Exhibit ___-T (JDW-2T)

BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement between CHARTER FIBERLINK WA-CCVII, LLC and QWEST CORPORATION Pursuant to 47 U.S.C. Section 252.	DOCKET NO. UT-083041

REBUTTAL TESTIMONY

OF

JAMES D. WEBBER

ON BEHALF OF

CHARTER FIBERLINK WA-CCVII, LLC

November 17, 2008

TABLE OF CONTENTS

Exhibits

Exhibit___(JDW-3): Curriculum Vitae of James Webber

I. INTRODUCTION AND PURPOSE OF TESTIMONY

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS FOR THE RECORD.

A. My name is James D. Webber. My business address is: QSI Consulting, Inc. 4515 Barr Creek Lane, Naperville, Illinois 60564.

Q. WHAT IS QSI CONSULTING, INC. AND WHAT IS YOUR POSITION WITH THE FIRM?

A. QSI Consulting, Inc. ("QSI") is a consulting firm specializing in regulated industries, econometric analysis and computer-aided modeling. I currently serve as Senior Vice President.

Q. PLEASE DESCRIBE YOUR EDUCATIONAL BACKGROUND AND WORK EXPERIENCE.

A. I earned both a Bachelor of Science degree in Economics (1990) and a Master of Science degree in Economics (1993) from Illinois State University. I have approximately 15 years of experience in the regulated utility industries, with the last 13 years specifically focused on competitive issues within the telecommunication industry.

Prior to accepting a position with QSI Consulting, Inc., I was employed by ATX/CoreComm as the Director of External Affairs. In that capacity, my

responsibilities included: management and negotiation of interconnection agreements and other contracts with other telecommunications carriers; management and resolution of operational impediments (including, for example, the unavailability of shared transport for purposes of intraLATA toll traffic and problems associated with persistent failed hot cut processes); management of financial disputes; design and implementation of cost minimization initiatives; design and implementation of regulatory strategies; and management of the company's tariff and regulatory compliance filings. I was also involved in the company's business modeling as it related to the use of Resale services, UNE-Loops and UNE-Platform.

Before joining CoreComm, I was employed by AT&T from November 1997 to October 2000 where I held positions within the company's Local Services and Access Management organization and its Law and Government Affairs organization. As a District Manager within the Local Services and Access Management organization, I had responsibilities for local interconnection and billing assurance. Prior to that position, I served as a District Manager – Law and Government Affairs, where I was responsible for implementing AT&T's policy initiatives at the state level.

Prior to joining AT&T, I was employed (July 1996 to November 1997) as a

Senior Consultant with Competitive Strategies Group, Ltd. ("CSG"), a Chicago-based consulting firm that specialized in competitive issues in the telecommunications industry. While working for CSG, I provided expert consulting services to a diverse group of clients, including telecommunications carriers and financial services firms.

From 1994 to 1996, I was employed by the Illinois Commerce Commission ("ICC") where I served as an economic analyst and, ultimately, as manager of the Telecommunications Division's Rates Section. In addition to my supervisory responsibilities, I worked closely with the ICC's engineering department to review the tariffed and contractual offerings as well as supporting cost, imputation and aggregate revenue data submitted by Local Exchange Carriers, Interexchange Carriers ("IXCs") and Competitive Local Exchange Carriers.

From 1992 to 1994, I was employed by the Illinois Department of Energy and Natural Resources, where I was responsible for modeling electricity and natural gas consumption and analyzing the potential for demand-side management programs to offset growth in the demand for, and consumption of, energy. In addition, I was responsible for analyzing policy options regarding Illinois' compliance with environmental legislation.

A more detailed discussion of my educational and professional experience can be

found in Exhibit___(JDW-2), attached to this testimony.

Q. ARE YOU ADOPTING THE DIRECT TESTIMONY OF MICHAEL STARKEY FILED IN THIS PROCEEDING ON OCTOBER 8, 2008?

A. Yes.

Q. ON WHOSE BEHALF WAS THIS REBUTTAL TESTIMONY PREPARED?

A. This testimony was prepared on behalf of Charter Fiberlink WA-CCVII, LLC ("Charter").

Q. WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A. The purpose of my testimony is to respond to the direct testimony of Qwest Corporation ("Qwest"). Specifically, I will respond to the direct testimony of Ms. Renee Albersheim[1] on Issues 5, 6, 7 and 8, and the direct testimony of Mr. Robert Weinstein[2] on Issues 17, 19, 20, 21, 22, 23 and 24.

---

[1] Direct Testimony of Renee Albersheim on behalf of Qwest, WUTC Docket No. UT-083041, October 8, 2008 ("Albersheim Direct").

[2] Direct Testimony of Robert H. Weinstein on behalf of Qwest, WUTC Docket No. UT-083041, October 8, 2008 ("Weinstein Direct").

II. CHARTER SHOULD NOT BE LOCKED INTO LANGUAGE FROM QWEST'S NEGOTIATIONS TEMPLATE INTERCONNECTION AGREEMENT OR SGAT

Q. BEFORE YOU ADDRESS THE INDIVIDUAL DISPUTED ISSUES, DO YOU HAVE ANY OVERARCHING COMMENTS ABOUT QWEST'S DIRECT TESTIMONY?

A. Yes. A pervasive theme in Qwest's direct testimony is that Qwest's language proposals should be adopted because similar language is in Qwest's Statement of Generally Available Terms ("SGAT") that was developed during the 271 process or Qwest's Negotiations Template Interconnection Agreement ("Template ICA").[3] Qwest apparently believes that its proposed language is a presumptive baseline and that Charter should be required to justify any changes to Qwest's proposed language. I strongly disagree.

Q. PLEASE ELABORATE ON QWEST'S APPARENT BELIEF THAT ITS PROPOSED LANGUAGE IS A PRESUMPTIVE BASELINE.

A. There are numerous examples throughout Qwest's direct testimony in which

[3] See, e.g., Albersheim Direct, p. 24, lines 3-4, regarding Issue 5 ("This Commission should agree that the certainty of the language created in the 271 process is preferable to the vagueness created by Charter's changes..."); Albersheim Direct, p. 27, lines 16-17, regarding Issue 6(a) ("As with other contested provisions of this Interconnection Agreement, the provisions regarding limitation of liability were worked out in the 271 process."); Albersheim Direct, p. 38, lines 12-14, regarding Issue 8 ("Charter's changes...nullifies much of the work that was done by industry participants in the 271 process..."); Easton Direct, p. 10, lines 3-4 regarding Issue 11 ("The Qwest interconnection options are consistent with the options that were developed during the 271 proceedings."); and Weinstein Direct, p. 42 regarding Issue 24 ("Qwest's proposed language...is substantially identical to the process contained in Qwest's negotiations

Qwest refers to its proposed language as the "standard," "standard industry practice," "standard template" or "standard interconnection options."[4] Qwest explains in response to Charter Information Request 01-002 that Qwest considers its Template ICA to be a "standard template." This Qwest testimony and response shows a Qwest "entitlement mentality" regarding its interconnection agreement language proposals and positions. This entitlement mentality is further demonstrated by Qwest's references to Charter's proposed "changes" to this so-called "standard"[5] and the fact that Qwest in its testimony shows Qwest's proposed language as a baseline (without any identification of the language that Qwest proposes and to which Charter objects), while showing Charter's proposals as changes to what Qwest considers to be the "standard."[6]

Q. WHY SHOULD QWEST'S PROPOSALS, TO THE EXTENT THEY REFLECT SGAT LANGUAGE DEVELOPED DURING THE 271

---

template and the Qwest SGAT.")

[4] See, e.g., Albersheim Direct, p. 38, lines 12-14 regarding Issue 8 ("Charter's language veers away from standard industry practice..."); Albersheim Direct, p. 23, lines 15-16, regarding Issue 5 ("Charter seeks to change the liability standards with regard to listings."); Easton Direct, p. 6, lines 9-10, regarding Issue 10 ("This is the same language that is in the standard template."); Easton Direct, p. 3, lines 14-15, regarding Issue 10 ("...Charter seeks to change Qwest's standard template language..."); Easton Direct, p. 7, lines 4-6 regarding Issue 11 ("Charter proposes to alter Qwest's standard interconnection options by inappropriately changing the available options."); and Weinstein Direct, p. 42, lines 21-22 regarding Issue 24 ("Qwest's proposed language is the standard audit process...").

[5] See, testimony cited in footnote 4.

[6] See, e.g., Weinstein Direct, pp. 15-16. Mr. Weinstein shows Qwest's proposal for Issue 19 without identifying the Qwest-proposed language that Charter opposes, while at the same time showing Charter's proposed language for Issue 19 as changes to Qwest's proposed language. By contrast, Charter's testimony identifies the disputed language within both parties' proposals.

PROCESS, NOT BE VIEWED BY THE COMMISSION AS A STANDARD THAT CHARTER MUST JUSTIFY CHANGING?

A. Nothing in the Telecommunications Act requires that terms and conditions of an interconnection agreement must be identical for all CLECs. To the contrary, the structure of the Act reflects the opposite premise: that an interconnection agreement should be tailored to accommodate specific needs of the CLEC in order to provide a meaningful opportunity to compete. Had Congress intended that an interconnection agreement be a "one size fits all" document, as Qwest is trying to make it, Congress would have provided the SGAT as the sole means by which terms and conditions of interconnection would be made available by ILECs like Qwest.

Q. IS THERE ANOTHER REASON WHY CHARTER SHOULD NOT BE FORCED TO JUSTIFY CHANGES TO SGAT LANGUAGE DEVELOPED DURING THE 271 PROCESS?

A. Yes. Qwest no longer makes its SGATs available for opt-in by CLECs and has stated that SGATs are outdated. Qwest states in response to Charter Information Request 01-001(b): "The SGAT is not available for adoption as an interconnection agreement in Washington and has not been available for several years." In addition, Qwest admitted in a recent arbitration that "Qwest stopped

updating its SGATs...and [SGATs] are therefore outdated documents."[7] Qwest issued a notice through its Change Management Process ("CMP") that informed CLECs that the SGATs will no longer be available effective November 16, 2006, and Qwest has removed SGATs from its list of available agreements on its website and replaced them with Qwest's Template ICA.

Q. SINCE QWEST HAS REPLACED THE SGAT WITH ITS TEMPLATE ICA, IS IT APPROPRIATE FOR THE QWEST TEMPLATE ICA TO SERVE AS A PRESUMPTIVE BASELINE TO WHICH CHARTER MUST JUSTIFY CHANGES?

A. No. I have explained above why Charter should not be forced to justify changes to SGAT language, and there is even less reason for Charter to be forced to justify changes to the Template ICA language. It is not unreasonable for the Commission to presume that Qwest's Template ICA language is drafted in a manner that is most advantageous to **Qwest** (and not necessarily in the best interests of competitors). Therefore, any presumption that is made concerning Qwest's Template ICA language must be that the language usually favors Qwest, as opposed to the CLEC. Moreover, Qwest includes language in its Template ICA over the objections of CLECs in the CMP and includes some terms and conditions

[7] See, Rebuttal Testimony of Karen Stewart ("Stewart Rebuttal") on behalf of Qwest Corporation, Minnesota PUC Docket No. P-5340, 421/IC-06-768, September 22, 2006, p. 36 ("Indeed, the SGATs have

in its Template ICA that it has not put through the CMP at all (which means that the CLECs did not even get an opportunity to voice concerns on Qwest's terms and conditions). In neither case does the Commission approve the terms and conditions in Qwest's Template ICA. Simply put, Qwest alone is responsible for the content and revisions to its Template ICA, and it is not arrived at through collaboration with CLECs and is not a Commission-approved document. Despite Qwest unilaterally developing terms outside ICA negotiations, Commission oversight and the CMP, Qwest considers its Template ICA as the "industry standard."[8] Contrary to what Qwest would like this Commission to believe, Charter should not bear a Qwest-imposed burden of changing Qwest's "standard" terms and conditions – terms and conditions that were unilaterally established by Qwest.

Q. HAS THE WASHINGTON COMMISSION REJECTED THE NOTION THAT TERMS AND CONDITIONS AVAILABLE TO CLECS UNDER INTERCONNECTION AGREEMENTS SHOULD BE UNIFORM?

A. Yes. The Washington Commission has twice rejected such claims of uniformity or standardization and has found that asking for specific terms in an individual ICA is not a request for preferential treatment. The arbitrator in a Verizon arbitration

---

not been updated to incorporate changes in law since 2003 and are therefore outdated documents.")

[8] Qwest response to Charter Information Request 01-002.

case here said:

> The fact that there are differences in change of law provisions among various agreements is not discriminatory: It reflects the variations in negotiation and arbitration of terms in interconnection agreements. The interconnection agreements are filed with the Commission and available for review. CLECs have opted into a number of agreements, including the agreement originally arbitrated by MCI.[9]

Similarly, and more to the point, an arbitrator made the following observation in an arbitration between Qwest and Covad in this state:

> While Qwest relies heavily on "consensus" reached in the Section 271 proceeding as a strong reason for retaining the 30-day period, that argument does not apply to an arbitration proceeding. Parties engage in arbitration to enter into an agreement tailored to the companies' needs, not to adopt a standard agreement. Covad is not bound to the 30 day payment period simply because it was a party to the SGAT negotiations and hearings.[10]

Q. HAS QWEST PREVIOUSLY RECOGNIZED BENEFITS OF INDIVIDUAL, NON-UNIFORM ICA TERMS?

A. Yes. On October 16, 2003, Qwest, in opposing the then-current application of the FCC's "pick and choose" rule, filed extensive comments extolling the virtues of negotiated interconnection agreements and the importance of the "...dynamic,

---

[9] Washington State Utilities and Transportation Commission, Docket UT-043013, Order No. 17 *Arbitrator's Report and Decision* dated July 8, 2005 at ¶79, ["*Washington ALJ Report*"], *affirmed in relevant part in "Washington Order No. 18."*

[10] Arbitrator's Report and Decision, *In The Matter Of The Petition For Arbitration Of Covad Communications Company, With Qwest Corporation, Pursuant To 47 U.S.C. Section 252(B) And The Triennial Review Order*, WUTC Docket No. UT-043045, Order No. 04, Nov. 2, 2004 ["WA Covad Arbitration Order"], at note 16 to ¶100. Although the Commission rejected Covad's 30-day proposal (which is not an issue in this case), it did so on other grounds.

innovative interconnection negotiations intended by the Telecommunications Act of 1996."[11] Qwest recognized that: "ILECs and CLECs have a fundamental interest in making the interconnection process as cooperative and open as possible, since both parties benefit from well-negotiated and mutually beneficial wholesale arrangements."[12] Even more specific to the point here, Qwest argued that:

> ...the pick-and-choose rule restricts the ILEC's willingness to ***tailor negotiations and contracts to the specific needs of CLECs and their business plans***. Further, the current rule does not realistically reflect the ordinary trade-offs and give-and-take that characterize free negotiations, in which an ILEC would ordinarily be willing to give up one term of a contract in order to get another.[13]

Finally, Qwest summarized its arguments with the following opinion:

> The ability of carriers to negotiate binding agreements with each other was a cornerstone of the Act.[14]

Now that Qwest has reaped the benefits of eliminating the pick-and-choose rule by making these arguments, Qwest seeks to deny Charter the very ability to "tailor negotiations and contracts" to Charter's "specific needs" and "business plans" upon which Qwest relied to defeat that rule.

Q. ARE THERE OTHER EXAMPLES OF QWEST RECOGNIZING THE

---

[11] *Comments of Qwest Communications International Inc.*, CC Docket Nos. 01-338, 96-98, 98-147, October 16, 2003, p. ii.
[12] *Id.*, pp. 3-4.
[13] *Id.*, p. 4 [emphasis added]

BENEFITS OF INDIVIDUALLY TAILORED INTERCONNECTION AGREEMENT TERMS INSTEAD OF UNIFORM TERMS AND CONDITIONS FOR ALL CLECS?

A. Yes. In a recent arbitration, Qwest testified:

> due to the FCC's elimination of the "pick-and-choose" rule and its move to the "all-or-nothing" rule...CLECs are much less likely to opt into a standard SGAT when ICAs have become increasingly more tailored to CLECs. This tailoring has increased as CLECs have shaped their businesses to have a specialized focus, which is often necessary to survive in today's highly competitive telecommunications markets.[15]

Hence, Qwest is trying to deprive Charter of the very thing that Qwest has repeatedly testified is necessary to survive in a competitive telecommunications market – i.e., tailored interconnection agreements.

Q. IS THERE ANYTHING ABOUT CHARTER'S NETWORK, AND OPERATIONS, THAT WARRANTS SPECIFIC TAILORED INTERCONNECTION AGREEMENT TERMS?

A. Yes. As discussed by my colleague Mr. Gates in his direct testimony, Charter Fiberlink provides facilities-based local voice services to primarily residential, and some small business, customers using transport, switches, and other related equipment of its affiliated cable company. Notably, Charter does not resell any

---

[14] *Id.*, p. 6.
[15] Stewart Rebuttal, p. 36.

Qwest services, nor does Charter lease unbundled network elements ("UNEs") from Qwest. Since Charter does not rely on Qwest's network to provide its own services, Charter is in a relatively unique position to propose terms that are both commercially reasonable and technically sound for a facilities-based carrier, and that may differ from terms of the more traditional resale-based or UNE-based CLECs. As explained above, both Congress, in the Telecommunications Act, as well as this Commission have previously rejected the "one size fits all" view Qwest expresses in its direct testimony and have made clear that interconnection agreements tailored to the individual needs of a carrier are critical to a competitive telecommunications industry.

III. ISSUE BY ISSUE ANALYSIS

ISSUE 5: HOW SHOULD THE PARTIES AGREE TO LIMIT LIABILITY, AND DAMAGES, ARISING FROM EITHER PARTY'S ACTIONS?

Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S PROPOSAL FOR ISSUE 5 (LIMITATION OF LIABILITY)?

A. Qwest's witness, Ms. Albersheim, raises three concerns with Charter's proposals to modify the limitation of liability language in the parties' draft interconnection agreement ("Agreement") (which is in dispute for Issue 5). First, Ms. Albersheim

suggests (without a full explanation) that Charter's proposals "create ambiguity"[16] and increase the potential for litigation regarding liability or damages.[17] Second, Ms. Albersheim asserts that Charter's proposed Section 5.8.4 modifies "Qwest's standard" that has been contained in agreements with other CLECs for years.[18] Third, Ms. Albersheim states that Charter's proposed Section 10.4.2.6 "seeks to change the liability standards with regard to listings"[19] which, she asserts, would expand liability and increase potential for litigation.

Q. PLEASE ADDRESS QWEST'S FIRST CLAIM REGARDING AMBIGUITY AND POTENTIAL FOR LITIGATION.

A. Ms. Albersheim does not explain the basis for her claims that Charter's proposal is ambiguous and would lead to more litigation than Qwest's proposal. Instead, Ms. Albersheim simply states: "All of the proposals that Charter has made with regard to liability and indemnity in section 5 and section 10 create ambiguity in the contract and increase the likelihood that the parties will have to litigate any circumstance in which liability or damages are at issue."[20] Despite this blanket statement, Ms. Albersheim does not point to a specific section or provision in Charter's proposals that is ambiguous or increases potential for litigation.

---

[16] Albersheim Direct, p. 22, line 35. See also, *id.*, p. 24, line 4.
[17] *Id.*, pp. 22-23.
[18] *Id.*, p. 23, lines 8-11.
[19] *Id.*, p. 23, lines 15-16.
[20] *Id.*, pp. 22-23.

Q. DO YOU BELIEVE THAT CHARTER'S PROPOSAL IS AMBIGUOUS?

A. No. I believe that Charter's proposal will not introduce ambiguity, or lead to more litigation between the parties. Take for example the difference between Charter's proposed limitation on liability of "**actual, direct damages**" and Qwest's proposed limitation of "the total amount that is or would have been charged to the other Party by such breaching Party for the service(s) or function(s) not performed or improperly performed." Charter's proposal uses a specific, quantifiable, concept to limit a party's damages: "actual, direct damages." That standard is not ambiguous, but is instead a clear and discernible standard to measure how the parties may limit their damages. I also disagree with Ms. Albersheim's assertion that Charter's proposal would force the parties to litigate any circumstance in which liability or damages are at issue. Notably, she offers no explanation, or evidence, to support her assertion.

Q. WHY DO YOU BELIEVE THAT CHARTER'S PROPOSAL WILL NOT INCREASE THE CHANCES OF LITIGATION?

A. Because Charter's proposal is not ambiguous, and clearly provides a basis for the parties to identify the threshold by which damages between them should be limited. Moreover, I believe that actual, direct damages could be quantified just as easily as the current limit under Qwest's proposal. Finally, it is quite possible that the parties would disagree on the amount that would have been charged,

and/or the services or functions that were not performed, and/or the services that were improperly performed, which is the standard used under Qwest's proposal. Therefore, it seems that the risk of litigation, or disagreement, as to amounts that may be limited is no greater under Charter's proposal.

Q. MS. ALBERSHEIM STATES THAT QWEST'S PROPOSAL REFLECTS THE MUCH GREATER RISK OF DAMAGE TO FACILITIES QWEST FACES AS THE PROVIDER OF FACILITIES AND LIMITS THE DAMAGES TO THE AMOUNT CHARGED TO EITHER PARTY.[21] DO THESE POINTS SUPPORT THE ADOPTION OF QWEST'S PROPOSAL?

A. No. Ms. Albersheim's assertion relies upon an inaccurate premise. Specifically, Ms. Albersheim's argument is based upon her belief that "Qwest is the entity which provides the facilities to the CLEC" (page 23, lines 2-3), and that it therefore faces a "much greater risk of damage to its facilities." (Id., lines 3-4.) But it is simply not true that Qwest is providing Charter with access to its physical facilities (such as its Washington central offices) under the Agreement.

Q. PLEASE EXPLAIN.

A. As Mr. Gates, and others, have explained Charter is a facilities based CLEC. As a result, Charter provides service over its **own** facilities (or those of its cable

[21] *Id.*, p. 23.

company affiliate), and does not need to "access" Qwest's facilities, other than interconnection facilities, in order to provide service to its own end user customers. Therefore, Charter will **not** be leasing unbundled network elements or collocation arrangements from Qwest. Nor will Charter be reselling any Qwest facilities. Therefore, Charter will not be requesting "facilities" from Qwest, as Ms. Albersheim suggests. Instead, the parties will simply be interconnecting their networks (probably at a single point), for the mutual exchange of traffic.

Q. PLEASE ELABORATE.

A. By limiting liability to the total amount that is or would have been charged to the other Party, Qwest's proposal caps liability between the parties at a level that could prevent meaningful relief to the aggrieved party by the breaching party. This is particularly true for a company like Charter who, unlike many of Qwest's other CLEC customers, owns its own extensive network that it uses to provide service to its end users. As a result, the total amount that would have been charged to Charter by Qwest is relatively low and may not be sufficient to compensate Charter for its losses caused by Qwest's damage to Charter's network, as in the case of a fiber cut, for example. Charter's proposal on the other hand, which limits liability to "actual, direct damages," ensures that the party who suffers the damages from the other party, or its contractors, is compensated for the direct damages that it actually incurs instead of an artificial, lower amount. In

addition, Charter's proposal also ensures that the damaged party will be "made whole" in that it will be compensated for the *actual* direct damages it suffers.

Q. WHAT IS YOUR RESPONSE TO QWEST'S SECOND OBJECTION – THAT CHARTER'S PROPOSAL WOULD CHANGE "QWEST'S STANDARD"?[22]

A. As discussed above, CLEC interconnection agreements need not be uniform, and in fact, the Act, this Commission, and even Qwest itself has promoted the use of interconnection agreement terms and conditions individually tailored to the specific needs of a particular carrier. As explained above, Charter is unlike most state-certificated CLECs in that it does not purchase many of the services from Qwest that most of Qwest's other CLEC customers purchase, which means that Qwest's proposed limitation on liability based on the amount of charges Qwest would have assessed on Charter may not be sufficient to compensate Charter for harm to Charter caused by Qwest or its contractors. I would also point out that the provision is mutual and Charter is willing to abide by the same provision.

Q. PLEASE RESPOND TO QWEST'S THIRD CONCERN RELATED TO SECTION 10.4.2.6.

A. The concerns that Ms. Albersheim raises about Section 10.4.2.6 are a combination

[22] *Id.*, p. 23, line 9.

of the points she raises regarding the other two Qwest concerns under Issue 5. She states that Charter is attempting to change the liability "standards" for listings, expand liability and increase potential for litigation over damages. I would remind the Commission that this Agreement is not a tariff, nor should it be. It seems to me that most of Qwest's concerns stem from the fact that they are being asked to be fair about paying for the direct harm they cause the competitor, rather than hiding behind an unreasonable limitation that they hope will allow them to avoid their responsibility altogether. For the reasons explained above, Ms. Albersheim's concerns should be rejected.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 5?

A. I recommend the Commission adopt Charter's proposed language for Sections 5.8.1, 5.8.2, 5.8.3, and 5.8.4. I also recommend the Commission reject Qwest's proposed language for Section 10.4.2.6.

ISSUE 6(a): HOW SHOULD THE PARTIES' RESPECTIVE INDEMNITY OBLIGATIONS BE ESTABLISHED?

ISSUE 6(b): IN INDEMNITY SITUATIONS, WHERE THE INDEMNIFIED PARTY UNREASONABLY WITHHOLDS CONSENT TO SETTLE CLAIMS, MUST THE INDEMNIFIED PARTY THEN TAKE OVER THE ACTION?

Q. MS. ALBERSHEIM STATES THAT CHARTER CREATES FORMAL DEFINITIONS IN SECTION 5.9.1.1 WHEN THOSE TERMS ARE USED ELSEWHERE AND HAVE A DIFFERENT MEANING.[23] IS HER CONCERN WARRANTED?

A. No. Since Ms. Albersheim's direct testimony does not specify the terms Charter defines in Section 5.9.1.1 or what other sections of the Agreement in which those same terms are used with different meanings, Charter asked Qwest for this information in Information Request 01-049. Qwest indicates in its response to that information request that Ms. Albersheim was referring to the terms "Claims" and "Losses" in Section 5.9.1.1 and provides a list of Agreement sections where, according to Qwest, those terms are used elsewhere in the contract and have a different meaning. What Ms. Albersheim fails to mention is that the terms "Claims" and "Losses", as they are used and defined by Charter's proposed language in Section 5.9.1.1, are capitalized terms denoting a defined term in the contract. I've searched the other sections of the tariff to which Qwest refers in its

[23] *Id.*, p. 28.

response to IR 01-049 and those terms are not capitalized. This means that no confusion will result: when the terms "Claims" or "Losses" are initially capitalized in the contract, they carry the meaning Charter's proposed language ascribes to them in 5.9.1.1.

Q. MS. ALBERSHEIM STATES THAT THE COMMISSION SPECIFICALLY EXCLUDED THE TERM "GROSS NEGLIGENCE" FROM THE LANGUAGE IN SECTION 5.9.1.2 IN THE 271 PROCEEDING. WOULD YOU LIKE TO RESPOND?

A. Yes. Ms. Albersheim cites to the 28th Order and 31st Order in the Washington 271 Docket (UT-003022), dated March 2002 and April 2002, respectively, as support for her statement. And though these orders say that "gross negligence" should be excluded from SGAT Section 5.9.1.2, a review of the SGAT filed by Qwest with the Commission on June 25, 2002 (a couple of months *after* the Commission orders) contains the phrase that the Commission said in its 271 orders should be excluded ("unless the loss was caused by gross negligence or intentional misconduct of the employees, contractors, agents, or other representatives of the Indemnified Party.") So to the extent that any CLECs opted into the SGAT filed by Qwest subsequent to those orders, those CLECs would have had the "gross negligence" language in their contracts similar to what Charter proposes.

In addition, the Commission's 28th Order in the 271 docket also states that an exception for "intentional misconduct" language should also be excluded from Section 5.9.1.2, but Qwest has agreed to an exception in Section 5.9.1.2 for "willful misconduct." This shows that at the same time Qwest is arguing that terms from the 271 SGAT support its proposals in this proceeding (despite Qwest no longer making the SGAT available for adoption by CLECs), Qwest is attempting to pick and choose which terms from the SGAT to incorporate.

Q. IS QWEST'S PROPOSAL, WHICH EXCLUDES A "GROSS NEGLIGENCE" EXCEPTION, AN INDUSTRY STANDARD?

A. No. The 28th Order in the 271 docket (at paragraphs 120-121) explains that the indemnity language in Section 5.9.1.2 of the SGAT was patterned after similar language in the Texas T2A Agreement, which included an indemnification exception for "gross negligence." The successor Texas T2A Agreement maintained the same exception,[24] and, in fact, AT&T's 22-state generic interconnection agreement (i.e., AT&T's counterpart to Qwest's Negotiations Template Interconnection Agreement) contains the following language in Section 17.3:

> In the case of any Loss alleged or claimed by a End User of either Party, the Party whose End User alleged or claimed such Loss (the

[24] The successor T2A Agreement between AT&T Texas and Joint CLECs contains the following language: "Nothing contained in this section will limit SBC Texas' or CLEC's liability to the other for (i) willful or intentional misconduct (including gross negligence)..."

> "Indemnifying Party") shall defend and indemnify the other Party (the "Indemnified Party") against any and all such Claims or Losses by its End User regardless of whether the underlying Interconnection Service giving rise to such Claim or Loss was provided or provisioned by the Indemnified Party, ***unless the Claim or Loss was caused by the gross negligence or willful misconduct of the Indemnified Party***. (emphasis added)

As such, any claim by Qwest that excluding an exception for gross negligence is an industry standard is simply false.

Q. MS. ALBERSHEIM'S ASSERTS[25] THAT "ADDING AN EXCEPTION ON GROSS NEGLIGENCE HAS THE EFFECT OF VOIDING INDEMNIFICATION AND ELIMINATING THE PURPOSE OF THIS AGREEMENT." DO YOU AGREE?

A. No. The AT&T language which I just quoted shows that Ms. Albersheim's claim regarding Charter's proposal is incorrect, and not shared by other incumbent LECs. Surely, if such an exception voided the purpose of indemnification, then AT&T would not have included such an exception in its generic interconnection agreements for many years and continue to include it in its generic interconnection agreement across its entire 22-state service territory. It is simply meant to place the burden of the third-party claim on the correct entity. In other words, if Charter's actions harmed a third-party that sued Qwest, Charter would indemnify Qwest for the damage *except* to the extent that Qwest's gross negligence or

intentional misconduct was responsible for the harm. Such an exclusion is extremely common throughout the telecommunications industry and is only fair to both parties.

Q. REGARDING ISSUE 6(B), QWEST SAYS THAT THE LAW AND AGREEMENT SUFFICIENTLY ADDRESS CHARTER'S RECOURSE IF QWEST UNREASONABLY REFUSES TO SETTLE A DISPUTE.[26] WOULD QWEST'S PROPOSAL LEAD TO ADDITIONAL AND UNNECESSARY LITIGATION?

A. Yes. Though Qwest repeatedly relies on the "potential" for litigation as reason for rejecting Charter's proposals, Qwest seems to have no problem with the potential for additional litigation when it comes to Qwest's proposals. Ms. Albersheim states that "If Qwest acted in bad faith, then fee shifting may be ordered by the court as a remedy."[27] Ms. Albersheim's statement clearly envisions additional litigation between the parties to determine whether Qwest acted in bad faith by withholding consent to settle a dispute and whether fee shifting is appropriate. This litigation could be avoided by adopting Charter's proposal which would require the indemnified party to assume the defense if it withholds consent to a reasonable settlement offer.

---

[25] Albersheim Direct, p. 27, lines 11-13.
[26] *Id.*, p. 30, lines 7-8.
[27] *Id.*, p. 30, lines 8-9.

Q. MS. ALBERSHEIM TESTIFIES THAT CHARTER'S PROPOSAL PUTS AN UNREASONABLE BURDEN UPON QWEST. IS THAT CORRECT?

A. No. Ms. Albersheim claims that Charter's proposal would put unreasonable demands on the indemnified party, if its rejection of the settlement is reasonable.[28] But she fails to acknowledge that Qwest's proposal has just the opposite effect: it puts an unreasonable burden on the indemnifying party to defend the claim, *even if* the indemnified party rejects a reasonable settlement offer. As explained in my direct testimony[29] (pp. 20-21), Charter's proposal builds into the contract equitable incentives for the indemnifying and indemnified parties to accept, and respond to, reasonable settlement offers. Qwest's proposal, on the other hand, could allow the indemnified party to force the indemnifying party to incur tens of thousands of dollars in additional litigation costs, without any real incentive for the indemnified party to accept a reasonable settlement offer. The indemnified party should not have this level of control over the indemnifying party and should not be allowed to heap these additional costs on the indemnifying party, who also happens to be the indemnified party's competitor.

Q. DO YOU HAVE ANY CORRECTIONS TO MAKE TO YOUR DIRECT TESTIMONY REGARDING THE PARTIES' PROPOSED LANGUAGE

---

[28] *Id.*, p. 30, lines 9-11.
[29] Of course I am referring to the direct testimony that was originally filed by Michael Starkey, and which I have adopted in this proceeding.

FOR ISSUE 6A/6B?

A. Yes. In my direct testimony at page 16, lines 5-6, I inadvertently referred to Qwest's proposed language for this issue as Charter's proposed language. Accordingly, the word "Charter" at page 16, lines 5 and 6 of my direct testimony should read "Qwest." Additionally, the reference to Section 5.8 at page 19, lines 12 and 22 of my direct testimony should reference Section 5.9.2.3 instead.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 6?

A. I recommend the Commission adopt Charter's proposed language for Sections 5.9.1 and subparts and Section 5.9.2.3.

ISSUE 7: HOW SHOULD THE PARTIES' RESPECTIVE INDEMNITY OBLIGATIONS, AS THEY RELATE TO INTELLECTUAL PROPERTY RIGHTS, BE ESTABLISHED?

Q. DOES REMOVING THE QWEST-PROPOSED "LOSS, COST, EXPENSE OR LIABILITY" PHRASE EXPAND CLAIMS FOR LOSSES AND INCREASE THE LIKELIHOOD OF LITIGATION, AS MS. ALBERSHEIM CLAIMS?[30]

A. No. Ms. Albersheim fails to explain that in striking that language, Charter did so because it had proposed to define any, and all, "losses, costs, expenses or liabilities" as a defined term: "Claim." Therefore, Charter's proposed language would have the opposite effect, it provides greater clarity by formally defining what constitutes a "claim" under these terms. The disputed phrase is shown below (with Qwest's proposed language shown in redline and Charter's proposed language shown in bold):

> ...each Party (the Indemnifying Party) shall indemnify and hold the other Party (the Indemnified Party) harmless from and against any ~~loss, cost, expense or liability arising out of a c~~**C**laim that the use of facilities of the Indemnifying Party or services provided by the Indemnifying Party provided or used pursuant to the terms of this Agreement misappropriates or otherwise violates the intellectual property rights of any third party.

Despite Ms. Albersheim's claim that Charter's proposed language "dramatically

[30] Albersheim Direct, p. 33. Note: The Qwest proposed language for Section 5.10.2 shown at page 31 of Ms. Albersheim's Direct is missing the Qwest-proposed phrase "loss, cost, expense or liability arising out of a". This phrase should appear as disputed at Albersheim Direct, p. 31, line 9 between the words "any"

expands the potential claims for losses that could become the subject to litigation," she fails to mention that Charter's use of the term "Claim" is a defined term in the Agreement (note that this term is initially capitalized in Section 5.10.2, meaning that it is a defined term in the contract). Charter's proposed definition of the term "Claim" in Section 5.9.1.1 is "any loss, debt, liability, damage, obligation, claim, demand, judgment or settlement of any nature or kind, known or unknown, liquidated or unliquidated including, but not limited to, reasonable costs and expenses (including attorney's fees)." Notably, this definition of "Claim" specifically encompasses the "loss, cost, expense or liability" language that Qwest proposes. As such, Charter is not proposing to delete the language altogether, as Ms. Albersheim would have the Commission believe.

Moreover, I believe that Charter's proposed language provides more detail than Qwest's proposal concerning what constitutes a "loss, cost, expense or liability" for which an indemnifying party should indemnify and hold harmless the other party related to misappropriations or violations of the intellectual property rights of a third party. However, this additional detail does not "expand" potential claims for losses relative to Qwest's proposal.

Q. MS. ALBERSHEIM SAYS THAT CHARTER'S PROPOSAL TO REMOVE

---

and "claim."

QWEST'S LANGUAGE IDENTIFYING PERSONS AND INCLUDING THE PHRASE "WITH KNOWLEDGE" CREATES AMBIGUITY AND EXPANDS POTENTIAL FOR LITIGATION.[31] IS THIS TRUE?

A. No. This is another example where Ms. Albersheim makes the blanket assertion that Charter's proposed language is ambiguous and increases the likelihood of litigation without supporting her claim. She states that Charter's proposed language "could expand litigation to include the question of how to define what 'knowledge' is and who has/had such 'knowledge.'"[32] I disagree with Ms. Albersheim's notion that discerning what "with knowledge" means is an exceptionally difficult concept to grasp, and to the extent that parties need to litigate the issue, this is not sufficient reason for rejecting this language. As I explained in my direct testimony, the reason for the "at the direction, or with knowledge" language, in the intellectually property indemnification context, is that basic principles of fairness and reason dictate that one party should indemnify another party for intellectual property infringement only when the indemnifying party had knowledge of the infringement or direction over the infringing facility or service so that, in effect, the indemnifying party is actually responsible for such infringement. This fair and reasonable principle should be embodied in the Agreement and should not be rejected based on unsupported assertions about the

[31] *Id.*, pp. 33-34.

potential for litigation.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 7?

A. I recommend the Commission adopt Charter's proposed language for Section 5.10.

[32] *Id.*, p. 34, lines 2-3.

ISSUE 8: HOW SHOULD THE PARTIES STATE THEIR RESPECTIVE DISCLAIMER OF WARRANTIES?

Q. MS. ALBERSHEIM STATES THAT QWEST HAS OFFERED AN ALTERNATIVE PROPOSAL FOR ISSUE 8 "IN AN EFFORT TO SETTLE THIS ISSUE"[33] AND THAT CHARTER HAS NOT REPLIED TO QWEST'S SETTLEMENT OFFER. DID YOU ADDRESS QWEST'S SETTLEMENT OFFER IN YOUR DIRECT TESTIMONY?

A. Yes. I explained in my direct testimony (p. 29) why Charter disagrees with Qwest's settlement offer. Specifically, Charter's attorneys have informed me that Qwest's proposed phrase "AND THAT ALL PRODUCTS AND SERVICES PROVIDED HEREUNDER ARE PROVIDED "AS IS", WITH ALL FAULTS" is unnecessary and not appropriate for inclusion in the parties' contract (which is primarily a contract for services, i.e., the exchange of traffic). In addition, I understand that Charter's attorneys have specifically explained to Qwest's attorneys why Qwest's "settlement offer" did not address Charter's concerns. Therefore, I don't think it is accurate to suggest, as Ms. Albersheim does, that Charter has not replied to Qwest's settlement offer.

Q. MS. ALBERSHEIM TESTIFIES THAT QWEST CANNOT AGREE TO REMOVE THE "AS IS" LANGUAGE BECAUSE CHARTER HAS

OTHER PROVISIONS IN THE CONTRACT TO PROTECT IT IN THIS REGARD.[34] DO THESE PROVISIONS IMPACT YOUR OBJECTION TO QWEST'S "AS IS" LANGUAGE?

A. No. I explained in my direct testimony (at 28-29) why inclusion of this language is inappropriate. The reasoning I describe therein applies regardless of the testing provisions in the parties' Agreement.

Q. QWEST IS CONCERNED THAT CHARTER'S REFERENCE TO SPECIFIC WASHINGTON RULES IS TOO BROAD.[35] IS THIS A VALID CONCERN?

A. No. By referring to "APPLICABLE WASHINGTON LAW" and not providing a cite to a specific rule, Qwest's proposal is actually broader than Charter's. Further, Ms. Albersheim claims that the parties may become confused as to which rules apply to a wholesale customer like Charter versus a retail customer. I don't see this as a valid concern either, as both Charter and Qwest should be able to reasonably determine which rules apply to wholesale customers and which apply to retail customers, to the extent they differ. For example, the collocation standards in WAC 480-120-560, which are included in the Washington rules cited in Charter's proposed language, clearly apply to wholesale customers, given that

---

[33] *Id.*, p. 36.
[34] *Id.*, p. 37.
[35] *Id.*, p. 37.

the rules repeatedly refer to "ILEC" and "CLEC."

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 8?

A. I recommend the Commission adopt Charter's proposed language for Section 5.11.1.

ISSUE 17: SHOULD CHARTER BE LIABLE FOR MISCELLANEOUS CHARGES ASSESSED BY QWEST, EVEN WHERE CHARTER DOES NOT REQUEST THAT QWEST PERFORM ANY WORK?

Q. IS IT TRUE THAT "CHARTER DOES NOT WANT TO PAY THE MISCELLANEOUS CHARGES"[36] AS MR. WEINSTEIN CLAIMS?

A. No. As I stated in my direct testimony (p. 34), Charter agrees that when one party performs work *at the request of the other party*, the party performing such work should be compensated in accordance with the Agreement. This issue is not about Charter not wanting to pay for miscellaneous services, and in fact, agreed upon language states that Charter will pay for these services;[37] rather, this issue is about (a) whether Qwest should be able to bill for miscellaneous services that Charter does not request and (b) what the charges for miscellaneous services should be.

Q. IS CHARTER'S PROPOSAL FOR ADVANCE AGREEMENT FOR MISCELLANEOUS CHARGES "UNWORKABLE"?[38]

A. No. Indeed Qwest's response to Charter Information Request 01-026 shows that such a proposal *is* workable. Charter asked Qwest whether Qwest notified CLECs that miscellaneous service charges apply prior to undertaking the work. Qwest

[36] Weinstein Direct, p. 2, lines 13-14.

[37] The parties' proposed language on this issue in my direct testimony contained two inadvertent errors. The agreed upon phrase "Where applicable," should have preceded the word "Basic" in the parties' proposed Section 9.1.12 at page 30, line 21 (Charter's proposed language) and page 32, line 29 (Qwest's proposed language) of my direct testimony. Also, the agreed upon word "provided" should replace the word "noted" shown at page 30, line 14 and page 32, line 22. Disputed language for Issue 17 is shown at

responded: "Yes Qwest does provide notice with a few exceptions." Qwest also explains that it will secure Charter's approval prior to performing work. So, except in the case of a "few exceptions"[39] Qwest already does what Charter's proposed language requires.

Q. WHAT DOES QWEST SAY ABOUT THE "FEW EXCEPTIONS"?

A. Qwest says that "there may be situations where Qwest has performed work at Charter's request and the Miscellaneous service occurs without separate notice such as the situations addressed in Sections 9.1.12 (h) [dispatch], (g) [design change] and (j) [maintenance of service/trouble isolation] of the ICA." Notably, Qwest's response does not indicate that Qwest is unable to obtain Charter's advance approval of charges for these miscellaneous services, it just says that Qwest "may" perform work without separate notice. And since each of the miscellaneous services under subsections h, g, and j refer to the CLEC providing a request or other information to trigger a miscellaneous service, I don't see why Qwest could not obtain Charter's advance agreement of charges before work is performed.

In addition, Qwest does not acknowledge that Charter does not purchase UNEs from Qwest, which means that Qwest performing Miscellaneous Services for

---

pages 134-138 of the draft Agreement (Charter Petition Exhibit B).
[38] Weinstein Direct, p. 9.

Charter will occur infrequently, if at all. Agreed upon language in Section 9.1.12 states: "Miscellaneous charges apply for miscellaneous services listed below in this Section, if such miscellaneous services are *available with Unbundled Network Elements* as provided under 'Rate Elements' subsections of this Section 9....When more than one miscellaneous service is requested for the same *Unbundled Network Element(s)*..."[40] Since miscellaneous services are associated with UNEs, which Charter doesn't generally purchase from Qwest in the first place, any miscellaneous service should arise infrequently, if at all. Given the infrequency which Qwest will be providing miscellaneous services to Charter, providing advance approval, which Qwest admittedly already provides for some miscellaneous services, would not be a hardship on Qwest and would reduce potential disputes about why Qwest is charging miscellaneous services charges that apply to UNEs to a carrier who does not purchase UNEs.

Q. COULD DISPUTES ABOUT MISCELLANEOUS CHARGES BE ADDRESSED IN THE DISPUTE RESOLUTION PROCESS?[41]

A. I suppose they could, but there is no need to go down this road when these disputes could be avoided simply by adopting Charter's proposal and making clear that Charter must "affirmatively agree to the charges for such services in

[39] Qwest Response to Charter Information Request 01-0126.
[40] Emphasis added.

advance."

Q. MR. WEINSTEIN SAYS THAT HE COULD NOT FIND ANY OTHER INTERCONNECTION AGREEMENT THAT CONTAINED CHARTER'S PROPOSED "ADVANCE CLEC AGREEMENT" REQUIREMENT.[42] IS THIS REASON TO REJECT CHARTER'S PROPOSAL?

A. No. I assume he means any other Qwest interconnection agreement. I explained above that the Commission has previously rejected Qwest's suggestion that interconnection agreements should be uniform and that Qwest, itself, has previously described the benefits of interconnection agreements tailored to the individual needs of a carrier.

Q. WOULD THE CHARTER-PROPOSED PHRASES "SPECIFIC CIRCUMSTANCES" AND "MAY APPLY WHEN REQUESTED BY CLEC" LEAVE QWEST UNCOMPENSATED FOR WORK PERFORMED AS MR. WEINSTEIN CLAIMS?[43]

A. No. These phrases are simply intended to reflect the fact that the miscellaneous charges will only apply very infrequently ("may apply"), and then only when Charter specifically requests that Qwest perform the work ("specific circumstances"). These phrases are not intended to impose any other limitations

---

[41] Weinstein Direct, p. 9.
[42] *Id.*, p. 10, lines 15-17.

to the Charter proposal, but are instead simply offered to clarify the application of these charges.

Q. MR. WEINSTEIN STATES THAT RATES FOR MISCELLANEOUS CHARGES WERE APPROVED IN DOCKET NO. UT-003013.[44] DOES THIS SUPPORT QWEST'S RATE PROPOSAL FOR MISCELLANEOUS SERVICES?

A. No. Qwest's rate proposal for miscellaneous services is that such rates should be "market based" and "subject to change."[45] Nothing in Qwest's rate proposals in Section 9.1.12 requires Qwest to charge the Commission-approved rates for these services. On the other hand, the tariffed rates derived from the tariff references in Charter's proposed language are the Commission approved rates established in WUTC Docket No. UT-003013[46] – the very cost docket referenced by Mr. Weinstein. Therefore, Charter's proposed rate language under Section 9.1.12 is consistent with the Commission-approved miscellaneous rates in Docket UT-003013, and Qwest's is not.

---

[43] *Id.*, p. 11.
[44] *Id.*, p. 10, lines 13-14.
[45] Qwest proposes the following rate proposal for miscellaneous services: "Prices for this miscellaneous services are market-based, using Qwest's Tariffed, cataloged, price listed, or other similarly documented prices, and are subject to change."
[46] A comparison of the rates at the tariff references in Charter's proposed language in Section 9.1.12 subsections f, g, h, and j (Tariff, WN U-42 Section 3.1.Q) to the rates at Section 9.20 of Exhibit, which were established in Docket UT-003013 Part D (see footnote E of Exhibit A), shows that these are the same rates.

Q. BUT MR. WEINSTEIN STATES THAT "PARTICULAR SECTIONS OF A TARIFF ARE PRONE TO CHANGE" AND THAT "IF SUCH CHANGE OCCURS, CONFUSION WOULD OCCUR AND THE DOCUMENT WOULD NEED TO BE AMENDED."[47] HOW DO YOU RESPOND?

A. The Order from Docket UT-003013 that Mr. Weinstein cites as establishing the rates for these miscellaneous services was issued in December 2002 and the tariff pages to which Charter's proposed language cites for the same rates for these services are dated June and July of 2003 – more than five years ago. Hence, these particular tariff sections are not "prone to change" as Mr. Weinstein claims and, therefore, the confusion that he claims could result is very unlikely. However, if this unlikely event occurred and the tariff section did change, the parties could easily amend the Agreement as needed. This outcome is certainly more favorable than Qwest's proposal which does not reference the Commission-approved rates, and which provides Qwest the unilateral authority to establish and change miscellaneous services rates at will.

Q. HAS QWEST MODIFIED ITS RATE PROPOSAL LANGUAGE FOR MISCELLANEOUS SERVICES?

A. Qwest indicates in response to Charter Information Request 01-028 that "Qwest is

[47] Weinstein Direct, p. 10, lines 5-7.

amending its proposal for this section to reflect the prices located in Exhibit A established in Washington cost proceeding." However, this is not the language Qwest proposed in its direct testimony (see, Weinstein Direct, pp. 3-5) or in the proposed ICA or Decision Point List, and Qwest has not yet explained the reason for its new proposal. Perhaps Qwest will introduce its new rate proposal in rebuttal testimony and explain its change in position. That being said, the very fact that Qwest has taken the position that it should be able to price miscellaneous services for UNEs at "market based rates" and change them on Qwest's whim, coupled with Qwest's position that it may change rates in the parties' contract without an amendment,[48] raises concerns for me about Qwest's change in position and new proposal. I reserve the right to further comment on Qwest's new rate proposal once Qwest provides more details.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 17?

A. I recommend the Commission adopt Charter's proposed language for Section 9.1.12.

[48] Qwest response to Charter information request 01-035 ("a negotiation/amendment would not necessarily be required to implement the results of a cost docket.")

ISSUE 19: SHOULD QWEST BE PERMITTED TO UNDERTAKE MARKETING OF ITS OWN ACTIVITIES BASED UPON THE IDENTITY OF CHARTER'S SUBSCRIBER LISTINGS?

Q. THIS ISSUE RAISES THE QUESTION OF WHETHER QWEST SHOULD BE PERMITTED TO MARKET ITS SERVICES USING THE SUBSCRIBER LISTINGS CHARTER PROVIDES TO QWEST PURSUANT TO QWEST'S OBLIGATIONS UNDER SECTION 251(b)(3). DOES QWEST'S DIRECT TESTIMONY INDICATE THAT THIS ISSUE SHOULD EASILY BE RESOLVED IN FAVOR OF CHARTER?

A. Yes. Mr. Weinstein testifies that: "Qwest cannot market to a specific carrier's customers using lists from [its directory listings] database" and "Qwest does not use the listing database for any of its internal or external marketing" and "Qwest does not use the Directory Listings in its marketing programs."[49] Because it is Qwest's testimony that Qwest cannot, and does not, market based on its listings database, I do not see why Qwest is concerned by Charter's language restricting Qwest from using Charter's listings for marketing purposes. Charter's proposal under Issue 19 simply memorializes in the Agreement a restriction on marketing that Qwest (by its own testimony) currently abides by.

Q. WHAT IS QWEST'S OBJECTION TO CHARTER'S PROPOSAL?

[49] Weinstein Direct, pp. 14-15.

A. Qwest contends that Charter's proposal for Issue 19 improperly limits the lawful uses of directory listings.[50]

Q. IS QWEST'S OBJECTION WARRANTED?

A. No. At page 17 of his direct testimony, Mr. Weinstein states that Section 251(b)(3) of the Act requires Qwest to provide nondiscriminatory access to its local DA databases to competing providers of directory assistance services, which includes providing its end user directory listings along with CLEC end user listings to these competing DA providers. He then testifies: "Qwest's language allows the use of the listings for 'lawful purposes.'" But at the same time, Mr. Weinstein also acknowledges that Charter simply "seeks to limit the right to use the listings for lawful purposes." So by Mr. Weinstein's own testimony, Charter's proposal is consistent with Qwest's language.

Q. WOULD CHARTER'S PROPOSAL PROHIBIT QWEST FROM PROVIDING CHARTER'S SUBSCRIBER LISTINGS TO COMPETING DIRECTORY ASSISTANCE PROVIDERS?

A. No. Although Mr. Weinstein implies that Charter's proposal would somehow prohibit Qwest from providing Charter's listings to competing DA providers, this is not the case. Agreed to language in section 10.4.2.4 states:

[50] *Id.*, p. 14, lines 9-10 and p. 17, lines 1-3.

> CLEC grants access to CLEC's End User Customer Listings information for use in its Directory Assistance Services as described in Section 10.5, and in its Directory Assistance List Service as described in Section 10.6

The Directory Assistance List (DAL) service in Section 10.6 referenced in the agreed upon language quoted above is the service that Mr. Weinstein states Qwest must provide under Section 251(b)(3). This means that Charter's proposal does not in any way restrict Qwest's ability to fulfill its obligations in this regard. Hence, Charter's language acknowledges that Qwest providing Charter's listings to other Directory Assistance Providers under Section 251(b)(3) is a "lawful purpose" and does not impose restrictions on using its listings for this purpose.

In addition, Mr. Weinstein's claim that Qwest's language allows the use of the listings for "lawful purposes" is not entirely accurate. What Qwest's language actually says is "***other*** lawful purposes." (emphasis added) Nowhere in Qwest's position statement or its direct testimony does it explain what "other lawful purposes" Qwest's proposed language is designed to include. As I explain above, agreed-upon language expressly allows Qwest to use Charter's listings for the specific lawful purpose Qwest has identified.

Q. PLEASE ELABORATE ON YOUR CONCERN ABOUT INCLUDING QWEST'S "OTHER LAWFUL PURPOSES" LANGUAGE IN SECTION 10.4.2.4.

A. Because Qwest has not provided any specifics about what it believes are "other lawful purposes," Qwest's language is overly-broad and open-ended. If we could assume that the parties would agree as to what constitutes "other lawful purposes," then inclusion of that language would not be problematic, but that is not a valid assumption. Rather, it is much more likely that the parties may disagree as to what constitutes an "other lawful purpose" (as demonstrated by the fact that Qwest objects to Charter's language without providing an example of a "lawful purpose" that Charter's proposed language prohibits), which leads to an increased likelihood of future disputes between the parties.

Q. MR. WEINSTEIN CLAIMS THAT CHARTER'S PROPOSAL WOULD GRANT CHARTER CONTINUING VETO POWER OVER HOW ITS LISTINGS ARE USED, WHICH VIOLATES FCC RULINGS.[51] IS HE CORRECT?

A. No. At page 18 of his direct testimony, Mr. Weinstein provides quotes from FCC orders which conclude that once a providing LEC provides nondiscriminatory access to its DA databases to competing DA providers pursuant to Section 251(b)(3), the providing LEC cannot dictate limitations on the use of that information by the competing DA provider. The FCC quotes provided by Mr. Weinstein are not on point and are irrelevant to Charter's proposed language

under Issue 19. As discussed above, the agreed-upon language allows Qwest to utilize Charter's listings for DAL service under Section 10.6 to fulfill Qwest's obligation under Section 251(b)(3) in providing nondiscriminatory access to its DA databases to competing DA providers. The FCC quotes provided by Mr. Weinstein are applicable to a situation where Qwest may attempt to limit the competing providers' use of the DA information they obtain under the Section 10.6 DAL service. The FCC quotes provided by Mr. Weinstein do not address this issue – whether Qwest should be permitted to use the information it collects as a DA database provider to market its services to its competitors' customers. I would note that nothing in those FCC orders suggest that Qwest should be permitted to engage in such marketing.

Furthermore, Section 10.6 of the Agreement addresses the FCC conclusions contained in the quotes Mr. Weinstein provides.

> 10.6.2.1 If CLEC purchases use of Qwest's DAL information under this Agreement, Qwest grants to CLEC, as a competing provider of telephone Exchange Service and telephone toll service, access to DAL information for purposes of providing Directory Assistance Services and for other lawful purposes, including directory publishing in any format or medium, under the terms and conditions of this Agreement. CLEC is solely responsible for its lawful use of DAL information obtained under this Agreement pursuant to Section 251(b)(3) of the Act, including use of such information only for purposes permitted, or not prohibited by, the Act, federal and state laws, rules, and regulations, the FCC's

[51] *Id.*, pp. 17-18.

orders, rules and regulations, and the Commission's orders, rules, and regulations.

As the above excerpt shows, agreed-upon language in Section 10.6.2.1 allows DA information to be used for DA services "and other lawful purposes" – precisely what is required by the FCC orders which Mr. Weinstein cites. Similar "other lawful purposes" language is contained in Section 10.5.2.11 as it relates to the Qwest-provided Direct Assistance Service. Therefore, agreed-upon language in the Agreement already addresses Qwest's concern and shows that Qwest's "other lawful purposes" language in Section 10.4.2.4 is unnecessary.

Q. IS CHARTER'S PROPOSAL ON ISSUE 19 INTERNALLY INCONSISTENT AS MR. WEINSTEIN CLAIMS?

A. No. Mr. Weinstein states that Charter's proposal to delete the phrase "Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings" is inconsistent with Charter's stated position that Qwest should not be permitted to market to Charter subscribers by segregating or otherwise identifying Charter's subscribers in Qwest's databases.[52] Mr. Weinstein may be trying to confuse the Commission, but it is evident from a brief review of each party's proposed language, that Charter's position is that there should be a blanket prohibition on Qwest marketing to Charter subscribers based on the listings

[52] *Id.*, p. 16.

Charter provides to Qwest. That is why Charter's proposal specifically reflects this principle ("**CLEC's Listings supplied to Qwest by CLEC shall not be used by Qwest for marketing purposes.**"); and that is also why Charter proposes to use this language, rather than Qwest's more limited language. Charter's proposal prohibits this type of marketing, including marketing based on segregation, and therefore Charter's proposal is *not* internally inconsistent. Qwest's language, taken alone, is not sufficient because it leaves open the door for Qwest to market to Charter's subscribers in ways other than segregation of listings.

Q. MR. WEINSTEIN STATES THAT WHITE PAGES LISTING INFORMATION IS PUBLICLY AVAILABLE AND, IT MAKES NO SENSE TO BAR LAWFUL USES OF LISTINGS THAT ARE AVAILABLE TO THE PUBLIC.[53] WHAT IS YOUR RESPONSE?

A. As an initial matter, and as I explained above, Charter's proposal would not bar "lawful uses" as Mr. Weinstein claims. Qwest has not identified a lawful use of Charter's listings that would be prohibited by Charter's proposal for Issue 19.

More to the point, Mr. Weinstein seems to miss the entire purpose of Charter's proposal. Charter's proposal for Issue 19 is designed to ensure that Qwest doesn't use the listing information it receives from its competitors as a result of Qwest's

[53] *Id.*, pp. 18-19.

obligations under Section 251(b)(3) to identify its competitors customers and market Qwest's services to those customers. While white pages listings can be found on the internet, as Mr. Weinstein observes, those publicly available sources do not indicate the service provider associated with the white pages listings. For example, Mr. Weinstein refers to www.infospace.com (which is now www.superpages.com). This website requires that you type in a particular person's name in order to access his or her phone number and address, and does not indicate the service provider for customers. In addition, you can only find one customer's information at a time – rather than Charter's entire customer list in Qwest's Washington territory. As such, the concern that Charter has with regard to the listings information it provides Qwest does not extend to the publicly-available white pages listing information. Qwest, therefore, cannot use this public information to market to Charter customers because it doesn't identify the service provider.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 19?

A. I recommend the Commission adopt Charter's proposed language for Section 10.4.2.4.

ISSUE 20: WHETHER PRIOR WRITTEN AUTHORIZATION TO RELEASE, SELL, OR MAKE AVAILABLE, CHARTER LISTING INFORMATION SHOULD BE OBTAINED BY QWEST?

Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S PROPOSED LANGUAGE FOR ISSUE 20?

A. Mr. Weinstein raises three objections related to Charter's proposal for Issue 20:

- Charter's proposal contains an inappropriate approval requirement for providing listings to DA providers.
- Charter's proposal inappropriately bans the use of listings for marketing purposes for all entities, including DA providers.
- Charter's proposal is unnecessary because it already has the ability to keep its listings away from third parties.

I will respond to each of these criticisms below.

Q. WHAT'S YOUR RESPONSE TO QWEST'S CLAIM THAT CHARTER'S PROPOSAL CONTAINS AN APPROVAL REQUIREMENT FOR PROVIDING LISTINGS TO DA PROVIDERS?

A. Qwest's claim is false. Mr. Weinstein states: "where Qwest specifically proposed language that removes DA providers from the approval requirement, Charter did not."[54] Mr. Weinstein's testimony ignores the agreed-upon language in Section 10.4.2.5 which states: "No prior authorization from CLEC shall be required for

[54] *Id.*, p. 23, lines 8-10. See also, Weinstein Direct, pp. 22-23 ("Charter's proposed blanket requirement calls for prior written consent for all releases of directory listings. Qwest's proposal limits the written authorization to directory publishers and third parties, excluding DA providers.")

Qwest to sell, make available, or release CLEC's End User Customer Directory Assistance Listings to Directory Assistance providers, **provided that Qwest does so in accordance with Applicable Law.**"

Q. QWEST STATES THAT CHARTER'S LANGUAGE INAPPROPRIATELY BANS MARKETING USES FOR ALL ENTITIES PROVIDED WITH LISTINGS, INCLUDING DA PROVIDERS, VIOLATING THE FCC RULINGS DISCUSSED ABOVE UNDER ISSUE 19.[55] PLEASE RESPOND.

A. Recall that under Issue 19, Charter proposes language in Section 10.4.2.4 that prohibits Qwest from using the listings information Charter provides Qwest for Qwest's marketing purposes. The reason this information is needed is that without it, Qwest could exploit its obligations under Section 251(b)(3) to market its services to Qwest's competitor's customers in an anti-competitive manner. Hence, including this marketing prohibition fosters competition and is good public policy. The reasons for including Charter's proposed marketing prohibition under Section 10.4.2.5 for Issue 20 is very similar ("Listings shall not be provided or sold in such a manner as to segregate End User Customers by Carrier **and shall not be provided by Qwest for marketing purposes to third parties.**") The third party to which Qwest provides listings information could be

a competitor of Charter and should not be allowed to use the listings information that it obtains from Qwest due to Qwest's obligations under Section 251(b)(3) to market to Charter's customers. The same anti-competitive impacts that would arise if Qwest used Charter's listings to market to Charter's customers would arise if a competing DA provider who is also a competitor of Charter for local services used the listings information for marketing purposes.

In addition, as discussed under Issue 19, agreed upon language in Section 10.6.2 recognizes that competing DA providers are allowed to use listings supplied by Qwest for DA service and "other lawful purposes." Therefore, Mr. Weinstein is incorrect that Charter's proposal would result in a "limitation in the lawful use of directory listings by DA providers."[56]

Furthermore, to the extent that there is any question that this state commission has the authority to impose such a restriction on the use of listings information for marketing purposes, the very FCC order cited by Mr. Weinstein shows that it does.

Q. PLEASE ELABORATE.

---

[55] *Id.*, p. 22, lines 22-24 and p. 24.
[56] *Id.*, p. 24, lines 8-9.

A. Paragraph 29 of the SLI/DA First Report and Order[57] states as follows:

> Rather, in the *Local Competition Second Report and Order*, we concluded that competitors receiving LEC directory assistance information would be held to the same standards as the providing LEC in terms of the types of information that they could legally release to third parties. Competing DA providers operate under the same standards. As we noted in the *Local Competition Second Report and Order*, this holding does not preclude states from continuing to limit how LECs or competing DA providers can use accessed directory information, *e.g.*, by prohibiting the sale of customer information to telemarketers. Rather, section 251(b)(3) merely precludes states from discriminating among LECs by imposing different access restrictions on competing providers, thereby allowing certain LECs to enjoy greater access to information than others. This analysis applies to all DA providers, including competing DA providers.

As expressly indicated in the excerpt above, state commissions are *not* precluded "from continuing to limit how LECs or competing DA providers can use accessed directory information." Indeed, the FCC uses prohibiting sale of customer information to telemarketers as an example of a prohibition a state may impose (similar to Charter's proposed restrictions on marketing). The key is that states must treat all competing DA providers the same – and that is precisely what Charter's proposed language does by barring the use of Charter's listings information for marketing purposes.

Q. MR. WEINSTEIN CLAIMS THAT CHARTER'S PROPOSED

[57] Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC-Docket No. 99-273, FCC 01-27, 16 FCC Rcd 2736; 2001 FCC LEXIS 473; January 23, 2001 ("SLI/DA First Report and Order").

MARKETING RESTRICTION IS INAPPROPRIATE BECAUSE "CHARTER ALREADY HAS THE ABILITY TO KEEP DIRECTORY LISTINGS AWAY FROM THIRD PARTIES, WHATEVER PURPOSE THEY MAY HAVE IN MIND."[58] DO YOU AGREE?

A. No. Mr. Weinstein states that Charter's proposed marketing restriction is unnecessary because Qwest's "New Customer Questionnaire" allows a CLEC to select an option (i.e., option 2) that restricts Qwest from providing the CLEC's listings to directory publishers and other third parties unless Qwest receives the CLEC's letter of authorization from the directory publisher/third party. Mr. Weinstein states: "Charter's proposed language is really just a complicated choice of 'Option 2'."[59] However, the two are not comparable. Charter's proposal includes a single exception on the *use* of listings for marketing purposes, while Option 2 on the New Customer Questionnaire restricts access to listings to third *parties* – i.e., all directory publishers and other third parties unless a letter of authorization is provided.

Further, given the FCC's requirement above, Charter's restriction is necessary in order to treat all DA providers (including Qwest and competing DA providers) the same.

---

[58] Weinstein Direct, p. 24, lines 10-12.
[59] *Id.*, p. 24, lines 12-13.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 20?

A. I recommend the Commission adopt Charter's proposed language for Section 10.4.2.5.

ISSUE 21: GIVEN THAT THE PARTIES HAVE AGREED THAT THERE SHOULD BE NO CHARGES FOR DIRECTORY LISTINGS, IS IT APPROPRIATE TO INCLUDE LANGUAGE REFLECTING THE PARTIES' UNDERSTANDING IN THE AGREEMENT?

Q. WHAT IS QWEST'S CONCERN WITH CHARTER'S PROPOSAL FOR ISSUE 21?

A. Qwest claims that Charter's proposal creates a conflict with Qwest's right to seek a non-recurring charge for primary listings at some point in the future. Mr. Weinstein testifies: "If Qwest sought a rate change through a cost docket and the rate was approved, there would then be conflicting provision in the document."[60]

Q. IS MR. WEINSTEIN CORRECT?

A. No. It is an undisputable fact that Qwest currently does not assess a recurring or non-recurring charge for primary listings. Mr. Weinstein states at page 27 of his direct testimony: "The current nonrecurring charge for a primary listing is listed in Exhibit A as 'no charge.'" This is a roundabout way of saying that there is currently no nonrecurring charge for primary listings. Further, agreed-to language in Section 10.4.2.1.1 states that there is "no monthly recurring charge" for primary listings. As such, Charter's proposed language simply reflects the current terms, conditions and rates between the parties as it relates to primary listings. To the

[60] *Id.*, p. 25, lines 9-11. See also, *id.*, p. 27, lines 12-15 ("This proposal creates a conflict with Qwest's right to request the Commission order a nonrecurring charge for primary listings for which the Commission has the authority.")

extent that those terms, conditions or rates change in the future (if Qwest seeks a nonrecurring charge that is approved by the Commission, for example), agreed-to language in the parties' Agreement provides a mechanism to incorporate that change. Specifically, Section 2.2 of the Agreement states (in relevant part):

> It is expressly understood that this Agreement will be corrected, or if requested by CLEC, amended as set forth in this Section 2.2, to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Rates in Exhibit A will be updated to reflect legally binding decisions of the Commission and newly changed rates shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission.

Section 2.2 of the Agreement, therefore, is designed specifically to avoid the conflict that Mr. Weinstein claims would arise under his hypothetical situation.

Q. DOES OTHER LANGUAGE HAVE THE SAME POTENTIAL FOR CONFLICT THAT MR. WEINSTEIN RAISES WITH RESPECT TO CHARTER'S PROPOSAL?

A. Yes. Section 10.4.2.1.1 contains the following language (with Charter's proposed language shown in bold text):

> 10.4.2.1.1 Qwest will accept one (1) primary Listing for each main telephone number belonging to CLEC's resale and facilities-based End User Customers at no **non-recurring or** monthly recurring charge. Additional terms regarding application of rates is provided in Section 10.4.3.

As shown above, Qwest agrees to a ban in Section 10.4.2.1.1 on a recurring

charge for primary listings. So, following Qwest's criticism of Charter's proposed addition to its logical conclusion, if Qwest sought a recurring charge for primary listing through a cost docket and the rate was approved, the same conflict would arise that Qwest complains of regarding Charter's proposed reference to a non-recurring charge in that same section. Surely, if there was the potential conflict in Charter's language regarding non-recurring charges, Qwest would not have agreed to similar language regarding recurring charges. The fact is that there is no basis for distinguishing between recurring and non-recurring charges for primary listings in this regard – Qwest currently does not assess either and the contract should reflect as much.

Q. MR. WEINSTEIN SAYS THAT HIS REVIEW OF QWEST'S CONTRACTS DID NOT DISCOVER ANY OTHER CLEC WITH THE CHARTER-PROPOSED PROHIBITION IN THEM.[61] WOULD YOU LIKE TO COMMENT?

A. Yes. As explained above, the Act and this Commission promote individually tailored terms and condition in interconnection agreements and reject Qwest's notion that interconnection agreements should be uniform, and as such, Mr. Weinstein's reference to his review of Qwest's contracts is really irrelevant.

[61] *Id.*, p. 27, lines 18-19.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 21?

A. I recommend the Commission adopt Charter's proposed language for Section 10.4.3.3 and reject Qwest's proposed language for Section 10.4.2.1.1.

ISSUE 22: SHOULD THE AGREEMENT INCLUDE LANGUAGE ESTABLISHING THAT QWEST IS PROHIBITED FROM ASSESSING CHARGES UPON CHARTER WHEN CHARTER SUBMITS NON-PUBLISH OR NON-LIST INFORMATION TO QWEST?

Q. REGARDING PRIVACY LISTINGS, QWEST STATES THAT "CHARTER WANTS SOMETHING FOR NOTHING."[62] IS THIS TRUE?

A. No. To the contrary, Qwest's proposal to charge Charter for privacy listings actually reflects Qwest's attempt to get something (compensation) for nothing. As I explained in my direct testimony at pages 55-56, when one party performs work at the request of the other party, the party performing the work should be compensated, if not otherwise prohibited by applicable law. However, when another party does not perform work (as in the case of Qwest not having to undertake work related to getting privacy listings into directories), no compensation should be due.

Q. BUT MR. WEINSTEIN TESTIFIES THAT "QWEST MUST PERFORM SERVICES TO ENSURE THAT [PRIVACY LISTING] INDICATORS ARE NOTED, PROCESSED AND IMPLEMENTED."[63] WHAT IS YOUR RESPONSE?

A. Because Qwest was not clear about the services it claims it must perform for privacy listings, Charter asked Qwest to provide more information about this in

Information Request 01-037. I have provided the Charter request and Qwest response in their entirety below:

> REQUEST NO: 037
> Re: Weinstein Direct Testimony at page 29, lines 5-6: Please list and explain the "services" that Qwest "must perform" related to privacy listings.
>
> RESPONSE:
> The services include but are not limited to maintaining, storing, updating and processing the listing data. Privacy listings are an exception to a normal listing and require additional validation to ensure that each indicator is honored correctly for each specific purpose. Standard listings are *passed through the systems* and produced upon subscriber list products. Privacy listings have an indicator that is *read by the computer system* and extra effort is undertaken. For example, *Qwest programs* that create the DAL and Subscriber List products *have to recognize* a specific code to 'exclude' the privacy data such as the Non-publish indicator so *the program can strip* the telephone number from the product. If it didn't do that, the telephone number would be passed with the product resulting in a published number. The Subscriber List process has to recognize the NonPublish and NonListed indicators and exclude the entire listing from the product. Listings are updated frequently and require additional processing to capture any changes that have occurred since the previous update. (emphasis added)

Qwest's response indicates that most, if not all, the "services" performed for Privacy Listings are really electronic functions that are automatically performed by Qwest's computer systems. I've italicized the language in Qwest's response above discussing the functions performed by Qwest's computer systems to

---

[62] *Id.*, p. 31.
[63] *Id.*, p. 29, lines 5-6.

emphasize this point. Notably, nowhere in Qwest's response does it discuss manual intervention in the process. As such, the incremental cost to Qwest related to privacy listings is de minimus – if not zero, then something very close to zero.

Q. BUT THE FIRST SENTENCE OF THE RESPONSE SAYS THAT QWEST MUST MAINTAIN, STORE, UPDATE AND PROCESS THE LISTING DATA, AND THE LAST SENTENCE STATES THAT LISTINGS ARE UPDATED FREQUENTLY. HAS QWEST INDICATED THAT THIS INVOLVES MANUAL INTERVENTION?

A. No. The first sentence of the response is merely a recitation of Charter's proposed language in Section 10.4.3.4. As discussed below, this language does not reflect Charter's view of work that is involved for privacy listings, rather the work that should *not* be involved in privacy listings, and for which Charter should not be charged. Moreover, Qwest has already agreed in Section 10.4.2.5 that "Qwest will not charge CLEC for updating and maintaining Qwest's Listings databases." So, two of the four "services" in the first sentence Qwest has already agreed not to charge for. The remaining two – store and process – are done electronically by Qwest's computer systems and, as explained above, likely result in an incremental cost to Qwest of zero or close to zero.

The same goes for the last sentence in Qwest's response ("Listings are updated frequently and require additional processing..."): Qwest has already agreed not to charge Charter for updating listings and the "additional processing" is done electronically in Qwest's computer systems.

Q. DOES QWEST RECOVER THE COSTS OF MAINTAINING AND UPDATING LISTING INFORMATION IN OTHER CHARGES?

A. Yes. Qwest sells its listing information to directory assistance providers and directory publishers and, therefore, recovers any costs Qwest may incur through charges assessed to these third-parties, including maintaining and updating listing information. As indicated in Section 10.4.2.5, Charter has agreed that it "will not receive compensation from Qwest for any sale of Listings by Qwest," which means that Qwest keeps all of the compensation it receives for the sale of Charter's listings. Therefore, no additional compensation from Charter is appropriate.

Q. MR. WEINSTEIN SAYS THAT CHARTER'S OWN LANGUAGE PROPOSAL FOR SECTION 10.4.3.2 IDENTIFIES SOME OF THE SERVICES OR WORK QWEST MAY PROVIDE FOR A PRIVACY LISTING, BUT THEN PRECLUDES QWEST FROM CHARGING

CHARTER FOR THIS WORK.[64] DOES MR. CORRECLY INTERPRET CHARTER'S LANGUAGE?

A. No. The language Mr. Weinstein refers to is found in Section 10.4.3.4: "**Qwest will not assess a charge upon CLEC for providing, maintaining, storing, or otherwise processing information related to End User Customers Listings, that have requested non-list or non-publish status, or for any other act associated with such End User Customers.**" It is not that Charter believes that Qwest must perform these activities for privacy listings and should not be compensated, as Mr. Weinstein claims. Rather, Charter's point is that Qwest should not have to perform activities necessary to process privacy listings in order to get them into a directory, and as such, Qwest will not incur costs for these functions and should not charge Charter for costs that Qwest does not incur.

Notably, Mr. Weinstein states that: "Charter itself describes in its proposal some of the services or work Qwest *may* provide for a Privacy Listing."[65] Mr. Weinstein does not say that Qwest *will* perform the work, and his reference to Qwest potentially providing "some" of the services or work listed in Charter's language suggests that Qwest will not provide some of the work. The fact of the matter is that Qwest, in its direct testimony, provides nebulous statements about

[64] *Id.*, p. 31.
[65] *Id.*, p. 31, lines 21-22. (emphasis added)

work related to privacy listings, but does not explain in any level of detail the work that Qwest must perform.

Q. MR. WEINSTEIN STATES THAT THE COMMISSION HAS APPROVED A RATE FOR PRIVACY LISTINGS AND THAT CHARTER SHOULD NOT GET SPECIAL TREATMENT BY GETTING PRIVACY LISTINGS FOR FREE.[66] WOULD YOU LIKE TO RESPOND?

A. Yes. The Commission-approved rate that Mr. Weinstein discusses is a retail – not wholesale – rate. Qwest is apparently proposing the Commission-approved *retail* rate with a wholesale discount. When asked by Charter in Information Request 01-038 to "provide all cost support and related supporting documentation for the Commission-approved rate for Privacy Listings," Qwest responded: "The recurring rate was approved in 1980 and is still the same. The cost documentation from 28 years ago is unavailable." Obviously, a Commission-approved rate from 28 years ago must be a retail rate given that local competition for the incumbent LEC in a local market was non-existent at that time. Moreover, a retail rate from 28 years ago is not reflective whatsoever of any costs that Qwest would incur today for any type of processing of its competitors' privacy listings (which as I explain above is likely zero or close to zero). Charges that Qwest assesses on Charter under the Agreement should be cost-based and it is Qwest's responsibility

to substantiate its proposed charges. To the extent that Qwest is permitted to assess any charge for privacy listings, it should be cost-based, and the charge proposed by Qwest is indisputably not cost-based. Accordingly, Qwest's proposed charges should be rejected.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 22?

A. I recommend the Commission adopt Charter's proposed language for Section 10.4.3.4 and reject Qwest's proposed language for Sections 10.4.2.1.2 and 10.4.3.2.

[66] *Id.*, pp. 32-33.

ISSUE 23: SHOULD THE AGREEMENT REFLECT THE FACT THAT QWEST HAS THE OBLIGATION UNDER SECTION 251(B)(3) TO PROVIDE DIRECTORY LISTINGS FOR BOTH WHITE PAGES AND YELLOW PAGES LISTINGS?

Q. MR. WEINSTEIN SAYS THAT "QWEST IS NOT REQUIRED TO PUBLISH YELLOW PAGE DIRECTORIES OR CAUSE THEM [SIC] BE PUBLISHED."[67] DOES CHARTER'S PROPOSAL FOR ISSUE 23 REQUIRE QWEST TO PUBLISH YELLOW PAGES OR CAUSE THEM TO BE PUBLISHED?

A. No. Charter's proposed Section 10.4.5 states that to the extent that any classified (Yellow Pages) directory is published by or on behalf of, or under contract to, Qwest, then the same provisions and requirements that apply to CLEC listings for white pages would apply to classified listings. Charter's proposal does not require Qwest to publish yellow pages or cause them to be published; rather, it simply sets forth provisions that will apply if Qwest does.

Q. MR. WEINSTEIN STATES THAT "QWEST DOES NOT CONTRACT TO PUBLISH YELLOW PAGES" RATHER THE EXTENT OF QWEST'S INVOLVEMENT IN THE YELLOW PAGES BUSINESS IS THAT "QWEST HAS NEGOTIATED WITH DEX TO PROVIDE A COMPLEMENTARY YELLOW PAGE LISTING FOR THOSE BUSINESS

LISTINGS QWEST PROVIDES IN ITS DIRECTORY LISTINGS."[68] IS THIS GROUNDS FOR REJECTING CHARTER'S PROPOSAL?

A. No. Based on Mr. Weinstein's discussion of the extent of Qwest's involvement in the yellow pages business, it appears that Qwest is providing its directory list information (that contains both Qwest's and other carriers' listings) to publishers of yellow pages directories. That being the case, I fail to see why Qwest objects to Charter's proposal that would memorialize in the Agreement what Mr. Weinstein claims Qwest already does – including CLEC numbers in yellow pages directories to the same extent that Qwest provides its own End Users. (Section 15.1: "**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.**")

Q. DOES CHARTER CONFUSE QWEST'S ROLE IN WHITE PAGES DIRECTORY PUBLISHING OR PROPOSE A "YELLOW PAGES OBLIGATION"?[69]

A. No. Though Mr. Weinstein is not clear about the "yellow pages obligation" he

---

[67] *Id.*, p. 33, lines 17-18.
[68] *Id.*, p. 36.

claims Charter's proposal contains, Charter's proposal does not require Qwest to publish yellow pages or cause them to be published. In addition, to Mr. Weinstein's claim that Charter's proposal confuses Qwest's yellow pages obligations with its white pages obligations, I explained at pages 61-62 of my direct testimony that Section 251(b)(3) of the Act encompasses "primary advertising classifications" (or primary yellow pages listing) and imposes a duty on incumbent LECs like Qwest to publish competitors' business customers in Yellow Pages directories on a nondiscriminatory basis. I also described at pages 62-64 of my direct testimony that the requirement for ILECs to list competitors' customers in Yellow Pages on a nondiscriminatory basis has been upheld a number of times on appeal. Hence, Charter is not confused on Qwest's obligations related to white pages versus yellow pages.

Q. WHAT IS YOUR RESPONSE TO MR. WEINSTEIN'S OBJECTION THAT CHARTER'S PROPOSAL IN SECTION 15.1 WOULD REQUIRE QWEST "TO NEGOTIATE WITH YELLOW PAGES PROVIDERS ON CHARTER'S BEHALF"?[70]

A. Mr. Weinstein appears to be particularly concerned about Charter's proposed language in Section 15.1 that states: "Qwest shall promptly cause any contracts or

---

[69] *Id.*, p. 35.
[70] *Id.*, p. 36, lines 14-15.

agreements it has with any third party with respect to the provision of these services and functions to be amended, to the extent necessary, so that CLEC may provide its own End Users' information for inclusion in such printed directories on the same terms and conditions that Qwest End User information is included." Charter simply wants to be able to provide its end users' listing information for inclusion in the directories on the same terms and conditions as Qwest.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 23?

A. I recommend the Commission adopt Charter's proposed language for Sections 10.4.5 and 15.

ISSUE 24: SHOULD THE PARTY THAT INITIATES AN AUDIT ASSUME COST RESPONSIBILITY FOR THE AUDIT WHERE SUCH AUDIT: (A) THE AUDIT REVEALS MINIMAL DIFFERENCES IN AMOUNT BILLED AND AMOUNTS OWED; AND (B) AN INDEPENDENT AUDITOR IS SELECTED BY BOTH PARTIES?

Q. WILL COSTS OF AUDITS INCREASE UNDER CHARTER'S PROPOSAL AS MR. WEINSTEIN CLAIMS?[71]

A. No, not necessarily. Though Mr. Weinstein does not provide an explanation of this claim (see Weinstein Direct, p. 43, lines 1-3), presumably he is referring to his belief that the non-requesting party will request an independent auditor more frequently under Charter's proposal than would the requesting party under Qwest's proposal. This, however, should not be a concern of Qwest given Charter's proposal for the non-requesting party to pay for the auditor if the results show that the audit was warranted.

Q. PLEASE ELABORATE.

A. Charter's proposal under Section 18.2.10 states that if the terms of Section 18.2.8.2 are satisfied, then the non-requesting carrier will pay the expenses related to an independent auditor borne by the requesting carrier. Section 18.2.8.2 states that the non-requesting Party shall pay all of the requesting Party's commercially reasonable expenses in the event an Audit or Examination identifies a material

[71] *Id.*, p. 43, line 3.

difference between the amount billed and the amount determined by the Audit to be owed – albeit the parties differ on what should constitute a material threshold. Accordingly, if Qwest requested an audit and Charter requested the use of an independent auditor, the issue of who pays the expenses of the independent auditor will ultimately be determined by what the Auditor finds. If Qwest's requested audit was warranted, then Charter will pay, and if Qwest's requested audit was not warranted, then Qwest will pay. This structure properly balances the interests of the parties: it provides incentives for Qwest not to request frivolous audits (because Qwest will ultimately be required to pay for the expenses of an independent auditor if the auditor finds the audit unwarranted) and it provides Charter incentives not to casually request an independent auditor (because Charter will ultimately be required to pay for the expenses of the independent auditor if the auditor finds the audit was warranted). Accordingly, Mr. Weinstein's claim that Charter's proposal would allow the audited party to "use unwarranted expense of an independent auditor to thwart rights of the requesting party by forcing an independent auditor at no cost to itself"[72] is false.

Q. IS THERE ANOTHER REASON WHY MR. WEINSTEIN'S CONCERN ABOUT CHARTER ATTEMPTING TO THWART AUDITS BY

[72] *Id.*, p. 41, lines 11-13.

FORCING AN INDEPENDENT AUDITOR IS UNWARRANTED?

A. Yes. In response to Charter Information Request 01-041, Qwest states that it has not conducted an audit of a CLEC in Washington since January 1, 2002. This shows that such an audit would occur very infrequently, if at all, and that it is a stretch to claim that Charter is attempting to thwart audits that Qwest hasn't even performed in six years or more.

Q. MR. WEINSTEIN IS CONCERNED THAT CHARTER'S PROPOSAL ALLOWS ONLY THE NON-REQUESTING PARTY (AND NOT THE REQUESTING PARTY) TO REQUEST AN INDEPENDENT AUDITOR,[73] AND THAT QWEST'S PROPOSAL IS PREFERABLE BECAUSE IT ALLOWS EITHER PARTY TO REQUEST AN INDEPENDENT AUDITOR.[74] DO YOU AGREE?

A. No. Notably, the Charter proposed language does not preclude a requesting party from proposing to use an external auditor or its own employees for a requested audit. However, once the requesting party requests an audit, Charter's proposal allows the non-requesting party to require the audit to be conducted with a mutually agreed-to independent auditor. While Mr. Weinstein complains that "Charter's language would allow the non-requesting party to force the use of an

[73] *Id.*, p. 37, lines 15-17.
[74] *Id.*, pp. 40-41.

independent auditor in all situations",[75] there is nothing wrong with the non-requesting carrier having the ability to require the use of an independent auditor (after all, it is non-requesting party who is being audited and it has every incentive to ensure that the audit results are accurate and impartial), and in fact, Qwest's language for Section 18.2.10 would allow the same thing.[76]

Q. WHY SHOULD THE COMMISSION REJECT QWEST'S PROPOSAL TO SHIFT 50% OF THE COSTS OF AN INDEPENDENT AUDITOR TO THE NON-REQUESTING PARTY IF THE NON-REQUESTING PARTY REQUESTS THE AUDITOR?

A. As explained at page 71 of my direct testimony, the party requesting the audit is the cost causer in this situation and should pay for the auditor unless it is demonstrated that the audit was warranted based on the audit findings, at which point, the non-requesting party becomes the cost causer. The non-requesting party should not be penalized simply by wanting to ensure that the audit findings are fair and impartial, and Charter's proposal ensures that if the audit is deemed warranted by the audit findings, the non-requesting party will pay for the auditor.

Q. MR. WEINSTEIN STATES THAT QWEST'S PROPOSED AUDIT

---

[75] *Id.*, p. 41, lines 14-16.

[76] And as discussed above, because Charter would be required to pay the costs of the independent auditor if the audit was found to be warranted, Charter has no incentive to make frivolous requests to use independent auditors.

PROCESS IS THE SAME PROCESS THAT IS IN THE QWEST AGREEMENTS WITH OTHER CLECS, AND IN QWEST'S TEMPLATE ICA AND SGAT.[77] SHOULD THE COMMISSION ADOPT QWEST'S PROPOSAL BASED ON THE NEED FOR UNIFORMITY?

A. No. As explained above, this Commission has already rejected the notion that interconnection agreements should be uniform for CLECs. In addition, Qwest's pursuit of uniform agreement terms in this case contradicts Qwest's prior positions before the FCC and other state commissions that individually tailored agreements are critical to the success of competition.

Q. MR. WEINSTEIN POINTS TO THE 2% VARIANCE THRESHOLD IN SECTION 18.2.4 RELATED TO THE FREQUENCY OF AUDITS AS SUPPORT FOR QWEST'S CLAIM THAT CHARTER'S PROPOSED 10% VARIANCE THRESHOLD IN SECTION 18.2.8.2 IS UNREASONABLE. IS HIS CRITICISM WARRANTED?

A. No. The threshold in Section 18.2.4 and the threshold in Section 18.2.8.2 are for two entirely different purposes. Section 18.2.4 relates to the frequency of audits (i.e., a party can request more than one audit per 12 month period if a 2% variance threshold was met in the previous audit) and Section 18.2.8.2 relates to which

[77] Weinstein Direct, p. 42. See also, *Id.*, p. 39, lines 4-6.

party should pay for the audit (i.e., the non-requesting party will pay for the audit if the audit determines that the disputed variance threshold is met). Though Mr. Weinstein criticizes Charter's proposal for Issue 24 for containing a different threshold than in Section 18.2.4, the same goes for Qwest's proposal for Issue 24. Qwest proposes a 5% threshold in Section 18.2.8.2, compared to the agreed upon 2% threshold in Section 18.2.4. If the threshold in Section 18.2.4 had any bearing on the threshold to be adopted for Section 18.2.8.2, then Qwest would be pursuing a 2% threshold in Section 18.2.8.2 – but it does not, and Qwest is not. I explained at page 70 of my direct testimony why Charter's proposed 10% threshold is more reasonable for the Agreement between Charter and Qwest than Qwest's proposed 5% threshold, and Qwest provided nothing in its direct testimony to suggest otherwise.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 24?

A. I recommend the Commission adopt Charter's proposed language for Sections 18.2.8.2, 18.2.9 and 18.2.10.

IV. CONCLUSION

Q. DOES THAT CONCLUDE YOUR REBUTTAL TESTIMONY?

A. Yes, it does.