
10 about five minutes and that Mr. Dethlefs will take  
11 about fifteen, we'll take ten minutes for rebuttal.

12 JUDGE FRIEDLANDER: Let's go ahead and begin  
13 with Charter.

14 MR. HALM: Thank you, Your Honor. Chairman  
15 Goltz, Commissioner Oshie, Commissioner Jones, thank  
16 you for the opportunity to present additional oral  
17 arguments in the arbitration between Charter and Qwest  
18 in this proceeding. My name is K.C. Halm. I'm counsel  
19 for the petitioner, Charter Fiberlink.

20 I would like to begin by noting Charter's  
21 appreciation for the efforts of Judge Friedlander and  
22 the Staff in adjudicating this case in a timely and  
23 efficient manner. The decision is on the whole a good  
24 decision, we believe. However, we do ask this  
25 commission to review three particular elements of that

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1 decision. As Judge Friedlander just noted, those are  
2 Issues 5, concerning limitation of liability for  
3 directory listing errors, Issues 13, 14, and 15  
4 concerning each party's transport obligations and the  
5 proper compensation method for that transport, and  
6 finally, Issue 23 concerning Qwest's Yellow Page  
7 listing obligations.

8           Review of these three issues is necessary for  
9 two reasons; first to insure that the decision complies  
10 with federal law, specifically Section 251 of the  
11 Communications Act and the FCC regulations promulgated  
12 under that statute. That is the standard by which this  
13 commission must review and approve that decision. The  
14 second reason to review these three reasons is to  
15 insure that the decision results in fair and equitable  
16 terms that apply reciprocally to both parties' benefits  
17 and which create a level playing field for the  
18 competitor, Charter, to compete with Qwest.

19           If Your Honors would permit, I would like to  
20 begin my discussion with Issues 13, 14 and 15, the  
21 transport issues, and then talk about the two directory  
22 issues. As noted, Issues 13, 14 and 15 address the  
23 compensation obligations for each parties' transported  
24 traffic on their network. That traffic is traffic  
25 which is received from the other party when delivered

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1 for calls exchanged between the two parties.

2 Charter has proposed the bill-and-keep  
3 compensation method whereby each party provides in-kind  
4 compensation by accepting the traffic of the other  
5 party and delivering it to the called party. In  
6 return, the other party also accepts the first party's  
7 traffic and delivers it to the called party. No bills  
8 are rendered between the two parties because the  
9 transport provided by each party is roughly equivalent,  
10 and it's a form of in-kind compensation that they  
11 provide to one another.

12 Qwest on the other hand has proposed a  
13 modified form of reciprocal compensation whereby they  
14 would impose charges for the transport that each party  
15 provides to the other. The decision adopted Qwest's  
16 proposed method of compensation such that each party  
17 must pay the other for transporting traffic to and from  
18 the point of interconnection between their networks.

19 Charter asks that this commission reverse  
20 that part of the decision adopting Qwest's compensation  
21 proposal. Reversal is necessary because the decision  
22 is based both on factual and legal errors and  
23 represents an inequitable result that is poor public  
24 policy.

25 Before I discuss those errors, I would like

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1 to take a moment to talk about some basic facts about  
2 Charter's network and the exchange of traffic between  
3 Charter's network and Qwest's network. These facts are  
4 in the record. First, Charter is a facilities-based  
5 competitive provider of telephone service. Second,  
6 Charter does not purchase unbundled network elements or  
7 resell Qwest's services.

8 In fact, Charter uses the existing network of  
9 its cable company parent. That network is quite  
10 extensive. It includes fiber and hyperfiber, coaxial  
11 lines that run from the Charter headends and other  
12 central facilities all the way to their customer zones.  
13 Therefore, Charter has an extensive distribution  
14 network to most of the same homes that Qwest serves.

15 The third fact that is reflected in the  
16 record is that both parties' networks, Charter and  
17 Qwest networks, are currently interconnected by a  
18 single point of interconnection, which I will refer to  
19 as a POI, in the city of Yakima. Therefore, we know  
20 that when a Qwest customer, say, in Pasco, calls a  
21 Charter customer who lives in Pasco, the following will  
22 occur: First, Qwest will pick up the call and carry it  
23 from the subscriber's home in Pasco up to the point of  
24 interconnection at Yakima. Qwest will then hand off  
25 the call to Charter at the Yakima point of

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1 interconnection, and third, Charter will then take that  
2 call, deliver it back to Pasco to the called party.

3           And, of course, the same thing happens in  
4 reverse. When a Charter customer in Pasco wants to  
5 call a Qwest customer in Pasco, Charter delivers that  
6 call all the way to Yakima, hands it off to Qwest at  
7 the point of interconnection, and Qwest then takes it  
8 back to Pasco and delivers it to the called party. This  
9 example illustrates the fact that both parties are  
10 required to carry traffic on their networks the same  
11 distance.

12           A fourth critical fact that is reflected in  
13 the record is that traffic on each party's network and  
14 between the two networks is roughly balanced and is  
15 expected to stay that way. Despite the fact that  
16 traffic is balanced, that each party has extensive  
17 networks to deliver their telephone services and that  
18 each party must carry traffic on their networks roughly  
19 the same distance, the decision finds that Qwest should  
20 be permitted to charge Charter to carry traffic on  
21 Qwest's network.

22           That decision, we believe, rests on two  
23 critical errors of fact. The decision incorrectly  
24 concludes that traffic and transport obligations, two  
25 distinct concepts, are not balanced. Specifically at



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1 Paragraph 110, the arbitrator concludes that Qwest  
2 provides more transport to Charter because, quote,  
3 "Qwest provides transport from Charter's POI to over 45  
4 central office switches," end quote.

5           With respect to traffic, also at Paragraph  
6 110 of the decision, the decision finds or appears to  
7 conclude that traffic is also not in balance because  
8 the arbitrator states that Charter did not, quote,  
9 "...counter Qwest's assertion regarding the imbalance  
10 of traffic." Therefore, this decision appears to rest  
11 on the conclusion the erroneous conclusion that traffic  
12 and transport are not balanced.

13           With respect to traffic, Charter presented  
14 evidence that both parties agreed that the traffic  
15 between their two networks is roughly balanced. In  
16 fact, that agreement is memorialized in the draft  
17 agreement before the Commission today in Section  
18 7.3.4.1.2. Therefore, the conclusion that traffic is  
19 not in balance is in error.

20           The second factual error is that transport is  
21 not balanced. In fact, transport is roughly balanced  
22 because of the very nature of each party's networks and  
23 the calls flow between those two networks. The  
24 conclusion that transport is not balanced, as I said,  
25 appears to rest on this assertion that Qwest provides

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1 transport to over 45 central office switches.

2           Unfortunately, the decision doesn't cite any  
3 specific record evidence to support that assertion.  
4 Instead, it appears to stem from the Qwest Exhibit  
5 PL-9, which is attached to the rebuttal testimony of  
6 Qwest witness Mr. Phillip Lindsay. That exhibit shows  
7 numerous Qwest central offices serving Spokane and  
8 surrounding areas. It's a diagram showing a tandem and  
9 many other central offices in the Spokane area, but the  
10 fact is, and Qwest's own witness admitted on the stand,  
11 Charter does not serve any end-user subscribers in  
12 Spokane. Therefore, the relevance of the many central  
13 offices that Qwest employs in Spokane is of no utility  
14 here.

15           The record shows that Charter serves only a  
16 limited number of communities in eastern Washington;  
17 Pasco, Waitsburg, Walla Walla, and Kennewick.  
18 Therefore, the decision's apparent reliance on this  
19 Qwest exhibit and the claim that Qwest provides  
20 transport to over 45 central offices is simply wrong.

21           CHAIRMAN GOLTZ: Excuse me. So how would it  
22 work then. You used an example of calls going from  
23 Pasco being routed through Yakima and coming back to  
24 Yakima. How would it work from a call to a Charter  
25 customer in Pasco to a Qwest customer in Spokane?

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1           MR. HALM: The call would begin in Pasco with  
2 the Charter customer. Charter would pick it up on its  
3 network, deliver it to Yakima where the parties  
4 currently have one point of interconnection, the only  
5 point of interconnection in that LATA, and Charter  
6 would then hand off the call to Qwest. Qwest would  
7 presumably have to carry that call back to Spokane, but  
8 that would be a long-distance call, which would likely  
9 be carried on the separate part of the Qwest network.  
10 That wouldn't be a local call, which is the basis of  
11 the transport issue that we are talking about here  
12 today.

13           The record shows, as I've just pointed out,  
14 that Charter provides the same transport that Qwest  
15 does because of the very nature of the two networks and  
16 the areas that they both serve. Because there is one  
17 point of interconnection, because they both serve the  
18 same communities, and because calls to and from those  
19 communities necessarily travel the same distance to the  
20 point of interconnection, we can only conclude that  
21 both parties are providing the same amount of transport  
22 to one another.

23           In addition, because traffic is in balance,  
24 it is clear that both parties have to carry traffic the  
25 same distance, and therefore, the total amount of

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1 traffic, including the transport element, will be  
2 equivalent. We know the volume of traffic is in  
3 balance, the distances of transport are equivalent, the  
4 total call flow between the two will be roughly the  
5 same.

6           When both parties provide equivalent  
7 transport at the same rates for the same volume of  
8 traffic, it's much more efficient to employ the  
9 bill-and-keep compensation method. Otherwise, the two  
10 parties will be billing one another for roughly the  
11 same charges. Those charges would simply cancel each  
12 other out. There is no reason for the administrative  
13 expense of charging another party when you expect bills  
14 to be coming back to you in roughly the same amount.

15           With respect to the errors of law, the  
16 decision correctly affirms Charter's right to a single  
17 point of interconnection. However, the decision rules  
18 that Charter may only utilize that single POI with  
19 interconnection if it agrees to pay for Qwest's costs  
20 of transporting traffic to and from the area where that  
21 point of interconnection is located. At Paragraph 99,  
22 the arbitrator states, "Charter must be prepared to pay  
23 for Qwest's additional transport costs if Charter  
24 chooses a POI outside of the local calling area where  
25 the exchange is local traffic request."

1           In other words, the right to use a single POI  
2 is conditioned, conditioned on Charter's willingness to  
3 pay those transport costs. That is an error of law  
4 because the FCC has affirmed competitor's right to a  
5 single point of interconnection without condition. The  
6 decision doesn't say any authority that a single POI is  
7 conditioned on an obligation to pay for the other  
8 party's transport costs. Had the FCC wanted to  
9 condition that single POI right on a payment of  
10 transport costs, they would have done so, but they  
11 didn't.

12           JUDGE FRIEDLANDER: Mr. Halm, I have a  
13 question. In the FCC's local compensation order, I  
14 believe at Paragraph 209, the FCC states that in  
15 relevant part, Section 251(c)(2) -- "to competitive  
16 entry for carriers that have not declared ubiquitous  
17 networks by permitting them to select the points in an  
18 ILEC's network at which they wish to deliver traffic,"  
19 which does support your point that Charter can select  
20 the location of its POI.

21           However, the FCC goes on to say, "Moreover,  
22 because competing carriers must usually compensate  
23 ILEC's for the additional costs incurred by providing  
24 interconnections, the competitors have an incentive to  
25 make economically efficient decisions about where to

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1 interconnect." Can you address that statement from the  
2 FCC and how it relates to the decision that you would  
3 have to pay for the additional transport based on your  
4 location choice.

5 MR. HALM: The FCC orders to which you refer  
6 to, Judge Friedlander, is the 1996 report and order on  
7 local compensation, which set the basic framework for  
8 interconnection between two LECs, the competitive LECs  
9 and the incumbent LECs like Qwest. In so doing, they  
10 expressly affirm the right of a single point of  
11 interconnection for the competitive LECs, and there is  
12 a reference to the potential that charges may apply. I  
13 think the language you just cited to us was "must  
14 usually pay the incumbent for transport."

15 Interestingly, the FCC did not specifically  
16 state that competitors must pay incumbents for  
17 transport. They seem to be referring to existing  
18 arrangements where the competitor has agreed to pay for  
19 transport in return for the right to a single point of  
20 interconnection. So they simply refer to the fact that  
21 charges may be in place, and we know that exists today.  
22 Many of Qwest's contracts with CLEC's still in fact  
23 require the CLEC's to pay for transport, but nowhere in  
24 the first report and order or the specific rules under  
25 451 that were implemented in conjunction with that

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1 order is there a specific rule that says a competitor  
2 must pay for transport when it uses a single point of  
3 interconnection. So we read that paragraph as  
4 referring to the potential that charges may apply but  
5 likely in the instance where both parties agree that  
6 charges will apply.

7 CHAIRMAN GOLTZ: But you are saying as a  
8 matter of law though that Charter can pick any point of  
9 interconnection anywhere it wants and there can be no  
10 charges for transport under any factual circumstances  
11 is what you are saying.

12 MR. HALM: Charter may pick any point of  
13 interconnection conditioned on the point being  
14 technically feasible and within a LATA. Other than  
15 those two limitations, that's right. The FCC has never  
16 said that when it does so it is required to pay for the  
17 transport.

18 CHAIRMAN GOLTZ: Does the economics from  
19 Qwest's point of view vary among various possible  
20 points of interconnection? If you had connected in  
21 Pasco, would that be more economical for Qwest, or in  
22 some other place, would that be more economical for  
23 Qwest?

24 MR. HALM: I believe that is certainly true.  
25 During negotiations between parties prior to this

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1 proceeding, Qwest told Charter, Look, if you don't want  
2 to pay these transport costs, all you have to do is  
3 interconnect with us in Yakima and Pasco and Walla  
4 Walla and Waitsburg.

5 CHAIRMAN GOLTZ: That's not my question.  
6 Just between the one point, is there a difference in  
7 the economics to Qwest, and I guess to Charter, if you  
8 picked Yakima or Pasco or someplace else, does the  
9 economics change depending on the point or is it always  
10 the same?

11 MR. HALM: I think the economics could change  
12 depending on the point, depending on where the  
13 competitor has a nucleus of subscribers, and depending  
14 on where the majority of those calls are directed to  
15 the incumbent's network.

16 CHAIRMAN GOLTZ: Perhaps the language in this  
17 order is getting at because the competitor has a right  
18 to a single point of interconnection, it has an  
19 incentive to make economically efficient decisions  
20 about where to interconnect.

21 MR. HALM: Absolutely, and I think the FCC  
22 was explaining that they had to choose between  
23 incumbents and competitors. The whole purpose of the  
24 Telecommunications Act of 1996 was to open up the local  
25 telephone networks to competition. They imposed a



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1 series of duties upon the incumbents, one of which was  
2 the obligation to interconnect at a single point with  
3 competitors, and they clearly understood that there  
4 would be some cost consequences to that choice.

5 Now, given that the FCC was imposing all  
6 these obligations upon incumbents, favoring  
7 competitors, and they specifically said competitors  
8 have the right to a single point of interconnection,  
9 but they did not specifically say that it was  
10 conditioned upon paying the transport charges, it  
11 follows that the FCC was making a choice. They were  
12 saying, We are going to allow competitors to choose a  
13 single point. We know that that will reduce the  
14 competitors' costs, and that may increase the  
15 incumbents' costs, but that was the basic formula of  
16 the Telecommunications Act of 1996.

17 Incumbents will pay some costs. They will  
18 bear some additional burdens because they are the  
19 incumbents. We are the competitors, and in order to  
20 balance the playing field, the incumbents must bear  
21 some additional costs.

22 COMMISSIONER OSHIE: Before you go on,  
23 Mr. Halm, just to explore that point a bit, are there  
24 any other charges with regard to a point of  
25 interconnection that Charter believes to be an unlawful

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1 imposition of a condition? That's your argument with  
2 regard to transport. I'm sure there is more charges  
3 with regard to a POI than just transport.

4           So are there any charges that are allowed  
5 with regard to the point of interconnection, in your  
6 opinion, or Charter's opinion, or all charges with  
7 regard to the POI that may be imposed by Qwest also  
8 constitute an unlawful condition under 251?

9           MR. HALM: I would say that 251(b)(5)  
10 contemplates reciprocal compensation obligations of  
11 both parties. Both parties will incur costs in  
12 transporting and terminating the other person's  
13 traffic, and they can recover those costs through  
14 reciprocal compensation provisions of an  
15 interconnection agreement, and that's what we are  
16 talking about here today.

17           So it's without question that there is a  
18 statutory right to a reciprocal compensation  
19 arrangement, and Qwest has a statutory right. Our  
20 argument here is that the method of compensation  
21 opposed by Charter is more efficient and more equitable  
22 because both parties are providing roughly the same  
23 transport for each side. I'm not sure if that answers  
24 your question.

25           COMMISSIONER OSHIE: That's fine, Mr. Halm.

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1 If that's your answer, that's your answer. Thank you.

2 MR. HALM: Let me move quickly to the second  
3 error of law that we see in this decision, and that is  
4 that the decision fails to follow the precedent of this  
5 commission and the Ninth Circuit in imposing a  
6 bill-and-keep arrangement between Qwest's predecessor  
7 US West and another competitor, MCI Metro  
8 Communications.

9 In the Ninth Circuit decision, MCI  
10 Telecommunications Corp., versus US West, the Ninth  
11 Circuit affirmed that this commission's decision  
12 ordering Qwest's predecessor to enter into a  
13 bill-and-keep arrangement with MCI Metro, and in so  
14 doing, the Ninth Circuit explained that bill and keep  
15 represents an equitable arrangement, a sort of, quote,  
16 "rough justice approach," and that the adoption of that  
17 arrangement was appropriate given the Washington UTC's,  
18 quote, "general policy favoring bill-and-keep  
19 arrangements."

20 The same considerations apply in this  
21 instance and demand the same result as that ordered by  
22 the Commission and the Ninth Circuit several years ago.

23 JUDGE FRIEDLANDER: Mr. Halm, that case  
24 though, wasn't it a different set of facts and  
25 circumstances than what we have before us today?

1           MR. HALM: It certainly occurred in a time  
2 where competition was just beginning, and I would note  
3 that the Commission's decision didn't have enough  
4 record evidence to determine whether or not traffic was  
5 balanced or would be balanced between US West, Qwest,  
6 and MCI, the competitor, and I believe the Commission  
7 and the arbitrator in that case assumed that traffic  
8 would be balanced, and based upon that assumption, then  
9 imposed the bill-and-keep regime, and that  
10 bill-and-keep regime was later affirmed by the district  
11 court and the Ninth Circuit because of this  
12 commission's general policy favoring bill and keep.

13           It was a different time. There were  
14 different circumstances, but I think the key facts are  
15 the same here. Here we know that traffic is balanced.  
16 There, there was an assumption the traffic was  
17 balanced. Whether or not that bore out, we don't know,  
18 but because traffic is balanced here, applying that  
19 same policy makes sense.

20           JUDGE FRIEDLANDER: I just wanted to let you  
21 know that you have five minutes left, and also to ask  
22 you, because you have mentioned it several times that  
23 the parties have agreed that the traffic is in balance,  
24 and yet I think that that's the reason we are here  
25 today because Qwest has not agreed to that fact.

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1 Outside of the section that you mentioned, Qwest has  
2 stated that there is a differential between the two  
3 calling responses, so maybe you could address that.

4 MR. HALM: Yes.

5 CHAIRMAN GOLTZ: I think it would be okay to  
6 go a little over if we give time to Qwest as well.

7 MR. HALM: Thank you. There may be some  
8 confusion over the concepts of traffic and transport.  
9 From our perspective, traffic is the equivalent of the  
10 total volume of calls exchanged between the two  
11 networks, and again, if you look at the language in  
12 Section 7.3.4.1.2, the draft contract contemplates that  
13 both parties understand that traffic, the total volume  
14 of calls, will be balanced. Charter serves primarily  
15 residential subscribers. Charter's subscriber base is  
16 growing; therefore, the parties understand that the  
17 amount of calls going back and forth will be roughly  
18 the same.

19 I think the issue here is the length of  
20 facilities upon which each party provides, quote,  
21 "Transport." The total distance by which each party  
22 carries these calls from the point of interconnection  
23 back to the different call areas, and so that's the  
24 distinction that I think may be missing from this  
25 decision. Volume of calls, i.e., traffic, as opposed

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1 to the distance that calls are carried, i.e.,  
2 transport.

3 CHAIRMAN GOLTZ: How big of a deal is this in  
4 real terms for you? Can you give us some indication of  
5 the magnitude of the transport charges that you would  
6 be basing if the arbitrator's decision is affirmed and  
7 what that means to your business?

8 MR. HALM: I could tell you it would be many,  
9 many thousands of dollars each month. I can't give you  
10 a specific number. The charges that Qwest proposes to  
11 impose upon Charter would be billed on a monthly  
12 recurring basis and would be billed according to the  
13 total miles for which this transport is provided, so  
14 there is two different variables. We know there would  
15 be monthly charges, and there would be -- I think that  
16 the distance is cited in Qwest papers, are 60, 70, 80  
17 miles of transport.

18 CHAIRMAN GOLTZ: Is this a flat charge or is  
19 it based on the call volume?

20 MR. HALM: It's based on the distances, not  
21 call volume, so there is a shorter charge for shorter  
22 distances and a greater charge for longer distances.

23 COMMISSIONER JONES: Would it be an  
24 intrastate special access tariff rate or interstate?  
25 What charge would Qwest use?

1           MR. HALM: It would be a charge identified in  
2 the rate sheet of the draft interconnection agreement,  
3 and I'll defer to my colleagues here to point to  
4 specifics. Generally lower than an interstate access  
5 rate, but still significant enough for Charter to pay  
6 for lawyers to put on this case.

7           Let me see if I can move quickly on to the  
8 other two issues, the directory issues. The first  
9 directory issue is Issue 5. It concerns the limitation  
10 of liability language for directory errors. The  
11 arbitrator's holding with respect to Section 10.4.2.6,  
12 concerning limitation of liability for directory  
13 listing errors, was the adoption of Qwest's language,  
14 which would limit liability to an arbitrary amount  
15 unrelated to any harm that is incurred.

16           We would ask that you reverse that part of  
17 the decision permitting Qwest to limit liability for  
18 its directory listing errors to insure that Qwest has  
19 proper incentives to guard against directory errors and  
20 to conform the limitation of liability language in the  
21 agreement and the decision itself with the general  
22 limitation of liability provisions in Section 5.8.

23           As to general limitation of liability, the  
24 arbitrator correctly rejected Qwest's language in  
25 Section 5.8, and the decision does so because it

1 recognizes that Qwest language would not permit either  
2 party to recover actual damages. In fact, it would  
3 eliminate incentives for either party to act  
4 rationally. As noted in Paragraph 41 of the decision  
5 where there is, quote, "no rational relationship  
6 between the injury experience and the damages  
7 instituted, the parties have little to no incentive to  
8 act with care," end quote.

9           The decision does not require that same  
10 principle with respect to directory listing errors.  
11 Instead, the decision adopts Qwest's language, which  
12 incorporates Qwest tariff provisions. Those tariff  
13 provisions out of the Qwest local exchange tariff  
14 generally limit damages to either an amount paid for  
15 the specific directory listing or an amount paid for  
16 general telephone services.

17           Thereby, Qwest's language limits liability to  
18 amounts charged and is completely unrelated to any  
19 potential damages that might be incurred by Charter or  
20 its subscribers if there is a directory listing error,  
21 and as applied to Charter, that may mean that Charter's  
22 potential damages could be zero. Charter doesn't pay  
23 Qwest for telephone services, which is one of the  
24 limitations in the Qwest tariff, and therefore would  
25 not be permitted to recover any damages if the Qwest



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1 language is allowed to stand.

2           The decision also rests upon the incorrect  
3 conclusion that Charter would not appear to be an  
4 injured party in a directory listing error situation,  
5 but that fails to recognize that Charter is likely to  
6 be an injured party because it has obligations to its  
7 own end-user subscribers with respect to getting their  
8 listings into the directory accurately and correctly.

9           JUDGE FRIEDLANDER: Mr. Halm, could I stop  
10 you for another question? So you are telling me if I  
11 am a Charter customer, and let's say you spell my last  
12 name wrong, I can then come back and do what? I guess  
13 file some kind of an action against you or recover some  
14 damages because you spelled my last name wrong in the  
15 directory?

16           MR. HALM: I guess theoretically that would  
17 be possible. I don't think practically that would be  
18 likely, but let's say that you owned a pizza delivery  
19 service, and it's not that we got your name wrong. We  
20 just didn't get your number in the book correctly or we  
21 didn't get your number in the book at all, and  
22 therefore, you can't rely upon your listing in the  
23 directory and the potential for new customers to call  
24 you for delivery of pizzas. That could be a potential  
25 error that could be actionable.

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1           JUDGE FRIEDLANDER: Are you talking about a  
2 paid listing, a listing of a business where it would be  
3 a listing that the business actually is advertising, in  
4 which case they could recover the fees that they've  
5 paid for that advertisement; correct?

6           MR. HALM: There is a difference between  
7 advertisements in the Yellow Pages and simply the  
8 listing of your business in the pages itself, so yes, I  
9 think they could recover for charges for the  
10 advertisement, but if a business is improperly listed,  
11 they could suffer damages, unable to recover revenue  
12 that they would expect to receive, had the listing been  
13 properly included.

14           Maybe a better example is an undercover  
15 policeman. Those persons often request not to be  
16 listed in the directory at all. They want to maintain  
17 privacy for obvious reasons. There have been occasions  
18 in the past where these people's listings, their home  
19 address, their telephone number, is included in the  
20 published directory, and that could result in real harm  
21 that we could easily foresee.

22           JUDGE FRIEDLANDER: If this person is an  
23 undercover police officer, how would anyone know their  
24 identity anyway?

25           MR. HALM: They may know their name. That

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1 has actually occurred -- I'm aware of those  
2 circumstances occurring in the past where people that  
3 wanted their identity withheld were included in  
4 published directories, and that causes real problems.

5 JUDGE FRIEDLANDER: Can I ask you how you  
6 would calculate damages for that? Because what it  
7 comes down to is how are you going to quantify a damage  
8 in that case? I have a problem with that. I guess I  
9 can't wrap my mind around that.

10 For a downed pole -- you were speaking  
11 earlier of Section 5.8, I believe, and the decision  
12 that the arbitrator made with regard to actual and  
13 direct damages. When a pole is downed, it's very easy  
14 to calculate either a repair or replacement cost,  
15 inconsequential damages being set aside because the  
16 language of the agreement already covers those. So  
17 this one is a lot more difficult for me. Maybe you can  
18 go into how you calculate actual and direct damages for  
19 a directory listing.

20 MR. HALM: I will acknowledge that it is more  
21 difficult to do so than an occasion where equipment is  
22 damaged, and I can't give you a specific example here,  
23 but I don't think that's a reason for us to arbitrarily  
24 limit damages in a way that you properly recognize was  
25 inappropriate to do in other circumstances.

1           As I said, there could be any other number of  
2 circumstances where a person's listing is inaccurately  
3 published or is inappropriately published or a business  
4 doesn't get their telephone number or name correctly in  
5 the book, and that has ramifications for the potential  
6 revenue that they would earn. I think I've hit my  
7 25-minute limit, so I will reserve my final five  
8 minutes. Thank you.

9           JUDGE FRIEDLANDER: Thank you. Let's go  
10 ahead and hear from Qwest, and you have 20 minutes and  
11 I believe you are reserving ten for rebuttal.

12           MR. DETHLEFS: Thank you. I'm Tom Dethlefs.  
13 I'm going to speak to Issues 13 and 15, and Ms. Anderl  
14 will speak to the other two issues. We share  
15 Mr. Halm's initial comments about the efficient way  
16 this arbitration was handled, and we share the  
17 gratitude for the opportunity to speak to you today.

18           Let me just first describe the differences  
19 between the two parties' proposals. Both parties in  
20 this proceeding have proposed a bill-and-keep proposal.  
21 Charter's proposal is bill-and-keep for all usage-based  
22 charges and all transport, including direct-trunk  
23 transport. Qwest's bill-and-keep proposal is a  
24 bill-and-keep for all the usage-based charges, so that  
25 would include end-office switching, tandem switching,

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1 tandem transmission, with a carve-out that would  
2 exclude direct-trunk transport from bill-and-keep.

3 Qwest's bill-and-keep proposal is the same  
4 bill-and-keep proposal as negotiated with Comcast in  
5 Washington and was explicitly authorized by the FCC in  
6 the local competition order the FCC issued back in  
7 1996; in particular, Paragraph 1096 of that local  
8 competition order. The cite for that is 11 FCC  
9 received, 15499, Paragraph 1096.

10 So with that as an introduction, let me just  
11 address Mr. Halm's first two arguments about errors of  
12 the law. His first argument was that the arbitrator's  
13 report somehow conditions their choices in a single  
14 point of interconnection by requiring them to pay for  
15 transport costs. That's not actually what the  
16 arbitrator's report does. It recognizes that Charter  
17 gets to choose as few as a single point of  
18 interconnection in the LATA and that it gets to choose  
19 the point within Qwest's network if that point is  
20 technically feasible.

21 What the arbitrator's report then recognizes,  
22 however, is that when Charter makes a choice that  
23 causes Qwest's interconnection costs to increase, that  
24 will have consequences for Charter. In other words, it  
25 says that Charter has to take that into account when

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1 they choose their single point of interconnection. We  
2 believe that is what Paragraph 209 of the local  
3 competition order said. Let me read that again.  
4 Paragraph 209 says, "Because competing carriers must  
5 usually compensate incumbent LEC's for the additional  
6 costs incurred by providing interconnection,  
7 competitors have an incentive to make economically  
8 efficient decisions about where to interconnect."

9           So for example, if they choose a point of  
10 interconnection on one end of the LATA, and that means  
11 that Qwest has to transport traffic from a local  
12 calling area on the other end of the LATA all the way  
13 to that point of interconnection and back, that is  
14 something that Charter should take into account when  
15 they choose their point of interconnection, and the  
16 only way that happens is if they somehow account for  
17 Qwest's cost in that type of arrangement.

18           CHAIRMAN GOLTZ: So what would have been a  
19 more economic point of interconnection from Qwest's  
20 point of view?

21           MR. DETHLEFS: The fact that Charter chooses  
22 a single point of interconnection in the LATA is going  
23 to mean there are going to be circumstances where Qwest  
24 has to transport traffic from one local calling area to  
25 another local calling area, which it would not normally

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1 do for a local call.

2           If a Qwest customer in Pasco called a Qwest  
3 customer in Pasco, we wouldn't transport it out of the  
4 local calling area. That's something that's driven  
5 almost entirely by Charter's choice of a single point  
6 of interconnection in a local calling area other than  
7 the local calling area where traffic is exchanged.

8           This would be a good point for me to  
9 introduce another aspect of Qwest's bill-and-keep  
10 proposal, and that is that the direct-trunk transport  
11 is split based on relative use, so Charter isn't even  
12 going to pay for all the direct-trunk transport. They  
13 are going to pay for it to the extent that it's used to  
14 take Charter's traffic from the point of  
15 interconnection to the local calling areas in which the  
16 customers are located. So they don't even pay for all  
17 the direct-trunk transport if the traffic is in  
18 balance. They will pay for roughly 50 percent of it.

19           CHAIRMAN GOLTZ: So they wouldn't pay for a  
20 call from a Charter customer in Pasco to a Qwest  
21 customer in Pasco. They would pay for the reverse?

22           MR. DETHLEFS: They wouldn't pay for the  
23 example you gave where their customer is placing the  
24 call --

25           CHAIRMAN GOLTZ: But when their customer is

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1 receiving the call, they wouldn't.

2 MR. DETHLEFS: Exactly right. So we don't  
3 believe the arbitrator's report conditions their single  
4 choice of interconnection. We think it just recognizes  
5 that that choice has consequences for the costs of  
6 Qwest in that Charter has to take that into account,  
7 and the way that happens is they are required to pay  
8 for some of the transport, and that's why we require  
9 that direct-trunk transport.

10 CHAIRMAN GOLTZ: So what you are saying is  
11 when the same hypothetical that Charter has proposed  
12 where you have one scenario where there is a call from  
13 a Qwest customer in Pasco to a Charter customer in  
14 Pasco, you are saying that you pay the transport for  
15 the call from the Qwest customer, and Charter pays the  
16 transport to you for the call from the Charter  
17 customer.

18 MR. DETHLEFS: For the direct-trunk  
19 transport. If it's another type of transport, like  
20 tandem transmission or tandem switching, that's all  
21 bill-and-keep, so it's just a piece of the transport,  
22 and we believe it's an equitable arrangement because it  
23 recognizes that we are having to provide transport that  
24 we wouldn't otherwise have to provide for local calls  
25 because we have to take it out of the local calling



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1 area.

2           In this particular case, we've had three  
3 local calling areas that are at issue. We've got  
4 Yakima, Kennewick, and Pasco, and you've got Walla  
5 Walla and Waitsburg, and there are scenarios where we  
6 would have to provide 40 miles, up to 70 miles of  
7 transport that we wouldn't otherwise have to provide  
8 for local calls.

9           So let me turn to the second point. Mr. Halm  
10 argued that the arbitrator's report is inconsistent  
11 with Ninth Circuit precedent. That's not true. The  
12 Ninth Circuit merely affirmed the Commission decision  
13 ordering a bill-and-keep arrangement. It didn't make  
14 any decision about what types of bill-and-keep  
15 arrangements are permissible and which aren't, and as I  
16 mentioned earlier, in Paragraph 1096 of the FCC's  
17 initial order implementing the Act, they recognized  
18 Qwest's bill-and-keep proposal as a permissible  
19 arrangement.

20           So let me turn to the second area, alleged  
21 errors of fact. There is a little bit of confusion  
22 about what Qwest has argued is in balance. We don't  
23 dispute that presently the traffic going in each  
24 direction is roughly balanced in terms of the minutes  
25 going in each direction. What we disputed was the

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1 amount of transport that we each provide was in  
2 balance. Transport is a defined term in the FCC's  
3 regulations. It's the transmission path from the point  
4 of interconnection to the end-office switch that serves  
5 the called party.

6 Charter has an advantage in Washington and in  
7 other states. Because it's a new entrant, it can  
8 configure its network differently than Qwest's network,  
9 and as a result, what it's chosen to do is use a single  
10 switch. So the transport that Charter provides under  
11 the FCC's regulations is from that point of  
12 interconnection to its switch.

13 Now, Qwest has multiple switches, and so the  
14 amount of transport, as the FCC has defined transport  
15 in its regulations, that Qwest provides is more  
16 substantial, and whether it's 45 end offices if you  
17 count Spokane, or a smaller number of four, it's still  
18 a fact that we provide more transport as the FCC has  
19 defined that term.

20 I would add that even if Charter doesn't  
21 presently provide service in Spokane, it's at least  
22 theoretically possible that they could, so we have to  
23 think about this agreement in terms of what other kinds  
24 of carriers could opt into the Charter agreement could  
25 do, and there are scenarios where Qwest would provide

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1 substantially more transport than another carrier and  
2 would not get compensated for that  
3 bill-and-keep-covers-everything type proposal.

4           One point that Mr. Halm made on the amount of  
5 transport being in balance is he wants the same  
6 distance from Pasco, for example, to Yakima for us as  
7 it is for Qwest, and our point about that is yeah, but  
8 there is a difference in the networks. Charter has  
9 gained an advantage by pulling a single switch, but the  
10 consequence of that decision, as Mr. Easton our witness  
11 testified, is that they had longer loops, and in the  
12 FCC's first report and order and reaffirmed in its  
13 recent -- rule-making, loop costs are not considered an  
14 additional cost of terminating the call. They are not  
15 recoverable or reciprocal compensation.

16           So for example, if the parties had gone with  
17 straight reciprocal compensation with no bill-and-keep,  
18 Charter would not have been allowed to set off its loop  
19 costs against Qwest's transport costs, and we think  
20 that same kind of rule should carry over into the  
21 bill-and-keep proposal and that Qwest's proposal for  
22 bill-and-keep just for usage-based charges and not  
23 direct-trunk transport takes that into account.

24           Charter knew the rules when it designed its  
25 network. It could have employed more switches, but it

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1 gained an advantage by having fewer switches. The  
2 trade-off that that entails is that they don't have a  
3 right to recover reciprocal compensation for the loop  
4 costs. So the amount of transport is not in balance  
5 because the amount of our network that constitutes  
6 transport is different than the amount of network in  
7 their network that constitutes transport.

8           The last thing I would add on this issue is  
9 that the arbitrator in Minnesota recently issued the  
10 same day as the arbitrator's report in this proceeding,  
11 it adopted Qwest's language on Issues 13 and 15. The  
12 Minnesota Commission a week and a half ago voted to  
13 approve the arbitrator's report in Minnesota. That's a  
14 new development that I thought I should let you know  
15 today. With that, I turn over...

16           CHAIRMAN GOLTZ: Just one other question.  
17 One of the things that surprises me is maybe up to 50  
18 state commissions have been doing this for 14 years, 13  
19 years. You would think that this issue would have been  
20 resolved somewhere.

21           MR. DETHLEFS: For the most part, the  
22 agreements that were negotiated with bill-and-keep in  
23 our region have had bill-and-keep for usage-based  
24 charges. The Comcast agreement in Washington is that  
25 way. The Commission approved that negotiated agreement

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1 in 2005, roughly February, of the amendment to the  
2 original agreement that Comcast had. This is the first  
3 time it's come up that I'm aware of in our region. I  
4 wasn't able to find any cases in other commissions.

5 CHAIRMAN GOLTZ: Did I hear you say that your  
6 existing agreement in this state with Comcast has  
7 language similar to what you've proposed?

8 MR. DETHLEFS: It has the bill-and-keep for  
9 usage-based charges. It's the first amendment to the  
10 interconnection agreement with Comcast, and I can give  
11 you the sections, Section 7.3.4.1.1 of that amendment  
12 has bill-and-keep brand office termination, and then  
13 Section 7.3.1.2.1 of that agreement has bill-and-keep  
14 for tandem switching and tandem transmission. The  
15 underlying agreement has payments for direct-trunk  
16 transport.

17 CHAIRMAN GOLTZ: Is that actually analogous  
18 to this situation?

19 MR. DETHLEFS: I think that Comcast probably  
20 has a larger area of service than Charter does. I'm  
21 not that familiar with Comcast operations in  
22 Washington.

23 JUDGE FRIEDLANDER: Ms. Anderl?

24 MS. ANDERL: Good morning, commissioners.  
25 Lisa Anderl representing Qwest. I will be addressing

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1 Issue 5, which is the limitation of liability language  
2 in general, and also with regard to directory listings  
3 in particular, and Issue 23, which is an issue  
4 concerning publication of Yellow Pages and white pages  
5 directory.

6 With regard to Issue No. 5, Charter and Qwest  
7 are split. Qwest thinks that the arbitrator got the  
8 limitation of liability regarding directory listings  
9 correct but incorrectly expanded the limitation of  
10 liability for general damages, and let me talk about  
11 the limitation of liability for directory listings  
12 first.

13 The limitation that Qwest proposes is one  
14 that is consistent with Qwest's tariffs, and that does  
15 significantly limit liability for errors or omissions  
16 in directory publications. That limitation has a long  
17 and consistent history of being in place in the state  
18 of Washington with regard to how Qwest and other  
19 carriers limit their liability to their end-users in  
20 their tariffs.

21 It is consistent with how Qwest limits its  
22 liability in all of its other interconnection  
23 agreements with CLEC's, and it's consistent with how  
24 Charter limits its liability to its own end-users in  
25 its tariff when it provides a service to end-users in

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1 Washington, and for all of those reasons, we believe it  
2 is appropriate. I think that it is difficult to  
3 publish a perfect directory. I think that is  
4 consistent with good public policy considerations to  
5 encourage having the directory out there and not having  
6 severely onerous penalties for an error or omission in  
7 a directory, and that the amount of damages, if any,  
8 would be extremely difficult to prove.

9           There is also a question about whether the  
10 damages would, in fact, even be Charter's damages if  
11 there were an error in Charter's own business listing.

12           CHAIRMAN GOLTZ: So let me ask, under the  
13 hypothetical that we raised earlier, so let's assume,  
14 A, that you misspelled Ms. Friedlander's name in the  
15 white pages; B, you have listed the wrong phone number  
16 for the pizza delivery service in the business white  
17 pages, and C, you erroneously list that number in the  
18 Yellow Pages, and this is all a Qwest customer in a  
19 Qwest service area in the Yellow Pages or in the phone  
20 book. What are the remedies in each of those  
21 scenarios?

22           MS. ANDERL: For the free listings, the  
23 customer does not get any monetary compensation or  
24 damages; although, I do believe it is our practice, if  
25 not our written policy, to direct customers to either

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1 a, This number has been changed, or, The new number is,  
2 some sort of a recording if possible, if in publishing  
3 Judge Friedlander's number incorrectly, we haven't  
4 actually published another person's number for her. If  
5 we can route it to a recording, I think we do.

6 If it's paid advertising in the Yellow Pages,  
7 the individual's damages would be capped at the amount  
8 of the advertising paid for, and no consequential  
9 damages or lost profits or losses to business would be  
10 permitted to be recovered.

11 CHAIRMAN GOLTZ: I don't know if Charter does  
12 yellow pages, probably not.

13 MS. ANDERL: No, but Charter in taking  
14 responsibility for its customers' listings and in  
15 transmitting its customers' listing to a Yellow Pages  
16 publisher, if they do that, has a tariff that would  
17 limit its liability to its end-user customers in the  
18 same way that Qwest had limited its liability to its  
19 own end-user customers in the way it wants to limit its  
20 liability to Charter.

21 CHAIRMAN GOLTZ: So the only issue here  
22 is whether -- because we are having two companies  
23 engaged in this business, somehow this limitation of  
24 liability system we have is open up and subjects  
25 Charter to some greater liability than it would have if



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1 it was running its own show.

2 MS. ANDERL: I think that what Charter would  
3 like to do is subject Qwest to a greater liability, and  
4 whether that's because Charter thinks they might have  
5 greater liability or not, I don't know. As I said,  
6 based on Charter's tariff, which limits its liability  
7 to its end-users or its price list or its catalog, it  
8 doesn't look like there would be any increased  
9 liability for Charter, which also kind of asks why if  
10 they weren't going to have increased liability from  
11 their end-users why they would feel the need to have  
12 broader or greater recourse against Qwest.

13 Similarly, we believe that the language in  
14 the general limitation of liability section, 5.8.1,  
15 should be limited consistent for other types of damages  
16 between the companies should be limited in the way it  
17 has been in every other interconnection agreement in  
18 the state between Qwest and another carrier, and that  
19 is a limitation to the amount of the charges for the  
20 service affected on a monthly or annual basis.

21 Charter has proposed to expand the limitation  
22 of liability provision in the ICA to allow for recovery  
23 of actual and direct damages. Judge Friedlander agreed  
24 with that and gave some rationale in her decision about  
25 why she agreed with that, and Qwest simply respectfully

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1 disagrees that that's appropriate.

2           We believe that the rationale articulated in  
3 the Minnesota decision, which Mr. Dethlefs just  
4 mentioned, is sound and consistent with the industry  
5 practice that has been in place for nearly 14 years,  
6 and the purpose of the limitation of liability section  
7 as proposed by Qwest, and this is Minnesota Commission  
8 talking, and as approved by the Commission in other  
9 ICA's, which is also true here in Washington, is to  
10 limit liability for all claims arising under the  
11 contract except those claims due to gross negligence or  
12 willful misconduct.

13           Qwest's language achieves this purpose.  
14 Charter's proposed language is fundamentally  
15 inconsistent with this purpose because it does not  
16 limit liability in any meaningful way. Charter's  
17 proposal to permit recovery of actual direct damage  
18 would permit essentially unlimited liability for this  
19 type of damage, which Charter maintains is essentially  
20 equivalent to the expectation damages available under  
21 contract law.

22           However, the Minnesota Commission goes on to  
23 say that imposing contractual limitations on liability  
24 for breach of contract or negligence is a commercially  
25 reasonable approach for large companies to have the

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1 ability to absorb some potentially uncompensated losses  
2 arising in the ordinary course of business. As a  
3 policy matter, such clauses serve the purpose of  
4 limiting disputes and reserving litigation for larger  
5 issues involving more reprehensible conduct. Charter  
6 uses such a clause in its own tariffs, and that's also  
7 true here in Washington for end-users for the purpose  
8 of limiting disputes and avoiding litigation. In  
9 addition, the Commission has approved the use of such  
10 limitations on liability in all of Qwest's ICA's in  
11 Minnesota; again, also true here in Washington.

12 I do not have a more compelling rationale to  
13 offer you other than what I have just stated and the  
14 written arguments that we've already presented to you  
15 in our petitions for review, and so I won't repeat  
16 those, but we would ask you to modify Section 5.8.1 to  
17 be consistent with Qwest's language.

18 With regard to Issue 23 -- I don't know if  
19 Mr. Halm had a chance to address that.

20 MR. HALM: I didn't.

21 MS. ANDERL: I'm also happy to rest on our  
22 papers on Issue 23. It's a fairly straightforward  
23 dispute, but I could answer any questions if you like.

24 JUDGE FRIEDLANDER: Are there any questions  
25 from the Bench on Issue 23? Okay. I guess then we

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1 will go to -- if you were finished, Ms. Anderl.

2 MS. ANDERL: Yes.

3 JUDGE FRIEDLANDER: We will go to Charter for  
4 rebuttal.

5 MR. HALM: Thank you, Your Honor. I'll be  
6 cognizant of the time here. With respect to Issue 23,  
7 I won't go into the arguments that I've prepared here  
8 other than to note that the decision is based upon  
9 received impracticalities or deficiencies with  
10 Charter's proposed language, which Charter has agreed  
11 to withdraw in our petition for review. Other than  
12 that, the decision does not discuss applicable law;  
13 specifically Section 251(b)(3) of the Act, or federal  
14 court precedence applying that statute, and we think  
15 it's an error of law because it does not address those  
16 authorities.

17 Going back to the transport issues very  
18 briefly, Chairman Goltz, you asked the question of  
19 whether or not this issue has ever been resolved in  
20 these 50 states in the last 13 years. I would submit  
21 that this issue has been resolved by this commission  
22 back in '95, '96, when you adopted bill-and-keep  
23 between Qwest's predecessor, US West, and MCI Metro,  
24 now Verizon Business. That decision was affirmed by  
25 the Ninth Circuit, as we've noted.

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1           There is another authority that is not cited  
2 in our papers but which I will share with you here.  
3 The Western District of Washington affirmed your  
4 imposition of bill-and-keep in that case in US West  
5 Communications versus AT&T Communications of the  
6 Pacific Northwest. It's a West Law cite, 1998  
7 WL-1806670; again, Western District of Washington 1998,  
8 so I would argue that this commission has, in fact,  
9 resolved that question. It's been affirmed by the  
10 Ninth Circuit and district courts.

11           One other point, Mr. Dethlefs noted that in a  
12 recent NPRM notice of proposed rule-making, the FCC had  
13 reaffirmed a point about quote, unquote, "long loops."  
14 In the 2005 intercarrier compensation notice of  
15 proposed rule-making, the FCC asked a lot of questions  
16 about what it could do to change its current rules  
17 concerning interconnection and traffic exchange  
18 compensation, and one of the questions it asked was,  
19 Should we require competitive LECs to pay for transport  
20 when they use a single point of interconnection.

21           By implication, by raising that question  
22 asking if they should impose such a rule, it's clear  
23 that there was no rule prior to that time, and in fact,  
24 they've never acted on this 2005 NPRM, and again, I  
25 would assert that there is no rule that requires these

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1 LECs to pay compensation for transport when they use  
2 the same point of interconnection.

3 JUDGE FRIEDLANDER: So there is no rule  
4 requiring it, but there is also no rule that says  
5 carriers cannot be required. Do you see what I'm  
6 saying?

7 MR. HALM: I would acknowledge that, and just  
8 one further point, and that would be that it may be  
9 appropriate to require compensation in a circumstance  
10 where a competitive LEC has a small network or serves  
11 only a limited type of customers, but where the  
12 competitive LEC serves residential subscribers, has a  
13 network that is generally equivalent to the incumbent  
14 network, and carries traffic the same distances, it  
15 would be inappropriate to impose charges in that  
16 circumstance, and with that, I have no further  
17 arguments. Thank you.

18 JUDGE FRIEDLANDER: I did have one additional  
19 question, and this relates to Issue 5 and something  
20 that Qwest had noted. Charter's tariff does limit its  
21 own liability to its end-use customers for directory  
22 errors or omissions. Can you address how then your  
23 liability would be greater than what has been adopted  
24 and the language that was adopted limiting damages to  
25 Qwest's tariff?

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1           MR. HALM: I would acknowledge that the price  
2 list -- it's not a tariff. It's a Washington law.  
3 It's a price list -- does attempt to limit liability  
4 for certain types of damages arising out of directory  
5 errors. Arguably, if the damage incurred is so  
6 significant that courts could find it unconscionable to  
7 apply that principle or that provision, if the harm  
8 caused is so significant, it's possible that liability  
9 could exceed what is provided in that provision.

10           CHAIRMAN GOLTZ: So your concern is that the  
11 pizza delivery guy in Pasco -- Qwest goes to your  
12 company, and your concern is if you in sending his  
13 phone number to Qwest for inclusion in the directory,  
14 if you make a mistake with that number, and yet assume  
15 it's a Yellow Pages issue, than you're covered probably  
16 by your price list limitation and liability. Your  
17 concern is that someone in the Qwest office is going to  
18 say, This is one of Charter's customers. Let's just  
19 invert those last two numbers for fun and see what  
20 happens.

21           MR. HALM: Not necessarily they would  
22 intentionally do so, but as Ms. Anderl noted, it's a  
23 complicated process to get directories published  
24 without any errors, and when you've got two different  
25 competitors, Charter compiling the information and then

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1 providing it to Qwest, it's natural to expect that  
2 there will be errors in that process, and if the error  
3 occurs because of Qwest's employees lack of due care,  
4 then we want some recourse other than the limited  
5 damages available under their local exchange service.

6 CHAIRMAN GOLTZ: This is all done  
7 electronically, I assume. You just send a file with  
8 all the Charter customers and phone numbers, and  
9 somehow they just botch it up.

10 MR. HALM: Right. Maybe there is not two  
11 numbers transposed. Maybe a listing is completely  
12 omitted from the directory.

13 JUDGE FRIEDLANDER: Were there any other  
14 questions from the Bench? Okay. Qwest does have  
15 rebuttal time reserved. Did you want to go ahead and  
16 take advantage of that?

17 MR. DETHLEFS: Just very briefly. Just so  
18 the Commission has the information, the issue in the  
19 intercarrier NPRM is whether a CLEC should be required  
20 to compensate an ILEC for the cost that the ILEC incurs  
21 to take its own traffic to the point of  
22 interconnection. The issue that we have here is  
23 whether the CLEC should compensate the ILEC for  
24 carrying the CLEC's traffic from that point of  
25 interconnection to the called party.



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1           So the issue before the NPRM is actually more  
2 narrow than Mr. Halm indicated. It's directed  
3 specifically at whether the CLEC should be required to  
4 compensate the ILEC for carrying the ILEC's traffic to  
5 the point of interconnection. Let me read you the  
6 particular statement that the FCC has put in issue.  
7 This is in their intercarrier compensation NPRM. The  
8 cite is 16 FCC received 9610, and it's in Paragraph  
9 112. It says, "In particular, carriers have raised the  
10 question whether a CLEC establishing a single POI  
11 within a LATA should pay the ILEC transport cost to  
12 compensate the ILEC for the greater transport burden it  
13 bears in carrying the traffic outside a particular  
14 local calling area to the distant single point of  
15 interconnection.

16           That's in Paragraph 112. The discussion  
17 continues into Paragraph 113, and then it was raised  
18 again in 2005 in the further notice of proposed  
19 rule-making. That cite is 20 FCC received 4685, and  
20 it's at Paragraph 87. So I think where Mr. Halm left  
21 this is there is no rule prohibiting the Commission  
22 from requiring Charter to pay Qwest for direct-trunk  
23 transport to the extent that it's used to carry  
24 Charter's traffic. I believe that's completely  
25 permissible; that that was authorized by the FCC in its

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1 local competition order back in 1996.

2 MS. ANDERL: Nothing further on my issues.

3 JUDGE FRIEDLANDER: Thank you.

4 COMMISSIONER JONES: I have a few questions.

5 I'll start with Qwest. Mr. Dethlefs, since you brought  
6 up the NPRM on intercarrier compensation, what's your  
7 understanding of Qwest's position? My understanding of  
8 that docket is it's been going on 10 years, numerous  
9 opinions, very complicated, and you are just picking  
10 out one little strand of that. Qwest's overall  
11 position is for bill-and-keep at the edge; correct?

12 MR. DETHLEFS: I believe that is correct.

13 I'm not an expert on the nuances. I will say that the  
14 reason Qwest has supported that position is because we  
15 have all these disputes about intercarrier comp. There  
16 are circumstances in which we pay intercarrier comp.  
17 There are circumstances in which we collect  
18 intercarrier comp.

19 If you change the whole system, which is what  
20 the issue is there, probably is a wash and saves us  
21 some disputes, but as long as a set of rules exists  
22 where there is not bill-and-keep to the edge for all  
23 traffic, then we take the position as we have where  
24 there should be several --

25 COMMISSIONER JONES: So my question is is

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1 your advocacy of the FCC for bill-and-keep at the edge  
2 consistent with your advocacy for bill-and-keep with  
3 direct-trunk transport in this case?

4 MR. DETHLEFS: What we are arguing before the  
5 FCC is that they should change all the rules to  
6 intercarrier. Here, we have a situation where there is  
7 no wash for us. If Charter's bill-and-keep proposal is  
8 adopted, we are going to bear a greater direct-trunk  
9 transport burden than we otherwise would, and there is  
10 no offsetting gain to us. So I believe they are  
11 consistent in that respect. If Charter's proposal was  
12 part of an overall change, then we might actually  
13 support it.

14 COMMISSIONER JONES: This is for Ms. Anderl  
15 or Mr. Dethlefs. In response to what Mr. Halm said, he  
16 said thousands of dollars are at stake. I would like  
17 to hear Qwest on the record. Of the economic impact of  
18 this, have you done any traffic studies in the state of  
19 Washington for these four end-offices that are  
20 referenced?

21 MR. DETHLEFS: I don't have the actual  
22 numbers. I would agree that it's probably thousands  
23 per month. The bigger issue for Qwest though is once  
24 this agreement is approved, whatever its terms are, it  
25 can be opted in by other carriers. So when you

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1 consider the possible implications for other carriers,  
2 it's going to be much more than just thousands a month  
3 for us. Across our region, it might actually be in the  
4 several million dollars.

5 COMMISSIONER JONES: So one of your points is  
6 you are not especially concerned about the economic  
7 impact of this particular proposed interconnection  
8 agreement amendment, but you are more opposed about the  
9 opt-in possibility and the fact that other  
10 competitive-based carriers could opt into these terms  
11 in the future for a bill-and-keep arrangement.

12 MR. DETHLEFS: I think that's probably a fair  
13 statement.

14 COMMISSIONER JONES: Ms. Anderl, is it your  
15 understanding that this commission approved a  
16 confidential settlement agreement in release with MCI  
17 Network Services in the last year that proposed a  
18 bill-and-keep arrangement? Are you familiar with that  
19 at all?

20 MS. ANDERL: If you are referring to the  
21 interconnection agreement amendment that was rolled  
22 into the VNXX docket --

23 COMMISSIONER JONES: No, I don't think I am.  
24 I think I'm referring to UT-063038. I think we  
25 approved it at an open meeting, and it was described to

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1 the Bench as kind of a straight bill-and-keep  
2 arrangement, and the two parties agreed to that.

3 MS. ANDERL: When you reference Docket  
4 No. 063038, I think that was a Qwest complaint against  
5 nine carriers on VNXX issues, and consolidated with  
6 that was the MCI interconnection agreement amendment,  
7 and that was -- I don't think it was straight  
8 bill-and-keep on everything. I think it was limited to  
9 usage based, and I think there was an actual -- and it  
10 settled issues with regard to VNXX traffic too, which  
11 we believe not to be local and compensable, and you all  
12 know our advocacy on that, but if I recall correctly,  
13 that did not include transport in the bill-and-keep  
14 component of it. I could be wrong. Since it is now an  
15 approved interconnection agreement amendment, that  
16 component of it would be public. If there was any  
17 confidential settlement associated with it, it may be  
18 that the confidentiality is in terms of other things  
19 that were settled, but the interconnection terms are  
20 public.

21 COMMISSIONER JONES: I just want to confirm  
22 to both parties that there is an agreement that the  
23 traffic, not transport, that traffic is roughly in  
24 balance, and that particular section of the proposed  
25 interconnection agreement I think is cited at 73412

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1 cites that, and Qwest agrees with that.

2 MR. HALM: That's our position. I would like  
3 to hear from Mr. Dethlefs.

4 MR. DETHLEFS: We agree that presently the  
5 amount of local traffic is in balance. I think that's  
6 the relevant traffic for purposes of reciprocal  
7 compensation.

8 COMMISSIONER JONES: My last question is for  
9 Mr. Halm, and I read your brief in the petition for  
10 administrative review, and I think I understand the  
11 issue at Spokane. Spokane now, I think one of your  
12 competitors, Comcast, is a cable coax provider is very  
13 active in that market both in the residential space and  
14 the enterprise space, so is it your intention in the  
15 near future to enter the Spokane market?

16 MR. HALM: I don't think so, Your Honor, no.  
17 The cable networks that Charter has deployed in  
18 Washington are largely built out at this point, and  
19 frankly, I think that the communities that are cited in  
20 the record, which I described to you earlier today, are  
21 those which Charter will be serving now and in the near  
22 future.

23 COMMISSIONER JONES: I think also in your  
24 brief you cite that you do have an unconditioned right  
25 under 251(c)(3) at the single point of interconnection

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1 that's technically feasible that shouldn't be  
2 conditioned by anything else, but you also state in  
3 your brief that perhaps in the future if sufficient  
4 traffic volumes build up with your residential and  
5 business subscribers in these four areas, Kennewick,  
6 Yakima, Waitsburg, Walla Walla, that you may build out  
7 facilities in those local calling areas in the future.

8 I would like to confirm that point. Is that  
9 true that if you do have sufficient volumes in the  
10 future in traffic that Charter could not serve those  
11 areas through a single POI but could serve it with a  
12 multiple point of interconnection?

13 MR. HALM: It is certainly true that Charter  
14 could serve those areas by establishing additional  
15 points of interconnection. Largely, the model for  
16 Charter and other cable-based providers has been to  
17 leverage the existing cable network which largely  
18 serves residential subscribers at this time, to enter  
19 the market, obtain subscribers, obtain a base of  
20 subscribers, and it is only now that some cable  
21 operators, including Charter, are now expanding their  
22 phone service offering to small and medium-sized  
23 businesses, so I believe they are doing so in  
24 Washington today, and it's likely they could be  
25 building out facilities in those areas to serve

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1 businesses in those areas.

2 COMMISSIONER JONES: Thank you. That's all I  
3 have.

4 JUDGE FRIEDLANDER: Thank you both for being  
5 here, and as noted in the arbitrator's report, the  
6 Commission will enter an order on the petitions by July  
7 16th, 2009. So if there is nothing further from the  
8 parties, than this proceeding is adjourned. Thank you.

9 (Oral arguments adjourned at 10:50 a.m.)

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