[Service Date July 23, 2009]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between CHARTER FIBERLINK WA-CCVII, LLC, with QWEST CORPORATION, pursuant to 47 U.S.C. §252(b).	)	DOCKET UT-083041 ORDER 10 FINAL ORDER DENYING CHARTER'S PETITION FOR ADMINISTRATIVE REVIEW; DENYING QWEST'S PETITION FOR REVIEW; AND AFFIRMING, WITH ONE CLARIFICATION, ARBITRATOR'S REPORT AND DECISION

1 ***SYNOPSIS.*** *The Commission affirms the Arbitrator's Report and Decision, with one clarification, and requires the parties to file an interconnection agreement consistent with this Order within 30 days of the service date.*

BACKGROUND

2 **NATURE OF PROCEEDING.** This proceeding involves a petition by Charter Fiberlink WA-CCVII, LLC (Charter), to arbitrate an interconnection agreement (ICA) with Qwest Corporation (Qwest) under section 252(b) of the Telecommunications Act of 1996 (the Act), 47 U.S.C. § 252(b). [1]

3 **APPEARANCES.** Gregory J. Kopta, Davis Wright Tremaine LLP, Seattle, Washington, and K.C. Halm, Davis Wright Tremaine LLP, Washington, D.C., represent Charter. Lisa Anderl, Associate General Counsel, Seattle, Washington, and Thomas M. Dethlefs, Senior Attorney, Denver, Colorado, represent Qwest.

[1] Public Law No. 104-104, 101 Stat. 56 (1996).

4 **PROCEDURAL HISTORY**. On August 8, 2008, Charter, a competitive local exchange carrier (CLEC), filed a petition with the Commission requesting arbitration of a new ICA with Qwest, an incumbent local exchange carrier (ILEC).

5 The Commission entered an Order on Arbitration Procedure on August 15, 2008, appointing Administrative Law Judge Marguerite E. Russell as Arbitrator, consistent with the Commission's procedural rules governing arbitration proceedings under the Act, as well as the Commission's rules for conducting such arbitrations.[2]

6 Qwest filed a response to Charter's petition on September 2, 2008.

7 After convening a prehearing conference on September 10, 2008, the Arbitrator entered Order 02, a prehearing conference order establishing a procedural schedule for the arbitration, and Order 03, a protective order. The parties waived the statutory deadlines for arbitration in letters filed with the Commission on September 11, 2008.

8 Charter and Qwest filed their respective direct testimony and exhibits on October 8, 2008.[3] On November 17, 2008, both parties filed their responsive testimony.

9 The Commission held two days of evidentiary hearings from December 16 to December 17, 2008, in Olympia, Washington. The parties filed simultaneous initial briefs on January 29, 2009, and reply briefs on February 17, 2009.

10 On March 30, 2009, the Arbitrator entered Order 07, the Arbitrator's Report and Decision, resolving all contested issues. The procedural schedule in Order 07 included oral argument before the Commission on June 16, 2009, if the parties filed petitions for review.

11 Charter and Qwest both filed petitions for review and responses to the petitions. The Commission heard oral argument on June 16, 2009.

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[2] WAC 480-07-630 and WAC 480-07-640.

[3] Charter filed a replacement page for the direct testimony of Timothy J. Gates on October 14, 2008. On November 6, 2008, Qwest submitted the corrected direct testimony of Renée Albersheim.

MEMORANDUM

12 Qwest has requested Commission review of the Arbitrator's decision concerning limitations on liability generally between the parties. Charter has petitioned for review of the following three issues: (1) limitations on Qwest's liability for directory services, (2) compensation for direct trunk transport, and (3) the extent of Qwest's obligation to provide directory functions to Charter's customers for both white and yellow page listings.

1. Limitations on liability generally between the parties

13 The dispute in question concerns the calculation of monetary damages between the parties when one party's negligent acts or omissions in its performance under the ICA injures the other party. In Order 07, the Arbitrator adopted Charter's proposal limiting the injured party's recovery to the actual, direct damages resulting from the negligent conduct of the breaching party.[4] The Arbitrator rejected Qwest's language which limited damages to the amount that would have been charged to the injured party if the services or functions had been performed properly, essentially a refund of the amounts paid for services.[5] The Arbitrator observed that, unlike other contested arbitrations, Charter is not requesting a full range of services from Qwest including unbundled network elements, only terms pertaining to interconnection of the two companies' networks.[6] As a result, Charter's potential recovery of damages under Qwest's proposal would effectively be nominal. Further, the Arbitrator determined that Qwest's proposed compensation plan would involve a calculated amount wholly arbitrary and unrelated to the injury experienced and would provide little or no incentive for the parties to act with care when encountering the telecommunications equipment of a business competitor.[7]

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[4] Order 07, ¶ 35.

[5] *Id.*

[6] *Id.*

[7] *Id.*

14 Position of Qwest. Qwest seeks review of the Arbitrator's decision on this issue, essentially repeating the arguments it made in its earlier briefs in this proceeding.[8]

15 Position of Charter. Charter asserts that the Arbitrator's decision limiting the injured party's recovery of damages is appropriate.[9]

16 Commission Decision. We uphold the Arbitrator's decision in adopting Charter's limitation of liability language. Contract provisions should be crafted so that parties have reasonable and appropriate incentives to fulfill their respective obligations and avoid future litigation. Appropriately balanced contract provisions provide an enhanced level of certainty to the parties regarding each's rights and responsibilities during the contract period. The actual, direct damages standard, in our view, provides the appropriate incentive for a competitor to act with due care when interconnecting with the other's network.

17 Qwest argues that, because none of its other ICAs in Washington contain the actual, direct damages provision, it should not be approved here.[10] That argument misses the point. Simply because none of the other CLECs, with which Qwest has contracted, have challenged Qwest's standard language does not bar Charter from requesting this issue to be arbitrated now, nor should it prevent the Commission from considering the evidence presented in this case and articulating a standard of care that is appropriate under the circumstances. Indeed, we note that over the past few years the majority of contracts presented to us for approval are negotiated agreements in which the interconnecting CLEC has not chosen to arbitrate this liability clause, presumably as a trade-off for other acceptable terms and conditions or an unstated desire to avoid a contested proceeding. Therefore, we are not persuaded that the existence of these previous agreements are of sufficient weight to override the compelling argument Charter advances on this issue.

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[8]Qwest's Petition, at 1-2.

[9]Charter's Reply, at 2-9.

[10]Qwest's Petition, ¶ 7.

2. Limitations on Qwest's liability for directory services

18 Charter proposes that the same actual, direct damages standard which the Arbitrator applied to simple negligence should be applied to any errors or omissions that Qwest may commit in transmitting Charter's customer listings to directory publishers in Section 10.4.2.6 of the ICA. Qwest disagrees, arguing that the amount of damages for such errors or omissions should be limited to the amount specified in Qwest's Tariff, § 2.4.4.A.1, i.e., the amount the customer has paid for the listing.[11]

19 The Arbitrator rejected Charter's proposal to limit liability to actual, direct damages suffered by the injured party. The Order recognized that attempting to measure the actual, direct damages for an omitted or erroneous customer listing is problematic at best.[12] The Arbitrator reasoned that damages of this kind, unlike damages that may arise under Section 5.8.1 of the ICA, are unlikely to escalate to the level of a downed telephone pole or a cut fiber optic cable.[13]

20 Position of Charter. Charter seeks review of the Arbitrator's decision, asserting the Order's limitation of damages for directory listing errors or omissions to amounts listed in Qwest's Tariff conflicts with the Arbitrator's ruling on general liability limitations as described in Section 5.8.1 of the ICA.[14] Charter repeats the arguments it has made in earlier briefs in this proceeding.[15] In the alternative, Charter proposes that the Commission add language to Qwest's proposal specifically designating the

[11]For non-primary listings, listings that are furnished for an additional charge, the damages would be capped at the amount paid for the listing during the life of the directory in which the error or omission was produced. For primary listings, listings that are provided at no charge, the damages would be limited to the amount Charter is assessed for exchange service during the life of the directory.

[12]Order 07, ¶ 41.

[13]*Id.* (referencing Charter's examples of potential negligence in performance of the contract terms as described in Section 5.8.1 of the ICA).

[14]Charter's Petition, ¶ 3.

[15]*Id.*, ¶¶ 2-12.

portions of Qwest's Tariff relevant to this liability that will be incorporated into the ICA.[16]

21 Position of Qwest. Qwest argues that the Arbitrator provided a reasoned explanation for the two damage standards.[17] As to Charter's alternative language, Qwest acquiesces with the caveat that its referenced tariff section numbers may change in the future and a clause should be inserted stating "or other applicable sections regarding limitation of liability for Listings."[18]

22 Commission Decision. We deny Charter's petition for review on this issue and affirm the Arbitrator's decision as modified by the agreed-to language proffered by Charter and clarified by Qwest. Unlike damages produced when interconnecting two telecommunications networks, errors or omissions in transmitting customer listings, especially when those listings are commingled with the listings of the ILEC and other CLECs, is unlikely to provide Qwest with a competitive advantage.

23 Charter and Qwest have both agreed to language in Section 10.4.2.6 that would modify the language adopted by the Arbitrator and include the specific provisions within Qwest's Tariff relating to damages for errors or omissions in the provisioning of directory services. With the addition of Qwest's caveat clarifying that its tariff section numbers may change over time, Charter's language proposed within its Petition specifically referencing Qwest's Tariff provisions appears just and reasonable pursuant to § 252(c) of the Act.[19]

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[16] *Id.*, ¶ 11. Charter has proposed the following additional language: "To the extent that state Tariff(s) limit Qwest's liability with regard to Listings, **Sections 2.4.4 and 5.7.1 (E and F)** of **the Washington Exchange and Network Services Tariff, are** incorporated herein and supersede the Limitation of Liability section of this Agreement with respect to Listings only." Charter has added its language in **bold** to Qwest's original language. Charter's Petition, at ¶ 11.

[17] *Id.*

[18] *Id.*, ¶ 7.

[19] While the parties have agreed to the language in Section 2.2 of the ICA which obligates the parties to amend the ICA if state or federal law is modified, there is no comparable provision within the ICA that requires amendment due to the modification of Qwest's Tariff.

3. Compensation for direct trunk transport

24 Charter recommends that the parties use bill and keep compensation[20] for both transport and termination of telecommunications traffic between the carriers.[21] Qwest suggests using bill and keep compensation for termination but requiring Charter to pay for the additional cost of direct trunk transport to the extent that it is used to transport calls placed by Charter customers.[22]

25 The Arbitrator recommended adopting Qwest's language. She emphasized that though Charter has the legal right to select the location and quantity of its point(s) of interconnection (POI) with Qwest within a Local Access and Transport Area (LATA) that contains multiple local calling areas, there may be financial consequences to that selection.[23] Because of Charter's choice of the POI, Charter should be responsible for the additional transport costs that Qwest may incur because Charter selected a POI located outside of a local calling area.[24] The Order noted that the FCC agreed that CLECs have the right to select a single POI, but it also acknowledged that a CLEC is obligated by its decision regarding the POI to compensate ILECs for the additional costs associated with the provision of interconnection, including transport costs.[25]

26 Position of Charter. Charter seeks review of the Arbitrator's decision, asserting that the decision results in an inequitable outcome.[26] It argues that, by giving CLECs the

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[20]Bill and keep compensation is an arrangement whereby the interconnecting parties would not exchange compensation for the traffic that is delivered to their respective networks. The basis for employing such an arrangement is a belief that traffic will generally be in balance between them and that they would be incurring approximately the same costs.

[21]Charter's Petition, ¶ 33.

[22]Qwest's Answer, ¶ 8 & fn 2.

[23]Order 07, ¶ 99.

[24]*Id.*

[25]*Id.*, ¶¶ 104 and 111.

[26]Charter's Petition, ¶ 18.

right to choose a single POI location,[27] the FCC explained that Congress intended that CLECs determine each carrier's obligation regarding the transport of traffic to and from the POI.[28] Charter asserts that the FCC recognized that this discretion on the part of the CLEC would require the transport of traffic to and from the selected POI at some cost.[29]

27 Charter claims that the Arbitrator's decision erroneously states that the parties' traffic and transport obligations are imbalanced, and the company states that Qwest has admitted that the parties' traffic is roughly balanced.[30] With respect to each party's transport obligations, Charter takes issue with the Arbitrator's finding of imbalance based on Qwest's provision of transport from Charter's single POI to Qwest's 45 central office switches.[31] Charter disputes the numerical value placed on Qwest's central office switches, arguing that Qwest would only use its 45 switches in exchanging traffic with Charter if Charter had customers in Spokane, which it does not.[32] Charter argues that both it and Qwest serve customers in Pasco, Waitsburg, Walla Walla, and Kennewick, making the total transport each provides roughly equal.[33]

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[27]Charter stated at hearing and later in its Petition that the parties currently exchange traffic at a single POI in Yakima, Washington. IV Tr. 372:16-19.

[28]Charter's Petition, ¶ 22. Charter quotes the FCC as stating that "Section 251(c)(2) [of the Act] gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point on that network, *rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points*." Charter's Petition, ¶ 22, citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 at ¶ 209 (1996) (Local Competition Order) (emphasis added by Charter).

[29]*Id.*, ¶ 23.

[30]Charter's Petition, ¶ 25 and 26.

[31]*Id.*, ¶ 27.

[32]*Id.*

[33]*Id.*, ¶ 29.

28 At the June 16, 2009, oral argument, Charter also commented that, because of the equal traffic and transport that the parties currently exchange, a bill and keep compensation method should be employed.[34] Charter recommends this method because "[o]therwise, the two parties will be billing one another for roughly the same charges."[35]

29 Charter makes several additional arguments against imposing transport charges for calls initiated by Charter customers. According to Charter, the Arbitrator's decision did not apply the mutual cost recovery standard under Section 252(d)(2)(A)(i) of the Act.[36] Further, Charter argues that both the Commission and the Ninth Circuit Court of Appeals favor the imposition of the bill and keep compensation method.[37] Charter states that the FCC has recognized that there are inefficiencies associated with the current intercarrier compensation regime, and, by shifting the transport expense on Qwest's side of the POI to Charter, the Arbitrator's decision has eliminated Qwest's incentive to upgrade its network with more efficient technology.[38]

30 Position of Qwest. Qwest argues that the Arbitrator's decision was correct in excluding direct trunk transport from bill and keep compensation,[39] referring to the Arbitrator's recognition that Charter's choice in selecting a POI has the power to shift transport costs to the ILEC.[40] Qwest also called to our attention a decision by an arbitrator with the Minnesota Public Utilities Commission who, in an arbitration with

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[34]Halm, IV Tr. 377:6-9.

[35]*Id.*, ll 9-11.

[36]*Id.*, ¶ 28.

[37]*Id.*, ¶ 34, citing *MCI Telecommunications Corporation v. U.S. West Communications*, 204 F.3d 1262 (9th Cir.), *cert. denied*, 531 U.S. 1001 (2000), (affirming the United States District Court for the Western District of Washington's decision affirming the Commission's arbitration ruling).

[38]*Id.*, ¶¶ 41 and 42.

[39]Qwest's Answer, ¶ 45.

[40]Qwest's Answer, ¶ 9; *Arbitrator's Report*, In the Matter of the Petition of Charter Fiberlink, LLC, for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. §252(b), Minnesota Public Utilities Commission, MPUC No. P-5535, 421/M-08-952, March 30, 2009, (*affirmed*, July 10, 2009.)

similar facts, reached the same conclusion as the Arbitrator in Washington.[41] Finally, Qwest asserts that its proposed transport and termination compensation regime is the same as that approved by the Commission in Docket UT-053007, wherein the Commission approved an amendment to the fully adopted agreement between Qwest and Comcast Phone of Washington, LLC.[42]

31 With regard to Charter's claim that the FCC anticipated that CLECs would be able to prescribe each carrier's transport obligation to and from the POI, Qwest points out that the FCC found in that same order that CLECs have an incentive to make more economically efficient choices in selecting a POI location because CLECs must usually compensate ILECs for additional interconnection charges.[43] Qwest argues the FCC never found that the CLEC, by its choice of a single POI per LATA should be able to shift transport costs to the ILEC.[44] Qwest asserts that Charter's decision to establish a single POI increases Qwest's transport costs in two ways: 1) Qwest must transport its local traffic outside the originating local calling area to a POI with Charter in a different calling area, and 2) Qwest also must transport Charter's local traffic from the POI in a distant local calling area to the local calling area in which the call is placed and received.[45]

32 Qwest disagrees with Charter that the ILEC would not be providing transport to over 45 end office switches, as Qwest claimed at hearing and in testimony, because that number is based on Charter serving customers in Spokane.[46] First, Qwest asserts that the ICA does not prohibit Charter from serving customers in the Spokane area.[47] Further, even if Charter will not serve customers in Spokane and therefore would not

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[41] *Id.*, ¶ 29.

[42] Dethlefs, IV Tr. 394:3-5.

[43] Qwest's Answer, ¶ 13.

[44] *Id.*

[45] *Id.*, ¶ 14.

[46] *Id.*, ¶ 20.

[47] *Id.*

be accepting transport from Qwest's 45 switches but only four of Qwest's switches, Qwest points out that it will still provide more transport than Charter does over its single switch.[48]

33 In addition, Qwest claims that Charter has decided that it is more efficient to reduce its switching costs by using a network configuration consisting of a single switch with larger loops.[49] Loop costs, Qwest points out, are not recoverable under reciprocal compensation because the FCC determined that they are not additional costs of terminating calls.[50] As a result, Qwest argues that Charter provides only nominal transport that is recoverable, while Qwest incurs a much higher proportion of recoverable transport costs.[51]

34 With regard to the FCC's policy of encouraging deployment of efficient networks, Qwest asserts that Charter incorrectly assumes that only ILECs should invest in transport.[52] According to Qwest, if Charter receives free use of Qwest's network, Charter will not invest in transport technologies even though it should when the cost of its own transport is less than the amount Qwest charges for transport.[53] Qwest also asserts that Charter's suggested language tips what should be a level competitive playing field in Charter's favor. [54]

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[48] *Id.*

[49] *Id.*, ¶ 21.

[50] *Id.*, ¶ 26.

[51] *Id.*, ¶¶ 21 and 26. Qwest points out that Charter would only be assessed a direct trunk transport charge to the extent that direct trunk transport was used to carry Charter calls from the POI to Qwest customers. *Id.*, ¶ 15.

[52] *Id.*, ¶ 39.

[53] *Id.*, ¶ 38.

[54] *Id.*, ¶ 40.

35 Commission Decision. We affirm the Arbitrator's decision with one clarification.[55] As the Arbitrator's decision noted, Charter has the right to select a single POI within a LATA and to locate that POI wherever it is technically feasible to connect with Qwest's network. From there, Charter incorrectly extrapolates and concludes that the FCC meant to excuse CLECs from any financial responsibility for the additional direct trunk transport costs ILECs incur as a result of a CLEC's POI decision. Charter fails to cite any explicit FCC authority to support this conclusion.[56] Instead, as Qwest points out, the FCC stated that "because competing carriers must usually compensate [ILECs] for the additional costs incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect.[57]

36 Bill and keep compensatory regimes are typically entered into or imposed when the originating and terminating traffic between two carriers tends to balance out and as a result, intercarrier payments are roughly equal.[58] The carriers avoid the necessity of implementing a billing arrangement and the resulting administrative costs.

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[55] Order 07 misstated that Qwest claimed its transport traffic is greater than Charter's. Order 07, ¶ 110. Instead, the Order should have noted that Qwest believes its *transport* is greater than Charter, not its traffic. This clarification was verified at the June 16, 2009, oral arguments when both parties acknowledged that the expected traffic should be roughly equal. IV Tr. 419:4-7.

[56] Charter has only cited to a small portion of the FCC's *Local Competition Order* in ¶ 209. There, Charter points to the FCC's statement that CLECs can choose any technically feasible POI on the ILEC's network "rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points." This statement only demonstrates the uncontroverted point that Charter may choose a POI that it finds is more convenient. The statement does not provide proof that the FCC intended any additional direct trunk transport costs born out of the CLEC's decision to inure to the ILEC.

[57] *Local Competition Order*, ¶ 209. We reject Charter's argument that this statement of the FCC appears to refer only to voluntary charges that a CLEC has agreed to pay for transport in return for the right to a single POI. Halm, IV Tr. 379:17-380:6. There is no indication that the FCC was referring solely to existing ICAs or negotiated transport charges.

[58] *Rural Iowa Independent Telephone Ass'n v. Iowa Utilities Board*, 476 F.3d 572, 577 (8th Cir. 2007) and 47 U.S.C. § 251(b)(5). *BellSouth Telecommunications, Inc., v. MCImetro Access Transmission*, 317 F.3d 1270, 1286-7 (11th Cir. 2003) (Tjoflat, J., dissenting).

37 The parties have conceded that the traffic they exchange will be roughly in balance. However, balanced traffic between Qwest and Charter does not mean that the parties' financial obligations are a wash when a POI selection creates an imbalance in the use of transport facilities. Charter's network configuration consists of long transmission paths that, as Qwest notes, are properly classified as local loops. The FCC has concluded that local loop costs, like Charter's loops, should not be classified as an "additional cost" such that the "additional cost" would be recoverable through termination charges.[59] On the other hand, Qwest's transmission facilities are properly classified as transport because they provide transmission from the POI to and from Qwest's end office switch that serves the called party.[60]

38 The increase in costs to Qwest, due to Charter's decision to use longer loops and a single POI instead of employing additional switches, can be seen in the example of a call placed between customers in Waitsburg, Washington.[61] When a Qwest customer from Waitsburg calls another Qwest customer in Waitsburg, the call never leaves Waitsburg as Qwest employs a switch in that location. However, a local call from that same Qwest customer in Waitsburg to a Charter customer in Waitsburg would have to travel approximately 130 miles[62] over Qwest's facilities to Charter's switch in Yakima before going over Charter's local loops from Yakima to the Charter customer in Waitsburg. Likewise, a local call from a Charter customer in the same city to a Qwest customer, also in Waitsburg, would travel on Charter's loop to Yakima and then over Qwest's facilities to Qwest's Waitsburg customer. Clearly, Charter's decision to deploy a single POI and locating that POI in Yakima significantly

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[59]The FCC stated that "[t]he cost of local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities. We conclude that such non-traffic sensitive costs should not be considered "additional costs" when a LEC terminates a call that originated on the network of a competing carrier … only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an "additional cost" to be recovered through termination charges." *Id.*, ¶ 1057.

[60]47 CFR § 51.701(c).

[61]Both carriers provide local service to customers in Waitsburg, Washington, and exchange traffic in this area via the single POI in Yakima. Charter's Petition, ¶ 29.

[62]The approximate mileage listed here is for illustrative purposes only, is offered as an example of the distance a call must travel to and from the POI to a typical Qwest customer, and is not based on vertical and horizontal coordinates that the industry typically uses to calculate distances between network elements such as switching locations.

increases the transport costs Qwest incurs when it handles calls between Charter and Qwest customers that originate or terminate outside of Yakima. No explicit provision within the Act, nor its implementing regulations by the FCC, requires Qwest to bear that added financial cost.

39 As Charter pointed out at the oral argument, bill and keep is typically implemented because "[o]therwise, the two parties will be billing one another for roughly the same charges."[63] However, the parties' compensatory obligations are not equal, they would not cancel each other out, and the companies would not avoid unnecessary administrative costs by implementing a bill and keep regime. Further, by proposing a bill and keep regime for direct trunk transport, Charter is requesting that the Commission deny Qwest compensation for transporting Charter customers' calls. Thus, the Arbitrator properly rejected Charter's request for bill and keep to apply to direct trunk transport.

40 Furthermore, Charter neglects to consider the fact that, whether the interconnection uses Qwest's 45 end office switches or 4 end office switches, Qwest still provides more transport that Charter does with its one switch.

41 Charter's argument that the Arbitrator's decision does not take into account mutual cost recovery under the Act similarly fails. Pursuant to Section 252(d)(2)(A)(i) of the Act, the Commission shall not consider terms and conditions for reciprocal compensation to be just and reasonable unless the terms and conditions provide each carrier with mutual and reciprocal recovery of transport and termination costs on each carrier's network facilities of calls that originate on the other carrier's network. However, Charter fails to address the second portion of Section 252(d)(2)(A) which provides that terms and conditions must also "determine such costs on the basis of reasonable approximation of the additional costs of terminating such calls."[64] As stated previously, the FCC does not allow the recovery of Charter's local loop costs since these amounts are not viewed as additional costs. Therefore, the Arbitrator's decision to impose direct trunk transport charges upon Charter for calls that Charter customers make to Qwest customers complies with Section 252(d)(2)(A)(i) and (ii).

[63]Halm, IV Tr. 377:6-9.

[64]Section 252(d)(2)(A)(ii) (emphasis added).

42 Similarly, Charter's argument that the Commission and the Ninth Circuit Court of Appeals have a preference for bill and keep arrangements is not persuasive. Charter neglects to address the fact the sole case it cites, *MCI Telecommunications Corp. v. U.S. West Communications,*[65] is distinguishable from the instant docket. The *MCI* decision does not discuss each carrier's network arrangements, how many POIs are involved, and whether the CLEC chose, as Charter has, to substitute longer local loops for switches. The court did nothing more than find that the Commission's decision, based on the facts of that case, was supported by "substantial evidence." [66] It only found that bill and keep compensation was permissible, not that bill and keep should be mandated by the Commission in each and every arbitration. Charter even admits that the *MCI* decision does not tackle the issue of balanced transport costs paramount to this issue.[67] For that matter, in an order entered by the Commission in Dockets UT-063038 and UT-063055, the Commission actually carved out VNXX transport from the bill and keep compensatory regime and instead ordered that "requiring CLECs to pay for the transport of such calls is fair and reasonable based on the comparison of VNXX service to Qwest's FX service, under which the FX customer pays for transport of the FX call … we require CLECs to compensate Qwest for the transport of such calls only to the extent the calls actually use Qwest transport facilities"[68]

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[65]204 F.3d 1262 (9th Cir.), *cert. denied*, 531 U.S. 1001 (2000). At the oral argument, Charter also referenced, for the first time, *U.S. West Communications, Inc., v. AT&T Communications of the Pacific Northwest, Inc.* in support of the proposition that the Commission has already addressed the issue of bill and keep compensation and adopted the methodology. IV Tr. 410:3-10, citing to 1998 WL 1806670 (W.D. Wash. 1998). However, the *U.S. West* decision merely found that the Commission's adoption of an interim bill and keep arrangement was not arbitrary and capricious. Further, the Commission in *U.S. West* had previously found the ILEC's proposed alternative to bill and keep inferior. Such is not the case here.

[66] 204 F.3d at 1270-71.

[67]Charter's Petition, ¶36.

[68]*Qwest Corporation v. Level 3 Communications, LLC., et al*, Docket UT-063038, Order 05, and *In the Matter of the Request of MCIMetro Access Transmission Services, LLC d/b/a Verizon Access Transmission Services and Qwest Corporation for Approval of Negotiated Agreement Under the Telecommunications Act of 1996*, Docket UT-063055, Order 02, Oct. 5, 2007, ¶¶ 97-98.

43 In sum, the Commission is also unswayed by Charter's argument that the Arbitrator's decision is in some way inconsistent with the FCC's intercarrier compensation proceedings which, in part, advocate the deployment of efficient networks. In all of its intercarrier compensation rulings over the past decade, the FCC has made no explicit ruling that disallows the imposition of direct trunk transport charges in negotiated ICAs when compensable transportation obligations are imbalanced. Thus, the Commission rejects Charter's request and affirms the Arbitrator's decision.

4. The extent of Qwest's obligation to provide directory functions to Charter's customers for both white and yellow page listings.

44 Regarding the extent of Qwest's obligation to provide directory functions to Charter's customers for both white and yellow page listings, the Arbitrator found that Charter's language was unacceptable because it implied that Qwest would have to offer the same contractual benefits it had negotiated with the directory publishers on behalf of its own customers to all CLEC customers, even though the CLEC customers were not parties to the original contract.[69] The Arbitrator adopted Qwest's language which acknowledged that, outside of the actual act of placing a customer's listing information in a directory assistance database, any other directory services offered to CLEC customers need to be negotiated between the CLEC and the directory publisher.

45 Since the Arbitrator's decision, the parties have reached an agreement on language for Section 10.4.5 of the ICA whereby both parties concede that Qwest will provide Charter's customer listings to both white and yellow pages directory publishers in a non-discriminatory manner, commingled with Qwest's own customer listings and other CLECs' listings. The two parties continue to disagree on the specific language contained in Section 15.

46 Position of Charter. Charter complains that Qwest's proposed language attempts to eliminate Qwest's duty to provide CLEC yellow page listings to directory publishers even though Qwest acknowledges that it already does so.[70]

[69]Order 07, ¶ 143.

[70]Charter's Petition, ¶¶ 61 and 62.

47 Position of Qwest. Qwest concurs that the parties have agreed to language in Section 10.4.5 that requires Qwest to provide what Charter defines in Section 15 as "directory listing functions."[71] Qwest argues that Charter's proposed language for Section 15 repeats the language in Section 10.4.5 compelling Qwest to provide Charter's customers with directory listing functions to the same extent it provides its own customers.[72] Qwest asserts that its proposed language establishes that there are certain issues that are between the directory publisher and the CLEC's end-user customer that do not implicate Qwest.[73] Qwest points to the last sentence of Charter's proposed language as proof that Charter agrees with Qwest's assessment.[74] Given the parties' agreement in Section 10.4.5, Qwest proposes a modification to its Section 15 language so as to remove the redundant references to "white page" and "yellow pages Listings."[75]

48 Commission Decision. We affirm the Arbitrator's decision. The agreed upon language in Section 10.4.5 establishes Qwest's duty unequivocally to transmit CLEC white and yellow page listings in a non-discriminatory and commingled manner as required by Section 251(b)(3) of the Act. Both of the parties' language in Section 15

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[71]Qwest's Answer, ¶ 49. The compromise language in Section 10.4.5 states: "Qwest will provide CLEC's Directory Listings to white and yellow pages directory publishers in a non-discriminatory manner, and commingled and integrated with Qwest's and other CLEC listings, pursuant to the terms of this [ICA]."

[72]*Id.* Charter's proposed language in Section 15 states: "Qwest shall provide CLEC with directory listing functions (that is, inclusion of CLEC numbers in printed white and yellow pages directories) to the same extent that Qwest provides its own End Users with such listing functions, irrespective of whether Qwest provides such functions itself or relies on a third party to do so." Qwest offers to delete the reference to "yellow page Listings" and "white page" in its proposed Section 15 for consistency with the agreed upon language in Section 10.4.5. *Id.*, ¶ 51.

[73]*Id.*, ¶ 50.

[74]*Id.* Charter has proposed language in Section 15 of the ICA which states "[n]otwithstanding the foregoing, CLEC acknowledges that yellow pages advertising arrangements will be established directly between Qwest's Official Directory Publisher and any End Users seeking to place such advertising." Charter's Petition, ¶ 60.

[75]Qwest's Answer, ¶ 51.

provides that Qwest is not responsible for negotiating yellow pages advertising for Charter customers, such that even Charter has included a provision acknowledging that yellow pages advertising arrangements will be established directly between Qwest's directory publisher and any end users seeking to place such advertising. Qwest's language provides a clearer explanation of the parties' obligations to one another and, with Qwest's suggestion removing certain duplicative language in its own proposal, is more reasonable.

FINDINGS OF FACT

49 Having discussed above in detail the evidence received in this proceeding concerning all material matters, and having stated findings and conclusions upon issues in dispute among the parties and the reasons therefore, the Commission now makes and enters the following summary findings of fact, incorporating by reference pertinent portions of the preceding detailed findings:

50 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington vested by statute with the authority to regulate the rates and conditions of service of telecommunications companies within the state, and to take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal Telecommunications Act of 1996. RCW 80.36.150.

51 (2) Qwest Corporation is an incumbent local exchange carrier, providing local exchange telecommunications service to the public for compensation within the state of Washington.

52 (3) Charter Fiberlink WA-CCVII, LLC, is authorized to operate in the state of Washington as a competitive local exchange carrier.

53 (4) Charter has requested interconnection with Qwest's telecommunications network but did not request the provision of services or unbundled network elements from Qwest.

54 (5) Charter interconnects with Qwest in Yakima, Washington.

55 (6) The Commission has previously carved out telecommunications transport from an otherwise traditional bill and keep compensatory model.

CONCLUSIONS OF LAW

56 Having discussed above all matters material to this decision, and having stated detailed findings, conclusions, and the reasons therefore, the Commission now makes the following summary conclusions of law incorporating by reference pertinent portions of the preceding detailed conclusions:

57 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, this proceeding.

58 (2) Section 251(c)(2) of the Act requires an incumbent local exchange carrier to provide interconnection with any requesting telecommunications carrier on terms that are "just, reasonable, and nondiscriminatory."

59 (3) A requesting competitive local exchange carrier has the discretion to choose the location and quantity of the point(s) of interconnection with the incumbent carrier at any technically feasible location within Qwest's service area. *Local Competitive Order*, ¶ 209.

60 (4) A competitive carrier has an incentive to choose a point of interconnection that is economically efficient because competitive carriers must usually compensate incumbent carriers for the additional costs of interconnection. *Local Competitive Order*, ¶ 209.

61 (5) Only forward-looking, end-office switching costs that are recovered on a usage-sensitive basis constitute an "additional cost" to be recovered through termination charges. *Local Competitive Order*, ¶1057.

62 (6) Charter's local loop costs do not constitute "additional costs" and are not recoverable charges since the cost of local loops do not vary in proportion to the number of calls terminated over the facilities. *Local Competitive Order*, ¶ 1057.

63 (7) Charter's proposed language implementing the actual, direct damages standard for the parties' general liability to each other is reasonable.

64 (8) The limitation of Qwest's liability to Charter for errors or omissions in directory transmission to damages referenced in Qwest's Exchange and Network Services Washington Tariff is reasonable.

65 (9) Qwest's transmission of Charter customers' calls from the point of interconnection to Qwest's end office switch qualifies as transport. 47 C.F.R. § 51.701(c).

66 (10) Section 252(d)(2)(A)(i) of the Act mandates that the terms and conditions of any reciprocal compensation regime provide each carrier with mutual and reciprocal recovery of transport costs in order to be deemed just and reasonable.

67 (11) Such costs are determined on the basis of a reasonable approximation of the additional costs of terminating such calls. 47 U.S.C. § 252(d)(2)(A)(ii).

68 (12) Neither the United States Court of Appeals nor the Commission mandate that transport costs of the interconnecting parties must be collected as bill and keep compensation.

69 (13) Qwest is required to provide Charter customers with nondiscriminatory access to directory listing. 47 U.S.C. § 251(b)(3).

70 (14) The statutory requirement to provide nondiscriminatory access to directory listing does not obligate Qwest to renegotiate contracts with directory publishers that benefit its own customers in order to provide Charter's customers with the same non-basic white and yellow page functions.

ORDER

THE COMMISSION ORDERS:

71 (1) Qwest Corporation's Petition for Commission Review of the Arbitrator's Report and Decision is denied consistent with the findings and conclusions in this Order.

72 (2) Charter Fiberlink WA-CCVII, LLC's Petition for Administrative Review of the Arbitrator's Report and Decision is denied, with one clarification.

73 (3) Charter Fiberlink WA-CCVII, LLC, and Qwest Corporation, must file an Interconnection Agreement with the Commission, consistent with this Order, no later than 30 days after the service date of this Order.

Dated at Olympia, Washington, and effective July 23, 2009.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

JEFFREY D. GOLTZ, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.