

# KING & SPALDING

King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036-4003  
Tel: +1 212 556 2100  
Fax: +1 212 556 2222  
www.kslaw.com

Shaila Rahman Diwan  
Partner  
Direct Dial: 212-790-5346  
sdiwan@kslaw.com

July 29, 2022

## VIA NYSCEF

Justice Andrea Masley  
Supreme Court of the State of New York  
County of New York, Commercial Part 48  
60 Centre Street  
New York, NY 10007

**Re: *EarthLink LLC v. Charter Communications Operating, LLC*,  
No. 654332/2020**

Dear Justice Masley,

We write on behalf of Plaintiff EarthLink, LLC (“EarthLink”) in response to Defendant Charter Communications Operating, LLC’s (“Charter”) July 29, 2022 letter ([Doc. No. 158](#)), in which Charter requests that the Court “summarily deny” EarthLink’s Order to Show Cause for Spoliation Sanctions Against Defendant (“OSC”) or set a briefing schedule on the OSC. The Court should reject Charter’s baseless request for summary denial of the OSC for multiple reasons.

***First***, Charter offers no legitimate basis for its suggestion that the OSC is “premature.” Charter argues that EarthLink “had no reason” to seek spoliation sanctions at this juncture of the case, but that is plainly incorrect. As explained in EarthLink OSC papers, although Charter only revealed its spoliation to EarthLink on July 13, 2022, it destroyed the audio calls over two years ago, and has repeatedly obfuscated that fact through its representations to the Court and EarthLink in motion practice and discovery, needlessly imposing burdens and costs on EarthLink. ([Doc No. 157](#) at 6-8).

Resolving the spoliation issues raised in the OSC<sup>1</sup> now will not only prevent Charter from further wasting the Court’s and parties’ time and resources, but will streamline the issues

---

<sup>1</sup> Notably, Charter has resisted document collection in connection with its in-house attorneys who were responsible for its decision to destroy its call recordings. Resolution of these issues would streamline the need for additional discovery motions by EarthLink seeking to compel that discovery.

remaining for a potentially early summary adjudication (as noted in the OSC) as well as further discovery, including depositions. Thus, while Charter suggests the Court cannot appropriately decide the OSC “before the deadline for production of documents,” or complains these are solely matters for trial, Charter fails to explain why this is the case.

Moreover, Charter’s July 29 letter ***does not dispute*** that it deleted the audio recordings, and fails to offer any support for its suggestion that the Court should wait until document productions are completed to decide the OSC. Simply put, Charter does not dispute any of the facts warranting the sanctions sought in the OSC—nor could it, as they are based on Charter’s own representations to EarthLink. Accordingly, the issues arising from Charter’s spoliation raised in the OSC are ripe for this Court’s adjudication.

***Second***, Charter’s latest revelation that it has somehow discovered a previously-unknown cache of transcripts of certain of the audio recordings it deleted provides no basis for denial of the OSC. Charter’s claimed possession of these transcripts contradicts its multiple prior representations denying that such transcripts exist. For example:

- June 24, 2022, Charter objected to EarthLink’s request for the audio calls, “including all recordings or transcriptions of those communications,” on the ground that transcriptions “***have not been created and do not currently exist.***” ([Doc. No. 46](#) at 8-9).
- July 13, 2022, during the parties’ meet and confer in which Charter admitted to destroying the calls, Charter’s counsel explicitly said: “There are no recordings between Charter and the Service Subscribers. ***You asked for transcriptions, there are none.***”
- Thereafter, Charter sent EarthLink a letter on July 19 ([Doc No. 152](#)) ***confirming*** that it destroyed the audio calls that, notably, makes no mention that transcriptions of some calls exist.

There are no details in Charter’s July 29 letter explaining how, after July 19, Charter suddenly discovered transcriptions of the spoliated calls given its repeated statements no such transcripts exist. And in any event, as EarthLink already explained to Charter in an exchange Charter failed to provide to the Court. (*See* Exhibit 1 hereto). Charter’s July 29 letter confirms it now has transcriptions for only a fraction of the calls—which not only reinforces that it deleted the majority of its calls, but also raises a host of additional questions as to why certain calls were transcribed over others and whether these selections were made self-servingly to conceal evidence of Charter’s alleged misconduct. Accordingly, Charter’s sudden discovery of certain transcriptions of the spoliated calls provides no basis to summarily deny the OSC.

Charter has already proposed other secondary evidence that is inferior to the sole contemporaneous recordings of its calls with the Service Subscribers. These are addressed at length in EarthLink’s OSC. To the extent Charter now raises an additional category of secondary evidence a week before productions are completed, there is no reason why the parties cannot deal with that category in the OSC briefing as well.

**Third,** Charter’s suggestion that EarthLink inappropriately filed the OSC “while the parties were in the midst of exchanging meet and confer letters surrounding the issue” is meritless. EarthLink put Charter on notice on July 15, two days after Charter revealed its destruction of the call recordings, that EarthLink was “evaluating what relief to seek to redress Charter’s destruction of evidence.” While EarthLink has sent Charter multiple follow-up requests for details concerning *why* it chose not to preserve the evidence it spoliated – none of that changes the fact that there can be no further conferral concerning Charter’s failure to preserve the calls. Charter’s arguments cannot alter the simple fact that it deleted the audio calls that were highly probative of its alleged misconduct, which warrant sanctions as set forth in the OSC.

**Lastly,** while EarthLink does not oppose the Court granting the parties reasonable time to complete briefing of the OSC, EarthLink requests that any such schedule be appropriately tailored to ensure expedient resolution of the issues raised therein. As set forth above, prompt resolution of Charter’s spoliation issues will significantly streamline remaining discovery and prevent further needless expenditure of the parties’ and Court’s resources on these issues.

Respectfully submitted,



Shaila R. Diwan