

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK  
COMMERCIAL DIVISION, PART 48

EARTHLINK, LLC,

Plaintiff,

v.

CHARTER COMMUNICATIONS  
OPERATING, LLC,

Defendant.

Index No.: 654332 /2020

Motion Sequence No. 004

Hon. Andrea Masley

**KENNETH FOWLER**, an attorney duly admitted to practice law in the State of New York, affirms under the penalties of perjury that:

1. I am a lawyer with King & Spalding LLP, 1185 Avenue of the Americas, New York, New York 10036, counsel for Plaintiff EarthLink, LLC (“Plaintiff” or “EarthLink”).
2. I submit this affirmation in connection with EarthLink’s motion by Order to Show Cause for Spoliation Sanctions (the “Motion”) against Defendant Charter Communications Operating, LLC (“Defendant” or “Charter”). This affirmation is submitted in response to the Court’s request during the September 29, 2022 hearing on the Motion for additional detail regarding how EarthLink’s used Charter’s assertions to estimate that approximately 130,000 total calls<sup>1</sup> occurred between March 29, 2020 through October 31, 2020, and that no transcripts exist for approximately 43,200 of those calls. ([Dkt. 237](#), at 7–8.)

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<sup>1</sup> For purposes of this analysis, we took a conservative approach and interpreted “calls” to mean non-enterprise, non-field service, in-bound calls, consistent with Charter’s assertion that it does not send enterprise, field service, and outbound calls to its vendor for transcription. (See [Dkt. 184](#) ¶¶ 3, 5.) If we included these other categories of calls, the number of calls that Charter deleted for which there are no transcripts would increase, but Charter has not provided EarthLink sufficient information to conduct that analysis.

3. Consistent with our conservative approach, for our estimate of missing transcripts, we focused on the March through October 2020 period because Charter asserted that calls made prior to March 2020 were deleted before Charter received EarthLink’s formal document preservation demand.<sup>2</sup> ([Dkt. 174](#), at 9.)

4. In its reply in support of the Motion, EarthLink explained that, “[t]aking Charter at its word and extrapolating from the 86,400 transcripts produced for that period suggests that there were approximately 130,000 total calls with EarthLink subscribers—thus approximately 43,200 call recordings were deleted for which no transcript exists.” ([Dkt. 237](#), at 7–8.)

5. The chart below details how EarthLink used Charter’s assertions to arrive at those estimates:

	A	B	C
1	<b><u>Category</u></b>	<b><u>Value</u></b>	<b><u>Source</u></b>
2	Call Transcripts Produced by Charter	104,000	<a href="#">Dkt. 174</a> , at 6 (“Charter has now produced approximately 104,000 transcripts...”)
3	Transcripts of Calls Made Prior to March 2020	17,600	<a href="#">Dkt. 184</a> , ¶ 6 n.2 (“Charter has produced approximately 17,600 transcripts for recordings of calls placed between November 2019 and February 2020.”)
4	Transcripts Produced of Calls Made from March through October 2020	86,400	B2 (104,000) <b>minus</b> B3 (17,600) (Total transcripts produced, less pre-March 2020 transcripts)
5	Approximate <b><u>Percentage</u></b> of Calls Transcribed for March through October 2020	66.667%	<a href="#">Dkt. 184</a> , ¶ 3 (“Approximately two-thirds of the call recordings are transmitted to NICE for transcription.”)

<sup>2</sup> Charter asserts that calls prior to March 29, 2020, were deleted prior to Charter receiving EarthLink’s formal document preservation demand. ([Dkt. 174](#), at 9.) However, Charter’s papers specify only how many transcripts it produced for calls made prior to March 2020—not the specific date of March 29, 2020. [Dkt. 184](#), ¶ 6 n.2. Accordingly, we based our calculations on the numbers Charter included in its papers.

6	Approximate <b><u>Number</u></b> of Calls Recorded for March through October 2020	129,600	B4 (86,400) <b>divided by</b> B5 (66.667%) (Transcripts produced during period, divided by percentage of calls transcribed) <sup>3</sup>
7	Approximate <b><u>Percentage</u></b> of Calls <b><u>Not</u></b> Transcribed for March through October 2020	33.333%	<a href="#">Dkt. 184</a> , ¶ 3 (“Approximately two-thirds of the call recordings are transmitted to NICE for transcription.”)
8	Approximate <b><u>Number</u></b> of Calls <b><u>Not</u></b> Transcribed for March through October 2020	43,200	B6 (129,600) <b>multiplied by</b> B7 (33.333%) (Total calls during period multiplied by percentage of calls not transcribed)

Dated: October 14, 2022  
New York, New York

Submitted by,



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<sup>3</sup> Total Calls \* Percentage of Calls Transcribed = Number of Transcribed Calls.

**THEREFORE:**

Total Calls = Number of Transcribed Calls ÷ Percentage of Calls Transcribed.